Njehia v Republic (Criminal Appeal E44 of 2021)
[2023] KEHC 17689 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17689 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E44 OF 2021

TM MATHEKA, J

MAY 25, 2023

BETWEEN

JAMES MATHENGE NJEHIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment conviction and sentence of Hon E Soita RM)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Sub-section 8 (3) of the *Sexual Offences Act* No 3 of 2006 and sentenced to fifteen year's (15) imprisonment. The particulars of the charge were that on 27th and 28th day of July, 2014 at unknown time, in Molo District of Nakuru County intentionally caused his penis to penetrate the vagina of MWN a child aged 15 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The Particulars were that on the 27th and 28th day of July, 2014 at unknown time, in Molo District of Nakuru County, intentionally caused his genital organ namely penis to come into contact with genital organ namely vagina of MWN a child aged 15 years.

3. He was aggrieved by the conviction and the sentence and filed this instant appeal. The grounds of appeal filed on December 6, 2021 are that: -

    1. That the learned Trial Magistrate erred in law in convicting and sentencing the Appellant in disregard to the right to adduce and challenge evidence in defence as envisaged by Article 50(2) (k) of the *Constitution* providing for mandatory right to fair hearing and mitigation.

2. That the learned Trial Magistrate erred in law in convicting and sentencing the Appellant in his absence on an alleged case of defilement which charge is a felony and not a misdemeanor contrary to Section 206(1) of the *Criminal Procedure Code* Chapter 75 Laws of Kenya which provision allows for trial to be held in absentia only in respect of persons charged with misdemeanors.

3. That the learned Trial Magistrate erred in law and in fact in not taking into consideration the explanation by the Appellant for his absence.

4. That the learned Trial Magistrate erred in law and in fact in convicting and sentencing the Appellant while relying on the evidence of PW5 who was coerced to record statement and give incriminating evidence against the Appellant.

5. That the learned Trial Magistrate erred in law and in fact in convicting and sentencing the Appellant without taking into consideration that a crucial witness called Grace Nyambura was not availed in court to testify.

6. That the learned Trial Magistrate erred both in law and in fact in convicting the Appellant while relying on incredible and insufficient evidence.

7. That the learned Trial Magistrate erred both in law and in fact by shifting the burden of proof against the Appellant without justification.

4. The Appellant prayer was that the Appeal to be allowed, the conviction quashed and sentence be set aside and to he be acquitted.

5. The parties chose to dispose of the Appeal through written submissions. Only the Appellant's submissions are on record.

Submissions

6. The Appellant filed his submissions through the firm of Rodi Orege & Co Advocates.

7. On whether the trial court convicted and sentenced the Appellant in disregard to the right to adduce and challenge evidence in defence as envisaged by Article 50(2)(k) of the *Constitution* providing for mandatory right to fair hearing and mitigation, counsel for the Appellant submitted that the Appellant's right to cross examine and adduce his evidence was denied in that the court heard 6 witnesses, formed the view that the appellant had a case to answer and when the appellant did not show up to give his defence the court proceeded to deliver its judgment, finding the appellant guilty of defilement, convicted, and sentenced him to 15 years imprisonments to commence on the date of his arrest.

8. It was submitted that it is when the appellant was arrested for a different offence that the court informed him of the conviction and sentence in this case which was to start on the date of his arrest.

9. It was submitted that in those circumstances created by the conduct of the trial by the learned magistrate, the Appellant stood no chance of explaining his absence on the date of the defence hearing or having the sentence set aside to allow him put in his defence. Counsel cited *Joseph Maburu alias Ayub v Republic* [2019] eKLR where the court held that sentencing is a judicial exercise and once a judicial officer has pronounced a sentence, he/she becomes functus officio and if the sentence is illegal or inappropriate the only court which can address it is the appellate one.

10. On whether Section 206(1) of the *Criminal Procedure Code* Cap 75 Laws of Kenya was applicable in the appellant's case, it was submitted that the trial court erred in convicting and sentencing the Appellant in his absence. Counsel cited s, 206(1) of the *Criminal Procedure Code* which states:

Non-appearance of parties after adjournment

> 1. If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

11. Counsel urged that the charge facing the appellant was a felony and hence s. 206 (1) of the *Criminal Procedure Code* was not applicable. He relied on *Solomon Locham v Republic* [2015] eKLR where the court in dealing with a similar issue and relying on the definition of felony and misdemeanor at s. 4 of the *Penal Code*, drew the conclusion that the offence under s. 8(1) of the *Sexual Offences Act* was a felony.

12. On whether the court erred in law and in fact in not taking into consideration the explanation by the Appellant for his absence counsel relied on Article 50(2) (f) on the right of an accused person to be present for his trial unless his conduct makes it impossible. That the trial court was bound to hear the appellant's explanation for his absence before determining the case and delivering judgment and meting out the sentence. This position is expounded in *Kipyegon Chepkuto v Republic* [2021] eKLR where the court stated:

> "I find that in the circumstances, the trial court should have conducted an enquiry before proceeding with the trial and delivering judgement in the absence of the appellant. This I find is a condition precedent to invoking the constitutional provisions of article 50 (2) (f) of the *Constitution*. For to deny a person the right to cross examine or to confront his accusers would amount to a draconian measure; since the right to cross examination and to adduce evidence in one's defence is also guaranteed by the *Constitution* in article 50 (2) (k); which provides that an accused has a right to adduce and challenge evidence, the trial court would have conducted an enquiry by calling the police officer who arrested the appellant and if necessary the sureties. The appellant himself would also be called upon to explain his absence from court; since he was on bail."

13. On whether the court relied on evidenced obtained by coercion, counsel submitted that at trial PW5 was declared a hostile witness during examination in chief. That PW5 in his testimony explicitly explained to the court that he was forced to write the said statement, hence his statement should not have been considered. To bolster this position reliance was placed on *Abel Monari Nyanamba & 4 others v Republic* [1996] eKLR, where the court relied on *Batala vs. Uganda* [1974] EA 402 wherein the court stated that

> The giving of leave to treat a witness as hostile is equivalent to finding that the witness is unreliable.It enables the party calling the witness to cross examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given a little, if any weight.

14. On the fact of failure by the court to consider that a crucial witness called Grace Nyambura was not availed in court to testify, the appellant's counsel submitted that that the complainant testified that she was taken to the Appellant's house by one Grace Nyambura, a friend yet the prosecution failed to avail the said Grace as a witness. He urged the court to draw an inference that had the said witness attended court her evidence would have been prejudicial to the prosecution's case. On this he relied on *Joseph Peitun Losur vs Republic* Criminal Appeal No 168 of 2001 where the case of *Bukenya vs Uganda* (1973) EA 549 was cited with approval.

15. On whether the trial court convicted the Appellant while relying on incredible and insufficient evidence the appellant's counsel submitted that there was no explanation how PW1 came to know the house she was in belonged to PW5 and not the Appellant. He also found it absurd that the complainant stayed at the house where she was defiled from July 27, 2014 to July 29, 2014 without screaming or calling for help yet according to her testimony she had been left all alone.

16. Counsel also submitted that there were material contradictions in the prosecution evidence. That PW2 testified that she called her mother and husband(PW3) to inquire about PW1 whereabouts while PW3 testified that he was not around and only went home after two days. He further submitted that the prosecution witnesses were unreliable and that their evidence had a lot of gaps. For example, PW1 stated that she called her mother but her mother never mentioned being called by PW1. That PW1 stated that when her mother failed to pick up her call, she called one Joseph Ndirangu a neighbor asking for help and that he came in company of two police officers and her parents yet her parents PW1 and PW2 testified that they are the ones who went to the said neighbor who informed them of an earlier call he had received from PW1. The appellant wondered why the complainant chose to call the neighbor instead of calling her parents or the police officers. He submitted that if indeed PW1 was in trouble the said neighbor would have acted immediately. He contended that it is evident that the said neighbor never perceived that PW1 was in trouble and that he was never called as a witness. Counsel cited *FOO v R* [2020]eKLR

17. On whether the trial court shifted the burden of proof onto the appellant counsel submitted that in a criminal case the prosecution has a duty to prove a case against the accused person beyond reasonable doubt and that the burden only shifts when the evidential burden has been established against the accused which would require him to adduce cogent evidence in rebuttal.

18. He argued that in this case, the prosecution failed to discharge its duty as it failed to call some key witnesses; Grace Nyambura and Joseph Ndirangu to testify and this affected the strength of the evidence as a whole as the prosecution must make available all witnesses necessary to establish the truth even though their evidence may be inconsistent.

19. He urged the court to allow the appeal

Issues for Determination.

20. The issues that arise for determination are: -

    1. Whether the Appellant's rights to fair trial were infringed,
    2. Whether the proceedings against the Appellant were right, given the provision of section 206(1) & (2) of the *Criminal Procedure Code*,
    3. Whether the prosecution proved its case against the Appellant beyond reasonable doubt.

Analysis and Determination

21. The Appellant faulted the trial court for closing his case and proceeding to deliver its judgement in his absence without first inquiring the reasons for his absence. He argued that the court in doing so disregarded his constitutional right to adduce and challenge evidence in his defence as envisaged under Article 50(2)(k) of the *Constitution* 2010 and erred in convicting and sentencing him on an alleged case of defilement which charge is a felony contrary to section 206(1) of the *Criminal Procedure Code*.

22. It is not in doubt that after the prosecution closed its case, the trial court analysed the evidence tendered in court and on 31st January 2019 delivered a ruling that the accused person had a case to answer and consequently placed him on his defence. On this day, the accused informed the court that he would give unsworn evidence and a date for defence hearing was set for February 12, 2019.

23. On that day, the accused was not in court and his surety told the court that the accused had left the house on Tuesday for Londiani. The court issued a warrant of arrest against him on grounds that, that this was an old matter and fixed a mention date for February 21, 2019. On this day, the accused person & his surety were not in court and warrants of arrest against him and his surety was issued. The trial court subsequently fixed various mention dates for March 19, 2019, March 28, 2019, April 1, 2019, April 16, 2019, April 30, 2019, May 14, 2019, May 28, 2019, June 7, 2019, June 25, 2019, July 16, 2019, July 30, 2019, August 13, 2019, August 14, 2019, August 16, 2019, August 29, 2019, September 5, 2019, September 24, 2019, October 2, 2019, October 9, 2019 & October 15, 2019 but in all these dates the accused person & his surety were still absent and their whereabouts were unknown. There is however no indication on record whether the prosecution was facing any challenge in procuring the attendance of either the accused or his surety as the record shows that the prosecution kept praying for extension of summons to the investigation officer and extension of warrants of arrest against both the accused and his surety. Further there is nothing on record to show whether the Investigating officer attempted to track either the accused or his surety.

24. It was the responsibility of the surety to attend court and explain the whereabouts of the accused but she similarly never appeared and reasons to that effect are unknown.

25. The appellant's absence for his defence hearing was properly explained when he appeared in court on June 11, 2020: that he had been arrested for an offence of stealing and had been at Molo G.K Prison all this while, a position that was confirmed by the prosecution. Clearly the appellant had not absconded from the trial and the court ought not to have presumed that he had done so. The court was bound to follow the laid down procedure which was not to hear and determine the matter in the absence of the appellant.

26. The court in *Solomon Locham v Republic* [2015] eKLR. Dealt with a similar issue where the appellant therein sought for a revision order before the high court and the High court stated thus:

> " The legal question which arises is whether the proceedings against the 2nd accused were right, given the provision of section 206(1) & (2) of the *Criminal Procedure Code*...
>
> The above provision shows clearly that only where an accused person is charged with an offence which is a misdemeanor the trial Magistrate can proceed in his or her absence. The *Sexual Offences Act* No3 of 2006 does not describe offences in terms of Felonies and Misdemeanors. However, the *Penal Code* which define the two words comes in handy for assistance. Under section 4, which is on interpretation, a felony is indicated to mean:-

> An offence which is declared by law to be a felony or, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more. Misdemeanour is said to mean any offence which is not a felony.
>
> Under section 8(1) to (4) of the *Sexual Offences Act*, the least sentence one can get for the offence of defilement, of which depends on the age of the survivor, is 15 years' imprisonment. Maximum is life imprisonment. The offence is therefore a felony. The trial Magistrate in Criminal file No718/2013 was not entitled in law to proceed in absence of the 2nd accused, who had absconded.

27. I associate myself with the holding in the above case. On this ground the conviction and sentence are rendered unsustainable.

28. So what order should issue?

29. In my view since the learned trial magistrate had already determined that the appellant had a case to answer the issue is whether that would be the right place to begin or whether this court should continue to consider the rest of the appeal?

30. Neither party addressed this issue but its determination comes up from the finding that the trial court erred in proceeding vide s. 206 of the *Criminal Procedure Code* without hearing the appellant in his defence.

31. For guidance I call on the words of the East African Court of Appeal in *Fatehali Manji –v- The Republic* (1966) E.A 343 the court stated: -

> " The question for decision in this appeal is whether the order for retrial was justified or not. Section 319 (1) (a) of the *Criminal Procedure Code* of Tanganyika, under which the order for retrial must have been made, appears to give the High Court on appeal an unlimited discretion as to ordering a retrial but, as was pointed out in Ahmedi Ali Dharamsi Sumar –v- Republic (1) (1964) E.A 481 at P.482), quoting excerpts from the judgment in Salim Muhsin v. Salim Bin Mohammed and Others (2) ".....discretion must be exercised in a judicial manner and there is a considerable body of authority as to what is and what is not a proper judicial exercise of this discretion" We will not quote the other passages in full but we will content ourselves with stating the principles which emerge from them. They are the following: in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person. "

32. In general, a retrial will be ordered only when the original trial was illegal or defective. Evidently both the prosecution ought to have been aware that s. 206 of the *Criminal Procedure Code* was not applicable as the accused was facing a felony charge. The court had already found that the appellant had a case to answer and it was its intention that the appellant do make his defence. There were also other lawful routes to ensuring that the accused person who has absented himself from the trial for some reason before it was determined got to be tried when he was found.

33. The appellant needed to be heard before he court could arrive at a decision as to whether or not he was guilty of the offence he was facing. He was also entitled to a mitigation with respect to the sentence if he was found guilty. The offence he is facing is a serious offence

34. In the circumstances, it is my view that this case answers to two criteria for retrial. The trial was defective when the trial magistrate misguided herself and proceeded under s. 206 of the *Criminal Procedure Code* and that it would be in the best interests of justice for the appellant's defence to be heard before the determination of the matter.

35. In the circumstances, the conviction is quashed, the sentence is set aside, the judgment of Hon E Soita RM be expunged from the record.

36. The consequence to that is that the appellant will be retried, and considering the time lapse, for purposes of taking his defence, upon compliance with s. 200 of the *Criminal Procedure Code*, by a court of competent jurisdiction and not the trial magistrate Hon. E. Soita.

37. The trial court will take into consideration the period of time the appellant has been in custody and give the matter priority including considering granting him reasonable band terms.

38. To that effect the appellant be released to the OCS of the Police Station that was responsible for his case within 7 days hereof to be presented to court within the prescribed period

39. Right of Appeal 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH MAY 2023

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MUMBUA T. MATHEKA

JUDGE

Rodi Orege & Co. Advocates – For the Appellant.

Ms. Murunga: - For the Respondent.

Appellant