Mwangi v Republic (Criminal Appeal E043 of 2024)
[2024] KEHC 16183 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16183 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E043 OF 2024

DKN MAGARE, J

DECEMBER 20, 2024

BETWEEN

CECILIA NYAGUTHII MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(appeal against from the Judgment of Hon. D.N. Bosibori, Senior Principal Magistrate in Mûkûrwe'inî. PMCRC No. E096 of 2022 delivered on 21/6/2023.)

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. D.N. Bosibori, Senior Principal Magistrate in Mûkûrwe'inî. PMCRC No. E096 of 2022 delivered on 21/6/2023. The Appellant was charged with four counts of 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.

2. The particulars of offence were that the Appellant, on 4/4/2022 within Nyeri County, jointly with others not before court aided and abetted Christine Nthenya to commit an offence of female genital mutilation to (i) TWW a child aged 10 years, (ii) ENW a child aged 12 years, (iii) PW a child aged 13 years, and (iv) CW a child aged 17 years.

3. 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. The Appellant, aggrieved, lodged this appeal against both conviction and sentence.

4. In the Petition of Appeal dated 8/7/2024, the Appellant set out 12 grounds of appeal. The grounds are repetitive and argumentative and only plead that the trial court erred in law and fact in:

    a. Convicting the Appellant on insufficient, inconsistent and contradictory evidence.

b. Convicting the Appellant on uncorroborated, inconsistent and incredible witness statements of the prosecution.

c. Shifting the burden of proof to the Appellant.

d. Meting out a manifestly excessive sentence.

Evidence

5. PW1 was CWW, one of the victim minors. She also testified that she found the Appellant at Chaka in a white Toyota Probox car. That on the material day, her mother took her to the Appellant's home where she found a congregation and Aloise Waweru Muriithi was the driver who later drove her to Rose Mumbi's home. With three other girls, PW1 was shown a room where to sleep. In the morning, she boarded the Vanguard car together with the other three girls and Aloise as the driver.

6. She further stated that the Appellant escorted her to where the FGM was carried out. At the destination, she found a woman seated on a plastic chair and there was cotton wool, scalpel, and thick purple medicines. The woman asked her to remove her underwear and lay on the bed. She then applied the medicine to PW1's clitoris and it became numb. She did feel unconscious. She wore the underwear and left.

7. PW2 was PWM, also a victim minor. She stated that she was 14 years. It was her case that she was at her mother's home in Narumoru when her mother took her to the Appellant. She was told to go indoors. She found therein mama Shiko and Christine. Banana leaves were spread on the floor. Christine injected her on the clitoris and took a razor and cut her. That she found the Appellant cutting banana leaves at the time she arrived.

8. PW3 was NW, a girl aged 13 years. She testified that her mother called a driver to take them somewhere she did not know. On the way, EN , Tabitha, Gideon and Wangechi were children of the Appellant. Catherine joined them on the way to the FGM place. They reached the homestead and were given chairs to sit. She went to the hall in the homestead and found N, C, P, N and PW3 seated. She was injected by an old woman who also took a razor and cut her clitoris.

9. PW4 was ENW, another victim minor, who testified that her mother took her to where the FGM was to be performed and one Christine injected her and then cut her clitoris. On cross examination, it was her case that she heard that the person was called Christine Nthenya. That the subject house is where she underwent the cut on her clitoris and her underwear was not returned to her body as it was soaked in blood.

10. PW5 was EN . In relation to the Appellant, she testified that the Appellant escorted her where she underwent FGM. The Appellant escorted her from home to Gikondi using a motor vehicle.

11. PW6 was TWW. She was 10 years. She stated that her mother called a driver to take them somewhere she did not know. On the way, N joined them and later C joined them. They reached the homestead and were given chairs to sit. She went to the hall in the homestead and found N, C, P, N and N seated. She was injected by an old woman who also took a razor and cut her clitoris.

12. PW7 was Isaac Kabiru who testified that he only knew the Appellant. His evidence was that he ferried the Appellant with instructions from the Appellant's husband, one Wanjau. The Appellant was with her 3 children past Mûkûrwe'inî. He stopped at Chaka where they picked another girl. He did not know where exactly they were going. His driven car was a Toyota Sienta.

13. Nicholas Matimu Kaburia, a health officer at Mûkûrwe'inî Hospital also testified. He relied on his treatment notes dated 8/4/2022 and testified that he attended to ENN on 7/4/2022 and that she was on her menses. That her clitoris had been partially removed.

14. Number 75957 Cpl. Joshua Mwaka of Mûkûrwe'inî Police Station also testified for the prosecution. On 4/4/2022, he was on traffic duties along Othaya Mûkûrwe'inî at Gikondi when PC Elizabeth Mwikali approached him that her prisoner had escaped from Mûkûrwe'inî Hospital. They began a search and in attempt to stop the Vanguard that was ferrying the suspect, the driver changed direction and headed towards Muthuthini which forced PW3 to follow him in a chase. Some passengers came out and disappeared into a coffee plantation leaving behind Aloise. However, he managed to arrest EN Ngendo who was the suspect.

15. Dr. Naomi Sitati testified and relied on medical report and PRC. Per her testimony, she observed CW. The clitoris for CW was partially missing. She had a yellowish green discharge in her vagina. The approximate age of injury was 1 month and cause was sharp object. The injury causes a permanent disfigurement of the genitalia. On cross examination, she stated that she observed PW1 on 8/4/2022. She also confirmed that part of the clitoris was missing and it was highly unlikely that one is born without a clitoris.

16. Margaret Wahu Maina was the Government Analyst. She testified that she did DNA profiling and produced results in which she produced in court. On cross examination, it was her case that she didn't generate DNA profile for the razor blades. That there was a disparity in the dates of the report but the correct date was 6/7/2022.

17. Elizabeth Mwikali testified that she was the investigating officer. It was her testimony that when they arrived at the scene of the crime, they found the victims in a wooden hall in the Appellant's compound. That some of the girls like PW1 and EW had not undergone FGM. That they went to the latrine made of wood and demolished it whereby they seized razor blades, and banana leaves with wrapped cotton wool and pieces of flesh suspected to be clitoris of the victims.

18. That CW also was present and showed them where the incident took place from where they seized 2 razor blades, 3 cotton wool pieces and 2 pieces of flesh wrapped in banana leaves. That the subject house belonged to the Appellant and photographs taken showed the homestead of the accused with latrine, a hall and main house. Based on the evidence, they decided to charge the accused.

19. Charles Mwasaru No. 234866 was the OCS Mûkûrwe'inî. He visited the scene twice. He was present when the items were recovered at the scene of crime. It was also his case on cross examination that he was not the one who took or signed the inventory. He received the report from Cpl. Bett.

20. Ben Oyugi, a Dentist from Mukurweini hospital also testified for the prosecution. He observed 4 patients: TW, EN, CW and PW. TW was missing the last molar teeth. It was his testimony and evidence that the x-rays showed fully erupted secondary dentition but wisdom 8s were missing on CW, the minor. On cross examination, he admitted that the patient age of between 16-17 years and 15-16 years in his two reports was contradictory. However, it was his case that if CW's age was 13 years, then she was an early bloomer with permanent molars sprouting already.

21. DW1 was Aloise Waweru Muriithi. He testified that he did not drive any motor vehicle from Naromoru to Chaka. And that he didn't know where PW1 could have undergone FGM.

22. DW2 was Cecilia Nyaguthii Mwangi. It was her case that she did not know the Appellant. She knew PW1 on 3/4/2022 when they approached her with her mother having confused gates with her (DW2's) neighbors.

23. DW3 was the Appellant who testified that the charges were fabricated. That on the fateful day, she left for a seminar with her 4 children. 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. On cross examination it was her case that she enjoyed a cordial relationship with her daughters who had no reason to lie against her.

Submissions

24. In her submissions dated 14/11/2024, the Appellant submitted that ingredients of the offence were not proved to the required standard beyond reasonable doubt. In this regard, it was the Appellant's submission that the trial court did not adhere to the rules on the burden and standards of proof.

25. The Appellant further submitted that the trial court in its ruling on whether the appellant had a case to answer already had meted a conviction against the appellant and therefore in putting the appellant to her defence it was merely meant to clear and clarify the conviction already meted out and a miscarriage of justice. Reliance was placed among others on Nairobi Criminal Appeal 77 Of 2006 Njue Njeru Versus Republic 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 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. We have said enough in this matter. Having considered the evidence, the submission by learned counsel for the State and for the appellant, we are of the view that the appellant's conviction was not safe. It cannot be allowed to stand. Accordingly, the appeal is allowed, the conviction quashed and the sentence set aside. The appellant is to be set free forthwith unless otherwise lawfully held'.

26. The Respondent did not file submissions.

Analysis

27. This court sitting on appeal has the duty to make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. 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.

28. It is therefore settled 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. 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."

29. The court will have to deal with the question of whether there was 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 trial court was correct in its finding that the Respondent proved the case against the Appellant beyond reasonable doubt.

30. The requirement of a prima facie case places upon the prosecution the burden for establishment of a rebuttal on presumption that an accused person is guilty of the offence he/she is charged with. 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:
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> "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.

31. In establishing a prima facie case, the trial court is not required to give reasons for holding that an accused has a case to answer. It has been found to prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. 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.

32. An exhaustive discussion of the merits of the witness testimonies need not be entertained as the court in so doing runs into the risk of prejudicing the fair trial to the detriment of the accused person. 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
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> I find that the Prosecution has established a prima facie case.

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

34. 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.

35. In this case, 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. The court in a 19-page single spacing ruling found that: -

26. There is also therefore evidence on record from the said witnesses that the minor underwent FGM. The accused persons were aware of the same but failed to notify the proper law enforcement authority. This evidence thus supports the charge of failing to report commission of FGM.

27. From the evidence placed before me, and having considered the relevant legal authorities, provisions and principles, I am satisfied without saying much at this stage for obvious reasons that the test of a prima facie case has been met by the Prosecution to warrant the accused persons to be called upon to answer. I find that the defence has not proved their allegations to successfully discredit the Prosecution's case. Accordingly, I will refrain from delving further in this matter. Having considered the material placed before me I am unable to find, at this stage, that the accused persons have no case to answer. The defence's submissions on a case to answer are thus rejected for now. The same will be delved into at length after the defence hearing.

36. There is on record an attempt to amend the Ruling's paragraphs *22* and *23* and counter sign. This was not a draft ruling. The findings are still on record and cannot be amended after delivery. The same ruling is part of the proceedings. The conduct by the court appears not to bringhonour to the nation and dignity to the office or even promote public confidence in the integrity of the office she holds. It is imperative, if such orders are given, the court below can bring it to the attention of the high court for purposes of guidance.

37. The defence was dismissed before it was tendered. No amount of window dressing will change the fact that the court dismissed the defence before it was tendered. The court stated:

> I find that the defence has not proved their allegations to successfully discredit the Prosecution's case. Accordingly, I will refrain from delving further in this matter.

38. The burden of proof was and cannot be on the defence. Having formed an opinion on the defence being untenable, the rest of the proceedings became a mere formality, meant to achieve one purpose; conviction of the Appellant.

39. I need to point out that right to a fair trial is non-derogable, peremptory and sacrosanct as posited in Article 25(c) of *the Constitution* which provides as follows:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-

(c) the right to a fair trial;

40. The Supreme Court, equally had this to say in Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment) concerning the right of an accused person to a fair trial:

The rights of an accused person to a fair trial is provided for under article 50 (2) of *the Constitution*. That right is absolute as it is one of the rights which cannot be limited pursuant to article 25(c) of *the Constitution*.

41. The prosecution had a duty to prove their case to the required standards. Most oft quoted English decision 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."

42. 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 it satisfied itself beyond reasonable doubt that the accused is guilty. 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."

43. 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 the prosecution's case. Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14 posits as doth:

"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."

44. Question of 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."

45. Therefore, to place an accused person on his defence, after the court has found their defence untenable and the prosecution case as proved is a mockery of justice. Nothing the accused will say will sway the court. The court cannot equally change its mind without raising eyebrows. Once a fact is deemed as proved, then no further evidence can be called.

46. 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 view be an attempt by the proverbial drowning man clutching at a straw. As such, a miscarriage of justice was inevitable.

47. The duty to prove the case rests with the prosecution. The High Court of Malaya 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
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> 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.

48. An analysis of evidence as put forth by the prosecution witnesses has been stated to perilously suggest 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. This is inimical to fair hearing. The issue of what is a prima facie case in criminal trials was clearly explained in Ramanlal Trambaklal Bhatt (supra):

> " 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:-
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> "Which on full consideration might possibly be thought sufficient to sustain a conviction."
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> 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.
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> 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.

49. Therefore, the trial court 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.

50. This will suffice to dispose of the Appeal. Given that I have already found that the court was biased, it is not possible to proceed to the analysis of the evidence on the culpability or otherwise, given that the analysis is conclusive in nature at a case to answer stage. I will not be able to separate the bias of the court and analysis of evidence. In Peters vs Sunday Post Limited [1985] EA 424 the court 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..."

51. The findings are tainted making the proceedings a nullity. There is no cure for a nullity. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council and at page 1172(1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

52. Consequently, I find no value for delving into the details of the merits 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 DK MARAGA, CJ & P, PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA & NS 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 Julkar Ali vs. State (Govt. of NCT of Delhi)(2012) 9 SCC 408, it was held: -
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> "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."

53. 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 then they were & PO 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."

54. 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

55. In the upshot, I make the following orders:-

    i. The appeal is merited and is allowed.

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

    iii. The Appellant is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF DECEMBER, 2024.

Judgment Delivered Through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by: -

Mr. Mwakio for the State

Appellant – present

Court Assistant – Jedidah