



**Mutai v Republic (Criminal Appeal E006 of 2024)
[2025] KEHC 2035 (KLR) (17 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E006 OF 2024
RPV WENDOH, J
FEBRUARY 17, 2025**

BETWEEN

SIMEON MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

- 1 This is an appeal by Simeon Mutai against the judgment of Principal Magistrate in CR.C E098/2024 where the appellant was convicted for the offence of assault contrary to section 251 of the [Penal Code](#). The appellant is alleged to have assaulted Ruto Canan on 4/1/2023 and occasioned him actual bodily harm.
- 2 Upon conviction, the appellant was sentenced to serve two (2) years imprisonment. He is aggrieved by both conviction and sentence.
- 3 Through the firm of Samba & Co., Advocates, the appellant filed the following grounds of appeal
 1. That the trial court erred in law by denying the appellant a fair hearing by denying the appellants two witnesses to give evidence in the appellant's favour;
 2. That the trial court conducted the trial casually that it failed to consider some issues like the ownership of the cattle;
 3. That trial court failed to analyze the evidence thus arriving at the wrong conclusion thus causing a miscarriage of justice;
 4. That the trial court shifted the burden of proof on the appellant;
 5. That the trial court handed the appellant a harsh sentence of two years imprisonment without option of fine.



4. For the above reasons, the appellant prays that the appeal be allowed, the conviction be quashed, sentence set aside or in the alternative, the matter be remitted back to the lower court for hearing before a different magistrate.
5. Directions were taken that the appeal be canvassed through written submissions and both parties complied.
6. This being a first appeal, it is required of this court to re-examine all the evidence tendered before the trial court, analyze and evaluate it and arrive at its own conclusions. However, the court should bear in mind that it neither saw nor heard the witnesses testify and should make allowance for that fact. For the above principle, the court is guided by the decision of *Okeno v Republic* [1972] EA 32.
7. The prosecution called a total of five witnesses, PW1 Ruto Pkanan, the complainant, PW2 Reuben Kirui; PW3 Wilson Nguriareng; PW4 Paul Jeremiah a Clinical Officer and PW5 PC Geoffrey Simiyu the Investigating Officer
8. PW1 recalled that on 4/7/2023, about 9.00 a.m. while taking cattle to his uncle while with his father, Kilokwam, Uncle Kidokwang and Wilson Charkan, that Simon screamed and the wife of Simon went ahead of them screaming and returned the cows; that Simon and the wife went to Mark and he went behind. It is then Simon hit him on the head with a club, he fell and bled; that Simon boarded a motor cycle and left. PW1 went to Hospital and reported at Kabichbich. He denied having fought over land though he admitted there was a land dispute with the grandfather.
9. PW2 recalled that he was with Wilson, Samuel and Longurasie, taking cows when Simon's wife screamed and beat the cows; that Simon jumped over the fence from his home while armed with a club and hit PW1; that PW1 bled and fainted. He denied that they were fighting but that there is a land dispute.
10. PW3 recalled that on the material date, he was with Reuben, Ruto and Kapich with herds of cattle, when people emerged on the road, women screamed; that Simon came and hit PW1 on the head and he fell and fainted. He denied there being a land dispute between him and the appellant.
11. PW4 of Kapenguria County Hospital examined the complainant aged sixteen (16) years, on 5/1/2023. He found that PW1 was injured on right side of the occipital of the head and had stitched wound 4cm long. The X-ray did not reveal any fracture.
12. PW5 of Kabichbich police station recalled the 11/1/2023 when the case was assigned to him.
13. When called upon to give his defence, the appellant gave unsworn evidence that on 3/1/2023 people trespassed onto his land; that he returned the cows and reported to police who issued him with an OB number; that on the day it is alleged the offence occurred, he had gone to the forest to see the boys who had been circumcised. He heard people screaming and went to find out and was told people had trespassed; that he found that they had already fought and taken their person away. He closed his case after the court declined to allow his two witnesses to testify because they had sat in court.
14. The appellant's counsel Mr. Samba submitted on the five grounds as follows; Counsel on denial of fair Hearing; Counsel submitted that the trial court was in breach of Article 50 (2) (k) of *the Constitution* when it denied the appellant an opportunity to call his witnesses; that the appellant and his witnesses being lay persons did not know that they were expected to remain outside the court room when the appellant was testifying; that the appellant was unrepresented and the court did not guide him of the procedural requirements; that the court should have allowed the witnesses to testify with the necessary caution and the failure to do so amounted to a miscarriage of justice. Counsel relied on the case of *Joseph Ndungu Kagiri v Republic* [2016] eKLR Where the court observed that an accused is entitled



- to fairness and the court has to play a balanced role and ensure all the Constitutional safeguards are protected. He also cited the case of *Natasha Singh v CBI* [2013] 5 SCC 741 where the court again observed that it is for the court to ensure that fairness is not hampered or threatened in a criminal trial.
- 15 On ground two, the counsel urged that the court failed to analyse the evidence so as to bring out the issues. For example on the issue of cattle, whose were they? the complainants or the appellant's? whether they were on the appellants' land; that there being evidence of a long standing land dispute between the appellant's family and complainants, the court should have carefully scrutinized the evidence to determine the ownership; that the appellant maintained that the complainants group had trespassed on his land and he had reported to the police on 3rd; that the testimonies of PW1,2 and 3 were inconsistent in that they all gave different versions of the events of the day; and that the circumstances are material and raise the question whether the events actually occurred; that the trial court failed to sufficiently consider the appellants defence. The Counsel relied on the Court of Appeal decision of *Richard Munene v Republic* [2018] eKLR on how the court should deal with contradictions and inconsistencies in the evidence of a witness and that they must be resolved in favour of an accused. In *Erick Onyango Ondeng v Republic* [2014] eKLR, the court held that the court has to analyse the contradictory evidence to determine which version of evidence he believes.
- 6 On shifting the burden of proof.
- 17 It is the appellant's submission that the court seemed to expect the appellant to prove his innocence yet the burden of proof always lies on the prosecution to prove its case beyond reasonable doubt as was held in *Woolmington v DPP* [1935] UK HL; He also relied on *Republic v Safari Katana Lugo* [2021] E KLR and *Uganda v Ssebyala* [1969] EA 204 where the court said that all that an accused need not prove his case but only create doubt as to the strength of the prosecution case.
- 18 On the sentence being harsh and excessive, it is the appellant's contention that the complainant suffered harm; that the offence is a misdemeanour, he was a first offender and the court should have considered an option if fine or non-custodial sentence, Counsel urged that Section 26(3) of the PC gives the court discretion to impose fine in default of custodial sentence. The Counsel cited the case of *Thomas Mwambu Wenyi v Republic* [2017] e KLR where the court cited the Indian case of *Alister Antony Pereira v State of Mahareshra* where the court considered the principles of sentencing which include inter alia, gravity of the offence, nature of the offence, circumstances of the offence, the motive. etc
- 19 In opposing the appeal, the prosecution Counsel Mr. Majale submitted that the five prosecution witnesses gave a credible and consistent account of how the appellant attacked the complainant and injured him; that under section 251 of the *Penal Code*, one is liable to fine or imprisonment upon conviction; that the land dispute that existed was immaterial as to justify the attack on the complainant by the appellant; that the appellant's unsworn evidence did not create any doubt in the prosecution evidence; As to denial of the appellants witnesses from testifying, it was submitted that ignorance of the law is no defence in law.
- 20 On sentence, Counsel relied on the decision of *Daniel Kipkosgei Leting* [2021] eKLR where the court observed that the objectives of the sentencing policy should be commensurate and proportionate to the crime committed and manner in which it was committed.
- 20 I have considered all the evidence on record, the grounds of appeal and the rival submissions. I will first deal with the first ground of whether the appellant was denied a fair hearing under Article 50 (2)(k) of *the Constitution* Article 50 (2) provides as follows;-
- (2) (2) every accused person has the right to a fair trial, which includes the right-
- (k) to adduce and challenge evidence”



- 21 In the instant case, when the appellant was called upon to defend himself, he opted to give unsworn evidence and indicated that he would call two witnesses. The defence hearing was adjourned from 14/11/2023 to 4/12/2023. After the appellant gave his unsworn evidence, he indicated that his witnesses were present but the prosecutor pointed out that the witnesses had been seated in court when the appellant was giving his defence, The court then ruled that the two witnesses would not be allowed to give evidence as that would amount to collaboration because the witness sat in court as the appellant gave his evidence. I have looked at the court record and do not see anywhere that the court warned or directed the appellant that his witnesses should remain outside as he gave his evidence. It is the prosecutor who first stated that the witnesses were seated in court as the appellant made his defence. This court cannot tell if the prosecutor knew all the while that the defence witnesses were seated in court and kept quiet. As an officer of the court, the prosecutor should have pointed out to the court the fact that the witnesses were seated in court if indeed he knew of the witness's presence in court.
- 22 Be that as it may, it is the duty of the court to ensure that an accused person, especially one who is unrepresented, like the appellant, understands the court procedures and the proceedings. The court has the duty to protect the accused's rights at all costs.
- 23 The right to fair hearing cannot be limited by dint of Article 25(2) (c) of *the Constitution*. I associate myself with the holding of J. Mativo in addressing the question of fair trial when he said in Joseph Ndungu (Supra) as follows
- 24 In the Kenya Criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much high pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of *the Constitution* of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society.”
- 25 The duty to inform an accused person of his rights squarely rests on the court. In the South African case of Mphukwa v S (CA & R) 360/2004 2012 ZAE CGHC 6, the court also said, a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding, a fair and just trial may not take place”
- 26 In this case, the trial court denied the appellant his right to call and challenge the evidence by the prosecution when the court declined to allow the defence witnesses a chance to testify, a right denied yet not explained to the appellant. The court should have allowed the defence witnesses to testify and caution them to the effect that they had a chance to hear the appellants defence and take that fact into account. I find that the right under Article 50 (2) (k) was violated. The result is that the proceedings were rendered null and void. Consequently, the conviction is hereby quashed and sentence set aside.
- 27 Having found as above, the court sees no need to consider the other grounds of appeal because this ground has determined the appeal.
- 28 The Appellant sought in the alternative to acquittal that the court orders a retrial.
- 29 The question is whether this court should order a retrial. Regarding what the court should consider whether or not to order a retrial it was well settled. In Ahmed Sumar -V- Republic (1964) EA 481 at page 483; the court said as follows; “It is true that where a conviction is vitiated by a gap in the evidence



or other defect for which the prosecution is to blame, the court will not order a retrial. But where the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame. It does not in our view follow that a retrial should be ordered.”

30 In this case, the appellant was sentenced to serve two years on 24/4/2024, so far, he has served about ten (10) months which is a substantial part of the sentence. Ordering a retrial would be prejudicial to the appellant. For the above reasons I decline to order a retrial.

31 In the end, I find that the appeal was merited. It is allowed. The appellant is acquitted of the charge of assault contrary to section 251 of the penal code and is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED, AND SIGNED AT KAPENGURIA THIS 17TH DAY OF FEBRUARY, 2025.

R. WENDOH

JUDGE

Judgment delivered in open court in the presence of

State Counsel - Mr. Majale

Ms. Nafula for Appellant -

Juma/Hellen – Court Assistants

Appellant – present

