



**Kinoti v Republic (Criminal Appeal E020 of 2024)
[2025] KEHC 10513 (KLR) (Crim) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL APPEAL E020 OF 2024
SC CHIRCHIR, J
JULY 17, 2025**

BETWEEN

MARTIN KIMATHI KINOTI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of L.K Mutai (CM) delivered on 25th
November 2022 in Isiolo chief magistrate's court criminal case No. 682 of 2018)*

JUDGMENT

1. Martin Kimathi Kinoti (the Appellant) was charged at Chief Magistrate's Court with two counts. On the first count, he was charged with attempted murder contrary to Section 220(a) of the penal code. The particulars of the charge were that on 18th day of June, 2018 at Tuluroba Area, in Isiolo Township, within Eastern Region attempted unlawfully to cause the death of Lilian Kainda Moses by Strangling her and forcing her to drink rat poison.
2. On the 2nd count he was charged with stealing Contrary to Section 275 of the *Penal Code*. The particulars of the offence were that on the 18th day of June, 2018 at Tuluroba area in Isiolo County within Eastern Region stole one gas cylinder, one college result slip, one national identify card and cash money Kshs. 3,500/= . All valued at Kshs. 10,000/= the property of Lilian Kainda Moses. He was convicted on both counts and sentenced to 10 years on count 1 and one year on count 2.
3. He was aggrieved by the outcome and moved to this court on appeal.
4. In his amended grounds of Appeal, he has faulted the trial court for failing to recall the complainant for purposes of cross-examination; that the government analyst was not called to testify on the poison allegedly administered to the complainant; that the whole case against him was based on suspicion;



that his defence was dismissed without any cogent reasons; and finally that the court failed to comply with the provisions of Section 333(2) of the Criminal Procedure code while sentencing him.

5. The parties filed submissions in respect of the appeal.

Appellant's submissions

6. The appellant states that when the complainant testified for the first time he had not been supplied with her statement, yet she was not recalled for purposes of cross-examination. He submits that as a result, his right to fair trial was violated.
7. It is further submitted that the Government Analyst was not called to confirm if the substance that he was given to analyze was indeed poison, and for failure to summon the Analyst, then the case was not proved beyond reasonable doubt. It is further submitted that the whole case was based on suspicion and suspicion cannot be a basis of conviction. In this regard, the Appellant has relied on the case of *Joan Chebichi Sawe vs Republic (2003) eKRL and PUNJAB VS- JAGIR SINGH (1974) 3 SCC 277*
8. It is the Appellant's further submission that the period of 4 years and 5 months he had served in custody prior to conviction was not considered as part of the sentence, contrary to the provisions of Section 333 (2) of the *Criminal Procedure Code*.

Respondent's submissions

9. On the recalling of witnesses, the prosecution admits that the Magistrate who took over the matter had ruled that the trial was to start *denovo* but the witnesses who had testified were not recalled. The Respondent therefore concedes to this ground of Appeal
10. On the failure to call the Government Analyst, the Respondent states that the report was produced by the investigation officer, and there was no objection to its production by the Appellant.
11. The Respondent finally submits that a reading of the ruling on sentencing shows that the court complied with Section 333(2) of the Criminal procedure Code.

Analysis and determination

12. This is a first appeal and the duty of this court as the first Appellate court is well settled. It is to review the evidence, evaluate it and arrive at its own conclusions. Some allowance must however be made for the fact that the trial court had the advantage of seeing and hearing the witnesses first-hand.
13. I have considered the grounds of appeal, the parties' submissions and the trial Court's Record. In my view the following issues arise for determination
 - a. Whether the Appellant's right to fair trial was infringed.
 - b. Whether the prosecution proved its case beyond reasonable doubt.
 - c. Whether the trial court complied with section 333 (2) of the Criminal Procedure code.
14. It is the Appellant's case that the witnesses who had testified were not recalled after the trial court ordered for the case to start *denovo*. The Respondent has readily admitted to this omission.
15. The hearing to this case began with S. Mungai – Chief Magistrate presiding. On 31.1.2022. Hon. L. K Mutai (CM) took over the matter. That day's records reads:

“Section 200 (3) complied with



Accused: let the matter start afresh

Then on ruling on the application on whether the matter should start afresh, the record reads:

Court: "I have considered above. It is not in-dispute that when the prosecution witnesses testified the accused was not seized with copies of (PW5) witness statements. It is therefore clear that he was not in a position to recall the prosecution witnesses adequately. Accordingly, and having considered the allegation and for the interest of justice allow the accused Application to have the matter start afresh."

16. When trial Magistrate made the above orders, two witnesses had testified and following the above stated ruling the said witnesses ought to have been recalled . However, when the matter next came up in court, instead of the matter starting afresh, the court proceeded to hear prosecution witnesses numbers PW3 up to PW7. The first two witnesses were never recalled, neither was the accused was called upon to re-take the plea.
17. The appellant has submitted that he did not get a chance to the cross- examine the complainant and the record as set out above support this submission. Further , a perusal of the judgment shows that the trial magistrate considered interalia the testimonies of the said two witnesses in arriving at her decision.
18. To the extent that a retrial was ordered but the Accused did not retake the plea nor the first two witnesses recalled, the later omission constituted the Appellant's right to fair trial, specifically , "the accused 's right to adduce and challenge evidence". (see:Article 50 (2) (k) of *the Constitution*.)
19. In view of the foregoing , the proceedings in its entity constituted a nullity. The proceedings are hereby set aside, the conviction quashed and sentence set aside.

Whether a Retrial is tenable

20. This court considered the considered in Rwaru mwangi -vs- Republic [2007] KECA 338(KLR) the court of Appeal set out the factors to be considered when determining whether a retrial should be ordered. The court held: "ordinarily a retrial will be made where the interest 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 ongoing trial. The length of time having lapsed since the arrest and arraignment of the appellant and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's or not. (See Muiruri Vrs- Republic (2003) KLR). It is also necessary to consider whether on proposed consideration of the admissible or potentially admissible evidence, a conviction might result from a "retrial".
21. In the present case ,the mistake herein was entirely the courts. The appellant was in custody throughout trial and as at the date of this judgment , he would have been in custody for a period of 7 years. A retrial if ordered would probably take another 2 years. In my view, a state of uncertainty for such a long period is prejudicial and is unfair to the appellant, and not in the interest of justice. A retrial is not tenable.
22. Consequently, the appeal is allowed as aforesaid. The conviction is quashed and sentence set aside. The appellant shall be set free forthwith, unless otherwise lawfully held.

DATED, SINGED AND DELIVERED AT ISIOLO THIS 17TH DAY OF JULY, 2025.

S. CHIRCHIR

JUDGE

In the presence of:-



Roba Katelo- Court Assistant
Martin Kimathi- The Appellant
Mr. Ngetich for the Respondent.

