Mugoh v Republic (Criminal Appeal E025 of 2022)
[2023] KEHC 23879 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23879 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E025 OF 2022

LM NJUGUNA, J

OCTOBER 18, 2023

BETWEEN

TISIANO COSMAS MUGOH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising from the decision of Hon. D.C. Endoo (RM) in the Chief Magistrate's Court at Embu Criminal Case No. E012 of 2022 delivered on 15th March 2022)

JUDGMENT

1. The appellant, being dissatisfied with the ruling the abovementioned decision, has sought the following orders:

   a. That the appeal be allowed;

   b. That the ruling be set aside;

   c. That the evidence of PW1 be expunged from the court record as the same is inadmissible;

   d. That the evidence of PW2 be struck out of the court record;

   e. That a declaration be made that the entire proceedings in Embu Criminal Case No. E012 of 2022 are unconstitutional, illegal, null, void and a nullity for being conducted contrary to *the constitution* and Sections 127(1) and 130 of the *Evidence Act*;

   f. That Hon. D.C. Endoo (RM) recuses herself from Embu Criminal Case No. E012 of 2022;

   g. That the trial file be returned to the Chief Magistrate for reallocation to a different magistrate;

   h. That in the alternative, this court do order that the case do start afresh ensuring that all the objections of the accused are well noted on the court's record; and

i. Any other order that the court shall deem fit.

2. The grounds of appeal are that the learned Magistrate erred in law and fact by:

   a. Finding that the application not to proceed with the hearing cannot be entertained;

   b. Finding that the accused was supplied with the K-Rep Bank Account Opening Form but misplaced its copy when it was clear from the court's record that the document was not supplied;

   c. Illegally ordering the accused to request the prosecution to supply him with the K-Rep Bank Account Opening Form within 2 hours;

   d. Finding that the accused's right to fair trial must be protected but failed to allow his application not to proceed with the hearing;

   e. Illegally ordering that the matter proceed at 12:30pm even when the accused did not have the document complained of which violated the rights of the accused under Article (50)(2)(c) and (j) of *the Constitution*;

   f. Giving the accused 2 hours to prepare his defense contrary to Article (50)(2)(c) and (j) of *the Constitution*;

   g. Failing to record that the accused asked her to recuse herself from the proceedings;

   h. Failing to find that the committal documents which the prosecution supplied to the accused were not accompanied by an inventory/list of documents;

   i. Failing to recuse herself from the proceedings in order to allow the accuse to appeal against her ruling;

   j. Failing to record the objection by the accused that the evidence of PW1 and PW2 was inadmissible;

   k. Illegally admitting eh evidence of PW1 and PW2 contrary to Sections 127(1) and 130 of the *Evidence Act*;

   l. Allowing the testimony of PW2 even though she did not record any statements with the DCI; and

   m. Adjourning the proceedings for only two days.

3. The respondent filed a replying affidavit stating that when the matter came up for hearing on 15th March 2022, the appellant submitted that he was not ready to proceed as he had not been given all the documents he needed. The respondent's record showed that the appellant had been supplied with the document and had acknowledged receipt of it. That the court considered this request and ordered the matter do proceed. That the appellant cross-examined PW1 but stated that he questions the credibility of PW2 as she is his wife and therefore her testimony would be inadmissible. That appellant has been trying to frustrate the hearing by all means.

4. This appeal was canvassed by way of written submissions and both parties filed their submissions.

5. The appellant submitted that the trial magistrate ought to recuse herself from the case because she took the evidence of PW2 which is inadmissible and therefore null and void ab initio. That the trial court lacks jurisdiction to hear the matter as the evidence of PW1 is inadmissible in light of Article 50(2) of *the Constitution* and Section 231 of the *Criminal Procedure Code*. He relied on the cases

of *Mega Progressive Peoples Parrty v IEBS & 3 Others* (2015) eKLR, Republic v Pacificah Kenyansa Samuel & 3 Others (2016) eKLR and *R. v Mercy Chepchumba Kosgei* (2020) eKLR. That the court lacks jurisdiction because the inventory filed by the respondent is a forgery as some items listed therein have been cancelled and overwritten making it invalid. For this argument he relied on the cases of *Republic v Mark Lloyd Sterenson* (2016) eKLR, *Ndolo v Mwangi & 2 Others* (2010) 1 KLR 372 and *Ndungu v Republic* (1985) eKLR. That the court did not expressly name the document that is alleged to be missing and therefore the proceedings are null and void. That the testimony of PW2 cannot be admitted as she is the appellant's wife and this contravenes section 127(4) of the *Evidence Act*. That the trial magistrate is incompetent and therefore unable to carry on with the proceedings.

6. The respondent submitted that they exercised their responsibility under Article 50(2)(j) of *the Constitution* and referred to the case of *Thomas Patrick Gilbert Cholmondeley Vs Republic* (2008) eKLR where the court discussed the right of an accused person to be supplied with all the materials that will be relied upon by the prosecution. That the appellant was given sufficient facilities to prepare his defense but in this case the appellant is working hard to delay or in any way avert the trial. They cited the case of *Dennis Edmond Apaa & 2 Others v EACC & Another* (2012) eKLR. That the appellant cannot allege that PW2 is his wife as there is no proof of such marriage within the meaning of Section 55 of the *Marriage Act* No. 4 of 2014. On the question of whether the magistrate should recuse herself, they cited the case of *Kamande & 3 others v Republic* (2004) eKLR and stated that the appellant has not given solid reasons for recusal or disqualification of the trial magistrate.

7. The issues for determination are:

   a. Whether the case should start de novo because the appellant was not allegedly supplied with all the materials he needed for his defense;

   b. Whether the trial magistrate should recuse herself;

8. I have read the impugned proceedings and noted that the trial magistrate expressed herself clearly and, in many words, explaining the obligations of the court and the reasons why the proceedings will not be halted. She acknowledged that the appellant was supplied with all the documents he required from the prosecution and there was evidence to show for this. She explained that the court is strictly accountable for judicial time in the interest of the general public and not just the appellant alone. The trial magistrate noted on the record that the appellant had tried on several attempts to have the proceedings stall and the court accommodated him.

9. The question of jurisdiction of the trial court has been raised by the appellant and arguments made on several grounds. The jurisdiction of the trial court is well settled under Section 7 of the *Magistrates' Courts Act* and I find no merit in that argument. The appellant argued that the testimony of PW2 was inadmissible but the same was admitted into evidence by the trial magistrate. He added that this is a reason to start the case de novo, a reason to strip the court of its jurisdiction and also to ask the magistrate to recuse herself. In my view, his arguments on this point do not hold any water.

10. On the issue of inadmissibility of PW2's evidence, if the witness is a spouse of the appellant, the court is simply guided by section 55 of the *Marriage Act* and Section 127 of the *Evidence Act*. Marriage is a matter of fact and can be proved through evidence. In this case, the appellant has not proved that PW2 is his wife. The question is; does this call for a case to start afresh? In my view, no, it is not sufficient reason and to do so will be to misappropriate precious judicial time and offend Article 159 of *the*

Constitution which expects the courts to serve justice promptly. In the case of *Stephen BoroGithiavs Family Finance Building Society & 3 others* Civil Application No.Nai 263 of 2009 it was held that:-

> "....A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all cobwebs hitherto experienced in the civil process and to wed out as far as practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution disputes in a just, fair and expeditious manner...."

11. On the issue of whether the trial magistrate should recuse herself from the proceedings, the grounds for recusal should be well founded and must not be loosely speculated. Bias is the major reason for recusal and in this case, no bias has been alleged or proved. In the cases of *Charity Muthoni Gitabi v Joseph Gichangi Gitabi* (2017) eKLR and *Kalpana H. Rawal V. Judicial Service Commission and 2 others* (2016) eKLR, the Court of Appeal held;

> "An application for recusal of a Judge is a necessary evil. On the one hand, it calls into a question the fairness of a judge who has sworn to do justice impartially, in accordance with *the constitution* without any fear, favour bias, affection, ill will, prejudice, political, religion or other influence. In such applications, the impartially of the Judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the Judge is all too human and above all *the constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial Judge. When reasonable basis for requesting a Judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of the 2 evils. The alternative is to risk. Violating a cardinal guarantee of *the constitution*, namely the right to a fair trial, upon which the entire judicial edifice is built. Allowing a Judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by independent and impartial court ....."

12. This position was also held in the case of *Philip K. Tunoi & Another Versus Judicial Service Commission & Another* (2016) eKLR, where the Court of Appeal held;

> "In determining the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who will adopt a balance approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or suspicious in determining whether or not there is real possibility of bias."

13. I do note that the appellant has raised a host of issues but it all boils down to these two: jurisdiction and recusal. In my view, there are no sufficient grounds on the basis of which this court can allow these prayers as the trial court record sufficiently paints the picture to me, of what the reality looks like in this case. The appellant has duly been supplied with the necessary documents to enable him prepare his defense but he is not satisfied with the proceedings going on expeditiously. In my view, the trial magistrate is simply doing her job of dispensing justice, and very well at that.

14. In the end, I find that the appeal lacks merit and is hereby dismissed. The trial shall proceed from where it had stopped in the trial court.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

....for the Appellant

....for the Respondent