Muriuki v Republic (Criminal Appeal E055 of 2023)
[2024] KEHC 11963 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11963 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E055 OF 2023

DKN MAGARE, J

SEPTEMBER 26, 2024

BETWEEN

ROSE MUMBI MURIUKI ..... 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 offences were that the Appellant, on 4/4/2022 at Mukurweini Subcounty Hospital in Mukurweini Subcounty 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 her of the offence and sentenced her 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 raised a prolitixious, unseemly and winding 25 grounds of appeal. The grounds are also monotonous and revolve against two issues only – proof beyond reasonable doubt and severity of the sentence.

Evidence

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

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

10. PW3 testified that the 6th Accused ferried her to the Appellant'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 6th Accused person with the Appellant and the 4th and 7th accused persons. He trailed the Vanguard for about 5 Km and blocked it when it reached a dead end. That the 6th Accused stepped out and fled towards a nearby coffee plantation.

12. The 6th Accused 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 he had been arrested. He came and was led to a different motor vehicle to the police station.

13. The parties did not file submissions.

Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

15. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the Court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

16. 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 is 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 differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

17. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

18. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

19. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure

that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

20. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

21. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

22. 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:-
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> > " 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.'"

23. In demystifying prima facie case, this Court in 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-
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> > " 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* 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."

27. 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.

28. 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.

29. 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.

30. 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 & Ors [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.

31. 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."
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> 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.

32. 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."

33. 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."

34. 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 [RN Nambuye, MK 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."

35. 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

36. 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