



REPUBLIC OF KENYA



**Wabomba alias Rispah Nakhumicha Masinde v Republic (Criminal Appeal
78 of 2019) [2023] KEHC 21421 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 78 OF 2019
AC MRIMA, J
JULY 31, 2023**

BETWEEN

MIRA WABOMBA ALIAS RISPAH NAKHUMICHA MASINDE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon. P. K.
Biwott (Senior Principal Magistrate) in Kitale Chief Magistrate's
Court Criminal Case No. 2851 of 2015 delivered on 10th July 2019)*

JUDGMENT

Introduction:

1. The Appellant herein, Mira Wabomba alias Rispah Nakhumicha Masinde, was charged with the offence of making a document without authority contrary to Section 357(a) of the Penal Code. The particulars of the offence were that on 11th May 1996 at Kwanza Registration office within Trans Nzoia County with intent to defraud, without lawful excuse, made a document namely National Identity Card No.00xxxxx in the name of Rispah Nakhumicha Masinde, purporting to be her real names and owner of Plot No. 12 at Kapomboi Settlement farm.
2. The Appellant pleaded not guilty to the charge when she was arraigned before the trial Court and she was subsequently tried.
3. After a full trial, the Appellant was acquitted of the offence of making a document without authority as charged, but was convicted of the offence of impersonation contrary to Section 382(1) as read with Sub-section (2) of the Penal Code. She was she sentenced to pay a fine of Kshs. 20,000/= and in default to serve four months imprisonment.



The Appeal:

4. Dissatisfied with the conviction and sentence, the Appellant filed her Petition of Appeal dated 22nd July, 2019. It raised 14 grounds of appeal disputing the findings of the trial Court. She lamented that the trial Court erroneously convicted her since the dispute was in its nature civil. She faulted the trial Court for personifying the dispute, misinterpreting the fabricated evidence on record, shifting the burden of proof to the Appellant and punishing the Appellant for giving unsworn evidence.
5. The Appellant continued that the trial Court erred in failing to hold that the suit land belonged to the Appellant and the Complainant's father. She opined that the evidence of the Land Settlement and Adjudication Officer absolved her from any form of liability. She challenged the evidence of the prosecution witnesses as lacking probative value. She was of the view that there was a delink between the Appellant and Mira Wabomba. Finally, she persuaded that her defence was cogent.
6. In the premises, therefore, the Appellant urged the Court to allow the appeal and quash the conviction.
7. During the hearing of the appeal, the Appellant on 15th November, 2022 informed the Court that she had paid the fine imposed on her but elected to proceed with the appeal. Resultantly, parties filed and exchanged written submissions in disposing of the appeal.
8. According to the Appellant's submissions dated 5th November, 2022, no evidence was tendered before the trial Court as to suggest that her Identity Card was false. She added that the Identity Card No. 00xxxxx was never produced in evidence thereby negating the evidence furnished by the prosecution against her. She clarified that her Identity Card was replace and not issued on 11th May, 1996.
9. The Appellant argued that she was not Mira Wabomba and that no evidence pointed to this suggestion. She stated that while she was called Rispah Nakhumicha Masinde, holder of Identity Card No. 00xxxxx, the Complainant and her sister, was called Rispah Nakhumicha Mwasame, holder of Identity Card no. 16xxxxx. She wondered how the Complainant allegedly acquired registration of the suit land in 1992 when she was 46 years old yet the same had been allocated to her in 1996.
10. Lastly, the Appellant submitted on the issue of fraud. She submitted that there was neither a charge on the same nor evidence adduced in support thereof. Be that as it may, the same could only be met by the Complainant. She relied on the evidence of PW6 for this assertion. It was the Appellant's view that none of the prosecution witnesses testified as to the substance of the charges leveled against her. Withal, she decried that the prosecution was commenced over 30 years later bringing into play constitutional violations of her rights to a fair trial and the rule of law. For these reasons, the Appellant urged this Court to quash the conviction.
11. The appeal was opposed by the prosecution who filed written submissions dated 17th October, 2022. It disputed all grounds raised in support of the appeal. The prosecution maintained that the Appellant was guilty of personifying her sister with intent to fraud her sister off her suit land contrary to Section 382 (1) and (2) of the Penal Code. For these reasons, the prosecution maintained that it had discharged its burden of proof to the required standard.
12. The prosecution lauded the findings of the fact finder as lawful and justifiable. It then stated that any contradictions were too minor to affect the outcome of the trial.
13. Finally, the prosecution maintained that the trial Court was correct in convicting the Appellant of a lesser offence within its definition set out in Section 179(2) of the Criminal Procedure Code.
14. Ultimately, it urged this Court to dismiss the appeal by upholding the conviction and affirming the sentence.



Analysis:

15. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.
16. Having carefully perused the record, this Court is now called upon to determine whether the trial Court was right in convicting the Appellant on the offence of impersonation having found that the offence of making a document without authority was not proved.
17. Before venturing into that discourse, a review of the prosecution evidence will definitely lay a firm foundation for the discourse.
18. The prosecution called seven witnesses in a bid to establish the charges drawn against the Appellant. According to the prosecution's theory, the Appellant is the elder sister to the Complainant (Rispath Nakhumicha Mwasame who testified as PW1) and Cosmas Chako Makokha (who testified as PW4). They were all the children of Sarah Nanyama who testified as PW2. The Appellant was born in 1935, PW1 was born in 1952 while PW4 was born in 1946.
19. Prior to issuance of Identity Cards, PW1 obtained five acres of land in Kapomboi Settlement Scheme as a squatter. That was after independence and on 2nd August, 1971.
20. PW5, Patrick Majimbo Kwanusu, the then Area Chief in 1972 recalled the allocation exercise undertaken by the Government through the Settlement Fund Trustees where PW1 was issued with Plot No. 12. Upon issuance, PW1 invited her sister, the Appellant, onto the suit land to take care of it as she was married of elsewhere. This was corroborated by PW4 and PW5.
21. In corroboration of ownership by way of allocation in 1974, PW3, Samuel Wanduesi Wepukhulu, recalled that while he was issued with five acres of land on Plot No. 37 within the said Scheme, one Rispath Nakhumicha, who is not the Appellant, was issued with Plot No. 12 as per the list generated during the exercise. Plot No. 12 was later changed to Plot No. 13. A list of the allottees was generated and handed over by PW5 to the Settlement Fund Trustees officials.
22. During the issuance of Identity Cards in 1998, PW1 testified that the Appellant used PW1's name Rispath Nakhumicha to obtain an identity card, but inserted the name Masinde unto it. She contended that the Appellant was called Mira Wabomba and she had never adopted the name Rispath Nakhumicha. She was emphatic that the Appellant was never legally called Rispath Nakhumicha Masinde, a fact duly corroborated by PW2, PW4 and PW5. Following this discovery, PW1 informed her father. The Appellant was advised to take two acres out of the five acres, but there was no meeting of the minds.
23. PW2 on the other hand testified that the suit land belonged to the elder sister, the Appellant, as the younger one, the complainant, could not be given land as at that time. She alluded that the land was inherited by the Appellant upon the death of their father Elijah Masinde.
24. A dispute arose as to ownership of the suit land. When PW1 returned back to the suit land to claim ownership, she was chased away by the Appellant. The incident was reported to the Chief who referred the dispute to the Settlement office. Thereafter, the OCS summoned the Appellant who maintained that the names as they appeared in the Identity Card were hers.



25. PW6, Francis Obina Oseko, a Land Settlement officer produced records for Parcel No. 12. It was allocated on 20th January, 1986. It was assigned to and accepted by Rispah Nakhumicha Masinde and not Mira Wabomba. That allotment was proceeded by a Charge issued the same day.
26. The matter was reported at Kitale Police Station. PW7, No. 34666 Cpl. John Kimani commenced investigations into the matter where he collected the evidence and interrogated the witnesses.
27. According to PW7, the Complainant presented an Identity Card No. 16xxxxx bearing the name Rispah Nakhumicha Mwasame. On the other hand, the Appellant presented an Identity Card No. 00xxxxx in the name of Rispah Nakhumicha Masinde. The Appellant denied that she was called Mira Wabomba. PW7 then gathered further evidence and eventually formed the opinion that there was sufficient evidence to charge the Appellant with the offence upon arrest.
28. In support of its case, the prosecution produced identification reports for both the Appellant and PW1.
29. After close of the Prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on her defence.
30. The Appellant gave unsworn evidence in denying the offence. She maintained that she was called Rispah Nakhumicha Masinde. She added that she was the lawful proprietor of the suit land. She relied on the allotment letter dated 1st October, 1982 and the Charge registered in her name. She contended that as a result of that registration, she developed the plot and built her residential home.
31. The Appellant also called Reuben Wanjala, DW2, her neighbour, who testified that the Appellant was called Rispah Nakhumicha Masinde. He asserted that just like him, the Appellant was issued with the documents over the parcel of land.
32. It was on the basis of the foregoing evidence that the trial Court found that the offence of making a document without authority was not proved. The Court, however, convicted the Appellant of the offence of impersonation.
33. At the hearing of the appeal, the prosecution submitted that the trial Court, rightly so, relied on Section 179(2) of the Criminal Procedure Code to find the Appellant guilty of a lesser offence. That submission, therefore, introduces the subject of cognate offences.
34. Section 179 of the Criminal Procedure Code (hereinafter referred to as 'the CPC') provides as follows: -
 1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
 2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
35. As a starting point, the plain reading of the above provision apparently settles that the offence which an accused may be convicted of upon the dismissal of the main charge must be a cognate and minor one compared to the original charge.
36. The Black's Law Dictionary defines a 'cognate offence' as follows: -

a lesser offense that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.



37. Courts have as well interrogated Section 179 of the CPC at length. The Court of Appeal sitting in Malindi in Criminal Appeal No. 5 of 2013 Robert Mutungi Muumbi vs. Republic [2015] eKLR had the following to say on the subject: -

As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged.

An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See Robert Ndecho & Another V. Rex (1950-51) EA 171 and Wachira S/o Njenga V. Regina (1954) EA 398).

Spry, J. explained the essence of the first consideration as follows in Ali Mohammed Hassani Mpanda V. Republic [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

Subsection (1) envisages a process of subtraction: the Court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.

The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See Republic V. Cheya & Another [1973] EA 500).

In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied. (emphasis added).



38. In Uganda, Hon. Stephen Mubiru, J., in finding that the offence of Manslaughter was minor and cognate to that of Murder in Criminal Sessions Case No. 910 of 2014 Uganda -vs- Obe Zayio Bosco expressed himself thus: -

... when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it (see also Uganda v. Leo Mubyazita and two others [1972] HCB 170; Paipai Aribu v. Uganda [1964] 1 EA 524 and Republic v. Cheya and another [1973] 1 EA 500). The minor offence sought to be entered must belong to the same category with the major offence. The considerations of what constitutes a minor and cognate offence were set out in Ali Mohamed Hassani Mpanda v. Republic [1963] 1 EA 294, where the appellant was charged together with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of The *Penal Code Act*. The magistrate found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s.241 of The *Penal Code Act*. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence and whether that offence must be cognate with the major offence charged. The High Court of Tanganyika held that;

s.181 of The Criminal Procedure Code (similar to section 87 of The Trial on Indictments Act, Cap 16) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted.

Section 87 of The Trial on Indictments Act envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence.....

(emphasis added).

39. The Courts in the above cases, rightly so, emphasized the need of ascertaining the two key aspects being cognate and minor while interrogating whether Section 179 of the CPC would be applicable in a case.
40. Cognate mainly relates to the sense that the original major offence encompassed all the ingredients of the subsequent minor offence. In other words, the ingredients of the minor offence must be wholly ingrained or subsumed in the ingredients of the major offence. Minor must mean that the other offence should be a lesser offence to the major offence. This may be ascertained from the sentence imposed in law on the subsequent offence.
41. It is only after the two key elements are certainly proved that a Court may invoke Section 179 of the CPC to convict on the cognate and minor offence. Ascertaining the two key elements ensures that the accused's right to a fair trial as guaranteed under Article 50 of *the Constitution* is not curtailed even in the absence of not calling upon the accused to take a plea on the cognate and minor offence. It also insulates the accused from any prejudice whatsoever.
42. Returning to the case at hand, the Appellant was charged with the offence of making a document without authority contrary to Section 357(a) of the Penal Code. He was acquitted as the offence was



not proved. The Appellant was, however, found guilty and convicted of the offence of personation contrary to Section 382(1) as read with Sub-section (2) of the Penal Code.

43. Section 382 of the Penal Code creates the offence of personation as follows: -

382. Personation in general:

- (1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour.
- (2) If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof, he is liable to imprisonment for seven years.

44. The Appellant was found guilty of the offence as described in both sub-sections (1) and (2) of Section 382 of the Penal Code. The sentence provided for under sub-section 2 is seven years imprisonment at most.

45. Section 357(a) of the Penal Code which creates the offence of making a document without authority also settles the sentence on conviction to a maximum of seven years as well.

46. On the ingredients of the offences, it is obvious that the offences of making a document without authority and of impersonation do not bear any similarity in character. There is no way the offence of impersonation can be ingrained in the offence of making a document without authority. The two offences are world apart and incompatible. The offence of impersonation is, therefore, not cognate and minor to the offence of making a document without authority.

47. With such a finding, this Court finds that the trial Court, with utmost respect, therefore, erred in convicting the Appellant on the offence of impersonation contrary to Section 382(1) as read with Sub-section (2) of the Penal Code as a cognate and minor offence to that of making a document without authority contrary to Section 357(a) of the Penal Code.

48. The upshot is that the conviction cannot legally stand.

Disposition:

49. The appeal, hence, succeeds on both conviction and sentence.

50. Consequently, the following final orders do issue: -

- a. The appeal on conviction and sentence hereby wholly succeeds.
- b. The conviction on the offence of personation contrary to Section 382(1) as read with Sub-section (2) of the Penal Code is hereby quashed and the sentence of a fine of Kshs. 20,000/= or in default four months imprisonment is hereby set-aside.
- c. The fine paid by and on behalf of the Appellant shall forthwith be returned to the depositor.
- d. This file is marked as closed.

It is so ordered.

DELIVERED, DATED and SIGNED at KITALE this 31st day of July, 2023.

A. C. MRIMA

JUDGE



Judgment delivered in open Court and in the presence of: -

Mr. Katama Ngeiywa, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

