Njau v Republic (Criminal Appeal E025 of 2023)
[2024] KEHC 8637 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8637 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E025 OF 2023

AC BETT, J

JULY 12, 2024

BETWEEN

AUGUSTINE KIARIE NJAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of B.M. EKHUBI, PM in Thika Criminal Case No. 3508 of 2015 dated and delivered on 14th July 2021)

JUDGMENT

1. On 4th July 2021, the appellant was convicted of the offence of Defilement contrary to section 8(1)(2) of The *Sexual Offences Act* No. 3 of 2006 whereby he was sentenced to serve life imprisonment to be computed from the date of his arrest.

2. The facts of the case are that on diverse dates between 7th July 2015 and 9th July 2015, at Juja Farm area within Kiambu County, the appellant intentionally caused his penis to penetrate the anus of M.N, a child aged 3 years.

3. Being aggrieved by the conviction and sentence, the appellant lodged a petition of appeal in person in which he set out two grounds of appeal as follows: -

> " 1. That the trial court erred in law and facts by not finding charges (sic) against the Appellant were not proved beyond reasonable doubt as required by law.
>
> 2. The trial court did not consider in my sentence the Thirty-Six (36) months I was remanded at industrial area remand and allocation prison during my trial of this matter."

4. In her written submissions dated 18th March 2024, Ms. Wanjiru for the appellant framed two issues for determination by this court:

> " 1. Did the prosecution prove its case beyond reasonable doubt?
>
> 2. Was the Accused accorded a fair hearing?"

5. I have considered the appellant's grounds of appeal and the issues framed by his counsel. I have also perused the record of appeal. The second issue raised by the appellant is fundamental to the appeal. The right to a fair trial is firmly entrenched in the *Constitution*. In my opinion, the court has to analyze the evidence and proceedings afresh in order to make a determination whether or not the appellant was accorded a fair trial and if the answer is yes, then proceed to make a determination on the other ground of appeal.

6. The appellant submits that he was not accorded a fair hearing. It is the appellant's advocate's submissions that the defence case was closed prematurely, and this occasioned a miscarriage of justice to the appellant. The appellant was placed in his defence on 26th August 2019. His advocate informed the court that the accused would give a sworn statement and call three witnesses. Defence hearing was then scheduled for 29th October 2019 when the appellant and one of his witnesses gave evidence. The matter was adjourned due to pressure of work. The defence case was adjourned two more times through no fault of the appellant who was present for hearing. On 20th January 2020, the appellant was absent, and his advocate sought an adjournment. The court fixed the matter for mention on 3rd August 2020 and issued summons to the appellant and the surety.

7. The appellant was absent for seven consecutive times during which time a warrant of arrest was in force and on 2nd February 2021, the court set the case for Judgement on 14th July 2021 and ordered that the Registry do contact the appellant's advocate. Judgement was delivered on 14th July 2021 in the absence of the appellant and his advocate. Upon delivering judgement, the court extended the warrants of arrest. At this point, it appears that there was some confusion on the record because despite judgement having been delivered, on 7th September 2022, the matter came up before a new magistrate and the prosecution, also new, took directions in presence of the appellant and his advocate, that the matter do proceed from where it had reached and warrant of arrest in force against the appellant be lifted. The matter was then fixed for a hearing on 23rd January 2023. On that day, another new magistrate noted that judgement had already been delivered and proceeded to commit the appellant to life imprisonment as ordered by the trial court in its sentence.

8. It is the appellant's submissions that he had not closed his case and was precluded from doing so by the covid-19 pandemic that led to the scaling down of the court operations. The appellant's advocate referred the court to the proceedings of 16th June 2020 when the matter was mentioned in chambers and the court issued summons to the appellant and his surety noting that the matter was scheduled during the period court operations had been scaled down.

9. At the time of writing this judgement, this court had not received the respondent's submissions.

10. The lower court record speaks for itself. Indeed, the appellant had not closed his defence at the time the trial magistrate made a decision as a result of the numerous adjournments on account of absence of the appellant and his counsel, to give a judgement date. On 2nd February 2021, the trial magistrate had recorded the following proceedings:-

> " Court

Judgement on the July 14, 2021.

Warrant of arrest to remain in force. In charge criminal to contact the surety and counsel."

11. From the previous proceedings, there is no indication that the court directed that defence counsel be informed of the hearing date. It is instructive to note that on 17th August 2022, Njoroge holding brief for the appellant's counsel asked for the two weeks to contact the appellant on the ground that they had learnt of the date a day before. The matter was then adjourned for further mention on 7th September 2022 and on that date both the appellant and his advocate were present. They were unaware that judgement had been delivered, appellant convicted, and sentence pronounced in the appellant's absence.

12. Section 206 (1) and (2) of the *Criminal Procedure Code* provides as follows:-

> " 1. If at the time or place to which hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with a felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.
>
> 2. If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits."

13. In the instant case, the appellant was charged with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act*. The appellant was sentenced to serve a life sentence. In the circumstances, the offence with which the appellant was charged falls within the purview of Section 206 (2) of the *Criminal Procedure Code*. Section 4 of the *Penal Code* defines a felony as follows:-

> " 'felony' means an offence which is declared by law to be a felony, or if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more."

14. Bearing in mind that the appellant faced serious charges, the trial magistrate ought to have carefully adhered to the express provisions of Section 206 (2) once it came to his notice that the appellant had been convicted and sentenced in absentia. The appellant's advocate was also under duty to aid the court to make the right decision by making an appropriate application for review and setting aside of the conviction and sentence on account of violation of the appellant's constitutional right to be present during his hearing. It is trite knowledge that for the better part of the year 2020, the country faced a shut down due to the Covid-19 pandemic. At one point, courts did not operate, and this could have led to confusion in the Appellant's mind concerning court schedules. On 7th September 2022, the appellant appeared in court without being arrested. His voluntary appearance is not the sign of an absconder. He therefore had sufficient grounds to justify the setting aside of the judgement.

15. The appellant's advocate submitted that the failure by the court to set aside the conviction and re-open the defence case was a violation of the appellant's right to a fair trial and resulted in a mistrial. She relied on the case of *Solomon Locham v Republic* [2015]eKLR where the court stated:-

> " After the 2nd Accused was arrested and arraigned in court, the provisions of Section 206(2) of the *Criminal Procedure Code* were not complied with. It's probable his absence in court was a result of a cause of which was beyond his control.
>
> The order by the trial magistrate for issuance of warrant of arrest and to proceed in absence of the 2nd Accused was made at the first instance the 2nd Accused was absent. This was not right as the accused was not allowed time to probably surface and offer an explanation. In other words, at that moment there were no enough grounds to reasonably conclude that the 2nd accused had absconded and was not willing or available on another day to further participate in the trial. The procedure adopted by the trial magistrate deprived the 2nd Accused of the right to be personally present throughout his trial as envisaged under Section 194 of the *Criminal Procedure Code* and Article 50(f) of the *Constitution* which states that an accused person should be present when tried, unless his or her conduct makes it impossible for trial to proceed. Proceeding without him amounts to mistrial."

16. Based on the reasoning in the above case, the appellant herein ought to have been granted an opportunity to be present at the time the trial magistrate proceeded to pronounce a judgement date. Since the trial magistrate at the point of issuing a judgement date directed that the appellant's advocate be contacted, it appears that the court had not exhausted efforts to secure the appellant's attendance especially in view of the special circumstances of the Covid-19 pandemic and its far-reaching ramification over the operations of the courts and the people of Kenya.

17. On the date the appellant and his advocate first appeared after the lengthy absence, directions were taken that the proceedings continue from where it had reached. It is evident that the appellant was intent on pursuing his defence. The closure of the case in his absence denied him the opportunity to produce his two remaining witnesses. When the appellant reappeared, the court should have then given him an opportunity to present his remaining witnesses and failure to do so led to a mistrial.

18. I therefore declare the proceedings in the lower court a mistrial. I quash the conviction and set aside the sentence.

19. I find that the first ground of appeal is rendered moot by the declaration of a mistrial.

20. The last issue this court has to deal with is whether to order a retrial. The appellant urged the court to quash the conviction and set aside the sentence. Although the respondent did not file its submissions, this court must take into account the gravity of the charges and the age of the complainant. The appellant had been sentenced to life imprisonment but has been in custody for one and a half years. Prior to that, he was out on bond, and the default was partly his fault because he was represented, and he could have used his advocate to keep track of the hearing date. I have also taken into consideration the fact the case had reached the defence stage. Only two witnesses were remaining. The evidence was weighty enough for the court to place the appellant on his defence.

21. In *Pius Olima And Another v Republic* [1993]eKLR the Court of Appeal held that:-

> " The principles that emerge are that a retrial may be entered where the original trial as was found by the High Court...is defective, if the interests of justice so require and if no prejudice

is caused to the Accused. Whether an order for retrial should be made ultimately depends on the particular tasks and circumstances of each case."

22. Applying the above principle, I find that this is a suitable case to refer for retrial. Since the appellant and his advocate had taken directions to proceed with the trial from where it had reached, no prejudice will be suffered by the appellant. In *Charo Mole v Republic* [2010]eKLR, the Court of Appeal allowed a retrial notwithstanding the fact that the appellants had served 17 years in prison. In ordering the retrial, the court considered the serious nature of the charges, which were two counts of robbery with violence, the weight of potentially admissible evidence, the nature of the irregularities and who was responsible, and the interests of justice.

23. I have carefully considered the circumstances in this case as enumerated above. I have also been guided by the past decisions of the court of appeal. The appellant faces charges of defilement of a three-year-old boy who happens to be his cousin. The evidence on record is weighty and could lead to a conviction. The mistrial was caused partly by the appellant's many absences during hearing as well as transfer of the trial magistrate. The new magistrate failed to properly direct himself on the law, but the appellant and his advocate were equally to blame for not making an application to set aside the conviction and sentence immediately after they learnt about it. They instead opted to file an appeal.

24. It is in the interest of justice that this case goes for retrial. Since the trial magistrate was transferred, I direct that the appellants do appear before the Chief Magistrate's Court Kiambu for hearing of the defence case and writing of judgement. To facilitate compliance, I order that the appellant be produced before the Chief Magistrate's Court at Kiambu on 30th July 2024 for purposes of taking a date for defence.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 12TH DAY OF JULY 2024.

A. C. BETT

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Appellant virtually in person

Baraka for the respondent

Court Assistant: Polycap Mukabwa