Onyango v Republic (Criminal Appeal E062 of 2024)
[2025] KEHC 1421 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1421 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E062 OF 2024

RE ABURILI, J

FEBRUARY 21, 2025

BETWEEN

ROSELINE ATIENO ONYANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment, conviction and sentence of Hon. G.C.Serem, Resident Magistrate in Kisumu Chief Magistrate's Court Criminal Case NO E931 of 2022 delivered on 15th July, 2024)

JUDGMENT

1. The appellant Roseline Atieno Onyango was found guilty of the offence of obtaining money by false pretenses contrary to section 313 of the *Penal Code*. Particulars are of the offence are that on diverse dates between 5th and 12th March, 2022, Kisumu Township, Kisumu Central Sub County within Kisumu County, the appellant obtained Kshs 320,000/= by falsely pretending that she would recruit the sister to the complainant Elijah Odoyo Omollo, to be a police officer, in recruiting her to the National police Service, a fact he knew to be false.

2. The appellant denied committing the offence and she was released on bond pending trial. The case proceeded to full trial. After hearing the prosecution and defence case, the trial court found the appellant guilty of the offence as charged and after hearing mitigation and considering the presentence report, sentenced the appellant to serve three years imprisonment.

3. Aggrieved by the guilty finding and sentence, the appellant filed her petition of appeal setting out five grounds of appeal. However, at the hearing of this appeal, her counsel consolidated the five grounds into two namely, contradictions in the evidence and sentence.

4. The appeal which was opposed was canvassed by way of written submissions filed by the appellant through her advocate Mr. Lore while Mr. Marete Principal prosecution Counsel submitted orally, with an oral rejoinder by Mr. Lore.

5. In his written submissions, the appellant's counsel submitted that the trial magistrate's analysis of the evidence of PW2 that it was cogent enough to confirm that monies received by PW1 were directly conveyed to the appellant was faulty because there was no evidence adduced by the prosecution to link such incident whatsoever.

6. Counsel isolated the evidence at pages 12 and 13 of the record of appeal that PW1 in cross examination stated that she gave her sister Kshs 320,000 which she had withdrawn from mpesa bit by bit and from the Till Number 2156105 along Aga Kahn Walk then 17,000 from Till Number 366126 at Siddy Mobile. That she stated that she had never gone to Nairobi and that from 12/3/2022 to 29/11/2022 she had made no report of the incident regarding the charge of obtaining by false pretense.

7. Further, that at pages 16 and 17, PW2 stated that the amount that she gave to the appellant was only Kshs 800.

8. It was submitted therefore that the prosecution should have produced the documents alleging the transactions to prove the same.

9. Further, it was submitted that PW4 did not capture the record of mpesa statements alleged by PW1 and that he had no mpesa statements to produce as evidence to confirm the transactions.

10. It was further submitted that the trial court was misled as to the amount of money given to the accused, which was only Kshs 800 and not Kshs 320,000 as there were no mpesa statements produced to prove the sum allegedly given to the appellant. Counsel submitted that according to the evidence of PW1, some withdrawals were made in Kisumu and Nairobi but that the amount could not reach kshs 320,000 subject of the charge against the appellant.

11. On sentence, it was submitted that the appellant had pleaded for remorse, was sick with diabetes and took care of 4 orphaned grandchildren, was a first offender hence she was not to be given custodial sentence considering her age which was 60 years old.

12. Opposing the appeal, the Principal Prosecution Counsel, Mr. Marete submitted that the evidence of the 4 prosecution witnesses was truthful, corroborated and credible. On sentence, it was submitted that the 3 years imprisonment was lawful. Counsel urged the court to consider ordering for compensation of the complainant. Further, that the appellant was not remorseful although she admitted committing the offence in her mitigations and to the probation officer.

13. In a rejoinder on behalf of the appellant, Mr. Lore Advocate restated the written submissions and argued that restitution is matter of discretion and that the appellant was now offering restitution. That she was given maximum sentence of three years imprisonment oblivious of her mitigations and that the Court which heard the application for bail pending appeal observed that the appeal had overwhelming chances of success. He urged the appeal be allowed.

14. I have considered the grounds of appeal and the submissions by both parties through counsel. The issue for determination is whether this appeal has merit.

15. This being a first appeal, this court is mandated to reassess and reevaluate the evidence adduced before the trial court and reach its own independent conclusion albeit taking into account the fact that unlike the trial court, it did not have the opportunity to hear and see the witnesses as they testified hence give

an allowance for that. In the every so often cited case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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, see Peters v. Sunday Post, [1958] E. A. 424."

16. It is therefore necessary to re-evaluate the evidence and reach a conclusion bearing in mind that this court has not had the benefit of hearing or seeing the witnesses, an advantage only the trial court had.

17. However, before I delve into that evidence, that is, and if I must do that, my attention has been drawn to the judgment by the trial magistrate and therefore the necessity to establish whether, without delving into evidence, the judgment which is impugned meets the threshold of a judgment more particularly in a criminal case.

18. The judgment commences as follows in part and material to this judgment:

> " 1. The accused person herein Nelson George Ochieng was on 1/12/22 charged with obtaining money by false pretenses contrary to section 313 of the *Penal Code*.
>
> 3. PW1 testified and stated that he was a brother of the accused person and he proceeded to describe how he had given the accused person money .....the detailed testimony is further stipulated on record.
>
> 6. PW4 who was the I.O explained how the accused was arrested and further how he gathered the evidence. His testimony is well stipulated on record
>
> 8. ..the accused person testified and stated ...her full testimony is further on record.
>
> 16 ...hence the accused is found guilty of obtaining money by false pretense contrary to section 313 of the *Penal Code*."

19. I have set out the above paragraphs because first, the person who was the accused in the charge and the appellant herein is Roseline Atieno Onyango, very different from the person named in the judgment, Nelson George Ochieng and who was being found guilty of the charge of obtaining money by false pretense.

20. Throughout in her judgment, the trial magistrate did not even mention the appellant's name other than the citation which names Rose Anyango again, which name is not the same as that which is in the proceedings and the charge sheet. Obviously, the trial magistrate must have been referring to other persons, not the appellant herein.

21. Further, the statement in the judgment that PW1 was the brother to the accused is evidence that is not found on record.

22. Finally, and more significantly, is that the appellant was never convicted of the offence for which she was charged. There was a finding of guilt but of a person known as Nelson George Ochieng and not Roseline Atieno Onyango. In law, only minors or persons who are insane can be found guilty but cannot be convicted.

23. Section 215 of the *Criminal Procedure Code* provides as follows, upon the court finding an accused person guilty of the offence charged:

> 215. Decision
>
> The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.

24. Equally, section 217 of the *Criminal Procedure Code* provides for Drawing up and signing of a conviction or order by the court making the conviction.

25. It is for that reason that when appealing to the High Court from the subordinate Court, section 347 of the *Criminal Procedure Code* stipulates that (1) Save as is in this Part provided— (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and...

26. As to whether the serious errors of omission and commission identified hereinabove in the judgment subject of this appeal are curable under section 382 of the *Criminal Procedure Code*, it is clear that there was no conviction and even if this court was to assume that there was one because of the finding of guilt, the person who was being found guilty is not the appellant herein but Nelson George Ochieng.

27. Additionally, the convicting evidence was never brought out in the judgment. Instead, the trial magistrate kept referring to ...the detailed testimony is further stipulated on record. See paragraphs 3,6,8 of the judgment delivered on 15th July, 2022 as highlighted above.

28. In this case, I find that albeit the trial magistrate made a finding of guilt, that guilt was against a stranger to the proceedings and more so, there was no conviction of the appellant herein.

29. In addition, I observe that the record shows that the prosecution witness PW1 did refer to mpesa statements which were marked for identification as PMFI 1, as evidence of the money that he withdrew from mpesa to give to the complainant cash money. Although this failure to produce the mpesa statements may not have vitiated the finding of guilt, assuming there was a conviction, since there were other witnesses who stated that they saw the money being given out to the appellant and for what purpose, as was witnessed by PW2 and PW3.

30. However, and mysteriously, the prosecutor never led that evidence for the investigating officer to produce the said mpesa statements and the said investigating Officer, PW4 even denied ever capturing the complainant's witness statement on mpesa statements. This conduct on the part of the prosecutor in my view was very strange in the sense that there is no explanation given for the mpesa statements marked for identification which PW1 clearly stated that he gave to the police and which were before the court with the prosecutor asking the court to mark for identification, could vanish when PW4 came to testify.

31. This smacks of bad faith on the part of the prosecutor and PW4 to the detriment of the victim of the alleged offence. Victims of offences too have rights guaranteed under Article 50(9) of *the Constitution* as implemented by the *Victim Protection Act*.

32. Under section 13 of the Act, where the victim of the offence is the complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to— (a) subject to the provisions of the *Evidence Act* (Cap. 80), adduce evidence that has been left out; (b) give oral evidence or written submission.

33. Many at times, victims of offences suffer injustice before courts of law because the prosecution and investigators perpetuate that injustice by withholding crucial evidence. Justice is for both parties, the accused and the victims of offences and whereas the accused has the guaranteed right to fair trial, the complainant victim too has rights to access justice and which justice must be seen to be done.

34. Prosecutors and courts undertake a public duty bestowed on them by the public. They must therefore at all times act in good faith and in the public interest by being diligent in their work. Where there is deliberate negligence of duty, the public suffer damage and so do the institutions where we serve suffer collateral damage.

35. It is also not lost to this Court that courts are blamed by complainants or victims of offences when cases are lost on accounts such as the one here, especially where such evidence would have been crucial to the case.

36. On the whole, I am not satisfied that the serious omissions and commissions identified in the judgment are curable under section 382 of the *Criminal Procedure Code*. In my view, those errors occasioned a mistrial and prejudice to the victim of the offence because anyone reading the judgment which was never amended or corrected would wonder as to who was on trial, where is this testimony of witnesses that is not captured in the judgment but is said to be further stipulated on record.

37. For the above reasons, I am unable to venture into the merits of the case. I declare the case a mistrial, there being no conviction of the person charged.

38. The question is whether the court should order for the retrial of the appellant as requested by appellant. The law as to when a retrial should be ordered was set out in the age-old cases of Fatehali Manji Vs Republic [1966] EA 343 where the Court of Appeal when dealing with the same issue, guided as follows:

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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 own facts and circumstances and an order for a retrial should only be made where the interests of justice require it." (See Philip Kipngetich Terer –vs- Republic [2015] eKLR)

39. In Muiruri Vs R [2003] KLR 552, the Court held that: -

> " It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

40. It is however important to note that all the above cases which have been followed by this Court and the Court of Appeal in past decisions, were rendered prior to the promulgation of the 2010 Constitution which entrenched therein the rights of victims of offences under Article 50(9) and therefore the above decisions and principles must be applied with necessary modifications, adaptations, qualifications and exceptions necessary to bring them into conformity with *the Constitution* as mandated by section 7(1) of the Transitional and Consequential provisions of *the Constitution*.

41. The case that I find capturing the above spirit well though decided before 2010 is Mwangi –versus- Republic [1983] KLR 522, where the Court of Appeal held at page 538 that: -

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

42. From these authorities, it is clear that in deciding whether or not to order a retrial, the court must strike a balance between the interests of justice on the one hand and those of the accused person on the other. And justice is for both the accused and the complainant or victim of the offence.

43. Applying the above principles, and applying the guideline set out in the Mwangi –versus- Republic (supra) case that...that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

44. In this case, my view is that there was evidence on record which might support the conviction of the appellant and it is hardly one year since the appellant was tried. I will therefore not acquit the appellant noting that the evidence on record was not hopeless on the culpability of the appellant, and as an acquittal must be based on proper analysis of evidence on record giving reasons for the acquittal in a matter where the complainant lost over Kshs 300,000.

45. This finding and order will also give the appellant the opportunity to make amends with the complainant since in her submissions on appeal, she stated through her advocate that she was ready for restitution and not custodial sentence in view of her responsibilities to the 4 orphaned children and her age, coupled with her poor health. In other words, the appellant has the opportunity to reconcile with the complainant and even compensate him for the loss which, nonetheless, is still can be recovered vide civil proceedings.

46. Accordingly, the finding of guilt is quashed and sentence imposed set aside. In the interest of justice, I order for a retrial of the appellant herein for the same offence before a different magistrate and a different prosecutor to conduct the prosecution.

47. Owing to the health issues experienced by the appellant and her age, I order that she remains on the same bond terms given by this court in this appeal until her case is concluded.

48. The judgment to be uploaded and a copy be supplied to the trial magistrate.

49. The appellant to appear before the Chief Magistrates' Court at Kisumu on 11th March 2025 for mention of her case. Prosecution Counsel who is present, Ms Kagali to take note of the matter and follow up.

50. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025

R.E. ABURILI

JUDGE