Atsiaya v Republic (Criminal Appeal 28 of 2019)
[2022] KEHC 16543 (KLR) (Crim) (19 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16543 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 28 OF 2019

CW GITHUA, J

DECEMBER 19, 2022

BETWEEN

AGGREY CHWEYA ATSIAYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the original conviction and sentence in Milimani Sexual Offence Case No. 21 of 2017 dated 4th October, 2018 (Hon. P. Ooko- PM))

JUDGMENT

1. The Appellant, Aggrey Chweya Atsiaya has appealed to this court against his conviction for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* and the sentence of twenty years' imprisonment imposed on him by the trial court.

2. The particulars of the offence were that on September 27, 2015 at around 7 p m in Langata Division within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FSA (name withheld), a child aged 13 years.

3. In his petition of appeal christened "memorandum grounds of appeal" filed on February 27, 2019, the appellant basically complained that the learned trial magistrate erred in law and fact by convicting him on evidence which was insufficient to prove his guilt beyond reasonable doubt and by dismissing his plausible defence.

4. During the hearing, both the appellant and the respondent chose to prosecute the appeal by way of written submissions. The appellant filed his written submissions on June 29, 2022 while those of the respondent were filed on July 15, 2022.

5. In his submissions, the appellant purported to amend his grounds of appeal by introducing new grounds not covered in his petition of appeal. He did so without seeking leave of the court or seeking to regularize the anomaly after filing the submissions before the appeal proceeded for hearing.

6. Be that as it may, although as a general rule an appellate court is barred by Section 350(2) of the *Criminal Procedure Code* (C P C) from permitting an appellant to rely on grounds of appeal other than those set out in the petition of appeal, I note that some of the grounds raised in the appellant's submissions relate to points of law touching on an accused person's right to a fair trial and this court, being the first appellant court, cannot close its eyes to the same. The court is duty bound to examine and make a determination on all legal issues that arise from the petition of appeal or from the record of proceedings of the trial court.

7. In his submissions, besides reiterating the grounds set out in his petition of appeal, the appellant contended that his trial was unfair and unlawful since the provisions of Section 200(3) of the C. P. C was not complied with by the magistrate who took over the hearing and concluded the trial after the magistrate who commenced the hearing was transferred.

8. The appellant further submitted that he was wrongly convicted as the ingredients of defilement namely age of the victim, penetration and positive identification of the culprit were not proved beyond reasonable doubt. For this proposition, he relied on several authorities including the Court of Appeal decisions in *John Mutua Munyoki vs Republic*; *P.K.W vs Republic* [2012] eKLR and *James Tinega Omwenga vs Republic* Nakuru Criminal Appeal No.59 of 2011

   He also submitted that the trial court erred in shifting the burden of proof from the prosecution to himself contrary to the law. He urged the court to find merit in his appeal and allow it

9. On her part, learned prosecuting counsel Ms Millicent Odour on behalf of the Respondent contested the appeal. She asserted that the appellant was properly convicted as the prosecution had proved by cogent evidence all the essential ingredients of the offence preferred against him. She invited the court to dismiss the appeal for lack of merit.

10. I have carefully considered the evidence on record as I am legally obliged to do in the execution of my duty as the first appellate court. I have also considered the grounds of appeal, the parties rival submissions and all the authorities cited by the appellant as well as the entire proceedings recorded by the trial court.

11. Having done so, I find that it would be prudent and appropriate to first deal with the appellant's complaint that his constitutional rights to a fair trial were violated in the course of the trial as he was denied an opportunity to make an election regarding whether or not to have witnesses recalled after the initial trial magistrate proceeded on transfer and Hon P O Ooko (PM) took over the proceedings.

    The Appellant maintained that failure of the succeeding magistrate to comply with Section 200 (3) of the C.P.C. prejudiced him and made his trial a nullity. The prosecution though duly served with the appellant's submissions did not make any response to this claim in its submissions in response.

12. My reading of the proceedings before the trial court confirm that the appellant's trial commenced before Hon C C Oluoch (S P M) on November 18, 2015. The learned trial magistrate proceeded to hear all the five prosecution witnesses before she proceeded on transfer.

    The record shows that Hon P O Ooko P M took over the proceedings on February 8, 2018 subsequent to which the prosecution closed its case.

13. The record also confirms the appellant's complaint that after taking over the proceedings, Hon P Ooko did not comply with the mandatory provisions of Section 200 (3) of the C P C which is in the following terms;

> '' Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right"

14. Section 200(4) proceeds to provide as follows;

> Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial ".

15. A plain interpretation of Section 200 (3) of the Criminal Procedure Code leaves no doubt that a succeeding magistrate has a statutory obligation to inform an accused person of his right to demand recalling of witnesses to either testify afresh or for cross-examination as the accused person may elect.

16. There is a long thread of authorities that have espoused the principle that failure of a succeeding magistrate to comply with Section 200 (3) of the C P C violates an accused person right to a fair trial which is an obsolute right guaranteed under Article 25 of the *Constitution* and renders such a trial a nullity. For instance, In the case of *Morris Kinyalili Liema –vs- Republic* [2012] eKLR, the court stated as follows;

> "……Under this provision, it is the duty of a magistrate who takes over a criminal trial commenced by another magistrate to explain to the accused person the import of the section and to give the accused person an election whether to recall the witnesses who have already testified to come testify again or to be cross-examined. Our jurisprudence has established that failure to do so is fatal to a conviction. See, for example, Migot v Republic (1991) KLR 594.
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> 18. We have examined the record of the trial in the Court below. It shows that the Learned D Ochenja who conducted the trial at the latter stage failed to adhere to the mandatory terms of section 200(3) of the Criminal Procedure Code. We find the contravention of section 200(3) to have rendered the trial as a whole fatally defective.
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> 19. We, therefore, quash the conviction and set aside the sentence."

17. Similarly, in *David Kimani Njuguna -vs- Republic* [2015] eKLR, the court of Appeal held thus;

> "…the provisions of Section 200(3) are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or Magistrate complies with it out of a statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court renders the trial a nullity."

18. Guided by the above authorities which I wholly agree with, it is my finding that failure byHon. P. Ooko to comply with the mandatory provisions of Section 200 (3) upon taking over the hearing from

the previous magistrate violated the appellant's right to a fair hearing guaranteed by the *Constitution* of Kenya 2010.

The right to a fair trial goes to the very core of the administration of justice and its violation rendered the appellant's trial a nullity.

19. Having found as I have above, I find that it is not necessary to consider the other grounds of appeal advanced by the appellant. The above finding alone is sufficient to dispose of this appeal because it leads to the inevitable conclusion that the appellant's conviction was unsafe.

20. The appellant's appeal therefore succeeds with the result that his conviction is hereby quashed.

21. The next question that I must now answer is whether it would be in the interest of justice to acquit the appellant or remit the case to the trial court for retrial.

22. The principles that guide a court in deciding whether or not to remit a case for retrial or acquit an appellant were emphasized in the case of *Fatehali Manji –versus- Republic* [1966] E.A. 343, wherein Sir Clement de Lestang, the then acting President of the predecessor to our Court of Appeal stated at Page 344 as follows;

> " In general a retrial will be ordered only when the original trial was defective or illegal ; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes 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 circumstance and an order ofretrial should only be made where the Interests of Justice require it and should not be ordered where it is likely to cause injustice to the accused person."

23. From the above principles, it is clear that a retrial will be ordered when the interests of justice requires it taking into account all the circumstances of each particular case including the nature of the offence and the evidence on record.

24. Although the conviction in this case has been vitiated by an error on the part of the learned trial Magistrate Hon P Ooko as demonstrated above, I have considered the evidence on record in its entirety and in my view, a retrial if ordered may not lead to a conviction and it is likely to be an exercise in futility. Besides, the record reveals that the appellant was convicted and sentenced on October 4, 2018 meaning that he has todate served slightly over four years in prison and he was in remand custody during the trial that took about three years to be concluded. This in effect means that the appellant has been in lawful custody for about seven years.

25. Given the foregoing, I find that ordering a retrial in this case will occasion great prejudice to the appellant and will not be in the interest of justice. In the circumstances, I decline to order a retrial and instead order that the appellant be set free forthwith unless otherwise lawfully held.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **KISII** this 19th day of December 2022

In the presence of:

The appellant present in person

Ms. Adhiambo for the state

Ms. Karwitha Court Clerk