Republic v Wayero & another (Criminal Appeal E038 of 2023) [2024] KEHC 7150 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7150 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E038 OF 2023

REA OUGO, J

JUNE 12, 2024

BETWEEN

REPUBLIC .... APPELLANT

AND

GEORGE WAMALWA WAYERO .... 1ST RESPONDENT

PATRICK WANJALA MUKISU .... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. C.M. Wattimah P.M. in Sirisia Criminal Case No. 271 of 2020 dated 30th May 2023 and delivered on 13th June 2023)

JUDGMENT

1. The respondents herein, George Wamalwa Wayero and Patrick Wanjala Mukisu, were charged with the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars were that on the 8th day of April 2020 at Sitabicha area, Toloso location in Bungoma County, jointly, willingly, and unlawfully did grievous harm to Richard Kitirwa Milimo.

2. The trial magistrate found that the prosecution did not prove its case as it failed to prove the nature of the injuries sustained. The respondents were acquitted under section 215 of the *Criminal Procedure Code*. The appellant is aggrieved by the judgment of the trial magistrate and has filed a petition of appeal dated 27/6/2023 on the following grounds:

    1. That the learned magistrate erred in law and fact and misdirected herself by holding that the prosecution failed to prove its case beyond reasonable doubt.

    2. That the learned magistrate erred in law and fact by locking out the evidence of the Medical Officer and the Investigation Officer at the expense if the complaint when sufficient reasons had been advanced for the absence of the two witnesses.

3. That the learned magistrate erred in law and fact in failing to consider the evidence that there was long-standing grudge between the complaint and the appellant and his family.

4. That the learned magistrate erred in law and fact by failing to appreciate that the offence of grievous harm was such a serious crime that needed to be dealt with objectively without undue regard to technicalities.

5. That the learned magistrate erred in law and fact by giving the respondent's defence undue weight and consideration.

6. The trial magistrate failed to critically analyze the evidence and thus arrived at an erroneous evidence and thus arrived at an erroneous decision.

3. The appellant in its appeal seeks the following reliefs:

   a. That the acquittal of the respondents be quashed and set aside

   b. That an order for a fresh trial for Sirisia Criminal Case No 271 of 2020 before any other magistrate of competent jurisdiction

4. As a first appellate court, this court is obligated to evaluate the evidence afresh and make its own conclusions, except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* [1972] E.A 32. The evidence before the subordinate court was as follows:

4. Richard Kirwa Milimo (PW1) testified that on 8/4/2020 at 10:00 a.m. he left his house with his son Isaac Makokha (PW2). He met the 2nd respondent on the way. PW2 told them he wanted them to talk and suddenly the 1st respondent appeared. The 2nd respondent asked the 1st respondent why he had not finished PW1. The 1st respondent held him by the coat as he tried to get away. The 1st respondent pulled him and the 2nd respondent removed a knife and then stabbed him in the lower abdomen on the left and his intestines came out and he fell. PW2 ran away and raised an alarm. PW1 was taken to Bungoma Refferal Hospital. He was treated from the 8th – 18th April. He reported the incident to the police.

5. PW2 testified that he was with PW1 when the two respondents came. The 1st respondent held PW1's coat and the 2nd respondent stabbed him with a knife. PW2 testified that he was 30-40 meters away. PW1 fell on the ground. PW2 raised an alarm and the neighbours responded and helped. He testified that he had known the respondents for over 10 years as they were neighbours.

6. The prosecution closed its case and the respondents were placed on their defence.

7. George Wamalwa (DW1) testified that PW1 is his neighbour but he denied causing injuries to him. On 8/4/2020 he was at home and the prosecution case was all fabricated as the witnesses bought land from them.

8. Patrick Wanjala Mukisu (DW2) he testified that on 2/5/2020 he went to Maeni at his father's home and weeded maize till 15/5/2020 when he was told that his child was unwell. He took the child to the hospital and he died. The child was taken to the morgue and on the day he went to collect the body, he was arrested by the police.

9. At the close of the hearing, the trial magistrate observed as follows in his judgment:

> " ...In this case therefore, no treatment notes were produced. There is therefore no proof of injuries. In defence DW1 stated that he knew the complainant as a neighbour, that he did not injure him. He stated that the case is merely fabricated due to a land tussle between them.

Similarly DW2 also denied committing the offence and stating that the charges were strange to him. Having said that therefore, I find that the prosecution failed to present treatment notes. It has therefore not been proved that any injuries were sustained by the complainant."

10. The prosecution in their submissions has challenged the finding of the trial court. They argue that there was a miscarriage of justice for the victim of this case. The victim was stabbed and suffered grave injuries and he testified to that effect. They contend that in this case, the trial magistrate appears to have placed much weight on the need for an expeditious trial for the respondents without considering the corresponding duty to ensure that the victim. The decision of the magistrate to lock out the key evidence from the doctor was not fair at all. The court was sufficiently informed and it noted in its ruling that the clinical officer had taken his child to school. This was a good reason to adjourn the case and summon the clinical officer to explain why he could not be in court as expected.

11. They further submit that there was an unfair playground for the prosecution to prove its case hence the victim and the public at large were prejudiced. There was no fair hearing and determination. The trial magistrate erred by locking out the key witnesses in this case.- The court ought to allow the case to be determined on its merit and not technicalities which are frowned upon by Article 159 (2) (d) of the *Constitution*. Without the key evidence in the form of medical evidence, it was superfluous for the trial court to proceed to place the respondents on their defence. It was obvious that without such key evidence, a conviction could not be secured.

12. They also submit that the High Court is bestowed with immense power to supervise magistrate courts and tribunals to ensure that they conduct themselves in accordance with the law. The recourse available to rectify the error by the trial magistrate is the inescapable conclusion that there was a mistrial and the order that the case be fixed for a fresh hearing and determination before another magistrate of competent jurisdiction.

13. The respondents in their submissions opposed the appeal. They argued that they underwent a full trial and that it took the prosecution 2 ½ years to close its case. They point out that the mistake was not that of the trial court but that of the prosecution's failure to avail witnesses. The prosecution has a right to appeal against acquittal in certain cases if the decision appears to be wrong in law or in excess of jurisdiction. A verdict of acquittal is bar to a subsequent prosecution of the same offence. In *Muiruri v Republic* 2003 KLR 552, the court set out the following factors to be considered in granting a retrial:

    a. Illegality

    b. Defect in the original trial

    c. The length of time which has elapsed since the arrest and arraignment of the appellant/ respondent.

    d. Mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court.

14. It was further submitted that a retrial is also permitted in a case of serious offence where there has been an acquittal but compelling new evidence has subsequently come to light. The respondents submit that the issues raised by the prosecution are not new evidence and that the prosecution did not appeal against the ruling made by the trial magistrate on 23/1/2023 denying them the adjournment.

Analysis And Determination

15. I have carefully considered the petition of appeal and rival submissions by the parties, the appeal raises two issues, firstly, whether the appellant has established a case for retrial, and secondly, whether the prosecution proved its case to the required standard.

16. In this case, the prosecution relied on the evidence of two witnesses, PW1 and PW2 who were father and son respectively. In this case, the prosecution is accusing the trial court of placing much weight on the need for an expeditious trial for the respondents without considering the corresponding duty to ensure the victim gets justice. The prosecution is therefore seeking a retrial so that they produce the medical evidence that was not produced during the initial trial. Before I can determine whether the appellant has proved a case for retrial, it is important to understand the chronology of events leading to the close of the prosecution case after calling only two witnesses.

17. In this case, the respondents were arraigned in court on 2/6/2020 and the trial commenced. In the course of the trial, the prosecution sought 8 adjournments giving various reasons. On 16/1/2023 the prosecution sought an adjournment and asked the court to set down the matter for hearing on 23/1/2023 as it was the date convenient for the clinical officer to adduce evidence. The prosecution's application was opposed by the respondents since it had on several instances sought to have the hearing adjourned. The court allowed the application for adjournment on the condition that it was the last adjournment.

18. On 23/1/2023, the prosecution once again sought an adjournment because the date was not convenient for the Clinical Officer who had taken his child to school. The trial court declined their application and the prosecution closed its case without calling crucial witnesses. Was there any mistake on the part of the trial court? The Court of Appeal in *Samuel Wahini Ngugi v R* (2012) eKLR stated as follows:

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Ahmed Sumar v R* (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
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> > It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.........In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person"(Emphasis mine)

19. In this case, I find no fault in the manner in which the hearing of the prosecution case was conducted. The prosecution was allowed a last adjournment on 16/1/2023 after the hearing was delayed because it had earlier sought several adjournments. In my view,due regard should have been given to the trial court's order granting the final adjournment as court orders are not issued in vain. I therefore find that the appellant has failed to establish a case for retrial.

20. I now turn to consider whether the prosecution proved its case to the required standard. The prosecution conceded that the evidence of the clinical officer or medical evidence, in this case, was of grave importance.

21. The trial court held that it was important that the injuries sustained by PW1 be corroborated by medical evidence. It relied on the case of *John Oketch Abongo v Republic* [2000] eKLR Criminal Appeal No 4 of 2000 where it was held that:

> "Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the *Penal Code*. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence."

22. The court in *Francis Kimani Karanja v Republic* [2016] eKLR observed that the evidence on the injuries needs to be examined together with the rest of the evidence and circumstances of the case such as the existence of a grudge. The court stated:

> "The question that follows is whether the evidence on record disclosed the offence of grievous harm as defined above. Whether or not grievous harm or any other form is disclosed must be a matter for the court to determine from the evidence on record guided by the definition in the *Penal Code*.[17]A court is assisted by the medical evidence offered in arriving at the conclusion on the nature and classification of the injuries. In many cases, the courts have accepted and have been guided by the findings and opinions in the medical evidence. But in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.[18]
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> ...
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> However, I am aware that there is a presumption that every harm is unlawful unless it is shown that an accused person acted in self defence.[20] However, the evidence on the injuries need to be examined together with the rest of the evidence and circumstances of the case and this leads to the next issue, namely, the admitted existence of a grudge or possibility of a grudge caused by the land dispute between the parties. It is not in dispute that the parties had an active and acrimonious land dispute and in fact on the material day they had just returned from the local chiefs office where they had been summoned by the chief in connection with the said dispute. As was held in the case of *DPP v Hester*[21] evidence emanating from a witness who holds a grudge or could potentially hold a grudge against the accused person needs to be treated with care and caution because such persons may have an agenda of their own. A similar position was held in *R v Knowlden*[22] where family members tendered evidence implicating one another."

23. DW1 testified that they had an existing land dispute with PW1 and PW2. The evidence points to an existing grudge between the two families. Further, the prosecution's failure to call the investigating officer and the clinical officer did not strengthen their case. In a case such as this, where the evidence by the prosecution is barely adequate, the court may infer that the testimony of uncalled witnesses would likely have been unfavourable to the prosecution. In *Bukenya and others v Uganda* 1972 EA 549 Lutta Ag. Vice President held:

> 'The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court

may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution…'

24. In the end, I find that the trial magistrate cannot be faulted in holding that the prosecution failed to provide sufficient evidence that could lead to a conviction. The appeal is without merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF JUNE 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Matere For the Appellant

1st & 2nd Respondents Present in person

Wilkister/ Diana -C/A