KGM v Republic (Criminal Appeal 48 of 2019)
[2021] KEHC 6880 (KLR) (Crim) (19 May 2021) (Judgment)

KGM v Republic [2021] eKLR

Neutral citation: [2021] KEHC 6880 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 48 OF 2019

LN MUTENDE, J

MAY 19, 2021

BETWEEN

KGM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the original conviction and sentence in Criminal Case No. 1050 of 2016 at Chief Magistrates Court Makadara Law Courts by Hon. Stephen Jalang'o) – SPM on 16/11/2018)

The trial of a child offender was vitiated by failure of the prosecution to furnish the child with its witness statements in advance.

The decision espoused on the duty of the prosecution to supply an accused person with the witness statements and the evidence that it intended to rely on in proving its case. Further, the instant court reprimanded the trial court for violating the rights of the child by sentencing him to 50 years' imprisonment contrary to 190 (1) of the Children Act, 2001.

Reported by Moses Rotich

Constitutional Law *- Bill of Rights - rights of a child - the right to a fair trial - where the appellant (a minor) was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code - failure to furnish the accused with witness statements of the prosecution witnesses - where the appellant alleged that he did not understand the language used by the trial court to record the proceedings - whether failure by the prosecution to furnish the appellant with the witness statements violated the appellant's right to a fair trial-whether failure by the trial court to record the language used during trial of the appellant violated the appellant's right to a fair trial-Constitution of Kenya 2010, article 50 (2) (j) and (m); Penal Code, Cap 63 Laws of Kenya section 296 (2).*

Criminal Law *- sentencing - sentencing of a child offender - where the appellant was convicted of the offence of robbery with violence and sentenced to 50 years' imprisonment-whether the sentence of 50 years' imprisonment meted on the appellant was unlawful and breached section 190 of the Children Act - Children Act, 2001 sections 190 (1) and 191.*

Brief facts

The appellant (a minor) jointly with another were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code, Cap 63 Laws of Kenya (Penal Code). After undergoing a full trial, the appellant was convicted of the offence of robbery with violence and sentenced to serve 50 years' imprisonment.

Aggrieved by the judgment of the trial court, the appellant lodged an appeal against both conviction and sentence. It was the appellant's contention that the charge sheet was defective for inconsistencies with respect to the time the offence was alleged to have been committed. Further, the appellant argued that the evidence adduced by the prosecution witnesses was contradictory and insufficient. The appellant claimed that the contradictions in the prosecution evidence ought to have been resolved in his favour.

In addition, the appellant contended that the sentence of 50 years' imprisonment imposed on him by the trial court was in contravention of article 53 of the Constitution of Kenya 2010 (the Constitution) and section 191 of the Children Act, 2001 (Children Act). It was the appellant's argument that such sentence was illegal as he was a minor at the time of the commission of the alleged offence of robbery with violence.

Further, the appellant claimed that he was not accorded a fair trial as the case proceeded without him being provided with witness statements.

Issues

i. Whether the contradictions in the evidence adduced by prosecution witnesses called for rejection of the evidence adduced.

ii. Whether failure by the prosecution to furnish the appellant with the witness statements violated the appellant's right to a fair trial.

iii. Whether failure by the trial court to record the language used during the trial of the appellant violated the appellant's right to a fair trial.

iv. Whether the sentence of 50 years' imprisonment meted on the appellant by the trial court was unlawful and breached section 190 (1) of the Children Act, 2001.

Held

1. The complainant stated that the incident happened at around 4.30 pm. PW2, the arresting officer, testified that he heard a lady screaming at 6.00 pm and that he saw 3 young men running. A search conducted resulted in the recovery of a cellphone from the appellant's co-accused and a knife from a third suspect who was allegedly taken to the police station but never reached court. Although the complainant claimed that the handbag was taken by the appellant and recovered, PW2 stated that the complainant had her handbag and the appellant was not found in possession of anything. PW3 who was in patrol with PW2 testified that they stopped the 3 young men who were running and who failed to comply and hence they pursued and arrested them.

2. The appellant was arrested after the complainant raised an alarm seeking help. It was not insinuated that witnesses had watches and did establish the exact time that the incident happened. Therefore, the extent of the discrepancies alluded to was inconsequential. It did not call for rejection of the evidence adduced.

1. The offence was committed during the day. The complainant's evidence that she positively identified the appellant was supported by the fact of recovery of what she had lost and the conduct of the appellant of running away.

2. Issuance of the prosecution witness statements to the appellant was the duty of the prosecution which it failed to discharged. The trial court on its part failed to ensure that the appellant's right of being

informed in advance of the case that he faced had been complied with. Therefore, what transpired during trial was a violation of the appellant's constitutional rights.

3. The appellant conceded to have understood Kiswahili language when the plea was taken. Subsequently, there was an omission of the language of the court having been indicated but the court's interpreter whose duty was to interpret was present. The record clearly showed that following interpretation of what transpired, the appellant was able to participate in the proceedings. The appellant cross-examined witnesses and tendered evidence in his defence without raising any complaint regarding the language used.
4. The trial court fell into error when it failed to address conclusively the fact of the appellant having been a child. A social inquiry ought to have been conducted to guide the court in addressing the issue of sentence in accordance with the Children Act.
5. In the instant case, the appellant was jointly charged with another, who was a young adult, and the court sentenced both of them to 50 years' imprisonment. In meting out the sentence, the trial court stated that both the appellant and his co-accused were not remorseful. That was in violation of the rights of a child.
6. The appellant did not get a fair trial as envisaged in law. The conviction that resulted could therefore not stand considering that the trial was vitiated by an error emanating on the part of the court.

Appeal allowed.

Orders

i. *The conviction of the appellant by the trial court was quashed.*
ii. *The sentence of 50 years' imprisonment meted on the appellant was set aside.*
iii. *The appellant was set at liberty unless otherwise lawfully held.*

Citations

Cases

Kenya

1. *Cholmondeley, Thomas Patrick Gilbert v Republic* Criminal Appeal 116 of 2007; [2008] eKLR - (Explained)
2. *Dima, Denge Dima & others v Republic* Criminal Appeal 300 of 2007; [2013] KECA 480 (KLR) - (Explained)
3. *Gakuru, Cyrus Maina v Republic* Criminal Appeal 58 of 2014; [2016] KEHC 4144 (KLR) - (Explained)
4. *Makokha, Jason Akhonya v Republic* Criminal Appeal 131 of 2012; [2014] KECA 23 (KLR) - (Explained)
5. *Malombe, Simon Githaka v Republic* Criminal Appeal 314 of 2010; [2015] KECA 534 (KLR) - (Explained)
6. *Muiruri v Republic* [2003] KLR 552 - (Explained)
7. *Oluoch v Republic* [1985] KLR 549 - (Explained)
8. *Wario, Roba Galma v Republic* Criminal Appeal 159 of 2014; [2015] KECA 521 (KLR) - (Explained)
9. *Watu, Philip Nzaka v Republic* Criminal Appeal 29 of 2015; [2016] KECA 696 (KLR) - (Explained)

Uganda

Twehangane Alfred v Uganda Criminal Appeal No139 of 2001; [2003] UGCA 6 - (Explained)

Nigeria

David Ojeabuo v Federal Republic of Nigeria (2014) LPELR-22555 (CA) - (Explained)

United Kingdom

Woolmington v DPP [1935] AC 462 - (Explained)

Regional Court

Okeno v Republic [1972] EA 32 - (Explained)

Statutes

Kenya

1. Children Act (cap 141) sections 2, 190(1); 191 - (Interpreted)
2. Constitution of Kenya articles 50(2)(c); 53(1)(f) (2) - (Interpreted)
3. Penal Code (cap 63)sections 25(2); 296(2) - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. KGM, the Appellant, jointly with another, were charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. Particulars being that on the April 7, 2016 at about 1700 hours at Kariobangi North Estate within Nairobi County, while armed with a dangerous weapon namely, a knife robbed Doreen Achieng Manyasa of her mobile phone make Samsung Galaxy and handbag all valued at Ksh 8300/- and at the time of the robbery threatened to use actual violence against the said Doreen Achieng Manyasa.

2. Having been taken through full trial, he was convicted and sentenced to serve fifty (50) years imprisonment.

3. Aggrieved, he appeals on grounds that: charges were defective; evidence adduced was contradictory and insufficient; contradictions should have been resolved in favour of the defence; the trial was unfair and contrary to the constitutional principles and the plausible defence put up was dismissed.

4. The case, as presented by the prosecution was that on the April 7, 2016 at 4.30 pm, PW1 Doreen Achieng, the complainant, herein was on her way to work and upon arrival at Kariobangi Roundabout she was accosted by three young men who snatched her handbag, threatened to stab her with a knife and snatched her cellphone. As she screamed chasing after them, she heard gun shots. She ran to the location and found the police having arrested the three young men. Her hand bag and cellphone were recovered. She identified the appellant as the one who took her hand bag.

5. Upon being put on his defence, the appellant stated that on the material day, while in company of his parents they took his sibling to the clinic and after parting ways at Kariobangi Roundabout he started jogging, and, as he attempted to board a bus, he was arrested.

6. The appeal was canvassed by way of written submissions. It was urged by the appellant that at the time of the offence he was 17 years old but the court proceeded to sentence him to 50 years imprisonment, a sentence that was in contravention of article 53 of the *Constitution* and section 190(1) of the *Children Act*, and, therefore, illegal. That the charge sheet was defective for inconsistency in respect of the time the offence is alleged to have been committed. That time was essential, and since the time alluded to having differed it was fatal. He also questioned the bag that was allegedly robbed.

7. Further, the appellant submitted that he was not accorded a fair trial as the case proceeded without him being furnished with witness statements. That the burden of proof was shifted to the defence as the court faulted the accused for not availing witnesses and that the court failed to indicate the language used.

8. The appeal was opposed by the respondent, through Ms Ursula Kimaru, learned state counsel, who argued that following the appellant's allegation that he was 17 years old, an order for age assessment was made but no report was filed, but, called upon the court to consider that the appellant failed to act as a child by colluding with his co-accused and robbing the complainant. That the trial failed to take off severally as the appellant had not been supplied with statements and it only proceeded after the Appellant stated that he was suffering in prison and that, there is nothing to show that the arresting officer testified before witness statements were supplied to the appellant. That circumstances that prevailed could not have favoured securing of another witness to support the prosecution's case but the complainant's evidence was confirmed by the fact of the cellphone that belonged to the complainant and, that, the burden of proof was not shifted.

9. This being the first appellate court, it has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was well put in the well-known case of *Okeno v Republic* [1972] EA 32 where the court stated as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

10. What constitutes the offence of robbery with violence was well captured in the case of *Olouch v Republic* [1985] KLR where the Court of Appeal stated as follows:-

> " ...Robbery with violence is committed in any of the following circumstances:
>
> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or
>
> At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

In the case of *Dima Denge Dima & others v Republic*,Criminal Appeal No 300 of 2007,it was stated that:

> " ...The elements of the offence under section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

11. According to the evidence adduced, the complainant was alone when accosted by more than one person and her handbag and cellphone were taken. In the course of the act, there was threat to use violence. The appellant queries the time of the alleged arrest and detention, and the kind of cellphone and bag that were allegedly stolen, which according to him was inconsistent and contradictory. He cited the Nigerian Court of Appeal case of *David Ojeabuo v Federal Republic of Nigeria*(2014)

LPELR-22555(CA) cited in the case of *Cyrus Maina Gakuru v Republic*, Criminal Appeal No 58 of 2014, where the court stated as follows:-

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

12. In the case of *Twehangane Alfred v Uganda* (Cr App No 139 of 2001(2003) UGCA it was held that it is not every contradiction that warrants rejection of evidence. The court delivered itself thus:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

13. The complainant stated that the incident happened at 4.30pm PW2 No 91693 PC Francis Kaulu the arresting officer testified to have heard a lady screaming at 6.00pm and that he saw three (3) young men running that they intercepted. A search conducted resulted into the recovery of a cellphone from the appellant's co-accused, and a knife from a 3rd suspect who was allegedly taken to the police station but never reached court. Although the complainant claimed that the handbag was taken by the appellant and recovered, PW2 stated that the complainant had her handbag and the appellant was not found in possession of anything. PW3 No 72617 PC Gerevasio Kalulu who was on patrol with PW2 testified that they stopped the three young men who were running who failed to comply hence they pursued and arrested them. They recovered the knife, mobile phone and the handbag that had been dropped which the complainant had. In the case of *Philip Nzaka Watu v Republic* [2016] e KLR, the Court of Appeal held:-

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".

14. The inconsistency alluded to is the time between the act of commission of the offence and arrest of the suspects. The appellant was arrested after the complainant raised an alarm seeking help. It was not insinuated that the witnesses had watches and did establish the exact time that the incident happened, therefore, the extent of the discrepancy alluded to was inconsequential. It did not call for rejection of evidence adduced.

15. The issue to be proved would be whether the appellant was positively identified as one of the complainant's assailants. Therefore, minor discrepancies noted were not fatal to the prosecution's case. The offence was committed during the day. The complainant's evidence that she positively identified her assailants was supported by the fact of recovery of what she had lost and the conduct of the

appellants of running away. In the case of *Roba Gama Wario v Republic*(2015) eklr where the appellant ran away after the incident, the court was of the view that the conduct of the appellant was indicative of the fact that he was conscious of what he was doing and what he had done was wrong.

16. The appellant has complained that his trial was not fair as article 50(2) (c) of the *Constitution* was contravened. The stated provision of the law states as follows:

    (2) Every accused person has the right to a fair trial, which includes the right—

        (c) To have adequate time and facilities to prepare a defence;

17. In particular he argues that he was not furnished with witness statements to prepare for his case. In the case of *Thomas Patrick Gilbert Cholmondeley v Republic* NRB CA Criminal Appeal No 116 of 2007 [2008] eKLR, it was held as follows:

> " We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like item.."

18. In the case of *Simon Githaka Malombe v Republic* (2015) eKLR the Court of Appeal stated thus:

> " The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in article 50(2) (c) and (j) be real. The denial of witness statements in the present case reduced the trial to a farcical sham."

19. At the outset the appellant sought to be provided with prosecution witness statements. On the August 1, 2018, when the matter came up for hearing the prosecution was ready to proceed but the case could not proceed because the appellant had not been furnished with the same. In the result, the court adjourned the case to enable the prosecution comply with its earlier order. In the meantime, the matter came up for mention but no statements had been availed. On the May 14, 2021, there was no indication as to whether or not the statements had been supplied, but, the appellant indicated that he wanted to proceed as he was suffering in remand. After PW1 had testified on July 10, 2017, the appellant sought to be furnished with statements. PW2 testified on the September 5, 2017. After his testimony, the court directed the Prosecution to provide the appellant with statements an order that was complied with. Thereafter, two more formal witnesses testified and the prosecution closed its case.

20. From the narrative above, issuance of witness statements was the duty of the prosecution which they failed to discharge. The court on its part failed to ensure that the appellant's right of being informed in advance of the case that he faced had been complied with. Therefore, what transpired was a violation of the appellant's constitutional rights. In the circumstances, the trial was not what was expected to be.

21. The court has been faulted for recording the language used by the court as English/Kiswahili during plea taking but subsequently, during trial, not indicating which language the court was using. In the case of *Jason Akhonya Makokha v Republic* [2014] eKLR the Court of Appeal stated thus:

> " The cardinal principles that we can draw from the above case law propositions are that, one, any court of law taking a plea from an accused person has to ensure that the language of the court and the language the accused person wishes to use to communicate with the court is indicated on the record and where an accused person is not conversant with the language of the court, he should be afforded the services of an interpreter; two, an unexplained violation of a constitutional right to language would normally result in an acquittal irrespective of the nature and strength of the evidence which might be adduced in support of the charge; save that each case has to be determined on its own facts and circumstances; three, that there was a reciprocal duty on the part of an accused person to indicate to the court, for instance that he was not able to understand the language of the proceedings although this does not however lessen the duty of the court of being satisfied that the accused was able to follow the proceedings; four, that where some doubt exist as to whether or not an accused person was accorded the services of an interpreter, the doubt must be resolved in his favour."

22. The appellant concedes to have understood Kiswahili language at the time of plea taking, a language that was indicated. Subsequently, there was the omission of the language of the court having been indicated, but, the court interpreter was present whose duty was to interpret. The record which is clear shows that following interpretation of what transpired, the appellant participated in the proceedings, cross examined witnesses and even tendered evidence in his defence without raising any complaint regarding the language used. Consequently, he was not prejudiced.

23. As to whether the burden of proof was shifted, it is urged that the trial magistrate gave a benefit of doubt to the prosecution and faulted the defence for not availing witnesses.

In the case of *Woolmington v DPP* [1935] AC 462 pp 481, Visount Sankey LC stated that:

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

In the course of analyzing evidence, the trial magistrate was of the view that the evidence given by the appellant and his co-accused was not corroborated. This was a misdirection since they were only required to give an explanation. They were not obligated to call witnesses to corroborate what they told the court.

24. The appellant having been sentenced to 50 years imprisonment, it is contended that it was in contravention of the *Children Act*. During plea taking the appellant indicated his age as 17 years. The allegation prompted the trial court to order for age assessment. However, the age assessment report was not filed and the trial magistrate did not address the question of age. The fact of the court having

sought an age assessment is an indication of the court having exercised a doubt as to the appellant being an adult.

25. Article 53(1)(f)(2) of the *Constitution* provides thus:

1) Every child has the right—

(f) Not to be detained, except as a measure of last resort, and when detained, to be held—

(i) For the shortest appropriate period of time; and

(ii) Eparate from adults and in conditions that take account of the child's sex and age.

(2) A child's best interests are of paramount importance in every matter concerning the child.

26. Section 2 of the *Children Act* provides that:

" child" means any human being under the age of eighteen years.

27. Section 190 of the *Children Act* provides thus:

(1) No child shall be ordered to imprisonment or to be placed in a detention camp.

(2) No child shall be sentenced to death.

28. Section 191 of the *Children Act* provides for methods of dealing with offenders as follows:

(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

(a) By discharging the offender under section 35(1) of the Penal Code (cap 63);

(b) By discharging the offender on his entering into a recognisance, with or without sureties;

(c) By making a probation order against the offender under the provisions of the Probation of Offenders Act (cap 64);

(d) By committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) If the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) By ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) In the case of a child who has attained the age of sixteen years dealing with him, in accordance withany Act which provides for the establishment and regulation of borstal institutions;

(h) By placing the offender under the care of a qualified counsellor;

(i) By ordering him to be placed in an educational institution or avocational training programme;

(j) By ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (cap 64);

(k) By making a community service order; or

(l) In any other lawful manner.

29. This is a case where the trial magistrate fell into error when he failed to address conclusively the fact of the appellant having been a child. A social enquiry should have been conducted to guide the court in addressing the issue of sentence in accordance to the *Children Act*.

30. The punishment for robbery with violence is provided for in section 296(2) of the *Penal Code* that provides that in case of a conviction the offender shall be sentenced to death. Section 25(2) of the *Penal Code* provides that a death sentence shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years. In the instant case the appellant was jointly charged with another, who was a young adult, and the court sentenced both of them to serve 50 years imprisonment. In meting out the sentence he stated that both of them were not remorseful. This was in violation of the rights of the child.

31. The upshot of the above is that the appellant did not get a fair trial as envisaged in law. The conviction that resulted can therefore not stand. Considering that the trial was vitiated by an error emanating on the part of the court, the question arising is therefore, whether a retrial should be ordered? In *Muiruri v Republic* [2003] KLR 552, the Court of Appeal stated that a retrial can only be allowed if it is unlikely to cause an injustice to the appellant. As stated, what transpired was an injustice to the appellant.

32. In the premises, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be set at liberty unless otherwise lawfully held.

33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MAY, 2021.

L. N. MUTENDE

JUDGE