Wabwire v Republic (Criminal Appeal E088 of 2022)
[2023] KEHC 3374 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3374 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E088 OF 2022

RPV WENDOH, J

APRIL 20, 2023

BETWEEN

FELISTA FEDELIS WABWIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. J. Munguti – Senior Principal Magistrate in Migori Chief Magistrate's Criminal Case no. E290 OF 2020 delivered on 25/8/2022)

JUDGMENT

1 The appellant, Felista Fedelis Wabwire was convicted by Senior Principal Magistrate's Court Migori for the offence of threating to kill, contrary to Section 223 (1) of the *Penal Code* and creating a disturbance in a manner likely to cause a breach of the peace contrary to Section 95 (1) of the *Penal Code*.

2 The particulars of the charges were that on August 13, 2020 at Sangla Area in Suna West Sub County of Migori County, without lawful excuse, uttered words "nitakuuwa" meaning I will kill you" words that were directed at Grace Nekesa Patroba.

3 She is also alleged to have caused a breach of the peace by shouting and uttering abusive words at Grace Nekesa Patroba on the same day.

The trial proceeded with the prosecution calling three witnesses.

When called upon to defend herself, the appellant called two other witnesses in support of her case.

The trial court convicted the appellant on both counts and she was sentenced to seven (7) years imprisonment on Count 1 and three months imprisonment in Count II.

The appellant being aggrieved by the said judgment, preferred this appeal based on the following grounds:-

1. That the offences were not proved;

2. That the sentence was harsh and excessive;

3. That the court failed to comply with Articles 50 (2) (g) and (h) of the *Constitution*.

4 The appellant therefore prays that the conviction be quashed and sentence set aside.

This being a first appeal, this court has the duty to re-examine all the evidence that was tendered before the trial court, analyse it and arrive at its own determination but must always bear in mind that this court neither saw nor heard the witnesses testify.

5 The appellant filed submissions in support of her grounds of appeal. She submitted that though the offence was allegedly committed on August 13, 2020, it was not until December 4, 2020 that she was arrested and the delay was not explained; that the alleged broken windscreen of the complainant's vehicle was not produced as evidence in court; that it cannot be possible for her to have hired thugs to come kill PW1 when they lived in the same house and no evidence was called to support that contention; that the sentence was harsh and the court failed to consider that she had children and that the complainant was using this case to get her out of the land. She prays that if the appeal is not successful, the court to substitute the sentence with fine or non custodial sentence.

6 The State opposed the appeal and the prosecution counsel filed submissions. Counsel submitted that all the four ingredients that need to be proved in an offence of threatening to kill were established as was set out on the case of *Phenias Njeru Koru v Republic (2015) eKLR* (CRA 51 of 2013 Embu). Counsel urged that the testimony of PW1 was corroborated by PW2.

7 On grounds 2, counsel urged that under Section 223, one is liable to ten (10) years imprisonment upon conviction and therefore seven (7) years imposed was were fair. On Count II, the sentence was lawful because if is the sentence provided for under the law. Counsel relied on the case of *Bernard Kimani Gacheru v Republic 2002 eKLR* where the court settled the grounds upon which an appellate court can interfere with a sentence i.e. that the sentence is manifestly exec essive in the circumstances of the case; that the trial court overlooked material facts, or the court applied the wrong principles of law. Counsel argued that the appellant has not demonstrated any of the above grounds and the sentence handed on the appellant is lawful and reasonable.

8 On the 3rd ground, counsel urged the court to look at the proceedings of May 25, 2021 page 10 of Record of Appeal and note that the appellant had engaged an Advocate by name Mr Mboya and that although the court record does not show that the appellant was informed of the rights under Article 50(2) (g) and (h) of the *Constitution*, she was aware and knew that she was at liberty to get services of an Advocate and she actively participated in the proceedings and hence she was not prejudiced at all.

9 I have duly considered the grounds of appeal, the evidence on record and the rival submissions. I think that I need to start by considering the third ground where the appellant complains of violation of her Constitutional rights. Article 50 (2) (g) and (h) provide as follows;

50(2)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.

(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 his right promptly.

10 In view of the said provision, it is necessary for the court to look at the trial court record. The appellant was arraigned before the court on December 2, 2020. When the charge was read to her, she denied the

charge and the case was fixed for hearing on May 20, 2021. The hearing commenced on May 20, 2021 and PW1 and PW2 testified. On May 25, 2021 an advocate by name Mr Mboya came on record for the appellant and applied for vacation of Orders of May 29, 2021. The Counsel did not conduct the case any further. It is clear from the record that at no time did the court inform the appellant of the right to choose or seek legal representation as required by Article 50 (2) (g).

11 In Criminal Appeal No 33 of 2019 *Chacha Mwita v Republic* J Mrima when dealing with a similar matter observed that the right to choose an Advocate of one's choice means that for an accused person to exercise that right, he / she must be told of the said right to legal representation by an Advocate of his /her choice. Under Article 25 (c) of the *Constitution*, the rights under Article 50 cannot be derogated. Even if Mr Mboya came on record at one time and left just as he had come, the court had a duty to inform the appellant person of that right. In *Mphukwa v S (CA &R 360 / 2014 (2012)* the South African Court held that

> ... A general duty is on the part of the Judicial Officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding, a fair and just trial may not take place. It is therefore the duty of a magistrate to inform the Accused of the said right and in some cases where necessary, the accused may need to apply to the Legal Aid Board for assistance to get free legal Aid".

12 In *Joseph Kiema Philip v Republic (2019) eKLR* J Nyakundi held that it is the trial court that has the duty to inform an accused of the right to choose counsel. The court also observed that the court had the duty to record that it had complied with the said requirements. Recording is important in the event the court's decision is challenged.

13 As to when the accused should be informed of the right, it is clear that the information has to be relayed promptly, which means before plea is taken or soon thereafter. This was confirmed by the court in Joseph Kiema Philip case (*Supra*). The court said:-

> ... the earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings; that is the first hearing."

14 In this case, the appellant was not informed of this right at any stage of the proceedings which was a violation of the Article 50(2) (g) as regards fair trial. Failure to comply with the said provision renders the proceedings a nullity. See Chacha Mwita case supra.

15 As regards Articles 50(2) (h), it is required that an accused be informed that an advocate may be assigned to the accused person by the State at State expense if substantial injustice would otherwise result. From the wording of the above provision, this right is not automatic. At present, only people charged with murder and children in conflict with the law are entitled to legal counsel at State expense. To be entitled to counsel under this subsection, it must be established that substantial injustice will result, for example where one does not understand the proceedings or the charge is too complex, or accused is illiterate etc. This sub Article was discussed in the case of *Karisa Chengo SC Petition No 5 of 2015*. Since it has not been demonstrated that substantial injustice will result, the court finds that the right under Article 50 (2) (h) was not violated.

16 Having found that the proceedings were rendered a nullity, the next question is whether this court should do order a retrial?

17 I have considered the evidence on record. PW1 Grace Nekesa Patroba, who identified the appellant as a wife to the brother. Her testimony is that she found the windscreen of her vehicle smashed and on enquiring from the appellant, whom she lived with, she threatened to bring thugs to attack her

and burn her in the house, and used abusive language towards her. According to PW1, the appellant had been married to her later brother but left, got married in Tanzania and only returned to burry her brother in 2018.

18 PW2 James Moses Oketch testified that on August 13, 2020, she had visited the complainant when the appellant threatened to bring thugs to attack the complainant. PW2's statement was not clear who bought the land, which seems to be the source of the dispute.

The appellant (DW1) denied committing the offence and claims that the complainant who is her sister-in-law wants to evict her from her land which was bought by her late husband.

19 DW2 John Mariko, a neighbour to the complainant told the court that the disputed land was bought by the appellant's husband from a Kisii man and that it is the Appellant's husband who built the house where she lives. According to him, the complainant has been harassing the appellant. He denied that the complainant's windscreen was smashed.

20 DW3 Josephine Awuor, a neighbour to the appellant stated that on January 13, 2020 she stayed with the appellant in her stall and that the appellant sold her vegetables till 8:30p.m She denied that the appellant ever assaulted the complainant as alleged.

21 From the above analysis of the evidence, it is clear that there exists a land dispute between the complainant and appellant as at the time this offence was allegedly committed. Even before hearing the case, the trial court made some orders that seemed to determine the issue of ownership of the land by ordering the appellant to keep off the land yet the dispute before the court was a criminal case. Issues of ownership of the land should have been left to the ELC Court to determine.

22 PW1 told the court that the appellant threatened her with death when she asked who had smashed her windscreen. PW1 did not mention that she was with any other person at the time, though PW2 said that he was present. Smashing of the windscreen having been the last straw, one would have expected the said windscreen to be produced in court or photographs of it.

23 PW2's testimony was not so clear as to what the appellant told the complainant. The testimonies of PW1 and PW2 were so vague as to the occurrence of the day. For example, neither PW1 or PW2 told the court at what time of the day the incident occurred. Whereas PW1 says she built the house, PW2 said it is the appellant. It would have been helpful if the prosecution led PW2 to tell the court exactly what he saw.

24 Having found that there was bad blood between the complainant and appellant over ownership of land, it seems that what occurred was some disturbance that was likely to cause a breach of the peace. It was not even established that any windscreen was broken because the vehicle was not photographed and availed in court. In brief, I will come to the conclusion that the 1st charge of threat to kill was not proved to the required standard.

25 The appellant was charged with two charges which arose from the same facts. This is multiplicity. Multiplicity arises from charging of a single criminal act or offence as multiple separate counts. It may result in violation of an accused's rights under Article 50(2) (g) of the *Constitution*. The first charge was threating to kill and the second, was charged with offence of creating disturbance that was likely to result in a breach of the peace . Again the evidence in support thereof was very vague. PW1 said that the appellant was using abusive language. The words used by the appellant were not disclosed. Telling the complainant that she had many husbands cannot amount to creating a disturbance.

26 For an offence of creating disturbance under Section 95 (1) of the *Penal Code* to occur, the victim must be apprehensive that some harm may be done to her/him by the offender's actions.

27 In the end, I find that the potentially admissible evidence on record, would not result in a conviction, and for that reason, I will not order a retrial. The appellant is acquitted of the charges and is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF APRIL, 2023.

R WENDOH

JUDGE

In presence of ;-

Ms Kosgei for State

Appellant present in person

Ms Nyauke –Court Assistant