Gitonga v Republic (Criminal Appeal E015 of 2021) [2023] KEHC 2624 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2624 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E015 OF 2021

LW GITARI, J

MARCH 9, 2023

BETWEEN

MIKE MUTWIRI GITONGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of grievous harm contrary to Section 234 of the *Penal Code* in the Chuka Senior Principal Magistrate's Court Criminal Case No E298 of 2021. It was alleged that on May 30, 2021 at Kiango'ndu sub-location, Kiango'ndu location in Meru sub-county within Tharaka Nithi County, the Appellant unlawfully did grievous harm to one Purity Kagendo. He was tried and consequently found guilty of the offence. He was then convicted and sentenced to serve fifteen (15) years' imprisonment.

2. Aggrieved by the said decision of the trial court, the Appellant filed the present appeal based on the grounds that:

    i. The learned trial Magistrate erred in law and fact by convicting and sentencing the accused without having due regard and/or adhering to the very clear provisions of Article 50 of the *Constitution*.

    ii. The learned trial Magistrate erred in law and fact in failing to find and/or appreciate that the accused fundamentally suffered incapacity to effectively and efficiently defend himself during trial and which hardship harmed his case.

    iii. The learned trial Magistrate erred in law and fact in failing to find and/or appreciate that the accused suffered fundamental medical issues and/or serious impairments that affected his reactions/responses and which misled the court into misreading and/or misinterpreting the accused's general demeanor,

reactions and responses before court and which led the court into misdirecting itself and rendering a wrong verdict and an excessive sentence.

iv. The learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant on the basis of evidently greatly subjective observation that are of no probative value.

v. The learned trial Magistrate erred in law and fact in misdirecting herself, thereby arriving at the wrong conclusions, conviction and sentence.

vi. The learned trial Magistrate erred in law and fact in failing to take into consideration the circumstances of the alleged offence and thereby denying the accused the benefit of the impact of the prevailing circumstances both on himself and on his action.

vii. The learned trial Magistrate erred in law by convicting and sentencing mainly by relying on the defence evidence in a trial where the accused's participation was evidently superficial and peripheral due to fundamental hardships on the part of the accused person.

viii. The sentence passed/meted against the Appellant by the learned trial magistrate was manifestly excessive and unfairly oppressive considering the facts and circumstances of both the parties and the alleged offence.

ix. That new and compelling evidence has become available which the accused did not get an opportunity to present before court during trial.

3. The Appellant thus prayed for this appeal to be allowed, the conviction be quashed, the sentence set aside, and a retrial be conducted.

4. The appeal was canvassed by way of written submission which I have summarized hereunder.

The Appellant's Submissions

5. The Appellant filed his written submissions on April 28, 2022. It was his submission that the proceedings of this matter in the trial court failed to meet the standard and threshold of a fair hearing as provided under Article 50 of the *Constitution*. That the Appellant being a school drop-out, he had minimal education and exposure and therefore did not have the capacity to understand the intricate processes of the court. Further, that the Appellant allegedly suffers from a medical condition referred to as vasovagal syncope, also known as neurocardiogenic syncope, which occurs when a person faints as a result of triggers such as the sight of blood or extreme emotional distress. According to the Appellant, his condition greatly contributed to his reactions during his trial and that the trial court fatally misapprehended those reactions as the Appellant's demeanor.

6. Finally, the Appellant submitted that considering that there were apparent domestic issues between himself and the complainant, the trial court failed to remain objective as it allegedly easily sided with complainant's view point but failed to place itself in the shoes of the Appellant. The Appellant thus urged this court to be guided by the cases of *Nicholas Mukila Ndetei v Republic*, and *Benson Ochieng & France Kibe v Republic* [2018] eKLR in considering this appeal.

The Respondent's Submissions

7. On its part, the Respondent filed his written submissions on May 17, 2022. The Respondent submitted that the Appellant was accorded a fair trial. That when the plea was taken, the charge

was read over to the Appellant in details and in a language he understood, the same being Swahili. That the Appellant was then given an opportunity to answer to the charge to which he responded by pleading not guilty. That after trial court found that the Appellant had a case to answer, the Appellant indicated that he was ready and willing to give his defence on the same day. It was thus the Respondent's submission that the trial court did not infringe on the Appellant's right as guaranteed under Article 50 of the *Constitution*.

8. On whether the Appellant suffered incapacity to effectively and efficiently defend himself during trial, the Respondent submitted that being a school drop-out does not incapacitate a person. Further, that trial was conducted in Swahili, which is the language that the Appellant indicated he understood. For these reasons, the Respondent urged this Court to find that the Appellant had the literal capacity to proceed with the trial in the lower court.

9. In addition, it was the submission by the Respondent that the evidence produced by the prosecution was merited and proved the essential elements of the offence of causing grievous harm. The Respondent further submitted that the sentence meted on the Appellant was lawful to the extent that it is provided under Section 234 of the *Penal Code* and that the same was lenient considering that one is liable to imprisonment for life upon conviction.

10. Lastly, on whether the court should order for retrial, the Respondent, citing the cases of *Muiruri v Republic* [2003] KLR 552 and *John Njeru v Republic* [1980] eKLR, opined that the Appellant's trial was neither illegal nor defective to warrant this Court to issue an order for retrial. As such, the Respondent urged this court to dismiss the appeal in its entirety and uphold the decision of the trial court on the conviction and sentencing of the Appellant.

Issues for Determination

11. I have considered the present appeal, the grounds of the appeal, as well as the submissions by the parties. The main issues that come up for determination by this Court are as follows:

    i. Whether the Appellant was accorded a fair trial, and if not,

    ii. Whether the Appellant has laid a basis to warrant this court to issue an order for retrial, and if not,

    iii. Whether the prosecution produced the essential elements attendant to the offence of causing grievous harm to the required standard of beyond any reasonable doubt.

    iv. Whether the sentence meted against the Appellant was excessive in the circumstances of this case.

Analysis

12. This being a first appeal, this Court is expected to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it did not get the opportunity to either see or hear any of the witnesses. See *Okeno vs Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " 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 vs Republic (1957) EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala vs R (1957) EA 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 finding and conclusion; 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 vs Sunday Post [1958] EA 424."

13. Similarly, in *Kiilu & Another vs Republic* [2005]1 KLR 174, the Court of Appeal stated that:

"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

2. 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; 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."

It is clear from these authorities that it is the duty of the first appellate court to evaluate both the facts and the law and make its own finding. The appellant is entitled to expect the decision of the appellate court after an evaluation of the evidence which was adduced before the trial court and its own conclusion as well as its independent finding."

14. Guided by the above authorities, below is a review of the evidence adduced by the prosecution in the trial court.

The Prosecution's Case

15. Purity Kagendo (PW1), was the complainant in this matter. She stated that the Appellant was her husband. That on May 25, 2021, she had a disagreement with the Appellant while they were at home and she told the Appellant that she wanted to go back to her parents' home. That the Appellant started accusing her of stealing his money and claiming that she wanted to run away with the money. According to PW1, the Appellant claimed that she had gotten a bonus from a tea harvest and that is why she wanted to leave him. It was her testimony that the Appellant told her that she could not leave until she gave him his money. On May 30, 2021, PW1 took her children and her items and left for her parent's home. She alleged that the accused found her by the roadside and started assaulting her with a *panga*. She testified that the appellant cut her on the back of the head and she fell down. The appellant then cut on two times on the left leg as she lay on the ground and she sustained serious injuries and one of the injuries on the left knee was still bandaged at the time she gave evidence in court. Members of the public intervened and took away the children. The accused then ran away and PW1 was taken to Chuka District Hospital where she was admitted for three (3) weeks.

16. PW2 was Faith Gateria Moses, the Appellant's mother. It was her testimony that she knew PW1 as her son's wife. That on the material day at around 1 p.m., she was on her way from church when she found the Appellant and PW1 fighting. She stated that she found the accused having already assaulted PW1 with a *panga*. That the Appellant ran away and she took PW1 to hospital for treatment. It was her evidence that PW1 and the Appellant used to have family differences.

17. PW3 was Joseph Mwenda Mirebu, a clinical officer at Chuka District Hospital. He filed the P3 form for PW1. According to him, PW1 went to the hospital with a history of having been assaulted by a

person well known to her. PW3 physically examined PW1 and noted that she had lacerated wounds on the neck at the back side, deep cuts on the left knee anterior aspect, and deep cuts on the left lower leg with severed muscular tissue exposing the bone. It was further his testimony that PW1 was brought to the hospital two hours after the alleged assault. As a result of the injuries inflicted on her, PW1 was treated and stayed in the hospital for three weeks from the date of her admission, that is, on May 30, 2021, to the date of her discharge, that is, on June 20, 2021. PW3 classified the degree of injury as grievous harm and produced the P3 form as P Exhibit 2. He also produced as P Exhibits 1 and 3, the same being PW1's discharge summary and x-ray films respectively, which indicated the treatment that PW1 received while at Chuka District Hospital.

18. PW4 was PC Nasibo Hassan attached to Chuka Police Station. He recalled receiving a call from the chief of Kiango'ndu on the material day informing him that someone called Mike Mutwiri had assaulted his wife. Together with one CPL Kimani, PW4 went to the scene of the crime. He found that the complainant, PW1, had already been rushed to hospital. It was his testimony that the accused was arrested with the *panga* which he had already washed after cutting his wife. He produced the panga as P Exhibit 4.

19. The prosecution then closed its case. Consequently, the trial court gave its ruling on whether the Appellant had a case to answer. It was the finding of the trial court that that a prima facie case had been established by the prosecution and as such, the Appellant was placed on his defence.

The Appellant's Defence

20. The Appellant gave an unsworn statement in his defence. He stated that on the material day, he left his home in the morning and went back at around 1 p.m. That he found some things missing from his home and his medicines were outside the house. He left the compound and found PW1 by a road. According to the Appellant, it was PW1 who had a panga and that he only had a piece of wood. He stated that he asked PW1 why she was leaving. He then alleged that he hit the *panga* that PW1, the *panga* fell on her and it cut her. Subsequently, the Appellant stated that he went home and that the PW1 was taken to hospital.

21. The Appellant did not call any other witnesses and his testimony marked the close of the defefence case.

22. I shall now consider the issues which arise for determination by this Court.

a. Whether the Appellant was accorded a fair trial.

23. It was the Appellant's submission that he was denied his right to a fair trial as guaranteed under Article 50 of the *Constitution*. Specifically, the Appellant contended that the trial did not meet the standard of fair trial as set out under clauses 2(c), (g), (h), (j), (k), and (l) of Article 50 of the *Constitution*. The aforementioned clauses stipulate as follows:

> " (2) Every accused person has the right to a fair trial, which includes the right—
>
> (a) ...
>
> (b) ...
>
> (c) to have adequate time and facilities to prepare a defence;
>
> (d) ...
>
> (e) ...

(f) ...

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

(h) 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;

(i) ...

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;"

24. On the right to have adequate time and facilities to prepare a defence, it is the Appellant's contention that he did not have an opportunity or was not accorded an opportunity to exercise that right. The record of proceedings in the trial court shows that after the trial court gave its ruling on August 11, 2021 on whether the Appellant had a case to answer, the trial court went ahead and explained the provisions of Section 211 of the *Criminal Procedure Code* to the Appellant to which he replied, "I will give unsworn evidence with no witnesses. I am ready with my defence now." See page 9 paragraph 10-19 of the record. The trial court then proceeded with the defence hearing on the same day. From the foregoing, it is clear that the Appellant, on his own volition, opted to proceed with his defence hearing on the same date he was put on his defence that is August 11, 2021. Thus, his claim that he was not given adequate time to prepare for his defence is unsubstantiated and in my view, the same is a mere afterthought. Furthermore, the record shows that plea was taken on 2/6/2021 and it was not until 3/8/2021 that the matter proceeded to hearing on the said date the appellant informed the court that he was ready to proceed and he was issued with statements. He also informed the court that he understands Kiswahili. Article 50(2) (supra) requires that an accused be given adequate time and facilities to prepare his defence. It would seem that the only materials to be supplied were the statements of witnesses and documentary exhibits. The right was not violated as he was supplied with the materials to enable him to prepare his Defence.

25. On the right to legal representation as provided under Article 50(2)(g) and (h) of the *Constitution*, the Appellant contends that the trial court failed to inform him of this constitutional right. From the record, the Appellant took plea on June 2, 2021. The trial commenced on August 3, 2021 and proceeded until the prosecution closed its case on August 11, 2021. All this time, the trial court never informed the Appellant of his right to choose an advocate of his choice to defend him nor was he informed that he had a right to be represented by an advocate. I also note that he was never informed of the right to being assigned counsel by the State at the State expenses if injustice would result.

26. In the persuasive case of *Chacha Mwita v Republic* [2020] eKLR, Mrima J exhaustively dealt with allegations of breach of the right to fair hearing guaranteed under Article 50 (2)(g) and (h). The said judge was of the view that it is the duty of a court to promptly inform unrepresented accused persons of their right to legal representation especially where the charge is a serious one which may merit a

sentence which could be materially prejudicial to the accused. Mrima, J went on to opine as follows in this regard:

> "29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of the Constitution among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law."

27. Persuaded by the above decision, I note that the trial court never explained the right to legal representation to the Appellant at any stage. The offence that the Appellant was facing attracts a possible sentence of life imprisonment as per the provisions of Section 234 of the *Penal Code.* As such, it is my view that the trial court failed to comply with the dictates of Article 50(2)(g)(h) of the *Constitution*. The Appellant was hence not accorded a fair trial in line with Article 50(2)(g)(h) of the *Constitution*.

28. Having found so, it automatically follows that the next question for this court to consider is the effect of the derogation of the right under Article 50(2)(g) of the *Constitution* in the circumstances of this case. In the case of *Chacha Mwita* (supra), the court rendered itself as follows in this regard:

> "35. There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.
>
> 36. In answering the question, I will consider the wording of the Article 50(2)(g) and (h) of the Constitution. From the wording of Article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under Article 50(2)(g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in the Constitution then it remains the unwavering duty of this Court to enforce the provisions of the Constitution."

29. I am persuaded by this finding. In my view, a trial should be rendered a nullity upon proof of derogation of the right under Article 50(2)(g) of the *Constitution*. In this case, the record shows that at no point was the Appellant informed of his right to choose or be represented by an Advocate which is his right to a fair hearing. He represented himself throughout the trial and it is notable from the record that when the Appellant was given a chance to cross-examine the prosecution witnesses, his response was constantly that he had no questions save for the very few questions he asked the investigating officer (PW4). Further, when he was given a chance to submit his mitigation, the Appellant once again chose not to

say anything. Considering that the offence committed carries a possible sentence of life imprisonment, I am satisfied that the Appellant was bound to suffer substantial injustice and as such his right under Article 50(2) (g) (h) of the *Constitution* ought to have been explained to him at the earliest opportunity of the trial. The earliest possible opportunity is at the state of his appearance in court for plea taking.

30. This finding now leads this Court to consider whether the Appellant should be retried.

b. Whether the appellant has laid a basis to warrant this court to issue an order for retrial.

31. In the case of *Samuel Wahini Ngugi v R* (2012) eKLR where the Court stated as follows:

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
>
> It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.........In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person
>
> That decision was echoed in the case of Lolimo Ekimat vs R, Criminal Appeal No 151 of 2004 (unreported)when this Court stated as follows:
>
> ...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."

32. Having carefully considered and reviewed the record, and without going into the merits thereof, it is my view that a conviction might result if the case is properly prosecuted. The offence herein was committed on 30/5/2021. The victim (PW1) hails from Maua Meru from what she told the court when she gave evidence is likely to be traced to come and give evidence. The mother-in-law, PW2), the clinical officer and the investigating officer are witnesses who can be called without any difficulties. The prosecution is not likely to encounter any difficulties in availing the witnesses. The offence is serious, it is domestic violence in which the victim sustained severe injuries and scars which she will live with for the rest of her life. The culprit should therefore not go unpunished, justice demands that he faces the full force of the law. It is in the interest of justice that a retrial be ordered.

33. Having come to conclusion that the right of the accused to fair trial was violated, it will not be necessary to consider the other grounds of appeal.

Conclusion

34 For the reasons stated above, I allow the appeal, quash6 the conviction and set aside the sentence since the learned trial magistrate erred by failing in her duty to inform the appellant of his right under Article 50(2) (g) of the *Constitution*. I proceed to order as follows:-

1. There shall be a retrial of the appellant.

2. The retrial shall be at Chuka Chief Magistrate's Court before a magistrate with jurisdiction other than the trial magistrate
3. The appellant shall be released from prison and be remanded at Chuka Police Station. He be charged in court within seven days from today.
4. To that extent the appeal succeeds.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF MARCH 2023.

L.W. GITARI

JUDGE