Sirengo v Republic (Criminal Appeal 101 of 2022)
[2024] KEHC 12925 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12925 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 101 OF 2022

AC BETT, J

OCTOBER 4, 2024

BETWEEN

KEVIN SIRENGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment and conviction of Hon C. N. NJALALE (SRM) dated 14th February 2022 in Butali Criminal Case No 84 of 2022)

JUDGMENT

1. The Appellant Kevin Sirengo was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act. The facts of the case were that on 22nd October 2022 at [Particulars Withheld] within Kakamega County, he intentionally caused his penis to penetrate the vagina of A.M.Y. a child aged 15 years old.

2. The Appellant was convicted on his own plea of guilty and sentence to a term of 12 years imprisonment. The Appellant was aggrieved by the conviction and sentence and filed an appeal in which he faulted the trial court for its sentence which he terms as harsh and excessive. According to him, the trial court failed to consider his mitigation and age and the fact that he was remorseful. The Appellant also contends that the trial Magistrate grossly misconducted himself in that he did not accord him a fair trial as enshrined in Article 50 of *the Constitution*.

3. The Respondent does not oppose the appeal. It submits that the procedure and manner in which the plea was taken was not in accordance with the procedure set forth in the case of Moses vs. R (200)1 EA 163 where the Court of Appeal stated :-

> " The procedure for calling upon an accused to plead required that the accused admits to all the ingredients of the offence charged before a plea of guilt could be entered against him.

> The words it is true standing on their own did not constitute an unequivocal plea of guilt. It was established that every constituent ingredient of the charge be explained to the accused so that he should be required to admit or deny every constituent."

4. The Respondent states that the above requirement is over and above the procedure laid down in the case of Adan vs. R. further quoting Ngugi J in Simon Gitau Kinene vs. Republic (2016) eKLR where he stated as follows:-

> " I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal. It shall be even more so when the accused faces a serious charge capable of attracting a custodial sentence."

5. On the date the Appellant was convicted, he informed the court that he wished to plead guilty. The court record indicates that the substance of the charge and the particulars thereto were read to the Appellant in Kiswahili language to which he replied ;- "Ni ukweli", upon which a plea of guilty was entered against him. The matter was then adjourned to the next day for facts. The next day, the Appellant maintained his plea of guilt and when the facts were read over to him, he replied :- "Maelezo ni ya ukweli". The trial court then convicted the Appellant on his own plea of guilty and proceeded to sentence him after taking his mitigation.

6. It is against the backdrop of the aforesaid proceedings that the Respondent faults the plea taking process. Although the Appellant did not fault the plea taking process, he contends that he was not accorded a fair trial. Part of the components of a fair trial are found in the plea-taking process. If the process is flawed, then the Accused suffers prejudice. In the present case, one cannot tell to which particular statement of facts the Appellant was pleading guilty. In the premises, the issue can only be left to conjecture.

7. In the case of George Wambugu Thumbi vs. Republic [2019] eKLR cited by the Respondent, the court held as follows:-

> " It is time that when an accused person responds it is true to a charge read to him or her to be asked what exactly he is saying is true to"

8. The Respondent submits that where an Accused is unrepresented, great caution must be taken on how the plea is taken. Part of the caution is ensuring that the language used is recorded, the answer given by the Accused is recorded in the exact words, every constituent of the charge is answered by the Accused, and, where the offence attracts a custodial sentence then the Accused should be warned of the same.

9. From the records, no inquiry was made as to what the Appellant was pleading to and the constituents of the charge were not explained to the Appellant. Neither was the Appellant asked to state his position on each of the constituents of the charge nor was he warned of the consequences of pleading guilty to the charge of defilement for the Accused was a youth aged 21 years old and unrepresented. It is therefore apparent that the plea of guilty was not unequivocal and the subsequent conviction and sentence are not safe. The conviction and sentence are hereby quashed and set aside.

10. The Respondent has urged the court to order for a re-trial. The circumstances under which a retrial can be ordered depends on the circumstances of each particular case. Nonetheless, it must be demonstrated

that the Accused shall not suffer prejudice as a result of the retrial. In the case of Pius Olima vs. Republic [1993] eKLR, the Court of Appeal stated as follows:-

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar v Republic, (1964) EA 481; Manji v The Republic, (1966) EA 343; Mujimba v Uganda, (1969); and Merali and Others v Republic, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case. "

11. The courts have severally held that in ordering a retrial, the court should consider factors such as illegalities or defects in the original trial as well as the length of time that has lapsed since the arraignment. It is also incumbent on the court to consider whether the mistakes that led to the mistrial were entirely the prosecution's making or not. See the cases of Muiruri vs. Republic (2003) KLR 522 .

12. The Court of Appeal in Mwangi vs Republic (1983)KLR 522 laid down another test to be applied in determining whether a court should order a retrial upon quashing a conviction. The Court stated thus :-

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the Appellant."

13. As submitted by the Respondent, the charges facing the Appellant were serious and he was sentenced to serve 12 years imprisonment. From the facts elucidated by the prosecution and the exhibits tendered being the age assessment reports, treatment notes, form PRC and P3 form, the prosecution had a good case against the Appellant which has high chances of a conviction. The charges are two years old so the witnesses must still be available, the Appellant has been in custody for less than two years and shall not suffer any prejudice by reason of a retrial.

14. In the case of Mohamed Osman Haji vs. Republic [2023] KEHC 26498 (KLR), the court ordered a retrial for an Appellant who faced charges for the offence of defilement that was alleged to have been committed one year and three months before the quashing of the conviction.

15. This court is guided by the foregoing authorities and holds the view that in the interest of justice, a retrial is imperative in this case. The court therefore directs that the matter be placed before a magistrate of competent jurisdiction except Honourable C.N. Njalale for retrial.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF OCTOBER 2024.

A. C. BETT

JUDGE

In the presence of:

Appellant in person virtually

Ms. Chala for State

Court Assistant: Polycap