Karanja v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 9718 (KLR) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9718 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E011 OF 2023

BM MUSYOKI, J

JULY 22, 2024

BETWEEN

DAVID NJOROGE KARANJA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in Ruiru Senior Principal Magistrate's Court (J.A. Agonda PM) sexual offence case number E005 of 2020 dated 27th March 2023)

JUDGMENT

1. David Njoroge Karanja, the appellant herein was arraigned in Ruiru Senior Principal Magistrate Court charged with defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* number 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. He pleaded not guilty and upon hearing the prosecution's case the Honourable Magistrate on 2-08-2022 ruled that the appellant had a case to answer.

2. The lower court record shows that after the ruling was delivered and Section 211 of the Criminal Procedure Code was explained to him, the appellant stated that 'I will give sworn evidence and I will be calling 4 witnesses'. The court proceeded to fix the matter for defence hearing on 13-10-2022. Come this date, the counsel for the appellant informed the court that he had three witnesses and the appellant was placed in the dock. He was sworn and made two sentences thus; 'I reside in Kikuyu-Muguga. I do not know why I am in court today'. At this point, Mr. Mugo for the accused stated; 'My client has no recollection where we are and not in good frame of mind to testify. I do pray for adjournment though no medical report has been filed'. The court allowed the adjournment and fixed the matter for mention on 23-11-2022 and ordered the counsel to file a comprehensive medical report regarding mental status of the appellant.

3. On 23-11-2022, the appellant was absent and he was said to be unwell. The court fixed the matter for defence hearing on 16-12-2022. On 16-12-2022, the defence had three witnesses but there seem not to have been a medical report filed as the defence counsel is recorded stating that he had requested for the court order regarding assessment of the appellant. The court proceedings are not clear what the court said about the medical report as what is recorded next is DW1 being sworn in and stating 'David Njoroge Karanja, I reside at Mugutha. I come from Kikuyu' followed by the prosecutor saying 'this matter has been long in this court and counsel has not raised the issue and the counsel has let his client remain quiet and this issue had not been raised until the defence stage. We can proceed with the other witness'. The appellant was then stood down until medical report was availed in court. Then DW2, DW3 and DW4 took witness stand. I notice that DW3 and DW4 who are the appellant's wife and brother respectively mentioned the issue of the appellant being mentally unstable.

4. After DW2, DW3 and DW4 completed their testimonies, the court on application by the prosecutor made an order that the detailed and comprehensive psychiatric report be filed in court before next hearing date and fixed the matter for hearing on 26-01-2023. The court did not specify in which hospital or institution the appellant was to be assessed. When the matter came for hearing on 26-01-2023, it would appear that a medical report was filed as the defence counsel applied that the court considers the medical report and Section 157 of Evidence (sic). Again, the prosecution protested that the issue was raised at the defence stage. It is not shown what the court said or decided on the issue. What is indicated next is the defence counsel closing his case.

5. It was important that I put the above background because it has a bearing on the decision I will make in this appeal. I say so because although the appellant had raised seven grounds of appeal in his amended petition, he has stated in his submissions that he is abandoning all the grounds save for ground 2 which reads; 'the trial court ignored the fact that the appellant was and is still suffering from senile dementia and therefore could not understand or follow the proceedings despite supporting medical evidence being adduced'. This is the only issue I am called upon to consider.

6. I have observed and it is clear in my mind that there are noticeable gaps in the recorded proceedings especially when it came to the issue of inquiry on the appellant's mental status. It appears to me that the Honourable Magistrate may have left out some verbatim applications. For instance, she did not put to writing the decision she made regarding the defence counsel's application that she considers Section 157 of the *Evidence* (sic). It is hard to understand what the magistrate or the counsel addressing her meant by Section 157 of *Evidence*. I have looked at the legible handwriting of the Magistrate and that is what she actually recorded. Assuming that it was meant to be Section 157 of the *Evidence Act*, it becomes more confusing because that Section deals with compellability of a witness to answer questions asked in court. I therefore find it hard to place this part of the proceedings to the issue which was before the Magistrate at that point.

7. The other confusing part of the proceedings is at the beginning of the proceedings of 16-12-2022 where after the appellant took oath and gave one line of introduction, the prosecutor immediately started protesting. It is not recorded what she was protesting about. There must have been either an application or statement made by the defence that she was reacting to.

8. When this matter came for hearing before me on 7-06-2024, Mr. Gakaria for the respondent told the court that he was willing to concede to the appeal to the extent that the matter be sent back to the lower court for a re-trial. The counsel for the appellant was not ready to take that offer. The court then directed the appellant to file his submissions.

9. I have read through the submissions by the appellant dated 12-06-2024 and those of the respondent dated 7-06-2023 alongside the proceedings and the exhibits produced in the lower court. I have also

carefully read through the judgement of the honourable magistrate. Having done so, I have come to the conclusion that the only issue I am supposed to address in this appeal is as proposed by the appellant in his 2nd ground of the amended petitioned of appeal which has been reproduced above.

10. The appellant has attacked the judgement of the magistrate by complaining that she ignored the medical evidence of the appellant's mental incapacity. Having read the judgment, I find that the magistrate did not ignore the medical reports. She actually considered them. In her judgment, she stated the following in respect of the appellant's mental status;

> 'Though medical report was produced in court, I find that it was not comprehensive and not conclusive document that this court would rely on to ascertain that the accused was indeed had been undergoing medical examination and was under close scrutiny of a doctor who had treated him over a period of time. The court was not told when he was diagnosed with the said ailment and what medication he was taking and whether there were further medical treatment administered. I wish to state the accused participated in the whole proceedings until when the prosecution closed its case and court found that the accused had a case to answer that is the time the accused was put on his defence that is the time the court was told of memory loss. I am of the view that if the accused was put on his defence, he would have adduced evidence that would have implicated him for having committed the offence (sic).'

11. In view of the above long statement by the magistrate, it is not right to state that the court ignored the medical report. It is clear that the court went through the medical report although it is not clear which of the two medical reports she considered. After due consideration of the medical report, she came into a clear conclusion. In the circumstances, the court took the contents of the report as placed before her into consideration.

12. But the above holding does not end the issue of the appellant's medical status. It should be important to establish whether the court came to the correct decision by dismissing the appellant's advocate's contention that the accused was not able to understand the proceedings. The appellant has relied on Section 162(1) of the Criminal Procedure Code which provides that;

> 'When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness'.

13. I do understand this Section as placing the responsibility of inquiring on the mental status of the accused person on the court. All that is required for the process of inquiry to kick off is a circumstance that would make it appear to the court that the accused person is not able to make his defence. It would appear that the magistrate was not satisfied with how the issue was raised. She observed that the accused participated in the proceedings all through until he was found with a case to answer. However, looking at the proceedings, the only part the accused was active is when he took plea and when he responded to the explanation under Section 211 of the Criminal Procedure Code. In all the other appearances, it was his advocate addressing the court. One would be tempted to ask how the advocate was taking instructions from his client during the proceedings including on 29-08-2022 when the appellant personally told the court that he would be giving sworn testimony and calling four witnesses.

14. However, we must be careful in making assumptions especially in criminal cases. A court is entitled to have its suspicions but as it has been held before, no amount of suspicion however strong it is can found a conviction. The honourable magistrate may have had her reasons to suspect that the appellant was playing games with the issue, but she was under a legal obligation to ensure that the legal loopholes

like the one the subject of this appeal are sealed. As I say this, I have in mind what the Court of Appeal stated in *DMM vs Republic* (2016) eKLR where it held that;

> 'The purpose of the provision of the Criminal Procedure Code detailing the procedure for dealing with an accused person who is insane is to avoid the likelihood of sentencing a person with mental disorder.'

15. The court is not a trained doctor, psychiatrist or a health professional such that it could give conclusive opinion on the mental or health status of a party before it. That is why Section 162(1) of the Criminal Procedure Code requires the court to make inquiry as to the soundness of the accused person whenever it appears that the same is doubtful.

16. I hold the view that the correct way of making the inquiry required under the said Section must be a court-controlled process. The trial court must take charge of the inquiry by making appropriate orders directed to a specified hospital, medical practitioner or medical institution directing them to assess the mental status of the accused. The court should not make general orders as it did in this matter where the appellant ended up being examined by a doctor of his choice. The two reports from the Nakuru County Referral & Teaching Hospital dated 25-01-2023 and Kinoo Medical Clinic dated 16-11-2022 were not in response to an order directed to them by the court. They are what I would call private medical reports. The court was therefore wrong in ordering the accused's advocate to file a comprehensive report. This is for obvious reasons. If the court allows either defence or prosecution team to take control of the inquiry, they are likely to choose to skew the reports to serve their interests. The inquiry cannot be restricted to a simple action of producing a medical report from the bar. It may, depending on the circumstances even require attendance of the maker of the report. The Concise *Oxford English Dictionary*, 12th Edition defines inquiry as an official investigation which definition I must say fits into the context of Section 162(1) of the Criminal Procedure Code. The Honourable Magistrate in my view did not do an inquiry as envisaged in the said Section.

17. Based on the above, I hold that the court erred by failing to make appropriate inquiry under Section 162(1) of the Criminal Procedure Code. The magistrate held that the appellant brought the issue late in the day. The law does not give a specific stage at which the issue should be addressed. The court was under obligations to make inquiry on the veracity of the claim by the appellant's advocates.

18. Having held that the lower court erred, what are the appropriate orders should I make in this matter? The appellant has earnestly urged that I should acquit the as this case should not be left to hang on him indefinitely. I do not agree with this proposal. Sections 162 and 167 of the *Criminal Procedure Code* had very clear provisions on what the court making the inquiries should do once it is confirmed that the accused is either of unsound mind or is otherwise unable to follow the proceedings.

19. I am aware that Sections 162(4) to 167 of the *Criminal Procedure Code* have been declared unconstitutional in various High Court decisions some of which are; *BKJ vs Republic* (2016) eKLR, *Joseph Melikino Katula vs Republic* (2017) eKLR, *Kimaru & 17 Others vs Attorney General & Another* (2022) KEHC 114 (KLR), *Republic vs SOM* (2018) eKLR and *AOO & 6 Others vs Attorney General & Another* (2017) eKLR although the Parliament is yet to make amendments to the said law to conform with the said various court's decisions. However, the said court decisions did not affect the process required of the magistrate to make inquiry on the mental status of an accused person. Actually, the said decisions have given a way forward on what the trial court should do once the inquiry returns positive. An outright acquittal is not an option once the accused person is found to be mentally unstable. I will not say more on this in order not to compromise what the lower court would be at liberty to do once I am done with delivery of the judgement.

20. In conclusion, I find and hold that the conviction of the appellant by the lower court was not safe. The sentence that followed cannot therefore stand. I consequently make the follows orders;

    a. This appeal is allowed.

    b. The conviction of the appellant in Ruiru Senior Principal Magistrate's court sexual offence case number E005 of 2020 is quashed and sentence thereof set aside.

    c. The matter is remitted back to the lower court for a retrial which shall start with inquiry as to the state of mind of the appellant as provided for in Section 162(1) of the Criminal Procedure Code.

    d. The Deputy Registrar shall send the file to the lower court for compliance with the above orders within fourteen days from the date of this judgment.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.