Kimani v Republic (Criminal Appeal 58 of 2017)
[2023] KEHC 21416 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21416 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 58 OF 2017

CW GITHUA, J

JULY 26, 2023

BETWEEN

SAMUEL MALEGWA KIMANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon. Ms. M. Wachira Chief Magistrate in Muranga's Chief Magistrates Court Criminal Case No. 1095 of 2011)

JUDGMENT

1. The appellant, Samuel Malewa Kimani was charged, tried and convicted of the offence of causing grievous harm contrary to Section 234 of the *Penal Code* in that on September 11, 2011 at Casablanca bar in Makuyu, Murang'a County, he unlawfully caused grievous harm to Robert Ndungu Mariba.

2. Upon conviction, the appellant was sentenced to serve four (4) years imprisonment. He was dissatisfied with his conviction and sentence hence this appeal.

3. In his petition of appeal filed on September 5, 2017, the appellant relied on five grounds of appeal in which he complained that the learned trial magistrate erred in law and fact by; convicting him on proceedings which were fatally flawed; convicting him on evidence that could not sustain a conviction; disregarding explicit orders of the High Court and failing to comply with mandatory provisions of Section 200 of the *Criminal Procedure Code*.

   The appellant also complained that the sentence meted out on him was excessive in the circumstances of the case.

4. The appeal was prosecuted by way of written submissions. The appellant's submissions were filed on his behalf on January 25, 2023 by his advocates Mwaniki Warima & Co. Advocates while those of the respondent were filed on its behalf by prosecution counsel Mr Steve Waweru on April 28, 2023.

5. In his submissions, learned counsel Mr Mwaniki submitted that the proceedings that resulted into the appellant's conviction were incurably defective as the learned trial magistrate breached the appellant's rights to a fair trial by failing to comply with the provisions of Section 200 of the *Criminal Procedure Code* (CPC) and for failing to comply with Sections 210 and 211 of the same code since after close of the prosecution case, no ruling on case to answer was delivered and the appellant was not placed on his defence; that the appellant was therefore condemned unheard contrary to the rules of natural justice. It was also submitted that the learned trial magistrate ignored orders given by the High Court in Revision Case No 2 of 2016. The appellant urged me to find merit in the appeal and allow it.

6. The respondent in submissions filed on its his behalf by prosecution counsel Mr Steve Waweru conceded to the appeal noting that the trial process in the lower court was flawed as the trial court failed to comply with Sections 200, 210 and 211 of the *Criminal Procedure Code* as well as Articles 25 and Article 50 (2) of the *Constitution*.

7. I have considered the written submissions filed by both parties and juxtaposed them with the record of proceedings in the lower court. I find that the appellant's submissions are supported by the proceedings of the lower court which confirm that after Hon T. Nzioki proceeded on transfer, Ms M. Wachira, the succeeding magistrate did not comply with the provisions of Section 200 (3) of the *Criminal Procedure Code* before taking over the hearing from where Hon Nzioki had stopped. The court record shows that the succeeding magistrate arbitrarily decided to continue with the trial from where the previous magistrate had stopped by stating as follows;

> " I take over these proceedings under Section 200 (3) of the *Criminal Procedure Code*....".

There is no indication on the court record that the appellant was asked to make an election under Section 200 (3) of *Criminal Procedure Code* on how he wished to have the trial proceed.

8. To compound the problem further, Hon Wachira recalled PW 2 for further cross-examination but after recording his evidence and the prosecution closed its case, she proceeded to reserve the case for judgement without first establishing whether or not the appellant, then the accused, had a case to answer and without giving him an opportunity to present his defence, if any. The learned trial magistrate proceeded to convict and sentence the appellant without having heard his version of the story which was obviously an affront to the appellant's right to a fair trial and the rules of natural justice.

9. Having established the above facts from the record, I have no doubt in my mind that indeed the proceedings that resulted into the appellant's conviction and sentence were fundamentally flawed as they breached the appellant's constitutional right to a fair trial which is an absolute right guaranteed under Articles 25 and 50 of the *Constitution of Kenya 2010*.

10. In my considered view, failure by the learned trial magistrate to comply with the mandatory provisions of Section 200 (3), Section 210 and Section 211 of the *Criminal Procedure Code* went to the root of the validity of the trial and were not errors which were curable under Section 382 of the *Criminal Procedure Code*. They are errors which caused the appellant grave prejudice and rendered the trial a nullity in law.

See: *Sophia Wanjiku v Republic* (2002) eKLR; *David Kimani Njuguna v Republic* (2105) eKLR.

11. Given the foregoing, I find that the learned prosecution counsel was right in conceding to the appeal as a conviction arising from incurably defective proceedings cannot be sustained.

In the premises, I find merit in this appeal and it is hereby allowed. The appellant's conviction is subsequently quashed and the sentence set aside.

12. Having quashed the appellant's conviction, the next issue for my consideration is whether to acquit the appellant or remit the case to the trial court for retrial. The principles that guide a court in deciding whether or not to order a retrial have been discussed in many authorities including the cases of *Fatehali Manji v Republic* (1966) 343 and *Muriuri v Republic* (2006) eKLR. The common thread that runs through those authorities is that whether or not to order a retrial depends on the facts and circumstances of each case but a retrial will be ordered where the court was satisfied that the trial in the lower court was defective or illegal or when the interests of justice requires it. As a general rule, a retrial should not be ordered if it was likely to cause injustice to the accused person.

13. In this case, the record shows that the appellant was imprisoned from August 23, 2017 when he was convicted to November 27, 2017 when he was released on bond pending appeal. His appeal has been concluded about five years later and for all this time, the appellant has been out on bond waiting to know his fate. In my view, it will not be in the interests of justice to order a retrial in this case. I therefore decline to make such an order.

14. As the appellant has been on bond pending appeal and his appeal has now been concluded, his bond pending appeal is hereby cancelled.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JULY 2023.

C. W. GITHUA

JUDGE

In the presence of:

The appellant

Ms Waititu holding brief for Mr Mwaniki for the appellant.

Ms Muriu for the Respondent