Chacha v Republic (Criminal Appeal E032 of 2023)
[2024] KEHC 2274 (KLR) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2274 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E032 OF 2023

RPV WENDOH, J

MARCH 1, 2024

BETWEEN

PETER ROBI CHACHA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction and sentence by Hon. M. O. Obiero – senior Principal Magistrate in Senior Principal Magistrate's Court at Kehancha CR NO. E 323 OF 2020 delivered on 8/8/2023)

JUDGMENT

1. Peter Robi Chacha, the appellant was convicted of two offences, namely criminal intimidation contrary to Section 228 (1) of the *Penal Code* and unlawful possession of a firearm and ammunition contrary to Section 4(2)(b) as read with Section 3 (b) of the *Firearms Act*.

2. The particulars of the charge are that on 19/12/2020 at Naora Village in Ikerege Location Kuria West, with intent to cause harm to Chacha Mwita Ngoina, his father, during an altercation, fired a home made gun in an attempt to intimidate him.

3. In Count two, he was allegedly found in possession of a home made gun designed to use 7.62 mm special calibre and 2 live ammunition of 7.62 mm without a firearm certificate.

4. After a full trial, the court convicted the appellant and sentenced him as follows:-

   Count 1: One year imprisonment;

   Count II: Seven years imprisonment.

5. Dissatisfied with the whole judgment, the appellant filed this appeal based on the following grounds:-

1. That the trial court erred by failing to comply with Article 50 (2) (g) and (h) and (j) of the *Constitution*;

2. That the offences were not proved to the required standard.

He prayed that the conviction be quashed and a retrial be ordered.

6. The appellant also filed submissions in which he urged that the court only informed him of his right to be represented by counsel of his choice but did not inform him that he could apply to the Legal Aid Committee for legal counsel. He also submitted that if PW2 testified on behalf of the Firearms Examiner which grossly violated his rights to a fair hearing.

7. The prosecution called a total of two witnesses in support of their case. PW1 Chacha Mwita Ngoina is the appellant's father. He told the court that on 19/12/2020, about 6:00p.m the appellant came home with a homemade gun. When PW1 enquired what he was carrying, the appellant told him he wanted to shoot him. PW1 managed to wrestle the appellant and disarm him and reported to the Assistant Chief who in turn called police who came and searched the appellant's house and recovered the spent cartridge.

8. PW2, Chief Inspector of Police Kibiton Boino received a report from Area Chief Joseph Robi of a shooting incident on 19/12/2020. He proceeded to the scene where PW1 reported that the appellant had threatened to shoot him. The home made gun that the suspect had used was handed to him and that they searched the appellants' and house recovered two unspent cartridges of 7.26 mm calibre especially designed to be used by an AK – 47 rifle; that the appellant had been taken for treatment following assault by members of public. He forwarded the home made gun and ammunition to the Ballistic Expert and produced the report; spent cartridge, home made gun and ammunition, exhibit memo Form and Report of the Ballistic Expert as exhibits 1 – 5.

9. When called upon to defend himself, the Appellant gave unsworn evidence in which he denied the charge and explained that on 19/12/2020, he was at his home when he heard gun shots. Next day, 20/12/2020 he was arrested, interrogated and he told police that somebody had left him with luggage on 19/12/2020 and he showed his mother who said it was a gun and he was arrested and charged.

10. Mr. Kaino, the prosecution counsel filed submissions in which he conceded the appeal. In his view, there are no grounds for ordering a retrial but it should be an acquittal.

11. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court afresh, analyse and evaluate it and the court should arrive at its own conclusion but bear in mind that this court neither heard nor saw the witnesses testify. This court is guided by the decision of *Okeno v. Republic* (1972) EA 32.

12. The first issue for consideration is whether the provisions of Article 50 of the *Constitution* were violated. The Articles allegedly violated are Article 50 (2) (b) (g), (h)and (i) and (j). the said provisions are as follows: - Article 50 (2)

> " Every accused person has the right to a fair trial which includes the right-
>
> (b) to be informed of the charge, with sufficient detail to answer it.
>
> (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 expenses, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) 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."

13. Article 50 of the *Constitution* generally protects the accused's right to fair hearing or trial.

14. As regards such Article 50 (2) (b) the record shows that the substance of the charge and every element were read to the Accused in a language which he understood being Kiswahili and he denied committing the offence. Later, the court which took over the matter after the transfer of the Magistrate who was hearing the matter, on 1/12/2022, Mr. Obiero Senior Principal Magistrate read the charge to the appellant afresh and he denied committing the offence. There is no evidence on record that the said provision was not complied with. The appellant did not disclose how the provision was violated.

15. As regards sub Article 50 (2) (g) which requires that an accused be informed of his right to counsel of his own choice, on 22/12/2020, when the appellant appeared before Mr. Areri, Resident Magistrate, the court only informed the appellant of his right to counsel of his choice and no how. In the case of *Mwita Chacha v. Republic* Criminal Appeal No. 33 of 2019, J. Mrima cited the South African case of *S. v. Daniels & Another* (1983(3) 27 (A) at page 299 C.H while explaining that the duty to inform the accused person squarely lies on the court the court it said:-

> "..... The accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation ."

16. Again in another South African case of *Mphukwa v. S* (CA &R 369/2004) (2012) ZAECGHC 6 (n Feh 2012) the court said:-

> ".... A general duty is on the part of the 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. It is therefore the duty of a magistrate to inform the Accused of the said right and in some cases where necessary, the accused may need to apply to the Legal Aid Board for assistance to get free legal Aid".

17. The appellant complains that he was never informed that he could seek legal in from the Legal Aid Committee. I totally agree that the court did not fully explain to the appellant what his rights under Sub Article 2 (g) were and so the appellant could not have known that he had an option of applying for Legal and to the Legal Aid Committee whether or not he qualified to be accorded the said aid.

18. As regards alleged breach of Sub Article 50 (2) (h), the said right is not absolute. For the appellant to be entitled to counsel at State expenses, it had to be demonstrated that 'substantial injustice' would result if counsel was not provided to the accused. In *Karisa Chengo v. Republic* the supreme court said: -

> "In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not

be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

(i) the seriousness of the offence;

(ii) the severity of the sentence;

(iii) the ability of the accused person to pay for his own legal representation;

(iv) whether the accused is a minor;

(v) the literacy of the accused;

(vi) the complexity of the charge against the accused;

19. In this case the appellant did not demonstrate that he would have suffered substantial injustice to be entitled to free legal services.

The appellant also faulted the production of the exhibits by the OCS (PW2). Production of reports made by experts is provided for under Section 77 of the *Evidence Act*. The court has a discretion to have such evidence admitted in court by another person other than the author of the report if for some good reason, the matter is unable to attend court without unreasonable delay or difficulty. In H*ussein Said Abdi v. Republic* (2021) eKLR the court said:-

> " Ordinarily, the prosecution must call the maker of the expert report. However, in instance where the prosecution intends to call another person other than the maker, like for example in this case, the investigation officer, the prosecution has to lay a basis and has to demonstrate that it has done due diligence to secure the attendance of the maker of the report to no avail and that the delay in waiting for the expert will cause unnecessary delay."

20. It means that the prosecutor should have applied to be allowed to produce the exhibits and the expert's report and explain why the Ballistic expert the was not present. The court should have allowed the appellant to respond and indicate whether or not he objected to such production before making a decision whether the Police could produce them. Production of the exhibits was therefore flawed. No reasons are given as to why the Ballistic Expert could not come to testify. Besides, the appellant may have had questions for the examiner which PW2 could not be in a position to answer. The court erred by not asking the appellant whether he objected to PW2 testifying on behalf of the Ballistic Expert and not complying with the provisions of Section 77 of the *Evidence Act.*

21. The instant case was heard by three magistrates. Mr. Mesa, Principal Magistrate took the evidence of PW1 and PW2. On 22/10/2021, Mr. Ong'ondo Senior Principal Magistrate took over and fixed the matter for hearing on 22/11/2021. On 22/11/202,1 the matter was placed before Hon. Areri. I believe Mr. Ong'ondo was on transfer by then. Hon. Areri indicated that he had explained Section 200 *Criminal Procedure Code* to the appellant and the appellant requested that the matter begin afresh to which the prosecution had no objection. The matter was to begin De novo on 25/1/2022. On 19/7/2022, the matter was placed before Hon. Obiero when the prosecutor indicated that they wanted to enter a plea agreement and an amended charge was read to the appellant to which he pleaded guilty and the matter was reserved for the facts on 1/12/2022. When the charge was read to the appellant again, he pleaded not guilty. The matter was set down for hearing on 6/2/2023 and thereafter, adjourned severally for different reasons.

22. On 16/3/2023, when the matter came up for hearing, the prosecutor did not have the police file while the appellant indicated that he was ready to proceed. In the afternoon of same date the court noted that though the prosecutor had he filed, they did not have witnesses and the hence went ahead to reserve the case for Ruling. On 30/3/2023, the court placed the appellant on his defence after considering the evidence on record. At this point, the court is at a loss as to at which evidence the court considered before making its ruling. This is because on 22/11/2021, Areri Principal Magistrate ordered that the case start afresh.

23. The court had directed that the matter do start *de novo* on 22/11/2021 and on 21/11/2021 the same magistrate had read a fresh charge to the appellant, The question is, at what stage was the evidence adduced that Obiero Senior Principal Magistrate made a ruling placing the appellant on his defence?. After declining to adjourn the case on 16/3/2023, the only option the court had was to ask the prosecution to close its case against the appellant for lack of evidence. What transpired just shows that the trial court did not bother to look at the court record before reserving the matter for ruling and even worse, going ahead to place the Appellant on his defence without evidence. The trial court was simply negligent.

24. The prosecution also observed that Count II disclosed two distinct offences i.e. possession of a firearm under Section 4 (2)(a) of the *Act* and possession of ammunition under Section 4 (2) (a) and 3 (6) of the *Firearms Act* respectively. These are two distinct offences. The inclusion of two counts in one charge amounts to duplicity and the court should have asked the prosecutor to amend the charge or strike the charge out. See *Bonaya Tari Buyio v. Republic* (2020) eKLR

25. In the end, I find that this is not a case for retrial, for reasons given above. This court has no option but allow the appeal and set the appellant at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 1ST DAY OF MARCH 2024.

R. WENDOH

JUDGE

In presence of; -

Ms. Wainaina for the state

Appellant Present

Emma / Phelix –Court Assistant