REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 38 OF 2019

REPUBLIC..APPELLANT

VERSUS

KARISA KENGA KALIWI...RESPONDENT

(Appeal against the ruling and acquittal by Hon. Nyawiri (SRM) delivered on 8th February 2018 in Malindi Criminal Case No. 363 of 2011 at Malindi Chief Magistrates Court)

CORAM:

Hon. Justice R. Nyakundi

Ms. Sombo for the state

A. M. Omwacha Advocate for the respondent

JUDGMENT

The appellant herein, the Director of Public Prosecution filed an appeal against the respondent challenging his acquittal on the following charges:

a). Stealing contrary to Section 275 of the Penal Code.

b). Making a false document without authority contrary to Section 357 of the Penal Code.

c). Giving false information to a person employed in the public service contrary to Section 129 (a) of the Penal Code.

d). Personation contrary to Section 382 (1) of the Penal Code.

e). Obtaining registration by false pretense contrary to Section 320 of the Penal Code.

f). Personation of a person named in a certificate contrary to Section 384 of the Penal Code.

At the trial of the respondent the prosecution summoned four witnesses to discharge the burden of proof of beyond reasonable doubt in all the charges facing the respondent.

Having considered the evidence by the prosecution and the defence the trial Magistrate made a finding in his Judgment that none of the offences was proved to the required standard of proof of beyond reasonable

doubt.

As a consequence, the respondent was acquitted for any breach of the Penal Code. Being aggrieved with the decision, the Director of Public Prosecution lodged an appeal on the following grounds:

> ***1). That the Learned trial Magistrate erred in Law and fact by acquitting the respondent despite the weight of evidence by the prosecution witnesses.***
>
> ***2). That the Learned trial Magistrate erred in Law and fact by misapplying the Law and facts therefore arriving at a wrong decision.***

The appellant submissions on appeal

On behalf of the state Senior prosecution counsel **Ms. Mathangani** appraising the evidence in the court below argued in her submissions under Article 50 (1) of the Constitution and generally violations on to fair trial rights which the Learned trial Magistrate denied the appellant an opportunity to be heard on merits. In support of this propositions Learned prosecution counsel cited the authorities of **Charo Karisa Salimu v R Criminal Appeal No. 499 of 2010.** The persuasive authorities from the Canadian Supreme Court in **R v Martin 1992 SCR Jordan v R SCC 27 of 2016** The point emphasized by the appellant counsel was to the effect that the exercise of discretion by the trial Magistrate was tainted with illegality and thereby denying the appellant an opportunity to present the case against the respondent.

The respondent submissions

Mr. Omwacha, counsel for the respondent gave a procedural history of the trial and urged the court to find that the prosecution lost the case because the burden of proof as stated in **Woolmington v DPP AC 1935** was not discharged beyond reasonable doubt. It was the case for the respondent counsel submissions that the state had all the resources and machinery to obtain all the relevant evidence before, within and without during the trial but they failed to do so until the conclusion of the case. That lost opportunity has not been explained by the appellant argues counsel. For this proposition he placed reliance on the case of **Kihara v R [1986] eKLR, Keter v R [2007] EA 135.** Learned counsel invited the court to dismiss the appeal.

Analysis and determination

The right to a fair trial under Article 50 of the constitution is absolute. The duty of the court under Article 50 (c) of the constitution is to effectuate the greater purpose of the constitution on fair trial rights. Whatever the purpose to be achieved under Article 50. Provisions on speedy trials and for the accused to be tried within a reasonable time courts must seek to give effect to both the letter and spirit of procedural and substantive law. This constitution being the Supreme Law of the Land further provides under Article 159 (d) justice shall be administered without undue regard to procedural technicalities. (2) and the purpose and principles of this constitution shall be protected and promoted.

On the whole the court's jurisdiction under Article 50 (1) of the Constitution must in exercise of its discretion obtain a fair trial both to the prosecution and the accused person.

The above reasoning has been adopted by several courts with the sole purposes to strike a balance between the right of an accused person with that of the state through the functions that the DPP under Article 157 (11) of the constitution. In all these, the trial court must not derogate the provisions of Article 50 on the right to a fair hearing.

The Jamaican case of **Mervin Cameron v Attorney General of Jamaica {2018} JMFC full 1** at paragraph 237 constitutes the nature of substantive right to a fair trial as follows:

> ***"The right to a fair trial is absolute, whatever the methods used in the trial process and any necessary safeguards employed, the sum total of the exercise must be that the trial was fair, for***

any result adverse to an accused person to be upheld."

Applying the same principle the English Court in **R v Sussex Justice,** exparte **Mc Carthy {1924} 1GB256 Lord Hewart** with reference to the well known statement held inter alia:

> ***"That justice should not only be done but should manifestly and undoubtedly be seen to be done."***

The right to equality of arms in adversarial proceedings under Article 50 as read with Article 27 on equality and freedom from discrimination presupposes the following elements:

- ***That the accused is presumed innocent until the contrary is proved.***
- ***Secondly, that criminal justice objective is to punish crime for the interests of society and victims of the offence.***
- ***Thirdly, the Director of Prosecution in terms of Article 157 (10) of the Constitution shall be solely responsible for ensuring the fairness and integrity of the process to prepare the witnesses and other documentary evidence in support of the charge against an accused person.***

Thus, courts in guaranteeing minimum rights under Article 50 are enjoined to observe the doctrine on equality of arms. The constitution and international Instruments, more specifically **the African Commission on Human and Peoples Rights in Avocatis Sans Frontiers, on behalf of Gaiten Bwanpanye v Burundi Communication No. 231 of 1999 held:**

> ***"That the right to a fair trial involves fulfillment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this it called for by the interest of justice, as well as the obligation on the part of the courts and tribunals to confirm to intentional standards in order to guarantee a fair trial to all. Further the commission added that the right to equal treatment by a jurisdiction especially in criminal matters means, in the first place, that both the defence and the public prosecution shall have equal opportunity to prepare and present their pleas and indictment during the trial."***

In determining the accused's rights to have his case heard and concluded within a reasonable time pursuant to Article 50 2 (E) of the Constitution; the persuasive authority in the case of **Dickey v Florida** adopted in the text principles of Constitutional Law by **Charles Kamau Law Africa at page 144 the court held:**

> ***"It appears that this court has stated that the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It appears that considerations must be given to at least three basic factors in judging the reasonableness of a particular delay, the source of the delay, the reasons for it and whether the delay prejudiced interests protected by the speedy trial clause."***

Placing this principle in context in the administration of criminal justice everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under Article 50(1) of the Constitution. The accused and the prosecution have minimum rights to adduce and challenge evidence under the same constitution.

The basic contention by the prosecution is that the Learned trial Magistrate termination of the case prematurely disregarded the principles of natural justice. The ultimate question I must ask and decide is whether the acquittal of the accused was safe and fair.

The issue to be determined is grounded in the case of **Sip Heng Wong Ng & Ng Ping Man v Queen {1987} 1 WLR 1356 [(1985)] MR 142** the court had this to say:

> ***"In a criminal trial, whether before a jury or before magistrates, it is a fundamental***

requirement of Justice that those called upon to deliver the verdict must have heard all the evidence. The evaluation of oral evidence depends not only upon what is said but how it is said. Evidence that may ultimately read well in a transcript may have carried no conviction at all when it was being given. Those charged with returning a verdict in a criminal case have the duty cast upon them to assess and determine the reliability and veracity of the witnesses who give oral evidence, and it is upon this assessment that their verdict will ultimately depend. If they have not had the opportunity to carry out this vital part of their function as judges of the facts, they are disqualified from returning a verdict, and any verdict they purport to return must be quashed."

The failure by the Learned trial Magistrate not to consider to exercise inherent jurisdiction and have the remaining witnesses including the investigating officer resulted in such unfairness of the proceedings. The weight of all evidence was given credence in the case of **Police v Poonoosamy {1986} MR 134,** the court considered that:

> ***"The concept of a 'fair trial' enshrined in Section 10 (1) of the Constitution cannot, in our view, be so interpreted as to require that the mode of proving conclusively a particular fact, though that fact may be a constituent element of an offence, must invariably take the form of oral evidence which the defence must be allowed to test by cross-examination."***

The ordinary rule is that the court in a realistic prospect of ensuring the right to a fair trial subject the discretionary bar the test is as stated in the case of **Jago v The District Court of New South Wales {1989} 168 CLR 23** where the court held:

> ***"The test of fairness which must be applied involves a balancing process for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial."***

In applying these principles to the instant case the exercise of power by the trial court to address procedural bias of delay should be considered in the context of proven or likely prejudice to the accused and the public interest who have a legitimate expectation to a fair, just, speedy and proportionate resolution of criminal case see Section 1(a) of the CPA. The most important issue raised by the appellant was the coercive nature by the Learned trial Magistrate to force her way to order for closure of the proceedings essentially contravening the right to a fair trial. It is not the right to a speedy trial which is an important component in the administration of criminal process. Other procedural mechanism in particular summoning and attendance of witnesses are essential guarantees to a fair trial.

The purpose and the object of constitutionalism requires the court not to upset the fundamental right at the expense of another secured and protected by the same constitution. In the case of **Hon. Ltd Saleh Khumba & Another v A. G. & other Constitutional Petition No. 16 of 2013:**

> ***"The entire constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other thus the rule of harmony, mile of completeness and exhaustiveness."***

It is therefore well settled that the admissibility of evidence as guided by both the Criminal Procedure Code and the Evidence Act should be adhered to for attainment of overall fairness in the criminal proceedings. The failure by the Learned Magistrate not to accord an opportunity to the prosecution to put forward the remaining witness or aid in facilitating the attendance was a serious defect which occasioned an injustice.

In other words, the execution of a judicial decision in a criminal trial which impairs the right of access to court is an infringement of the right to either the prosecution or accused to claim justice.

Article 27 (1) provides for equality before the Law. Every person is equal before the Law and has a right to equal protection and equal benefit of the Law. Article 47 on fair administration Act whatever methods

to be used by a trial court in favour of the accused on the right to a fair trial the necessary safeguards employed should not result in an injustice or prejudice to the victims or a prosecution standing in for the public interest, under Article 157 (11) of the Constitution.

The import of Article 50 (1) of right for every person to be heard in public hearing before an independent and competent tribunal is geared towards a right to have procedural rules applied in manner that promotes substantive justice.

In the instant appeal, the prosecution case was that the respondent **Mr. Karisa Kenga Kaliwi –** then an accused had committed various offences as stated in the charge sheet dated 7.6.2011. **Mr. Kenga** plead not guilty to the charges and was subsequently released on bail of Kshs.200,000/= with a surety of which culminate to attend trial unscheduled dates. From the record various trial dates were fixed by the court but a greater number of them aborted due to defence applications, either no counsel was present or the accused person not in attendance.

I further note that during the pendency of the trial, presiding Magistrate to the case ended up being transferred before conclusion of the trial. It is also not lost that though an accused person covenanted to abide by the bond terms as required by the court he did abscond on several occasions from the trial. When the Learned trial Magistrate exercised discretion to terminate the prosecution case. He failed to assess and determine the weight or effect of such prevailing circumstances which impacted on the trial being concluded within a reasonable time as deduced from the record as follows:

> ***1. The four witnesses had to give evidence and identified various documentary exhibits which were critical for the prosecution and to the defence.***
>
> ***2. That he failed to understand whether the many adjournments had fatigued the witnesses not to attend court.***
>
> ***3. That the delay of the trial which resulted into an order of last adjournment, though essential, was not exercised judiciously thus denying the prosecution and the respondent the much needed evidence to achieve fair administration of justice.***

In those circumstances victim participation in criminal law proceedings being fundamental under Article 47 of the Constitution and due process was violated.

At this stage the test, include asking the question whether the evidence is such that, if believed and properly admitted, it could reasonably be expected to have affected the result of the trial?

The graveman of it is the unfairness occasioned both to the prosecution and the defence deprived them of the opportunity to be heard on the merits.

In the above circumstances this is one of the rarest cases where the interest of justice and the public interest for that matter would be served by allowing the appeal.

The principle in the case of **Reid v The Queen {1980} AC 343** sums it all where **Lord Diplock** stated:

> ***"Any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interest of justice require that he should do so."*** See also the principles in the cases of **George Karanja Mwangi & Others v R CR Appeal No. 132 of 1983, Mohammed Rafig v R CR Appeal No. 56 of 1983.**

In my view, the crux of this matter is the purported documents which point to a reasonable hypothesis that the complainant lost his personal academic testimonies and national identity card, subject matter of the indictment in **CR Case No. 363 of 2011**. It is in these circumstances that the appellant and respondent both set to show the precise information as to the offence alleged against him. This did not happen

because the Learned trial Magistrate on his own motion terminated the prosecution case prematurely. There is merit on the issues raised by the appellant.

Looking at the length of the delay, as cited to be the cause of non- attendance of remaining witnesses, the record is clear that the respondent also contributed by absenting himself on various scheduled trial dates.

Further, the ability to mount a successful prosecution was inherently affected by series of transfers of the presiding Magistrates to the proceedings. In exercise of discretion by the Learned trial Magistrate to refuse a further adjournment sought by the prosecution was oppressive and punitive in nature in view of the unique and prior history of the case.

Accordingly, the dismissal order of the indictment is hereby set aside and substituted with a direction of a retrial before another Magistrate to be heard and determined on a priority basis but not more than thirty (30) days from the days of commencement of the trial.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Omwancha for the respondent

2. Karisa Kenga Kaliwi – The respondent

3. Ms. Sombo for the state