Momanyi v Republic (Criminal Appeal 90 of 2018)
[2022] KEHC 13913 (KLR) (Crim) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 90 OF 2018

LN MUTENDE, J

SEPTEMBER 22, 2022

BETWEEN

WILLY MOMANYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Willy Momanyi, the appellant herein, is a prosecution counsel from the Office of the Director of Public Prosecutions. He has proffered this appeal following the decision of Honourable Magistrate T.M Sinkiyian, in Milimani criminal case No 987 of 2011 where the learned trial magistrate found his conduct to have been contemptuous to the court.

2. The genesis of the matter relates to the court order and/or directions issued on March 22, 2017, where the prosecution was ordered to close its case, but, the appellant declined to comply and told the trial court on the face of it that he would not close the case. Consequently, he was sentenced to one day imprisonment, and, in addition to pay a fine of Ksh 25,000/- and, in default to serve five days imprisonment.

3. Dissatisfied with the order of the court, the appellant appeals on grounds that:

    a) The trial court erred in law by finding that the prosecution counsel was in contempt of court.

    b) The trial court erred in sentencing the appellant to one day imprisonment, and, in addition to pay Ksh 25,000/-, and, in default to serve 5 days imprisonment.

    c) The trial magistrate failed to follow and accord the appellant tenets of natural justice by allowing him ample time to defend himself before convicting him.

d) The magistrate failed to follow basic rules of a trial by asking the prosecution counsel to mitigate and thereafter convicting him and subsequently sentencing him.

e) The trial magistrate failed and neglected to frame and record the substance of the charge as regards the offence of contempt.

f) The trial magistrate failed and neglected to call upon the appellant to show cause as to why he should not be held in contempt.

g) The trial magistrate failed and neglected to allow the appellant fair opportunity to respond to the contempt of court conviction.

h) The trial magistrate erred in law in imposing on the prosecution to close its case, yet, days allocated for hearing of the case had not yet been spent; and, the prosecution had not yet called all its witnesses and tendered all evidence.

i) The trial magistrate erred by directing the prosecution on how to proceed in its case contrary to the independence of the Office of Director of Public Prosecutions(ODPP) provided for under article 157(10) of the *Constitution*.

j) The trial court found the appellant personally liable for contempt, yet, he acted in good faith in execution of the functions, duties and powers of ODPP as provided by section 15 of the *ODPP Act*.

4. Circumstances that led to the instant appeal were that; Simeon Sagana Kimani, Lucas Maliko Chacha and Philip Okeyo Obura were charged with the offence of stealing, conspiracy to defraud and fraudulent accounting. The complaint in issue was at the instance of National Non-Governmental Organization. The accused having pleaded not guilty to the charges, were subjected to trial which commenced in 2011 and was presided over by different Magistrates until the March 20, 2017 when the Hon Sinkiyian took over the matter and sought to have the matter concluded between 21st and March 23, 2017

5. The appellant, the prosecuting counsel who was seized of the matter called PW6 to the witness stand on March 21, 2017 and having tendered his testimony, the appellant sought an adjournment as other witnesses were not available. He told the court that their contacts which were on the statements were not going through. Mr Ongoya, counsel for the accused, vehemently contested the application arguing that the days were set for optimal resolution of the case. The appellant told court that he still had 2 witnesses, PC. Isaac Ogutu and Dr Macmillan. The court directed that he had only called one witness since the case began from the scheduled dates. It granted the adjournment but warned the prosecution to ensure it concluded the case within the scheduled days.

6. On March 22, 2017, when the hearing resumed, the appellant told court that the two witnesses were not available, that the investigating officer was not in court and that he had personally tried to call PC Ogutu and Dr Mackmillan who advised him that they were not aware of the case. However, he stated that the doctor would be available the following week.

7. Counsels representing the accused, Mr Ongoya and Mr Oundo vehemently opposed the application for adjournment, It was argued that the court had locked the judicial diary and it was not for the prosecution to choose the type of witnesses to call. That the appellant had told court that the two witnesses were to be availed but on the day of the hearing it turned out that they had no notice of the case. That there was ill motive on the part of the prosecution while the accused were suffering as the trial had been in court for seven (7) years. That PC Ogutu seemed to dictate time to come to court while

the doctor needed time. The court ruled that the appellant had confirmed to court with certainty on availability of the witnesses after talking to the investigating officer. That the appellant's turn around was deceptive and that he was underestimating the intelligence of the people involved in the case. The court found that his conduct was less than candid and that there was no reason to believe that if the adjournment was allowed the matter would proceed the next day. In the result, the court declined the application for adjournment and ordered the prosecution to close the case.

8. Consequently, the appellant told the court that he had no evidence to tender and was not closing the case. When the court asked him, if he was not closing the case, he was adamant that he was not as he had evidence. The argument that ensued made the defence counsel to address the court on the conduct of the appellant. Mr Ongoya argued that the appellant was a member of the bar and was governed by the Code of Ethics and respect to court was most important. That he was disrespectful, as he should have complied and sought further remedies. Mr Oundo urged that he equated the appellant's disobedience to that of an accused person who on being sentenced says no to the sentence.

9. The trial court considered what transpired and found that the appellant's utterances were in contempt on the face of the court contrary to section 10 (2) of the *Magistrates Courts Act*; having disobeyed the court order. The learned Magistrate allowed the appellant to mitigate before he could punish him.

10. The appellant apologized and further stated that he felt that the witnesses would be availed the next day. That he personally called them and they were willing to come. He asked for mercy.

11. To this the court noted that the apology was a justification for his utterances. That the appellant faulted the decision of the court declining adjournment by making utterances and he still failed to close his case as he wished to proceed the next day. That the apology was half-hearted. It found him guilty of contempt contrary to section 10 (2) of the *Magistrates Courts Act*, sentenced him to serve one (1) day imprisonment, and, in addition to pay a fine of Ksh 25,000/= or serve an additional 5 days in custody. He was given 14 days right of appeal.

12. The appellant canvassed the appeal through written submissions, where he urged that the court erred by not issuing notice to show cause and further not allowing him adequate time, opportunity and facility to defend himself. That the sentence was against the dictates of the law under section 215 of the *Criminal Procedure Code* and clause 22 and 23 of the Sentencing Policy Guidelines. That the court erred when it imposed on the appellant to close the case yet the days for hearing had not been expended, the court also forced the prosecution to close its case. The appellant submits further that the procedure before sentencing him was replete, contravening relevant laws and procedures.

13. The respondent, represented by the Office of the Director of Public Prosecutions did not file a response. At the outset, I note that neither the Magistrate's Court nor the office of the Attorney General were enjoined as parties, being necessary parties; the court having issued the impugned order and passed the sentence; the court was the complainant/victim of the contemptuous act and ought to have been sued in its own capacity; and, the Attorney General, the representative of legal proceedings of the state should have been enjoined.

14. This being a first appeal the court's duty is to reassess, reanalyse and interrogate what transpired before the court of the first instance, bearing in mind the fact of having not been present during the respective arguments, hence reaching an independent conclusion. The court must also be mindful of the fact that it cannot set aside a decision made based on the court's discretion unless it is persuaded that the court acted on wrong principles or acted in abuse of its discretion.

15. The appellant queries the power of the court, whether it can direct the prosecution to close its case? The power to adjourn a case before a subordinate court is provided for by section 205(1) of the *Criminal Procedure Code* (CPC) that stipulate thus:

> (1) The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may allow the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties conditioned for his appearance at the time and place to which the hearing or further hearing is adjourned:
>
> Provided that no such adjournment shall be for more than thirty clear days, or, if the accused person has been committed to prison, for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day.

16. Power vested in the court to grant an adjournment is discretionary. The court is expected to act judiciously in the circumstances, upon reasonable cause. In the case of *Republic v Paul Mutuku Magado* (2019) eKLR, it was stated that:

> " The above provisions leave no room for doubt that an adjournment is granted at the discretion of the court. It must however be exercised fairly and justly upon reasonable grounds being advanced. It must not be forgotten that the purpose of a trial is to give parties a fair level playing field where each will be given an opportunity to present its case. The said court process should however not be subjected to abuse."

17. The criminal procedure code gives the court power over criminal proceedings and discretion on whether or not to adjourn a case. In exercising the discretion to adjourn a case, the court should be bound by the principles of fair trial, a particular requirement that the trial must be determined without unreasonable delay under article 50 of the *Constitution*. In the *Magado case* (supra) the court was of the view that:

> " Whereas each application for adjournment depends on its own special circumstances, some of the common factors to guide a court in making a decision are: -
>
> i. The length of time a case has taken undergoing hearing from the time the plea was taken;
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> ii. Whether the accused person is out on bail/bond pending hearing or if he/she is in custody;
>
> iii. The number of applications for adjournment an accused person or the prosecution has made;
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> iv. If the reasons given for adjournment are plausible;
>
> v. The commitment of the parties to have the case heard expeditiously;
>
> vi. If any exogenous factors have contributed to delay in the hearing of a case;
>
> vii. If new or additional compelling evidence has come to the attention of the prosecution or the accused person in the course of hearing the case; and

viii. The nature of the charge and consequent sentence if an accused person was to be convicted"

18. In the instant case, the court declined to adjourn the matter and gave an account of how the matter had been in court for six (6) years, and, that only two (2) witnesses had testified from the time the magistrate took over the matter in 2016. That the court had taken a stance to hear witnesses and gave the prosecution four (4) days, but no witness had testified and the appellant had told the court that the two would be available on March 21, 2017. That, counsel, the appellant herein, confirmed to court with certainty, having spoken to the investigating officer. The court was not satisfied by the option of the appellant to seek an adjournment on the ground that witnesses were not available.

19. The trial court exercised discretion over proceedings that cannot be challenged unless there is a good ground to demonstrate that the power was arbitrary and based on some injustice. The Court of Appeal dealing with a similar issue albeit in a civil matter in the case of *Moses M. Njoroge & another v Samat Bhima* [1994] eKLR stated that:

> "It is of course not in doubt that any question of adjournment is a matter within the discretion of the judge of the court of trial and the manner of its exercise will not be interfered with if it appears to an appellate court that all necessary matters have been taken into consideration. See the case of *Patel v Gottfried* [1953] 20 EACA 81. The exercise of discretion should not defeat the rights of the parties altogether and should not do injustice to one or other of the parties. If it does so then the appellate court has power to review such an order."

20. The appellant who represented the prosecution had advised the court that he had personally followed up on the matter and realised that witnesses were not bonded, he expressed his frustration to court being that the investigating officer failed to bond the witnesses and that it was beyond him. In all fairness, the court ought to have exercised its discretion in favour of the prosecution by granting It the very last adjournment in compliance of Its earlier order to hear the matter until the last day given, namely March 23, 2017, instead of compelling the appellant to close the case on March 22, 2017 following speculation that the prosecution would not call any witness.

21. Th appellant urges that it was erroneous for the court to order him to close the case in light of article 157(10) of the *Constitution* that provides:

> The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority

22. This provision of the law is in regard to power to institute criminal proceedings that is solely within the discretion of the DPP. This is done without interference by any party. In the instant case the court rendered its verdict by directing the appellant to tender evidence and close the case, which was within the court's mandate, hence the order was valid. Having given the order, the appellant who was evidently aggrieved had the option to either apply for revision or to appeal against the order.

23. According to the law, court orders must be complied with and the appellant having subjected himself to the jurisdiction of the court, was bound by the court order.

24. It is trite that contempt of court is a quasi-criminal proceeding which ends up in sentencing. In *Re Breamblevale Ltd* [1969] 3 All ER 1062 at page 1063 it was pointed out that :

> " A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use time-honoured phrase, it must be proved beyond reasonable doubt."

25. This means that the specific breach must be defined. In *Mutitike v Bahari Farm Ltd* [1985] KLR 227 the Court of Appeal held that:

> " Where liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited, must be precisely defined. It was contended that there was no fair hearing of the contempt charges which would result in penal consequences."

26. The court found the appellant in contempt under section 10 (2) of the *Magistrate Courts Act* and further found that his utterances were in contempt on the face of the court. In the case of *Ramadhani Salim v Evans M. Maabi T/a Murphy Auctioneers and Winfred Wanjiku Gaitho* (2016) eKLR, the Court of Appeal stated that:

> " .... the *Magistrates' Courts Act*, 2015 which came into force on January 2, 2016 now gives the magistrate's courts unlimited jurisdiction to punish for contempt."

27. Section 10 of the said Act provides that:

1) Subject to the provisions of any other law, the court shall have power to punish for contempt.

(2) A person who, in the face of the court —

(a) Assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in court, or in going to or returning from the court;

(b) Interrupts or obstructs the proceedings of the court; or

(c) Without lawful excuse disobeys an order or direction of the court in the course of the hearing of a proceeding, commits an offence.

(3) .....

(4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which —

a. Scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

b. prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

(c) Interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.

(5) A police officer, with or without the assistance of any other person, may, by order of a judge of the court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the court.

(6) The court may sentence a person who commits an offence under subsection (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both.

(7) A person may appeal against an order of the court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the court.

28. That provision of the law refers to contempt on the face of the court which calls for summary disposition. As afore stated, the court had the discretion to punish a contemnor summarily. Offences relating to judicial proceedings are also provided for in section 121 of the *Penal Code* which sets out a summary procedure without requirements of service and notice to show cause. The alluded to provision of the law and in particular what is relevant herein stipulate:

> (1) Any person who –
>
> (a) Within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken; or .....
>
> is guilty of an offence and is liable to imprisonment for three years.
>
> (2) When any offence under any of paragraphs (a), (b), (c), (d) and (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding one thousand four hundred shillings or in default of payment to imprisonment for a term not exceeding one month.

29. The appellant herein was disrespectful to the court by conduct and word. He proceeded to argue with the judicial officer by telling her how he would not comply with the court order. Court orders must be respected by those bound. A concerned party cannot purport to declare that he cannot comply with the order.

30. The court declined to grant the adjournment sought and ordered the appellant to either close the case or tender evidence. To that effect and the appellant retorted:

> " I will not close my case. I have evidence to tender"

What followed was an argument between the appellant and the judicial officer. The conduct of the appellant was disrespectful and/or intimidating.

31. The contempt in issue was committed on the face of the court. This having been a rare situation; the appellant was given an opportunity to respond to what had transpired. He apologised, but, proceeded to justify why he should have been granted the opportunity to call witnesses the following day. An apology is a defence to contempt proceedings. He therefore mitigated and defended himself.

32. This was not a kind of case where the contemnor had a right to testify, call witnesses, have an advocate to cross examine the witnesses, for it was contempt in the face of the court.

33. On the punishment to be meted out, the court had the discretion of sentencing the offender to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both. The appellant was sentenced to serve one day in prison and in addition to pay a fine of Ksh 25,000/= and, in default to serve five days imprisonment. This was within the law.

34. In the result, the appeal is bereft of merit. Accordingly, it is dismissed.

35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 22ND DAY OF SEPTEMTER, 2022.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Ms. Chege for the State

Court Assistant – Mutai