Simiyu v Republic (Criminal Appeal E050 of 2022)
[2023] KEHC 3638 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3638 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E050 OF 2022

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

DICKSON SIEKISA SIMIYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Webuye Principal Magistrate's Court Criminal Case No 268 of 2015 with ten (10) counts of the offence of neglecting burning vegetation without authority, contrary to section 3(2) as read with Section 16 of the *Grass Fires Act*, Cap. 327, Laws of Kenya.

2. The particulars are that on March 15, 2015 at Musavele village in Bungoma East sub-County within Bungoma County, jointly with others not before Court, unlawfully and negligently kindled grass fire that spread and damaged various parcels of land belonging to ten (10) different people.

3. The prosecution case was supported by the evidence of 17 witnesses. On its part, the defence called 4 witnesses, including the Appellant. At the conclusion of the trial, the Learned Magistrate found that the charge was proved, convicted the Appellant and fined him a sum of Kshs 3,000/- for each of the ten (10) counts. In default, the Appellant was to serve 2 months imprisonment for each of the ten (10) counts to run concurrently. That Judgment was delivered on February 3, 2022.

Grounds of appeal

4. Being dissatisfied with the decision, the Appellant filed the Petition of Appeal on May 31, 2022. He had earlier obtained leave to Appeal out of time. In the Petition filed through the Appellant's Advocates, Messrs J.O. Makali & Co., 10 Grounds of Appeal were preferred as follows:

    i) That the Learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant when the evidence on record did not support the particulars of the charges.

ii) That the Learned trial Magistrate erred in law and fact in convicting the Appellant without due regard to evidence offered in defence.

iii) That the Learned trial Magistrate's Judgment was against the weight of evidence on record.

iv) That the Learned trial Magistrate misdirected himself by implying facts which ought to have been arrived at by proof beyond reasonable doubt.

v) That the Learned trial Magistrate erred in law and fact by failing to frame issues for determination hence arriving at a decision per incuriam.

vi) That the Learned trial Magistrate was absolutely harsh and biased on the Appellant in holding out both the conviction and sentence.

vii) That the Learned trial Magistrate erred in law in admitting evidence into the Court record in blatant disregard of the provisions of the *Evidence Act*.

viii) That the Learned trial Magistrate erred in law in failing to take mandatory directions pursuant to Section 200 of the Criminal Procedure Code upon taking over the trial from her predecessor.

ix) That the Learned trial Magistrate erred in law in failing to inform the Appellant his right under Section 200(3) of the *Criminal Procedure Act* hence proceeding on a mistrial.

x) That the entire trial of the Appellant was a mistrial.

Hearing of the Appeal

5. It was thereafter directed that this Appeal be canvassed by way of written Submissions. Accordingly, both parties filed their respective Submissions on January 16, 2023.

Appellant's submissions

6. Basically, the Appellant's Submissions is that Section 3(2) of the *Grass Fires Act* covers situations where the act is either "wilful" or "negligent", that the prosecution did not prove any criminal intent on the part of the Appellant. Counsel posed the questions; did he intend to burn the chaff on the land he was working on or to burn the trees of the complainants? Did he spread the fire maliciously with intent of destroying the complainant's property?

7. Counsel submitted that it was not established that the act of the Appellant was intended to destroy the neighbouring plantations, that the evidence of the prosecution was that the Appellant was with them and assisted in putting out the fire, there was no evidence that the Appellant neglected the fire in any way or that the Appellant wilfully set the crops on fire. the offence requires that there be evidence to prove that the act was wilful and unlawful. He submitted that in arriving at her decision, the trial Magistrate implied the Appellant's intention rather than inviting proof through evidence and that to that extent, the evidence before the trial Court did not support the particulars of the offence. He cited the decision in *Alex Taabu v Republic* [2011] eKLR.

8. Counsel further submitted that the Judgment delivered did not meet the threshold stipulated under Section 169 of the *Criminal Procedure Code*, that the trial Magistrate simply stated that she believed the evidence of the prosecution witnesses but gave no reasons for believing them apart from stating that the Appellant was a person living amongst them and that no grudge against the Appellant was established. He added that the Judgment does not set out the points or issues for determination and the reasoning behind the determination. He cited the decision in *James Nyanamba v Republic* [1983] eKLR.

9. He also submitted that the trial Magistrate failed to comply with the requirements of Section 200 of the *Criminal Procedure Code*, that the Section makes it mandatory for a succeeding Magistrate to inform the accused person of his right to have any witness recalled for cross-examination or to testify again, the Magistrate took conduct of the matter from another Magistrate but did not comply with the Section. He added that therefore it cannot be said that the Magistrate had the benefit of observing the demenour of the witnesses whose evidence was taken by the preceding Magistrate, therefore the Appellant's right to fair trial under Article 50 of *the Constitution* was infringed and that therefore the entire proceedings was a mistrial. He cited the decisions in *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 Others* [2015] eKLR and in *Ndegwa v R* [1985] eKLR.

Respondent's submissions

10. The Respondent's Submissions were filed by Learned Senior Principal Prosecution Counsel Grace Mukangu. She submitted that the offence under which the Appellant was charged required proof of 3 elements, namely, that a fire was kindled wilfully or negligently, that the person spreading the fire caused the damage or destroyed another's property and that the fire was kindled by the Appellant. She added that all the 3 elements were proved against the Appellant through the evidence of the prosecution witnesses.

11. Regarding Section 200 of the *Criminal Procedure Act* on the requirement for an accused person to be informed of his right to demand for recalling of witnesses where a Magistrate takes over the conduct of a trial from another Magistrate, Counsel readily conceded that the same was not complied with. She however submitted that the Appellant was throughout the trial represented by a Lawyer, that it was for the Appellant to make the demand to recall the witnesses, that the Appellant did not seek to do so, all he demanded was that the proceedings be typed which was done, thereafter he indicated to the Court through his Advocate that he was ready to proceed, the matter was protracted starting from the year 2015 and finally being concluded in the year 2022, in the circumstances the failure to comply with the said Section 200 did not prejudice the Appellant in any way. She cited the decision in *Nyabutu v R* [2009] KLR 409.

Analysis and determination

12. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned Judgment.

13. Being a first Appeal, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (see *Okeno v Republic* [1972] E.A 32)

Issues for determination

14. In my view, the issues that arise for determination in this appeal are the following;

    i) Whether the failure to inform the Appellant of his right to demand for recall of witnesses under Section 200(3) of the *Criminal Procedure Code* violated his right to a fair trial.

    ii) Whether the Judgment delivered by the trial Court met the threshold set out under Section 169 of the *Criminal Procedure Code*.

iii) Whether the charge of burning vegetation without authority, contrary to Section 3(2) of the *Grass Fires Act* was proved beyond reasonable doubt.

15. I now proceed to analyze and determine the issues.

i) Whether the failure to inform the Appellant of his rights to demand for recall of witnesses violated his right to a fair trial

16. Section 200 (3) of the *Criminal Procedure Code* provides as follows:

> "(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

17. In *Ndegwa v Republic* [1985] KLR at 534, the Court of Appeal cautioned as follows:

> "Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial."

18. In *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others* [2015] eKLR, Hon. Justice Makau, stated as follows:

> "Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanour of the witnesses to enable the Court make a just decision.
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> It should be noted Section 200(3) of C.P.C. gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for the succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted that it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory to explain to the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.
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> Section 200(3) of C.P.C. entrenches the accused rights to a fair trial as constituted under Article 50(1) of *the Constitution* of Kenya 2010."

19. From the foregoing, it is evident that although it is mandatory for the Court to explain to the accused his right to ask for the recall of witnesses, it is not mandatory for the Court to accept such request.

20. Be that as it may, because of the importance of having a trial conducted from commencement to conclusion by the same magistrate or judge, Section 200(4) provides that;

> " Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

21. Therefore, for a conviction to be set aside or for a retrial to be ordered on account of failure to comply with Section 200(3) of the *CPC* therefore, it has to be demonstrated that the accused person was materially prejudiced by that failure.

22. In this matter, the record reflects that the hearing began before Hon. S. N. Abuya. He took the evidence of the 1st to 6th witnesses between July 29, 2015 and 2/02/2016. The matter was then taken over by Hon. T.M. Mwangi who took the evidence of the 7th to 11th witnesses between June 12, 2017 and December 11, 2017. Finally, the case was taken over by Hon. M. Munyekenye who took the evidence of the 12th to 17th witnesses between June 12, 2017 and July 16, 2019 and who handled the matter to the end.

23. The record does not reflect that either Hon. T.M. Mwangi nor Hon. M. Munyekenye informed or explained to the accused his rights under Section 200(3) of the *Criminal Procedure Code* (CPC). Indeed, as aforesaid, the Learned State Counsel has readily conceded to this fact.

24. What the Learned State Counsel has submitted is that the failure to comply with Section 200(3) did not in any way prejudice the Appellant because he was represented by an Advocate during the trial and the Advocate never brought up the issue of Section 200(3) before the.

25. On this argument by the Learned State Counsel, the Court of Appeal in *Bob Ayub v Republic* [2010] eKLR stated as follows:

> " The record before us, the relevant part of which we have reproduced above, clearly shows that Musinga J. did not comply as was required of him, with the provisions of section 200(3) of the Criminal Procedure Code which as per section 201(2) was to apply mutatis mutandis in this case. He did not explain to the appellant his right to demand the recall and rehearsing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an advocate and so there was no need for that. Our short answer to that is that it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mere mention in the judgment that section 200 was complied with is hollow without any evidence from the record."

26. On the basis of the said guideline, I agree with the sentiments expressed by Cherere J in *Paul Ochieng Omollo v Republic* [2018] eKLR wherein, after quoting the said *Bob Ayub v Republic* [2010] eKLR (supra), she stated as follows:

> "..... the court's duty under section 200(3) is to the accused person and not to his counsel and thus it does not matter that the accused person is represented; it is incumbent upon the court to inform the accused person of his rights with or without legal representation. It has also been noted that the initiative is upon the court and it is not necessary that any form of application should be made before the court discharges its statutory responsibility."

27. It is therefore clear that the mere fact that an accused person was represented by an Advocate during the trial is not a sufficient excuse for the trial Court to fail to comply with Section 200(3) of the *CPC*.

28. In the circumstances, I agree with the Appellant's Counsel that the omission by the trial Court to comply with section 200(3) of the *CPC* vitiated the Appellant's right to fair trial as enshrined under Article 50 of *the Constitution*.

29. I therefore find that the net effect of this omission was to render the entire trial a nullity. This Court does not therefore not deem it necessary to deal with the rest of the appeal on its merit. For this view, I again borrow the words of Cherere J made in in *Paul Ochieng Omollo v Republic* [2018] eKLR (supra) where she stated as follows:

> " 10. I need not belabour the point that the appellant's trial was a nullity and for this reason there is no need to consider the rest of the grounds of appeal; for the same reason there is no basis upon which this court can consider the evidence adduced at the trial and come to its own conclusions, as it always ought to whenever exercising its appellate jurisdiction. If the trial was a nullity, there is in effect no evidence to reconsider."

Whether to order for a retrial or quash the Conviction

30. As already set out above, Section 200(4) of the *CPC* gives this Court the discretion to order for a new trial whenever it quashes a conviction on the basis that an accused person was materially prejudiced for non-compliance with Section 200(3) thereof.

31. Guidelines on these two options was was discussed by the Court of Appeal in *Samuel Wahini Ngugi v Republic* [2012] eKLR, where it was stated as follows:

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar v R [1964] EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
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> > " It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered ..... In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person"
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> That decision was echoed in the case of Lolimo Ekimat v R, Criminal Appeal No 151 of 2004(unreported) when this Court stated as follows:
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> "...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it." [emphasis added].

32. In view of the history of this case, I do not believe that a retrial is a feasible option. The case has been in Court for 8 years since 2015 and an enormous number of 21 witnesses testified, 17 for the prosecution and 4 for the defence. I do not think that availability of all these witnesses can now be guaranteed after all these years. Even if they could be availed, it is doubtful whether their memory of the events will still be intact.

Final Orders

33. In view of the foregoing, this Court makes the following orders:

i) This Appeal is allowed.

ii) The conviction of the Appellant is hereby quashed on the basis that the trial did not comply with section 200(3) of the *Criminal Procedure Code*

iii) The sentence imposed is therefore also set aside.

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA

JUDGE