Ibro v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 5875 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5875 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E024 OF 2023

JN NJAGI, J

MAY 23, 2024

BETWEEN

MOHAMED ISACK IBRO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction by Hon. E. K. Too, SPM delivered on 27/6/2023 and sentence of Hon. M. S. Kimani, PM, meted out on 19/7/2023 in Moyale Principal Magistrate's Court Criminal Case No. MCSO/E008 of 2021)

JUDGMENT

1. The appellant herein was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No.3 of 2006. That particulars of the offence were that on diverse dates between March 2021 and April 2021 in Moyale sub county within Marsabit county, he intentionally caused his penis to penetrate the vagina of ZAI (herein referred to as the complainant), a child age 15 years.

2. The appellant was sentenced to serve 10 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal. The grounds of appeal as contained in his amended grounds of appeal are that:

    1. That the learned magistrate erred in law and fact by failing to note that the DNA report is questionable since the maker was not called to prove the authenticity.

    2. That the learned magistrate erred in law and fact by failing to note that the evidence adduced by the prosecution witnesses herein is paradoxical.

    3. That the learned magistrate erred in matters of law and facts by failing to consider the appellant's plea on the matters of section 200 of Criminal Procedure Code.

4. That the learned magistrate erred in both matters of both law and facts by failing to take into consideration the appellant's mitigatory factors.

5. That the learned magistrate failed to take into consideration the defense of the appellant.

Case for prosecution

3. The prosecution called 4 witnesses in the case. The complainant PW1 testified that she was aged 15 years in the year 2021. That she was at the time a standard 8 pupil at [Particulars Withheld] Primary School at Bute, Moyale. That the appellant was her neighbour. That on diverse dates in the months of March and April 2021, she had several sexual encounters with the appellant. In the month of July 2021, she realized that she was pregnant. She informed her mother PW2. They reported to the police and the appellant was arrested and charged.

4. The complainant`s mother PW2 testified that on the 24/7/2024 she discovered that the complainant was pregnant. She told her that it is the appellant who had impregnated her. She took her to the police station. She was examined and found to be six months pregnant. She later gave birth.

5. Dr. Marsa Hassan Ali PW3 of Moyale Sub County Hospital testified that she examined the complainant on the 30/7/2021 and found her with a broken hymen. An ultra sound was done that showed that she had a pregnancy of 2 weeks and 10 days. She filled a P3 form to that effect.

6. The case was investigated by PC Joseph Mbuthia, PW4, of Moyale Police Station. His evidence was that the complainant was taken to the police station by her mother PW2 on the 30/7/2021. The complainant`s mother reported that her daughter was pregnant. He took her to hospital where she was examined and confirmed to be pregnant. That the girl identified the appellant as the cause of her pregnancy. He was arrested and charged with the offence of defilement. Later, a child was born. A DNA was done that indicated that the appellant was the biological father of the child.

7. During the hearing of the case in court, the complainant produced her birth certificate as exhibit, P.Exh.1. It confirmed that she was aged 14 years at the material time. The doctor PW3 produced the P3 form and the ultra sound scan dated 17/72022 as exhibits, P.Exhs 2 and 3 respectively. PC Mbuthia produced the DNA testing memo and the DNA report as exhibits, P.Exhs 4 and 6 respectively.

Defence case

8. When placed to his defence the appellant denied in a sworn statement that he committed the offence.

Submissions

9. The appeal was canvassed by way of written submissions. The appellant submitted that the trial court erred in allowing the DNA report to be produced in court by the investigating officer PW4 instead of summoning the maker of the report to produce it. He submitted that this prejudiced him as it denied him of the opportunity to cross-examine the maker of the document.

10. The appellant submitted that there were material contradictions in the prosecution case. That the DNA report was dated 18/1/2021 while the complaint was made to the police on 30/7/2021. That the ultra sound report was done on 17/7 2022 and indicated that the complainant was at the time 2 weeks pregnant. The appellant submitted that the contradictions were substantial as it means that the DNA sampling was done before the alleged defilement. (However, this is not correct as the report is dated 18/1/2022).

11. The appellant submitted that he was not accorded a fair trial in that the trial magistrate who took over the matter from the initial trial magistrate failed to comply with the provisions of section 200(3) of the Criminal Procedure Code.

12. It was further submitted that the case was not proved beyond reasonable doubt. The appellant urged the court to acquit him of the charge.

13. The respondent conceded to the appeal on the ground that the matter was heard by Hon. Too who took the evidence of all the prosecution witnesses and that of the appellant in his defence before he was transferred. That after Hon. Too was transferred the matter was taken over by Hon. W.K. Cheruiyot, SRM, after taking directions under section 200 (3) of the Criminal Procedure Code. The magistrate proceeded to hear the appellant`s defence for the second time. After the appellant closed his defence, Hon. Cheruiyot ordered that the file be forwarded to Hon. Too to write the judgment. Hon. Too wrote the judgment that was read by Hon. Kimani.

14. The prosecution submitted that Hon. Too had ceased to exercise jurisdiction over the matter after Hon. Cheruiyot took over the matter under section 200 (3) of the CPC and taking the testimony of the appellant in his defence. That Hon. Too erred when he referred the matter for judgment writing to a magistrate who was no longer seized of the matter. The respondent urged the court to order a retrial. It was submitted that the appellant will not be prejudiced by a retrial.

Analysis and Determination

15. This being the first appellate court in the matter, the duty of the court is as was stated in the case of Okeno vs. Republic [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

16. Before venturing into the merits of the appeal, it is incumbent upon this court to determine whether the trial against the appellant was conducted in a manner prejudicial to the tenets of a fair trial.

17. The respondent submitted that Hon. Too had ceased to exercise jurisdiction over the matter after the case was taken over by Hon. Cheruiyot under the provisions of section 200 (3) of the CPC. That the latter magistrate re-took the defence evidence of the appellant and he therefore erred in taking back the file to Hon. Too to write the judgment.

18. Section 200 of the Criminal Procedure Code deals with instances where a criminal trial is handled by more than one magistrate. It stipulates:

> '(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein

and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercise that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the appellant person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

19. The court record of the lower court in this matter shows that Hon. Cheruiyot took over the matter from Hon. Too and complied with the provisions of section 200 (3) of the CPC. What was pending at that stage was for the appellant to call a witness. Upon the provisions of the said section being explained to the appellant, the appellant chose to have the trial commence de novo. The prosecution opposed that plea and proposed that the matter proceeds from where it had reached. Hon. Cheruiyot considered the arguments of both sides and made a ruling that the case proceeds from where it had reached. The magistrate, whether inadvertently or not, proceeded to take the defence of the appellant again though the appellant had already given his defence before Hon. Too. The appellant then sought for time to call a witness. He did not avail the witness and the court ordered his case be closed. The magistrate fixed a date for judgment on 14/4/2023.

20. On the date meant for judgment, the magistrate made the following order:

> "I note that the entire case proceeded before Hon. E. K. Too. The accused never called any witness as he had earlier intimated. I shall order that the file be sent to Hon. E. K. Too for judgment writing."

21. In my view, the order by Hon. Cheruiyot to forward the file to Hon. Too to write the judgment ignored the fact that he had already taken over the case from Hon. Too and had proceeded to re-take the defence evidence of the appellant in which the appellant gave additional evidence not included in his defence when he testified before Hon. Too. More so, the prosecution cross-examined the appellant before Hon Cheruiyot but had not done the same before Hon. Too. Additional evidence about the way the DNA sampling was conducted came out during cross-examination before Hon. Cheruiyot. It was therefore not correct for Hon. Cheruiyot to say that the entire proceedings were conducted before Hon. Too. Having taken over the case from Hon. Too and having taken crucial evidence in the case, it behooved upon Hon Cheruiyot to write the judgment in the matter. There is no provision under section 200

of the CPC for a magistrate who has taken over a case from another magistrate and who has taken evidence in the case to send back the file to the magistrate who had initially dealt with the matter to write the judgment. I agree with the submission by the respondent that Hon. Too had in this case ceased to exercise jurisdiction when Hon. Cheruiyot took over the case and acted on the evidence recorded by his predecessor.

22. It is clear from the judgment of Hon. Too that he largely relied on the evidence contained in the DNA report to convict the appellant of the offence. As noted above, some of the evidence on the DNA report came out when the appellant testified before Hon. Cheruiyot. Hon. Too therefore convicted the appellant on evidence not wholly recorded by himself. I find that the appellant was materially prejudiced by being convicted upon evidence not wholly recorded by the convicting magistrate.

23. There is one other issue I find to have been prejudicial to the appellant during the trial - the manner the DNA report was produced before the trial court. The same was produced by the investigating officer, PW4, who was not the maker of the document. The document seems to have been produced under section 77 of the *Evidence Act* that provides that:

> 77. Reports by Government analysts and geologists.
>
> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

24. The provisions of this section have to be read in conjunction with section the provisions of 33 (b) of the *Evidence Act* that provides that:

> 33. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> (a) .....
>
> (b) made in the course of business
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> when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

25. The provisions of section 77 of the *Evidence Act* were stressed in the case of Soki v R (2004) 2 KLR 21, as cited in Republic v Teresia Wairimu Thuo (2019) 3KLR, where the Court of Appeal held that:

> " Before we allow this appeal, as we must do, we need to comment on the manner PW3 (Exh 1) was produced and the way it was dealt with by the trial Court and the superior Court. Section 77 (1) allows any document purporting to be report under hand of a government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in this case provided the accused does not object. It is however necessary that in a case such as this where an accused person is not represented by a counsel, that the accused be made aware of the consequences of the P3 or such other documents being produced by the police in the absence of the maker of such a document. The Court should explain to the accused his right to insist on seeking to cross-examine the maker if he so wishes. In this case, the appellant, should have been made aware that he could seek to cross examine the maker of P3 if he so wished. That was not done but we make haste to add that in our view, nothing turns on that omission as in any case the ingredients of the offence of robbery were satisfied even if injuries were not proved."

26. In the case of *Engau v Republic (Criminal Appeal 36 of 2020)* [2021] KEHC 324 (KLR) (6 December 2021) (Judgment) where identification parade forms were produced in court by a police officer who was not the one who conducted the parade, the court held that:

> Therefore, mere production of the Identification parade Forms with no explanation to the Trial Court why the author did not testify so as to be subjected to cross examination by the Accused persons so as the Trial Court would test the veracity of the evidence and the demeanour of the witness, it cannot legally be relied upon by this Court even if from the record, the Accused persons did not object to the production of the said reports.

27. Going by the above, the DNA report in this case could only be produced by the investigating officer after a proper basis had been laid as to why the maker of the document could not be availed to produce it. No such basis was laid out to the court. The appellant was not asked whether he consented to the investigating officer producing the document. He was not informed of his right to cross-examine the maker of the document. The document was heavily relied upon by the magistrate who wrote the judgment to convict the appellant. I find that the appellant was prejudiced by the production of the DNA report by the investigating officer.

28. I view of the foregoing, it is my finding that the appellant was not accorded a fair trial in that he was convicted by a magistrate who had ceased to exercise jurisdiction in the case and was convicted on the basis of a DNA that was not procedurally produced in court. I find the trial to have been a nullity. That being the case, there is no need for me to consider the merits of the appeal. The upshot is that the trial is quashed and the sentence imposed on the appellant set aside.

29. Having declared the trial a nullity, the question is whether I should order a retrial. In David Wafula v Republic [2016] eKLR, Majanja J. stated as follows:

> As to whether I should order a retrial, I find the case of Laban Kimondo Karanja v Republic NYR HCCRA No. 310, 311 and 312 of 2001 [2006] eKLR apposite. The court summarised the principles applicable in determining whether the court should order a re-trial as follows;

At the end, ... the principles an appellate court should apply in determining whether to order a retrial are as follows:-

i. A retrial may be ordered only when the original trial, was illegal or defective.

ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an injustice to an accused person.

iii. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result.

30. In Mwangi v Republic [1983] KLR 522, the Court of Appeal also held thus:

> " 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."

31. In Fatehali Manji –vs- Republic [1966] EA 343, it was held as follows 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 retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person".

32. The appellant was arraigned in court on 5/8/2021 and sentenced on 19/7/2023. He was on bond during the trial. It is the magistrates who handled the matter and the prosecution who are to blame for the manner the trial was conducted. I do not think that the appellant will suffer any prejudice if he is re-tried of the offence. In the premises, I order that he be re-tried of the offence before a magistrate of competent jurisdiction other than Hon. W. K Cheruiyot.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 23RD DAY OF MAY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent

Appellant – present in person

Court Assistant Jarso

14 days R/A.