



**Mathenge v Republic (Criminal Appeal E052 of 2023)
[2024] KEHC 11962 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E052 OF 2023
DKN MAGARE, J
SEPTEMBER 26, 2024**

BETWEEN

ALICE WANDIA MATHENGE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court Hon. D.N. Bosibori, Senior Principal Magistrate in Mukurweini PMCRC No. E096 of 2022 delivered on 23/8/2023.
2. The Appellant was charged with the offence of aiding and abetting female genital mutilation contrary to Section 20(a) as read with Section 29 of the *Prohibition of Female Genital Mutilation Act, 2011*.
3. The particulars of offences were that the Appellant, on 4/4/2022 at Muthuthini of Mukurweini subcounty within Nyeri County, jointly with others not before the court aided and abated Christine Nthenya to commit the offence of female genital mutilation to TWW, a child aged 10 years old and ENW, a child aged 12 years.
4. The Appellant was the 3rd Accused person in the lower court and was jointly charged with the 2nd Accused person. The Appellant was presented before the trial court and denied the charges against her and a plea of not guilty was entered.
5. The trial court considered the case and rendered judgment. The court found the Appellant guilty and convicted her of the offence and sentenced her to serve 3 years imprisonment.
6. The Appellant, aggrieved, lodged this appeal against both conviction and sentence.
7. In the Petition of Appeal filed on 31st August 2023, the Appellant pleaded that the trial court erred in law and fact in:



- a. Holding that the Appellant had aided and abetted female genital mutilation.
- b. Failing to find that the Prosecution had not achieved the required standard of proof beyond reasonable doubt.
- c. Shifting the burden of proof to the Appellant.
- d. Failing to find that vital witnesses were not called whose evidence would have controverted the prosecution's case.
- e. Meting out sentence that was harsh and excessive.

Evidence

8. In relation to the offence against the Appellant, PW1 testified that she boarded a Probox car together with the Appellant and the Appellant's children, PW5 and PW6 as well as PW3. That the vehicle ferried all the occupants to the scene where the offence was committed.
9. PW2 testified that her mother stopped at Chaka area where she met with the Appellant and her children aboard the Probox.
10. PW3 testified that she travelled alongside two other minors and they met the Appellant and her children at Chaka. The 2nd Accused asked the Appellant to step out of the Probox with her daughters while PW3 remained in the car with the Appellant's son.
11. PW4 testified that the Appellant escorted PW5 and PW6 to the scene before the 2nd Accused escorted them to the room where FGM was performed.
12. PW5 identified the Appellant as her mother. The Appellant had alerted her the day before that they would travel to the sub-county. That the Appellant was given PW5's underwear.
13. PW6 also identified the Appellant as her mother and PW5 as her sister. It was her case that the Appellant bought snacks for them at Kagere. The Appellant led her 3 daughters to the homestead. That she felt pain and the Appellant soothed her.
14. PW7 testified that he ferried the Appellant with her children to the scene. That he used PW8's car because his was short of fuel.
15. PW16 and PW17 confirmed that the Appellant and other offenders were arrested alongside the minors at the scene of the crime.
16. The Appellant testified as DW3. It was her testimony that the charges were fabricated. That on the fateful day, she left for a seminar with her 4 children. That PW5 and PW6 were her daughters. The seminar was about pupils who were to enroll to high school. The police arrived while she was at the seminar and demanded each child to sit next to their parent.
17. On cross examination it was her case that she enjoyed a cordial relationship with her daughters who had no reason to lie against her. She admitted to travelling to the venue with PW7 who was not charged.

Submissions

18. The Appellant filed submissions on 4/7/2024. It was submitted that the appeal on conviction and sentence was merited.



19. Further, it was in this regard submitted that the charge had no particulars of aiding and abetting and was contrary to Article 50 of *the Constitution* requiring the accused to be informed of the charge with sufficient details. Reliance was placed on *Kamunya vs Republic* (2009) eKLR.
20. It was also submitted for the Appellant that the Prosecution failed to prove the case against the Appellant beyond reasonable doubt. They relied on *Nguku vs Republic* (1985) KLR 412.
21. They also submitted that the trial court erroneously shifted the burden of proof to the Appellant by finding that the Appellant held PW5's underwear.
22. On sentence, it was submitted that the sentence was excessive and did not consider the mitigation that the Appellant was first offender.
23. I was urged to allow the appeal.

Analysis

24. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

25. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

26. It was held by the Court of Appeal in *Moses Nato Raphael -vs- Republic* [2015] eKLR as doth:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in *Miller v. Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible,



but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

27. On my reevaluation, I proceed to find an issue which I observe in respect of a possible miscarriage of justice to the Appellant per the ruling on prima facie case dated 26/1/2023 and delivered by the trial court. If there be no miscarriage of justice, then I proceed to determine the issue as to whether the Appellant aided or abetted the offence of female genital mutilation.
28. In demystifying prima facie case, this Court in *Republic vs. Abdi Ibrahim Owl* [2013] eKLR stated as follows:

“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v. R* [1957] E.A 332 at 334 and 335, the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It is may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

29. The court in the case of *Festo Wandera Mukando vs The Republic* (1980) KLR 103 discouraged giving reasons for its findings at this stage. The court stated as follows;

“...We once draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submissions is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned.

30. This position was also echoed by Muriithi J in *Republic v Daniel Kipkurui Kibowen* [2020] eKLR in finding a case to answer as doth:

Upon considering the evidence presented herein by the prosecution and the written submissions dated 23rd April, 2020 thereon by counsel for the Accused, without exhaustive discussion of the merits so as not to prejudice the fair trial of the case as counseled by *Kibera Karimi v. R* (1979) KLR 36, and *Festo*



Wandera Mukando v. R (1976 – 80) KLR 1626, and having considered as held in KBT HCCRC No. 13 of 2017, that –

“ A trial Court is under a duty, as held by the Court of Appeal in *Murimi v. R* (1967) EA 542, to acquit an accused if the Prosecution “failed to make out a case sufficient to require the accused to enter a defence” and further that such a case is made out when a prima facie case is established being “one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” See *Ramanlal T. Bhatt v. R* (1957) EA 332, 335

I find that the prosecution has established a prima facie case.

31. It follows that at prima facie case stage, the court is not to be concerned with the standard of proof. This was held in *Ronald Nyaga Kiura vs. Republic* [2018] eKLR wherein paragraph 22 is stated as follows:

“ It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the *Criminal Procedure Code*. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of *Ramanlal Bhat -vs- Republic* [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”

32. The rule against discussion and drawing inferences from prosecution witness testimonies at prima facie case stage appears to amplify the principle that justice must not only be done but also seen to be done. The accused person ought not to be convicted, or their defense wished away at no case to answer stage.

33. In this case, the court notes that the trial court deeply analyzed the witness testimonies and drew inference that the evidence so produced by the prosecution was credible. This inference had the effect of predetermining that the prosecution evidence established conclusively the truth of the matters upon which the Appellant was charged and as such had the effect of determining the case against the Appellant at no case to answer stage.

34. Therefore, it is the finding of this court that by the manner in which the trial court sequentially analyzed and drew conclusive and positive findings on the credibility of the prosecution’s witness who had testified at the prima facie case stage, the Appellant was prejudiced as her defense would be a futile attempt to fill in the gaps, if any, that the witnesses had created. This would in my view be an attempt by the proverbial drowning man clutching at a straw. As such, a miscarriage of justice was inevitable.

35. The High Court of Malaysia in Criminal Appeal No. 41LB-202-08/2013 – *Public Prosecution vs. Zainal Abidin B. Maidin & Another* stated as doth:

“ It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805. Further, in *Public Prosecutor v Saimin & Others* [1971] 2 MLJ 16 Sharma J had occasion to observe:

‘It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation



or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.”

36. The issue of what is a prima facie case in criminal trials was clearly explained in *Ramanlal Trambaklal Bhatt V R* [1957] E.A. 332 at p. 334-335 where it was said:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one:-

“Which on full consideration might possibly be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:-

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

37. The trial court also proceeded in a manner consistent with finding the Appellant with no case to answer and acquitting her forthwith but proceeded to put her on her defense instead. To do what she did amounted to a mistrial that prejudiced the Appellant leading to miscarriage of justice. The Court of Appeal in the case of *Anthony Njue Njeru v Republic* [2006] eKLR stated as follows:

Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt’s case (supra), we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the prosecution case. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the prosecution case, as the learned Judge did here unless the Court concerned is acquitting the accused person.

1. This will suffice to dispose of the appeal. The next question is to determine whether the court will order a retrial or acquit. In the case of *Khalid & 16 others v Attorney General & 2 others (Application 32 of 2019)* [2020] KESC 30 (KLR) (4 September 2020) (Ruling), the Supreme Court D.K. Maraga, CJ & P, P.M Mwilu, DCJ & V-P, M.K. Ibrahim, S.C Wanjala & N.S. Ndungu, SCJJ stated as doth: -

“Another principle in the de novo hearing is that it should not be taken as an opportunity to fill in gaps noted during the hearing by bringing a new set of evidence for the repeat trial. This is because a de novo hearing is a continuation of a trial and not a second trial. This was held in Indian Supreme Court case of *Ajay Kumar Ghoshal etc. Vs. State of Bihar & ANR*. [Criminal Appeal Nos. 119-122 Of 2017



“A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. 23. Also, in *Mohd. Hussain@JulkarAli vs. State* (Govt. of NCT of Delhi) (2012) 9 SCC 408, it was held: -

“A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice.”

39. A retrial is ordered if it is not prejudicial to the Appellant and if the interest of justice demands so. The Appellant has served a substantial part of the sentence. It is not fair to return her for the prosecution to correct an obvious error that the court committed. Subjecting the complainant to a second trial will not be in the best interest of justice. In the case of *Karimi v Republic* (Criminal Appeal 16 of 2014) [2016] KECA 812 (KLR) (3 February 2016) (Judgment) the court of Appeal [R.N. Nambuye, M.K. Koome, JJA, as they then were & P.O. Kiage, JA] stated as follows: -

“Mr. Kaigai had implored us to order a re-trial in view of the overwhelming evidence against the appellant. We take note of the fact that the appellant was a first offender; the minimum sentence provided for the offence is 10 years although he was sentenced to 15 years. The appellant has served about 5 years out of the said sentence and in our view; a retrial may be prejudicial to him and may not serve the interest of justice.”

40. In the circumstances, the conviction is untenable. I allow the appeal and set aside the conviction and sentence. In lieu thereof, the Appellant is set at liberty unless otherwise lawfully held.

Determination

41. The upshot of the foregoing is that I make the following orders:
- a. The judgment of the trial court on conviction and sentence is set aside.
 - b. The Appellant is set at liberty unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by: -

Njuguna Kimani & Co. Advocates for the Appellant

ODPP for the Respondent

Court Assistant – Jedidah

