Wanjohi & another v Republic (Criminal Appeal E034 of 2023)
[2024] KEHC 7008 (KLR) (10 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7008 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E034 OF 2023

DKN MAGARE, J

JUNE 10, 2024

BETWEEN

JOSEPH NJOROGE WANJOHI ..... 1ST APPELLANT

PETER NDERITU WANJOHI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. F. Muguongo, PM in Nyeri Chief Magistrate's Sexual Offence Case No. E037 of 2021 delivered on 20th April 2023, and sentence on 18th May, 2023)

JUDGMENT

1. This is an appeal from the judgment, conviction and sentence given by Hon. Faith Muguongo, PM in Nyeri CMSO. E037 of 2021 on 20/4/2023 and sentence on 18/5/2023.

2. I was tempted to strike out the Appeal in limine for having two appellants. An appeal ought to be filed by a petitioner alone. There is no provision for joint appeal. Section 347 of the Criminal Procedure Code provides as doth:

> " Save as is in this Part provided-
>
> (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and
>
> (b) Repealed
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> (2) An appeal to the High Court may be on a matter of fact as well as on a matter of law

3. Given it is the individual liberty at stake, each Appellant must appeal on his own persons. However, it is noted that directions had already provided as such. I shall proceed as if the two appeals are consolidated. The Appellants filed the following grounds of appeal:

    a. The learned Principal Magistrate erred in law and in fact in convicting the appellants on two complete and distinct offences of defilement and gang rape that were committed on the same dates, period, and place against the same complainant notwithstanding the fact that those distinct and complete offences share the same particulars of offence and ought not to have been in the same charge sheet and each of them carries a life sentence. Prejudice was occasioned and a miscarriage of justice was occasioned to the appellants.

    b. The learned Principal Magistrate erred in law and in fact for failing to appreciate that from evidence on record that the Appellants and the complainant were first cousins as their respective fathers are brothers and failed to conclude that the proper offence if at all against the two appellants was incest contrary to section 20(1) of the *Sexual Offences Act* which provides a term of imprisonment not less than ten years yet the ingredients of this offence are the same like the other offences the appellants were charged with save for the aspect of relationship. The magistrate opted to uphold the other charges and proceed to pass life sentence on the appellants. Prejudice was occasioned to the appellants.

    c. The learned principal magistrate erred in law and in fact in denying the appellants right to be represented by their advocate of choice after the complainant had given her evidence in chief on the ground that this was an afterthought on the part of the appellants and that the complainant would be traumatized by repeating whatever she said in her evidence in chief if she was to repeat the same in the presence of the defence counsel. Even assuming this was enough reason, the trial magistrate could have stopped at that stage after cross examination of the complainant but the trial court erred as thereafter and immediately allowing the complainant's mother PW2 to testify without the appellants having the benefit of counsel contrary to Article 50(2)(g) of *the Constitution*. A miscarriage of justice was occasioned and the appellants were prejudiced.

    d. The learned Principal Magistrate erred in law and in fact convicting the two appellants on insufficient, inconsistent and contradictory evidence. A miscarriage of justice was occasioned to the appellants.

    e. The learned Principal Magistrate erred in law and in fact in passing a sentence that was harsh and excessive in the circumstances which was a life sentence. Prejudice was occasioned to the appellants.

4. The grounds could have been better refined for conciseness and finesse. Being a criminal appeal, the lesser the court postulates the better.

Analysis

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

7. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

8. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " 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 v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E. A. 424."

9. The first issue in a criminal trial is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , 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."

10. 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."

11. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " 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."

12. 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 stated 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."

13. There are two sets of grounds of appeal. Those that address the substantial justice and those addressing the procedural justice. As per my tradition, I will deal with the procedural issues first. If these issues yield something substantial that may necessitate a retrial, the court will avoid making conclusive remarks that may embarrass the court below.

14. The appellants were charged with the following counts:

    i. Defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006.

    ii. Gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006.

15. In alternative the Appellant was charged with indecent act with a minor.

16. Plea was taken on the amended charge sheet on 31/8/2021. On 15/9/2021 Ms. Gachanja appeared and stated that C.M. Kingori wished to come on record for the accused. Pretrial was fixed for 20/9/2021. Ms. Gachanja appeared on 22/11/2021 and fixed the matter by consent for hearing on 8/2/2022 and prison mention on 9/12/2021.

17. On the hearing date the advocate was absent. PW1 testified. After testimony they stated that the appellants' lawyers were absent. They requested for adjournment for their lawyer was absent. The court ordered them to cross examine.

18. From the nature of cross-examination it is clear that they were affected by the decline to allow them get a lawyer. They were not seeking to set aside proceedings. The court could have simply placed the matter aside for the Appellants to call their lawyer.

19. Secondly, it was the court's duty to give directions at the start of the hearing regarding the position of the lawyers. These were not hard core criminals but 20 and 23 year old. The charge they were facing attracts stiff sentences. The world was not going anywhere, if they were to get a short adjournment for the day or to 2 days later to enable the lawyers attend court or for them to acquire brand new ones.

20. The same scenario was revisited again when Mr. Muhoho was instructed to save the situation. He was forced to proceed when he was protesting that he was not prepared. The Appellants were facing a lifetime in jail. A week or two to enable an advocate prepare is not harmful. This in other jurisdictions is known as ineffective representation by counsel. It is a serious infraction that sometimes leads to acquittals.

21. Article 50(2)(h) provides right to a fair hearing in the following terms: -

> " Every accused person has the right to a fair trial, which includes the right 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.

21. In this case the advocate was already appointed by the parties. It was imperative that he be heard. The Appellants raised the issue early enough but it was ignored. In the case of Wairimu v Republic (Criminal Appeal E012 of 2023) [2024] KEHC 6134 (KLR) (9 May 2024) (Judgment), I posited as doth: -

> " It follows that the appellant needed to raise the question of unconstitutionality early enough. The Appellant was represented. If any issue arose then the advocate should have, issue I do not find any constitutional right having been breached. The Appellant was well represented by an advocate who did not raise any issue of breach of constitutional nature. Ineffective representation by counsel is not the same as breach of constitutional imperatives."

22. The investigating officer is a public servant. There was no hurry in having him testify before advocates were instructed. The right to representation is a constitutional imperative. The appellants were not seeking to be represented at the state expense. They had their own advocates. The failure to allow

the right of representation soiled the entire proceedings. The proceedings became a nullity when blatant breaches occurred. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

23. In this case, the general nature of proceedings in the nullified proceedings point towards very serious charges. The Appellants cannot be acquitted. The incidences and evidence are still available testimony having been a short one and half years ago.

24. I shall not deal with other grounds as they may attract a retrial. In the case of JK v Republic [2021] eKLR, Justice L. NJUGUNA, recapped the decisions of a retrial as doth: -

> " The law as to when a retrial should be ordered has long been settled. In the case of Fatehali Manji Vs Republic [1966] EA 343 the Court of Appeal when dealing with the same issue, gave the following guideline: -
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> > "In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when 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 own facts and circumstances and an order for a retrial should only be made where the interests of justice require it." (See Philip Kipngetich Terer –vs- Republic [2015] eKLR)
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> 15. In Muiruri Vs R [2003] KLR 552, the Court held that: -
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> > "It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."
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> 16. In Mwangi –versus- Republic [1983] KLR 522, the Court of Appeal held at page 538 that: -
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> > "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."

25. I find that circumstances in this case warrant a retrial. In the circumstances I allow the appeal, set aside sentences and in lieu thereof, I order that the matter proceeds for retrial before a court other that Faith Muguongo.

26. Given the nature of the retrial, which was caused by a technicality, the Appellants shall remain in custody till the hearing and determination of the retrial.

Order

27. Therefore, I make the following orders:

    a. The court finds that the proceedings leading to conviction and sentence were a nullity and as such sentence and conviction is set aside. In lieu thereof, I order that the matter shall proceed for a retrial.

    b. It is directed that the matter shall proceed for retrial before the court below other than Hon. Faith Muguongo.

    c. The Appellants shall remain in custody during retrial.

    d. The Lower Court file be returned to be mentioned before the Chief Magistrate for directions on 25/6/2024.

    e. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF JUNE, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Mr. Mwakio for Mr. Njuguna Kimani for both Appellants

1st Appellant present

2nd Appellant present

Court Assistant – Jedidah