Gichuhi v Republic (Criminal Revision E223 of 2024)
[2025] KEHC 8171 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8171 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E223 OF 2024

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

JOSEPH MURIITHI GICHUHI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This matter came to me as a revision in respect of Mukurweini SPM Criminal Case No. E435 of 2022. The said decision was rendered by Hon D.N. Bosibori (SRM). This is the seventh matter I am handling from the same court where rules of procedure are treated as suggestions and standard of proof treated with whims. It is unfathomable that the applicant's life or his possible death was treated in such a cavalier manner without regard to every known procedural safeguards.

2. Even a simple request to recall a witness after amending a charge sheet from a simple charge of stealing to robbery with violence was ignored with impunity. To the court, her word was superior to the words in Article 50 of *the Constitution*.

    (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

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

        (a) to be presumed innocent until the contrary is proved;

        (b) to be informed of the charge, with sufficient detail to answer it;

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

        (d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

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

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

SUBPARA (ii)

a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

3. To the court, the right to remain silent means that the accused is guilty. The court has no regard to unsworn evidence. The same cannot be used against an accused person as the burden of proof still remains with the state.

4. The Applicant was charged with stealing contrary to Section 268 as read with Section 275 of the *Penal Code*. The particulars were that on 30.10.2022 at Kihungu trading centre, in Mûkûrwe'inî jointly with another not before the court stole from Rose Nyambura cash money Ksh 50/= and a mobile phone Techno Camon Pro IMEI number xxxxxxxxx valued at Ksh. 20,999/=, the property of Ryan Kariuki Ndirangu. The charge was apparently amended on 15.02.2023 to the charge of robbery with violence contrary to Section 296(2) of the *Penal Code*.

5. The first witness testified on hearsay, regarding theft that he did not see. After the first witness testified, the charge was changed to robbery with violence. The accused wished to have the first witness recalled. PW2 testified how she gave directions to the applicant and waited for him at NAWASCO offices. She stated that the applicant asked for the phone and money. She gave as she feared. She pitied him because he had disability.

6. There were no words said to threaten her. No evidence of violence was tendered. However, as I was reading the file, I was disturbed to note that in arriving at the ruling on the case to answer, the court made a full analysis of the evidence. She stated that she had evaluated the credibility of the witnesses.

The accused was called upon to answer to charges under Section 211. The court, as part of the ruling, stated that the rights and options under section 306(2) are explained.

7. The court sentenced him to suffer death for the said offence. Whereas there was no appeal on conviction, the record does not reveal violence. The court also ignored obvious procedural errors that made the trial a mistrial. The proceedings are so soiled that it is impossible to reconsider the sentence. Secondly, by amending the charge sheet from stealing, in the middle of a hearing and proceeding, the record was soiled. The applicant is entitled to be informed of the right to facilities of counsel. This was worse when the applicant was a person suffering from disabilities.

8. Thirdly the defence was dismissed as having no probative value. This is not the position in law regarding defence evidence. With all this errors, it is clear that there was a mistrial. The High Court of Malaysia in Criminal Appeal No. 41lb-202-08/2013 – Public Prosecution vs. Zainal Abidin B. Maidin & another stated as doth:

> " It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See magendran a/l mohan v public prosecutor [2011] 6 mlj 1; [2011] 1 clj 805. Further, in Public prosecutor v saimin & others [1971] 2 mlj 16 Sharma J had occasion to observe:
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> > 'It is the duty of the prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.

9. The only cure is to consider whether a retrial is tenable. This is a recent decision. In Julius Ole Koikai v Republic [2011] eKLR, the court of appeal, [Bosire, Waki & Aganyanya JJA)], considered what factors are to be considered for the court to order a retrial.

> In Rwaru Mwangi v. Republic criminal appeal no. 18 of 2006 (ur) this court considered what factors inform the court in determining whether or not a retrial should be ordered. The court stated:
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> > "ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See muiruri vs. Republic [2003] klr 552, it is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial.

10. In the case of Zachaeus Kombo Olumatete v Republic [2018] eKLR, G.W. Ngenye-Macharia, as she then was posited as follows regarding considerations in ordering a retrial:

> 5. Having found that Hon. A.R. Kithinji did not comply with this noble requirement behooves the court to determine whether a retrial should be ordered. The case law in guiding the court

in this determination is rich. In the renowned case of opicho vs republic [2009] klr 369, the court of appeal held as follows:

> "in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where 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 trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

7. On other factors for consideration before a retrial is ordered, include whether any prejudice would be occasioned to the Appellant. Under this head, the court may consider the period the Appellant has been in remand, the seriousness of the offence and any other factor affecting him personally such as illness and age. The Appellant took plea on 12th April, 2013 and paid bail on 25th April, 2013. Considering the period he has served the sentence, cumulatively, he has been in remand for only nine months and twenty days. This period does not surpass the interests of justice in trying a serious offence as defilement. Furthermore, it only serves justice to order a retrial so that even the complainant can see to it that justice has been served. It is also a serious offence that in the public interest ought to be disposed of in a trial conducted in an objective and fair manner.

11. In this case, though this was a mistrial, the potential sentence is a death penalty. Further, the errors came to the notice of the court suo moto while considering other matters in this file. The High Court is entitled under Article 165(6) and (7) to peruse any file and satisfy itself of legality of any proceedings. The said sub-articles provide as follows:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

12. In this case, there was clearly a mistrial. It cannot be left to stand in the interests of justice. The applicant was treated like a child of a lesser god. One of the most interesting and shocking revelation in the file is the utter disregard of the rules of procedure and the age-old protection given to accused persons. Morality and belief are irrelevant when handling a criminal case. The age old golden rule protecting and insulating the accused was set out in most oft quoted English decision of Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, which comes in handy in describing the legal burden of proof in criminal matters, 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."

13. An accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before it is satisfied beyond a reasonable doubt that the accused is guilty. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

14. Without analyzing the evidence in light of the evidence tendered and off hand, by dismissing the defence evidence the court reduced the standard to below that of a balance of probability in civil cases. It is not enough to quote myriad of authorities. The court should and must ensure that the burden of proof is discharged. If it is not, the court should and must acquit. Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14 provide as follows.

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

15. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

16. I am unable to maintain the proceedings or even consider the issue of mitigation in view of the proceedings that are glaringly irregular.

Determination

17. In the upshot, I make the following orders:

    a. The application for review is allowed. The court, suo moto, pursuant to Article 165(5) has perused the record and found the same to be a mistrial. The judgment on sentence and conviction given in Mûkûrwe'inî MCCR No. E435 of 2022 is set aside.

    b. The Applicant shall proceed for a re-trial in Mûkûrwe'inî MCCR No. E435 of 2022 before a different court other than Hon. D.N. Bosibori.

    c. The lower court matter be placed before Mukurweini court on 18/6/2025. Production order to issue.

    d. The applicant be provided with a pro bono advocate to defend him in the re-trial.

    e. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kimani for the State

Court Assistant – Jedidah