Koyabe v Republic (Criminal Appeal E223 of 2023)
[2024] KEHC 11187 (KLR) (Crim) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11187 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E223 OF 2023

LN MUTENDE, J

SEPTEMBER 23, 2024

BETWEEN

WYCLIFF SIMIYU KOYABE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Interlocutory appeal against the Ruling of the court in Makadara Chief Magistrate's Criminal Case No. 334 of 2023)

JUDGMENT

1. Wycliff Simiyu Koyabe, the Appellant, was charged with the offence of Stealing by Agent contrary to Section 268 as read with Section 283 of the *Penal Code*.

2. Particulars of the offence were that on the 12th June, 2014, at Cooperative Stima Plaza Branch at Ngara in Nairobi County being an agent to Komatsu Company in South Africa, the appellant stole cash Kshs 20,655,000/= which he was supposed to remit to Komatsu Company in South Africa being a sum of money for purchase and delivery of a bulldozer, the property of Wedgewood Supplies.

3. Having denied the charges, the case proceeded to hearing. To prove its case the prosecution called five (5) witnesses. At the close of the Prosecution case, the appellant was found to have a case to answer. It is hence argued by the appellant that there was insufficient evidence to establish a *prima facie* case requiring him being placed on his defence. That exculpatory facts, discrepancies and inconsistencies were not resolved in his favour, and, his submissions were not considered.

4. For those reasons the appellant being aggrieved proffered an appeal on grounds that :

    -The magistrate erred in law and fact in placing the accused on his defence.

-The evidence did not establish a *prima facie* case.

-The court failed to take into account exculpating facts and evidence of witnesses

-The court failed to evaluate and resolve the discrepancies and inconsistencies in his favour

-The court erred in law and fact when it failed to consider his submissions

5. The appeal was canvassed through written submissions. The appellant submits that the court did not give reasons for placing him on his defence and that his submissions, and, the totality of prosecution case was not considered.

6. Appreciating that it is not desirable for the court to deliver an elaborate ruling at the stage of no case to answer as stated in caselaw, reasons for placing him on his defence should be connected to the evidence tendered.

7. That the accused has a right to know the reasons in the same way he has the right to be informed of the reasons for arrest. Further that it is his fundamental right to be adviced of the decision pursuant to Article 47 of the *Constitution*. That his defence would focus on those grounds and this would save time and money.

8. That the ingredients of stealing were not established and the exact element of theft under Section 283 of the Penal Code was not manifest in the evidence.

9. That he was not the seller of the bulldozer involved; and, the agency relationship was not proved considering that the principal did not testify. Further that crucial witnesses did not testify in the case, including the complainant; the person authorized to transfer the money; the person meant to receive it; Tobifon Co. Ltd who was to tell who owned the company and who withdrew the money; and, Wedgewood who authorized payments. That PW1 did not produce documents to prove he was from the complainant company and that investigations did not connect the appellant to Tobifon Company Ltd which received the money.

10. That the amount in the charge sheet was stated in shillings but the transfer was in South African Rand; there was no evidence to connect the two currencies and prove that the amount on the charge sheet was of the same value of the Rand transferred.

11. That the prosecution did not prove that the appellant was present on the date and at the place of the offence. That PW6 stated that the appellant was not in Nairobi, it was alleged that he had stolen money from Cooperative Bank Stima plaza within Nairobi County and the Investigating Officer could not tell where the appellant was; evidence that was contradictory.

12. That the charge sheet was incurably defective since the statement of the offence was in broad terms and the conduct of the accused which implicates him was also not particularized, and,Komatsu Ltd did not initiate the charges. In the result the appellant was not able to confront the evidence.

13. Reliance in this regard was placed on the case of *Patrick Muthuri Mwendwa v Republic* (2022) eKLR where the court cited the case of *Ramanlal Trambaklal Bhatt v Republic* (1957) EA 332; and, it is argued that the appellant should not be placed on his defence to fill gaps for the prosecution.

14. The appeal is opposed by the State /Respondent who submits that the magistrate is not obligated to give reasons for rejecting submissions on case to answer. That the contrary would be a misapprehension and misapplication of the law. The State refers to the case of *Republic v Charles Kipkemboi Kibet* (2022) eKLR and *Festo Wandera v Republic* (1980) KLR 103 where the courts were of the view that a detailed analysis is discouraged.

15. It is further submitted that the appellant filed an interlocutory appeal contrary to settled law , the case of *Martin Makhaha v Republic* (2019) eKLR, *Thomas Gilbert Cholmondley v Republic*(2008)eKLR and Section 379 (1) of the *Criminal Procedure Code* have been referred to address this contention. It is also argued that appeals must be from convictions and that the decision on case to answer is not a conviction but opportunity for the accused to poke holes on the prosecution's case.

16. That the interlocutory appeal will prejudice the main trial, on the other hand the appellant will not be prejudiced since he can raise the issues in the event he is convicted.

17. In a rejoinder the appellant argues that the first stage is for the accused to have an opportunity to be acquitted if there is no evidence that can sustain a conviction. That it would not be fair for the accused to wait for conviction and thus would be driving him out of seat of justice.

18. Further that this court has supervisory jurisdiction which he has invoked, that trial commenced in 2014 and the ruling on case to answer was after 10 years. The appellant prays to be given audience in the appeal.

19. I have considered rival arguments. This being a first appeal the duty of the court is to reassess the evidence tendered and come up with independent conclusions. The court may only interfere with the trial court's discretion where the court erred in law or fact, considered extraneous factors and irrelevancies or left out relevant facts or where the decision was based on misdirection. (See the case of *Pandya v R* (1957) EA 336 and *Ruwala v R* (1957) EA 570).

20. The grounds of appeal and arguments of parties raise two issues for determination:

    Whether the appellant has right of appeal at the interlocutory stage.

    Whether the court erred in law and fact in its ruling on case to answer.

21. The provisions of Section 347 of the *Criminal Procedure Code* (CPC) provides that:

> 347. (1) 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;
>
> 1. Therefore, the statutory right of appeal in the criminal cases accrues after an acquittal or conviction. Generally, the law is that a criminal trial should proceed expeditiously to conclusion. As a matter public policy Interlocutory appeals are discouraged unless it is proved that the trial was conducted in gross violation of the accused constitutional rights and/or where the appellant was prejudiced, hence calling for the superior court to intervene.
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> 2. In the case of *Thomas Patrick Gilbert Cholmondeley v Republic* (2008) eKLR Criminal Appeal No 116 of 2007 the Court of Appeal held that:
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> "...We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section

> 84 (7) of the *Constitution*. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all... The trial before the learned judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practicing at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."

24. In *Martin Makhakha v Republic* (2019) eKLR, the Court of Appeal resounded its decision stating that:

> "As stated by the Cholmondeley case above, a determination that there is a case to answer does not and cannot mean that the Judge will inevitably convict. It is simply an opportunity for the accused to give his side of the story and poke holes in the prosecution's case. Under section 347(1)(a) of the *Criminal Procedure Code*, a right of appeal from a subordinate court to the High Court only arises where an accused person has been convicted. Therefore, the appellant had no right of appeal against the interlocutory ruling made by the trial magistrate. His appeal before the High Court was therefore incompetent."

25. In this case, the trial court exercised its discretion to place the appellant on his defence following its ruling under Section 210 as read with Section 211 of the *CPC*.

26. The appellant submits that he was denied audience at this stage and the right to be informed of reasons under Section 211 of the *CPC* was also violated. These submissions and grounds of appeal are a misconception of the law. Firstly considering that the statutory right of appeal which accrues at the close of criminal proceedings, the principle is that these reasons will be disclosed at the judgment stage hence the trial court and the High court cannot reinvent the wheel .

27. Secondly, the appellant further submissions are that his constitutional right to appeal has been limited and taken away. The argument is a misconception of the law. The appellant's petition and grounds of

appeal have been considered by this court pursuant to his right under the *Constitution*. The right is not automatic at all stages but is limited under the *CPC* which is appropriate and legal under Article 24 of the *Constitution*. The trial court complied with the appellant's fundamental rights throughout the proceedings .

28. As to the argument whether the court erred in law and fact in its ruling on case to answer. A *prima facie* case is defined as a case which raises a rebuttable presumption and requires the opponent to give a rejoinder. This was stated in *Republic v Abdi Ibrahim Owi* [2013]eKLR, where the court delivered itself thus:

> "*prima facie*' is a latin word defined by Black's Law Dictionary 8th Edition as, "sufficient to establish a fact or raise presumption unless disapproved or rebutted". '*prima facie*' is defined by the same dictionary as "the establishment of a legally required rebuttable presumption." *Anthony Njue Njeru v Republic* [2006] eKLR Criminal Appeal 77 of 2006"It may not be easy to define what is meant by a "*prima facie* case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." (Also see the case of *Ramanlal Trambaklal Bhatt v R*(1957) E.A 332 at 335).

29. Section 210 and part of Section 211 of the *CPC* provide that:

> 210. If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.
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> 211. (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence...

30. The burden of proof is on the prosecution to establish the charges against an accused and demonstrate a likelihood of conviction. An iota of evidence is not sufficient and the accused must not be placed on defence to fill gaps of an insufficient and hopeless charge.

31. Whether or not an accused is to be placed on his defence or to be acquitted depends on the discretion of the trial court. The court may also allow submissions. This discretion is governed by law.

32. At this stage, firstly, the trial court only considers the possibility of a conviction and the standard of proof is therefore not as high as it would be at the judgment stage.

33. In the *Martin Makhakha case* (ibid) the Court of Appeal stated that:

> "It is clear that the standard of establishing a case beyond reasonable doubt after the close of the prosecution's case is not required in determining whether or not the accused has a case to answer. This can only be done after an accused has been called to tender a defence. Only then can the court critically examine the evidence tendered under a microscope"

34. Where the evidence is not tangible, it is prudent to acquit the accused. This was emphasized by Odunga J (As he then was) in the case of *Republic v Alex Musau Jimmy* [2022] eKLR where he held thus:

> " where clearly the prosecution's case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. Defence case is not meant to fill in the gaping gaps in the prosecution case."

35. Secondly, where the court intends to place the accused on his defence, as it did here, the court is precluded from giving detailed reasons or explanations for its findings.

36. In the case of *Festo Wandera Mukando v Republic* (1980) KLR 103, the court held:

> "...we draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, and an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of "no case" to answer is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned."

37. An elaborate discussion of issues in interlocutory appeals is inappropriate and should be avoided at all costs. This is because the court would preempt or prejudice the main trial, as conclusive findings are yet to be reached.

38. A perusal of evidence on record without an explantion being rendered would be sufficient to establish a *prima facie* case. PW1 stated to be a director of Wedgwood Co Ltd and the appellant, met in South Africa and discussed the purchase of bulldozer which belonged to Komatsu. The appellant sent invoices to PW1 on this transaction and the amount quoted was 2.4 Million South African Rand, the money was to be paid to Tobifom a company owned by the appellant which was alleged to handle money and transactions for Komatsu.

39. PW1 testified that Wedgwood sent money through Cooperative bank to First Red bank in South Africa, the amount was credited into the appellant's personal account. The appellant asked for more money and thereafter became evasive, he travelled back to Kenya for a funeral and later went to DRC Congo. PW1 reported the matter and the appellant was arrested at JKIA while on transit.

40. PW2 worked with Alphine International Ltd, a sister company of Wedgewood. The company wanted to purchase machinery and were directed to the appellant who was in South Africa. PW2 testified that the appellant traded as Tobifom Company and that he sent emails and payment instructions and he also confirmed the cost of the machinery as Ksh 2.4 Million South African Rand. The appellant acknowledged receipt of the money but the bulldozer was not released. The appellant later asked for 12.4% penalty charges. Invoices from Komatsu were produced as Exhibit 2 (a) and (b).

41. PW3 was personally known to the appellant who used to be a neighbour in Kenya. He introduced the appellant to the complainant who wanted to purchase machinery. His evidence highlighted the discussions between them on transfer of funds and importation of machinery

42. There is sufficient ground from witness and documentary evidence that requires the appellant to give an explanation as to what transpired.

43. In the upshot, the grounds adduced and submissions urged are unmerited. The appeal which is therefore incompetent fails and is accordingly dismissed.

44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 23RD DAY OF SEPTEMBER, 2024.

L. N. MUTENDE

JUDGE