Mutisya v Republic (Criminal Appeal E096 of 2023) [2025] KEHC 3483 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E096 OF 2023

M THANDE, J

FEBRUARY 21, 2025

BETWEEN

JACKSON MUIA MUTISYA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal against the judgment of Hon. D. Wasike PM on 26.10.23 in Malindi Sexual Offences Case No. E065 of 2022)

JUDGMENT

1. The Appellant was tried and convicted of the offence of rape contrary to Section 3(1)(a)(c) of the *Sexual Offences Act*. The particulars of the offence are that on 1.10.23 at Malindi, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of GM (the Complainant) a girl aged 18 years. Following trial, the Appellant was sentenced to 10 years imprisonment. Being dissatisfied with both the conviction and sentence, he preferred this Appeal.

2. The Appellant faulted the trial Magistrate for proceeding with the case in the absence of the Appellant, thereby violating his rights under Article 47 and 49 of *the constitution*; failing to interrogate many glaring contradictions in the complainant's testimony; failing to find that the case was not proved beyond reasonable doubt.

3. In her testimony, the Complainant stated that at the time of the alleged incident, she was 17 years old. She stated that the Appellant took her on his boda boda to Alaskan to buy some items for her child. On their way back, the Appellant said he would pass by his house to drink water. When they got there, the Appellant took her hand and forced her into his house, held her by force, removed her skirt and panty and raped her. She struggled to free herself from his grip but was unable to. She screamed but no one heard her. She then left and did not tell anyone as the Appellant had threatened her. After 3 days, she reported the incident to the police.

4. PW1, the clinical officer who produced the medical evidence stated that upon examination, the Complainant's hymen was found to be broken. She had no obvious injuries and there was no spermatozoa.

5. The record shows that on 10.8.23 when ruling on case to answer was to be delivered, the Appellant was absent. The trial court deferred the ruling to 31.8.23 and warrant of arrest was issued against the Appellant. On 31.8.23, the ruling was delivered in the absence of the Appellant in which the court found that a prima facie case had been established and put the Appellant on his defence. The warrant of arrest against the Appellant was to remain in force. On 7.9.23, the Appellant was still absent and the defence case was closed.

6. The Appeal was canvassed by way of written submissions.

7. The Respondent conceded the Appeal on the ground that the Complainant went to hospital 4 days after the alleged offence and reported to the police 5 days after. Further that the medical evidence showed that the Complainant's hymen was broken but she had no visible injuries. Additionally, there was no proper identification of the Appellant. It was further noted that the ruling of case to answer was made in the absence of the Appellant. No attempt was ever made by the Court to summon the surety. The trial court was faulted for not considering and recording the Appellant's explanation for his absence. Additionally, that the trial court failed to explain to the Appellant that a new Magistrate had taken over the case. Further that the Appellant was charged with the offence of rape yet he should have bee charged with defilement as the Complainant was 17 years old.

8. I have considered the evidence by the prosecution. The Complainant stated that the Appellant grabbed her by the hand and forced her into his house where he raped her. Further that she struggled to free herself from his grip without success. However, PW1 who produced the P3 form, treatment notes and lab results stated that the Complainant had no injuries. If indeed she had been held by force and had struggled to free herself, the doctor who examined her would surely have noted some visible bruises notwithstanding that she was examined 3 days later. The absence of injuries casts doubt in the mind of this Court as to the credibility of the Complainant's testimony.

9. In its judgment, the trial court found that penetration had been proved because the Complainant's hymen was broken. This Court however notes that the Complainant did state in her evidence that she had gone to Alaskan to buy items for her child. The fact that she has a child is to me is a more likely explanation for the broken hymen.

10. The record shows that the trial court ruled that the Appellant had a case to answer and placed him on his defence in his absence. Although a warrant of arrest was issued when the Appellant failed to attend court, no attempt to summon the Appellant's surety was ever made by the trial court. His explanation for his absence was also not recorded or considered by the trial court.

11. Article 50(2) of *the Constitution* guarantees to every accused person the right to a fair trial. This right includes inter alia to be present during trial as follows:

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

        (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

12. Section 194 of the *Criminal Procedure Code* (CPC) also requires that:

> Except as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any).

13. In the present case, there is nothing on record to show that the Appellant's conduct was such that he made it impossible for the trial to proceed or that his personal attendance has been dispensed with. The position is that the Appellant stated that he failed to attend court as he was unwell.

14. Further, the defence case was closed without the Appellant being given an opportunity to defend himself. This was in violation of his right to have adequate time and facilities to prepare a defence as guaranteed by Article 50(2)(c) of *the Constitution*.

15. Proceeding with the trial in the absence of the Appellant as the trial court did, was a clear violation of both clear provisions of the law and of the constitutional right of the Appellant to a fair trial. In this regard, I associate with the holding of Githinji, J. in the case of Solomon Locham v Republic [2015] eKLR where he stated:

> The procedure adopted by the trial Magistrate deprived the 2nd accused of his right to be present throughout his trial as envisaged under section 194 of the *Criminal Procedure Code* and Article 50(f) of *the Constitution* which states that an accused person should be present when being tried, unless his or her conduct make it impossible for trial to proceed. Proceeding without him amounts to mistrial.

16. At sentencing, the learned Magistrate noted that the Appellant had stated that he was unable to defend himself as he was unwell. She however stated that this had been overtaken by events and proceeded to sentence the Appellant to 10 years imprisonment.

17. Section 206(2) of the CPC provides:

> If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.

18. Before sentencing the Appellant, the learned Magistrate ought to have considered, as required under Section 206(2) of the CPC, the reason for the absence of the Appellant when he was convicted and whether he had a probable defence. To the extent that this was not done, this Court finds that the court below misdirected itself.

19. One other disturbing aspect of this trial is that the Appellant was charged with and convicted of the offence of rape while the Complainant stated in her testimony that at the time of the alleged offence, she was 17 years old.

20. Under Article 50(2)(b) of *the Constitution*, the right to a fair trial includes the right to be informed of the charge, with sufficient detail to answer it. The Appellant was called to answer the offence of rape yet what he should have been called to answer, is the offence of defilement given that the Complainant was a minor. In light of this, the trial Magistrate clearly erred in finding that the Appellant had a case to answer.

21. From the manner in which the trial was conducted I find that the proceedings and conviction stand vitiated.

22. The Respondent has asked for a retrial. Having found, as I have, that the trial and conviction are vitiated, should a retrial be ordered? It is well settled that an order for retrial should only be made where it is unlikely to cause injustice to the accused. In the case of Obedi Kilonzo Kevevo v Republic [2015] eKLR, the Court of Appeal stated:

> " Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of Muiruri v Republic [2003] KLR 552, the court considered a similar situation and held as follows, inter alia:-
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> "Generally whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

23. An order for retrial will only be made where the interest of justice require it and if it is unlikely to cause injustice to the Appellant. The evidence as analyzed above shows that the prosecution evidence was not sufficient to sustain a conviction, a fact conceded by the Respondent. My view therefore is that an order for retrial would not be in the interests of justice and subjecting the Appellant to another trial would occasion him prejudice and injustice.

24. The upshot is that the Appeal herein is merited and is hereby allowed. The Appellant's conviction is quashed and the sentence is hereby set aside. The Appellant is set at liberty unless otherwise lawfully held.

DATED SIGNED AND DELIVERED IN MALINDI THIS 21ST DAY OF FEBRUARY 2025

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M. THANDE

JUDGE