Muriithi v Republic (Criminal Appeal E057 of 2023)
[2024] KEHC 11810 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E057 OF 2023

DKN MAGARE, J

SEPTEMBER 26, 2024

BETWEEN

ALOISE WAWERU MURIITHI ..... 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 21/6/2023.
2. The Appellant was charged with the offence of aiding a prisoner to escape from lawful custody contrary to Section 124 of the Penal Code.
3. The particulars of offence were that the Appellant, on 4/4/2022 at Mukurweini Subcounty Hospital in Mukurweini Sub-county within Nyeri County aided Esther Ngeno Njenga to escape from lawful custody of Sgt. Jane and PC/W Mwikali of Mukurweini Police Station.
4. The Appellant was charged on this offence jointly with two other accused persons.
5. The trial court considered the case and rendered judgment. The court found the Appellant guilty and convicted him of the offence and sentenced his to serve 18 months imprisonment.
6. The Appellant, aggrieved, lodged this appeal against both conviction and sentence.
7. In the Petition of Appeal dated 5/9/2023, the Appellant pleaded that the trial court erred in law and fact in:-
    a. Convicting the Appellant on insufficient, inconsistent and contradictory evidence.
    b. Convicting the Appellant at no case to answer stage which occasioned miscarriage of justice.

c. Convicting the Appellant despite acquitting Esther Ngendo Njenga who had been charged with escaping from lawful custody.

Evidence

8. In relation to the offence against the Appellant, PW1 testified that the 4th Accused person, one Esther Ngendo fled from the examination room at the scene of the crime but that she did not witness the 4th Accused escape.

9. PW2 testified that the 4th Accused and the minors were escorted to the hospital by the police and that PW2 and the Appellant herein were treated first at the examination room.

10. PW3 testified that the Appellant ferried her to the 5th Accused's home and dropped the 4th Accused person at Chaka using a Toyota Vanguard car.

11. PW11 testified that he assisted the investigating officer to arrest the Appellant with the 4th, 5th and 7th Accused persons. He trailed the vanguard for about 5 km and blocked it when it reached a dead end. That the Appellant stepped out and fled towards a nearby coffee plantation.

12. The Appellant testified that he was employed by the 7th Accused who was the son to the 5th Accused. He admitted that the 7th Accused drove the Vanguard car before their arrest. That they had visited Chinga area to buy arrow root suckers. That the 7th Accused phoned him and alerted him that the 7th Accused had been arrested. He came and was led to a different motor vehicle to the police station.

Submissions

13. The Appellant filed submissions on 8/3/2024. It was submitted that the Appellant was convicted at case to answer which was an injustice as it predetermined his final conviction. They relied on among others, the case of Antony Njue Njeru v Republic CA No. 77 of 2006 and *John Kihorio Kirumi vs Republic High Court Criminal Appeal No. 112 of 2013*.

14. In this regard, it was submitted that the trial court made final determination on the issue when that ought to have been done after hearing the defence case. That this was prejudicial to the Appellant and amounted to miscarriage of justice.

15. It was also submitted for the Appellant that the prosecution failed to prove the case against the Appellant beyond reasonable doubt. They relied on *James Njunjiri Maina vrs Republi CA No. 48 of 2014*.

16. They did not submit on sentence. I was urged to allow the appeal.

17. The Respondent did not file submissions.

Analysis

18. 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.

19. 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 is 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."

20. 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.'"

21. On my reevaluation, the issues are:-

    a. Whether the trial court occasioned a miscarriage of justice prejudicial to the Appellant at prima facie case stage and if not;

    b. Whether the trial court erred in its finding that the Appellant aided a prisoner to escape from lawful custody contrary to Section 124 of the Penal Code.

22. The Appellant submitted that he was convicted at no case to answer stage. They submitted that the trial court deeply analyzed the witness testimonies and drew inference that the evidence so produced by the prosecution was credible. That this prejudiced the defence case and amounted to miscarriage of justice as the case of the Appellant was predetermined now that the prosecution evidence established conclusively and determined the case at no case to answer stage.

23. 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.

24. 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.

25. 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.

26. 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* 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."

27. Therefore, 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 stage, the Appellant was prejudiced as his defense would be a futile attempt to fill in the gaps, if any, that the witnesses had created. This would in view be an attempt by the proverbial drowning man clutching at a straw. As such, a miscarriage of justice was inevitable.

28. 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.
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> Further, in Public Prosecutor v Saimin & Others [1971] 2 MLJ 16 Sharma J had occasion to observe:
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> '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.'

29. 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.

30. Therefore, it is the finding and holding of this court that the manner in which the trial court analyzed witness testimonies and drew inferences at prima facie stage was consistent with finding the Appellant with no case to answer and acquitting him forthwith. To do otherwise as 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.

31. This will suffice to dispose of the Appeal. I find no value for delving into the details of the second issue that regards the merits of the appeal. Therefore, I allow the appeal and set aside the conviction and sentence.

Determination

32. In the upshot, I make the following orders:

    a. The appeal is merited and is allowed.

    b. The Judgment of the trial court on conviction and sentence is set aside.

    c. The Appellant is set at liberty forthwith 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