



**Abdalla v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 12165 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E004 OF 2023
M THANDE, J
OCTOBER 11, 2024**

BETWEEN

MOHAMED ZUBEIR ABDALLA APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the judgment of Hon. M. M Wachira, PM
delivered on 10.11.22 in Lamu Criminal Case No. E104 of 2022)*

JUDGMENT

1. The appellant herein charged with the offence of attempted murder contrary to section 220(a) of the *Penal Code*. The particulars of the offence are that on 21.4.22 at around 1700 hours at Langoni of Langoni location in Lamu in Lamu Central sub county within Lamu County, the Appellant unlawfully and wilfully attempted to cause the death of Sudeis Kibwana (the Complainant) by stabbing his back chest using a knife. The Appellant faced the alternative charge of grievous harm contrary to Section 234 of the *Penal Code*. The particulars of the offence are that on the same date in the same place and time, he unlawfully did grievous harm to Sudeis Kibwana. In Count, II the Appellant was charged with the offence of failure to register as a Kenyan Citizen contrary to section 14(1) of the *Registration of Persons Act*. The particulars of this offence are that on the same day at around 2130 hours in the same area, being a Kenya citizen over 18 years of age, failed to apply to be registered as a Kenyan citizen.
2. The Appellant pleaded guilty to Count I but denied Count II and pleas were entered accordingly. Following a hearing, the trial court found that the offence of attempted murder was not proved but found that there was sufficient evidence that he caused grievous harm to the complainant. The Appellant was thus convicted of this alternative charge of causing grievous harm. As regards Count II, the trial court found that the same was not proved and acquitted the Appellant of the same. The Appellant was then sentenced to 7 years imprisonment.



3. Being aggrieved with both the conviction and sentence the Appellant filed this Appeal. The summarised grounds of appeal as set out in his petition of appeal dated 23.12.22, are that the trial Magistrate erred in act and law for:
 - i. failing to inform the Appellant of the right to appoint an advocate to represent him or to have one assigned to him as substantial justice would result due to the technical nature of the charges he faced.
 - ii. believing the evidence of the complainant without corroboration and disregarding the Appellant's defence.
 - iii. failing to find that the police failed to investigate the complainant hence causing a miscarriage of justice.
 - iv. misapplying evidence law in convicting the Appellant.
4. As a first appellate Court, I am required to subject the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32 and *Kariuki Karanja v Republic* [1986] KLR 190).
5. The facts of the case according to the prosecution are that the Complainant was on the road and as he passed by Alwi's shop, he was stabbed on the back. Upon turning, he saw the Appellant and lost consciousness. He was taken to King Fahd Hospital and gained consciousness after 2 days and remained there for 7 days. The police recorded his statement while he was at the hospital and he told them that the Appellant had attacked him. The Complainant told the trial court that he was alone during the incident and there were no eye witnesses. PW1 Madi Sheyumbe, a clinical officer at King Fahd Hospital confirmed that the Complainant had a chest injury. He stated that the injury was serious and life threatening and classified the same as grievous harm. The Complainant was taken to theatre to remove blood from his lungs. PW4 114982, P. C. Luke Shikuri stated that the investigating officer P. C. Lesale received information that the Complainant had been stabbed and was in hospital. He recorded the Complainant's statement who told him that it was the Appellant who had stabbed him. He was unable to get eye witnesses as no one was willing to come forward. PW4 stated that the Appellant had gone to the Police Station to record an O. B and had a minor injury. The Appellant had reported having been attacked by the Complainant and another person.
6. In his defence, the Appellant told the trial court that on the material date, while at Langoni the Complainant and 2 other young men stopped him and asked him why he talks like a woman. The Complainant then started hitting him with a fimbo. He fled on his bicycle, got a knife from the kiosks by the road and stabbed the Complainant as he ran away. He stated that there were men making noise. He went to the police station and reported the matter. He was told to go to hospital and the police arrested him there and he was charged in court. On cross examination, he conceded that he stabbed the Complainant while he was down on the ground. He too stated that witnesses had refused to attend court.
7. Both the Appellant and Respondent filed their submissions which I have duly considered.
8. It is the Appellant's case that the offence with which he was charged was serious and that he ought to have been represented by an advocate. Reliance was placed on the case of *Chacha Mwita v Republic* [2020] eKLR, where Mrima, J. ordered a retrial for failure of the trial court to comply with the provisions of Article 50(2)(g) of *the Constitution*.
9. The Respondent did not submit on this issue.



10. The constitutional right to a fair trial is sacrosanct. A key aspect of this right is the right of an accused person to be represented by an advocate and to be informed of this right promptly. Article 50(2)(g) of *the Constitution* provides:

Every accused person has the right to a fair trial, which includes the right—

- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

11. In the celebrated case of *Pett v Greyhound Racing Association*, (1968) 2 All E.R 545, at 549, Lord Denning in succinctly stated as follows regarding the right of an accused person to be represented:

It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"

12. The right to legal representation is a fundamental human right and critical to the realization of a fair trial. This right is not subject to the limitation provided under Article 24 of *the Constitution* and is indeed listed in Article 25 among the rights that may not be limited as follows:

25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (c) the right to a fair trial;

13. In the case before me, the Appellant was convicted of the offence of grievous harm contrary to Section 234 of the Penal Code which provides:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

14. The offence of which the Appellant was convicted is a serious one and carries a life sentence. The trial court was thus obligated to promptly inform the Appellant of his right to representation by an advocate of his choice. There is however nothing on record showing that the trial court informed the Appellant of this right. The trial court thus failed to comply with the express provisions of Article 50(2)(g) of *the Constitution*, thereby denying the Appellant the right to a fair trial and occasioning him substantial injustice. It follows that the proceedings in the trial court and conviction of the Appellant stand vitiated. In this regard I associate with the sentiment expressed by Mrima, J. in the case of *Mwita v Republic* [2020] eKLR (supra), where he cited his own decision in *Migori High Court Criminal Appeal No. 44 of 2019 N.M.T. alias Aunty vs. R* (unreported): as follows:

37. I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of *the Constitution* then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of *the Constitution* will be tantamount to amending *the Constitution* through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce *the Constitution* as it is the intentions of the People of Kenya as expressed in *the Constitution* will



never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law.

15. The question that the Court now needs to determine in light of its finding is whether the Appellant should be released. The circumstances herein are that a serious offence was committed and the Appellant admitted to having committed the same. The Court is mindful of the fact that justice must cut both ways. In the premises, releasing the Appellant will not be in the public interest and in the interest of justice. It is necessary that he be retried.
16. In *Muiruri v Republic* [2003] eKLR, the Court of Appeal stated as follows regarding a retrial:

What agonized our minds was the consequential order sought for retrial. Mr Kithi, learned counsel for the appellant, opposed the order for retrial and called for the appellant's acquittal, citing the long period elapsed between the appellant's arrest and the hearing of this appeal which is about 15 years. Generally, whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It 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 *Zededkiah Ojuondo Manyala v 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.
17. The circumstances herein are that the Appellant were arrested on 21.4.22 and was released on bond on 12.5.22. He was convicted and sentenced on 10.11.22. So far, the Appellant has served a period of less than 2 of the 7 years to which he was sentenced, which is not inordinately long. Additionally, the mistake leading to the vitiation of the conviction is entirely of the trial court's making. Considering the seriousness of the offence, my view public interest demands that a retrial will be in the interest of justice. I am of the further view that a retrial of the Appellant will not occasion prejudice to the Appellant. (see *Manji v. Republic* 1966 EA 343.)
18. Having found as I have, that there was a derogation of the Appellant's right to a fair trial resulting in substantial injustice, the ends of justice will be served by a retrial.
19. Accordingly, I do allow the Appeal, quash the conviction and sentence of the Appellant, order a retrial to be conducted on a priority basis by a Magistrate other than Hon. M. M Wachira. To this end, the Appellant shall be produced before the court in Lamu on 22.10.24 for the purposes of taking plea in the new trial.

DATED SIGNED AND DELIVERED VIS MS TEAMS THIS 11TH DAY OF OCTOBER 2024

M. THANDE
JUDGE

