



**Khan v Republic (Criminal Appeal 29 of 2020)  
[2023] KEHC 22737 (KLR) (Crim) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22737 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL 29 OF 2020  
DR KAVEDZA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**ZUHURA KHAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence delivered by Hon.  
M.W Njagi PM on 09.01.2020 at Milimani Chief Magistrate's  
Court Criminal case no. 1843 of 2015 Republic vs Zuhura Khan)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted for the offence of neglect of official duty contrary to section 128 as read with section 36 of the Penal Code, Cap 63 Laws of Kenya. She was sentenced to pay a fine of Kshs. 10,000 in default serve three (3) months imprisonment. Being dissatisfied, she filed an appeal challenging her conviction and sentence.
2. In her petition of appeal dated 28<sup>th</sup> January 2020, she raised 7 grounds. The grounds have been summarised as follows: In grounds 1,2,3,5 and 6, she challenged the totality of the prosecution's evidence against which she was convicted. In ground 4, she contended that the prosecution failed to call critical witnesses in her case. In ground 7, she averred that the trial court erred in handing out an excessive sentence.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).



4. The prosecution called 15 witnesses in support of their case. Doreen Nkatha (PW 1) told the court that she worked as a househelp in South C. On 15.02.2014 her employer accused her of stealing from her. She assaulted her by inserting a beer bottle into her private parts and burning her arms with a hot iron rod. Later on, her employer in the company of her husband escorted her to the police station where she was booked. On 18.02.2014, she was arraigned in court for plea-taking. She informed the magistrate of her ordeal. The court directed that she be taken to hospital for treatment. She was however not taken to hospital until 23.02.2014 when an ambulance from Medicines Sans Frontiers came. She was treated and referred to Nairobi Women's Hospital and later discharged. She maintained that the appellant refused to take her to the hospital.
5. Beatrice Kega (PW 2) and Norah Kemunto (PW 3) told the court that they visited the complainant at the police station after her arrest. She had injuries on her arms and told her that her employer had inserted a beer bottle into her private parts. At the time, she had not been taken to hospital. When they inquired why she had not been taken to the hospital, she was informed by the Deputy OCS, the appellant herein that there was no motor vehicle available.
6. Lilian Mwangi (PW 4) testified that she was arrested on the same day as the complainant and taken to the same station. She noticed that the complainant had blood stains on her clothes. The complainant narrated her ordeal at the hands of her employer. She told the court that she posted a police bail and was released. On 20.02.2014, she went to check on the complainant but she had not been taken to hospital. She donated her vehicle to escort her to the hospital but the appellant refused indicating that there was no police escort.
7. No. 73096 CPL Dorcas Meme (PW 5) and No. 79485 CPL Nancy Wahome Murithi (PW 6) both gave identical testimony and told the court that they inquired from the appellant who was the acting OCS why the complainant had not been taken to the hospital. The appellant accused them of being rude and threatened them with insubordination. On 23.02.2014, they called Medicines Sans Frontiers in Mathare. They arrived in an ambulance 30 minutes later and took the complainant for treatment.
8. Barbara Salala Kele (PW 7) a clinical officer at Medicines Sans Frontiers testified on behalf of Dr. Zabaila Abdul who left the organisation. She told the court the complainant was seen at their facility on 23.02.2014 after an alleged case of sexual assault by a person known to her. On examination, her arms were burnt, and her outer female genitalia was bleeding. She was referred to Nairobi Women's Hospital for further treatment. She produced the PRC form.
9. No. 88702 PC Moses Sakwa (PW 8), No. 46870 PC James Musau (PW 9), No. 60237 PC Secily Kemboi (PW 10) and No. 91070 PC Leah Keino (PW 11) all testified that the complainant was brought to the station on 17.02.2014 and booked on allegations of stealing. They confirmed that at the time, the appellant was in charge as the acting OCS. That she was acting in the absence of PW 12.
10. No. 233310 CI Amos Shamalla (PW 12) told the court that in 2014, he was the OCS Industrial Area Police Station. He recalled on 18.02.2014, several suspects were taken to court among them, the complainant. Once they were brought back, he was informed that the complainant had raised a complaint in court about her health. He directed CPI Maithya to investigate. He told the court that he was off duty from 18.02.2014 to 23.02.2014. During this period, the Deputy OCS, the appellant herein was left in charge. He told the court that when he came back, he found that the complainant had been admitted to Nairobi Women's Hospital.
11. No. 54474 CPL Jann Nzoka (PW 13) told the court that he booked the complainant when she was brought from court after taking a plea. It was his evidence that she had scars on her hands.



12. Lilian Mwendu (PW 14) a former investigating officer at IPOA told the court that she received a report that a suspect in police custody had been assaulted and did not receive medical attention. She conducted her investigations and interviewed the complainant who did not look okay.
13. Dr. Joseph Mukongo (PW 15) of Nairobi Women's Hospital told the court that the complainant was referred to their facility and was attended by Dr. Guako on 23.02.2014. On examination, he found bacteria in her labia majora as well as injuries on her arms.
14. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on her defence. She gave sworn testimony and did not call any witnesses. She told the court that when the complainant was brought to the station, after taking a plea, the OCS minuted Corporal Maithya to investigate. It later came to her attention that Corporal Maithya had not taken any action. She maintained that the complainant did not raise any complaint before she was taken to court. She told the court that she complainant was taken to hospital after it was brought to her attention that action had not been taken. She maintained her innocence.

### **Analysis and determination.**

15. It is trite that the prosecution bears the burden to prove each and every ingredient of the offence charged beyond reasonable doubt. (See *John Mutua Munyoki v Republic* [2017] eKLR). In order to ascertain whether or not the prosecution discharged this burden in the circumstances of the trial the subject of this appeal, it is important to highlight the elements of the offence of Neglect of Official Duty.
16. Section 128 of the *Penal Code* defines the offence of Neglect of Official Duty in the following terms (see also the *Stephen's Digest of the Criminal Law*, 9<sup>th</sup> ed (1950), page 114, at 145):

Every person employed in the public service who wilfully neglects to perform any duty which he is bound either by common law or by any written law to perform, provided that the discharge of the duty is not attended with greater danger than a man of ordinary courage might be expected to face, is guilty of a misdemeanour.
17. From the foregoing, the key elements of the offence of Neglect of Official Duty have been identified to include:
  - a. That the Appellant was employed in the public service.
  - b. That the Appellant was bound either by common law or by a written law to perform the duty the subject of the charge.
  - c. That the Appellant willfully neglected to perform the said duty.
18. The first element was not in doubt. The Appellant admitted that she had been employed in the public service for upto 25 years. The Appellant however disputed the 2 other elements of the offence: whether the Appellant was bound by common law or by a written law to perform the duty the subject of the charge, and whether the Appellant willfully neglected to perform such a duty imposed by law.
19. In respect of the second element, it is important to state that the mere fact that the Appellant was a police officer did not place a duty on the Appellant and no one else the obligation to take PW1 to hospital. The prosecution needed to identify a provision of the common law and or written law imposing the duty on the Appellant to take PW1 to hospital. However, other than the fact that the Appellant stood in for PW12, the prosecution led no evidence exhibiting that the duties and



responsibilities of the Appellant concerned with the custody and welfare of detainees at the Police Station nor that the Appellant had the sole obligation to take PW1 to hospital.

20. As regards the third element of wilful neglect, the order to take PW1 to hospital was made by the learned magistrate at the Makadara Law Courts on 18<sup>th</sup> February 2014. The order was not specifically directed to the Appellant. In fact, when PW12 received the directions from court, he assigned corporal Maithya to investigate. As confirmed by PW14, there was nothing on the OB asking the Appellant to deal. Curiously, corporal Maithya to whom PW12 gave express instructions to take PW1 to hospital and who therefore neglected the duty was not charged.
21. Further, PW1 was in fact taken to hospital on 23<sup>rd</sup> February 2014 in compliance with the order of the court. By the time the Appellant was charged on 3<sup>rd</sup> December 2015, the alleged neglected act had already been performed. There could therefore not arise a case of neglect of duty when the act for which the offence would be based was, and had in fact been, performed. Further, as has already been stated above, no evidence was led to the effect that that the duty to take PW1 to hospital belonged only to the Appellant.
22. In addition, the Appellant indicated that there was no motor vehicle nor officer to escort PW1 to hospital. However, as soon as an officer was available, the Appellant indeed assigned the officer to escort PW1 to the doctor to get a P3. For the offence of Neglect of Official Duty to be proven, not only must the neglect be wilful and not merely inadvertent, but it must be culpable in the sense that it is without reasonable cause or justification.” (See the English Case of Attorney General’s Reference (No. 3 of 2003), [2004] 3 W.L.R. 451, 2004 EWCA Crim 868; [2005] QB 73 and the Court of Final Appeal of Hong Kong decision in *Shum Kwok Sher v HKSAR*, [2002] 5 HKCFAR 381, at pages 409-410).
23. From the foregoing, not only did the prosecution fail to identify the law from which the Appellant’s alleged duty to take PW1 to hospital could be drawn to prove that the obligation was the Appellant’s and no one else, but, it is also apparent that there existed a reasonable excuse or justification for the failure to immediately take PW1 (noting that PW1 was indeed finally taken to hospital on 23<sup>rd</sup> February 2014), the conviction cannot be said to have been safe. Put differently, the prosecution did not prove its case to the standard required by law, beyond reasonable doubt.
24. Having found that the conviction was not safe, I need not delve into the remaining grounds as relates the credibility of the witnesses, and the legality of the sentence, as the preceding finding is dispositive of this appeal.

### **Disposition**

25. The upshot of the foregoing analysis is that the prosecution did not establish all the elements of the offence of Neglect of Official Duty beyond reasonable doubt. As such the appellant’s conviction was not safe. I accordingly allow the appeal, quash the conviction and set aside the sentence.
26. The appellant shall be set at liberty forthwith unless otherwise lawfully held.  
Orders accordingly.

**JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**



Mr Mutuma for the State.

Ms Okoth for the appellant

Appellant present on the platform.

Habiba C/A.

