Ndege v Republic (Criminal Appeal E045 of 2024)
[2025] KEHC 13917 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13917 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E045 OF 2024

WM MUSYOKA, J

OCTOBER 3, 2025

BETWEEN

PETER NDEGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment and decree of Hon. Ann Karimi, Senior Resident Magistrate, SRM, in Port Victoria SRMCCRC No. E116 of 2023, of 17th September 2024)

JUDGMENT

1. The appellant had been charged, before the primary court, of the offence of causing grievous harm, contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya. The particulars were that on 8th June 2023, at Sifungwe, in Bunyala Sub-County, within Busia County, he, jointly with Ann Ndinda, and another still at large, caused grievous harm to Paul Nyani Onyingi.

2. He pleaded not guilty to the charge, and a trial was conducted. 6 prosecution witnesses testified. The complainant, PW1, Paul Nyani Onyingi, testified to being assaulted, at the material time, by the appellant and his co-accused, Ann Ndinda. PW2, John Wandera, testified to finding the appellant and the other calling for petrol, to set the appellant alight. The appellant was at the scene, with a broken left hand and right leg. It was PW2 who took PW1 to hospital. PW3, James Okelo Barasa, a village elder, was informed by the appellant, a fellow village elder, that PW1 had been caught stealing. PW3 contacted PW2, a brother of PW1, and the 2 went to the scene, where they found the appellant and the other, and PW1. PW1 was on the ground, badly injured, while the appellant and the other were shouting that petroleum be availed, to burn PW1. It was him, PW3, and PW2, who took PW1 to hospital.

3. PW4, Edwin Odundo Okubo, was attracted by the commotion at the home of Ann Ndinda, and, when he rushed there, he found PW1, who told him he had been badly hurt. He found many people

there, including the appellant and his co-accused. PW5, Loice Barasa, was the clinician who attended to PW1. PW6, No. 125782, Police Constable Timothy Orenge, investigated the matter.

4. The appellant and his co-accused were put on their defence. Ann Ndinda, as DW1, made a sworn statement. She stated that it was PW1 who had stormed her home, with an intent to beat her up. She raised alarm, responders came, and assaulted PW1. She testified that the appellant was among them, and he tried to restrain the crowd from harassing PW1, but members of the public turned against him. She asserted that it was a case of mob justice. The appellant testified as DW2. He said that he had heard commotion from the home of his co-accused, and when he went there, he found PW1 being beaten by members of the public. He called PW3 to come to his rescue, and his brothers came and took him away. He asserted that he did not assault PW1.

5. In its judgment, the trial court framed 3 issues: whether PW1 suffered grievous harm, whether the same was caused unlawfully, and whether the appellant caused the harm or participated in the causation. The court found that PW1 suffered grievous harm, the injury was inflicted unlawfully, and that the appellant was complicit in the causation. The trial court found the appellant guilty as charged, and convicted him. He was subsequently, sentenced to serve 5 years in jail.

6. The appellant was aggrieved, and brought the instant appeal, founded on several grounds: violation of Article 50(2) rights, the investigations into the matter being inadequate, option of fine not being considered, alibi defence not considered, and the trial court being externally influenced and manipulated.

7. The appeal was canvassed by way of written submissions, filed by the appellant. On violation of Article 50(2), he cites Kimanyi Ndung'u vs. Republic [1979] KLR 282 [1979] KECA 5 (KLR) (Madan, Miller & Potter, JJA), to argue that, as an administrator, his role was to give direction, where a perceived crime had been committed, which he had done. He also submits that the investigations did not establish a case against him. He also submits that PW1 was a victim of mob assault. He also submits that his alibi defence was not considered, and relies on Karanja vs. Republic [1983] KLR 501 [1983] eKLR [1983] KECA 35 (KLR) (Hancox JA, Chesoni & Platt, Ag JJA).

8. On violation of Article 50(2) of *the Constitution*, the appellant does not state which particular rights had been violated. However, it is the duty of the trial court to ensure scrupulous compliance with what that provision requires, with respect to fair trial rights of accused persons. The said rights are numerous, and they include right to bail/bond, being informed of right to legal representation of one's own choice, being allocated a State Advocate in suitable cases, being furnished with the prosecution evidence in advance, being afforded facilities to prepare defence, being afforded opportunity to confront accusers, being provided with an interpreter where the accused is not familiar with the language of the court, among others.

9. Strict compliance with fair trial principles is a fairly recent development in the Kenyan jurisprudence, which gathered momentum immediately prior to the enactment of the new Constitution, and reached its climax with the new Constitution. A court, taking plea, should configure the exercise in such a way as to ensure that it complies with what is required, by Article 50(2), through informing the accused person of his rights, where *the Constitution* requires that; considering whether to admit him to bail/bond, regardless of whether he has asked for it; ensuring that there has been pre-trial disclosure of the prosecution evidence, among others.

10. I have perused the record herein. I see that the appellant was admitted to bond, which was processed. However, I note that the trial court did not address itself to the rights in Article 50(2). It did not enquire into the language that would have been comfortable for the appellant. The record is silent on whether there was communication to the appellant on his right to legal representation. There was equally no

communication or consideration on whether he required such representation, and if he was indigent, and whether he merited representation at State expense. The record is also silent on whether he was ever furnished with the prosecution evidence ahead of his trial.

11. I am aware that some courts hold the view that the issue of violation of fair hearing rights should count only where the appellant complains of them, and alleges and demonstrates prejudice arising from any non-compliance. I do not agree with that view. These are rights granted by *the Constitution*. The accused person does not have to claim them. They are integral to a fair trial. Where they are absent, whether an issue had been raised about them or not, the trial would be bereft of fairness. Indeed, the language of Article 50(2) casts a duty, with respect to some of them, on the part of the court, particularly those that require the accused to be informed of something. He does not have to raise it, for the court to inform him of it. The court is obliged to convey the information. For some, the trial court is bound to satisfy itself that there is compliance, before it commences the trial in earnest. Disclosure of prosecution evidence in advance, for example, is one such.

12. It would have been a different case, if Article 50(2) of *the Constitution*, did not exist, for section 382 of the Criminal Procedure Code, Cap 75, Laws of Kenya would cure any defects in the process. Section 382 provides that no decision of a criminal court is to be reversed or altered on appeal or revision, on account of an error or omission or irregularity in any of the filings and processes, unless the error or omission or irregularity has occasioned a failure of justice, after considering whether the objection could or should have been raised at an earlier stage in the proceedings. See Peter Ngure Mwangi vs. Republic [2014] KECA 405 (KLR) [2014] eKLR (Nambuye, Maraga & Mohammed, JJA). However, section 382 of the Criminal Procedure Code cannot be a remedy for curing non-compliances with Article 50(2) of *the Constitution*.

13. Strict observance of these constitutional dictates is important. Criminal proceedings or prosecutions have profound consequences, upon conviction. Deprivation of property, by way of fines, restitution, compensation, forfeiture, among others. Loss of liberty, taking the form of imprisonment or detention. There is also the spectre of loss of life, for the death penalty is still a punishment under this jurisdiction. See Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ).

14. The effect of these punishments or sanctions is derogation from the constitutional rights to property, liberty and life. The taking away of constitutional rights and freedoms can only be on the basis of very strong grounds, backed by concrete evidence, and in a process that is fair and transparent. Article 50(2) sets out the background or framework, upon which justification could be found, for taking away those rights, by way of ensuring that there is access to justice, and fairness in the process, through which those rights could be taken away.

15. I am not persuaded, that the trial court was alive to the duty cast on a court, conducting a criminal trial, by Article 50(2), with respect to fair trial rights. The court addressed itself to just a few of these rights; that is bail/bond, the right to confront accusers and the right to present a case in defence. The majority of the rest were not considered. The trial court did not enquire into the language that the appellant was comfortable using at trial. It did not inform him of his right to legal representation of his own choice. It did not inquire into whether the case was suitable for the appellant to have legal representation provided at State expense, after informing him of his right to such representation, after enquiring to whether he was indigent or not. It did not enquire into whether the prosecution had furnished him with the evidence, which would have enabled him to understand what the trial was all about, and to enable him prepare for his defence, inclusive of being armed with information to cross-examine the prosecution witnesses.

16. *The Constitution*, promulgated in 2010, is about placing the people at the centre, and about accountability and transparency. The Judiciary exercises judicial authority on behalf of the people, and for the benefit of the people. The courts exercise delegated authority on behalf of the people. The people include those who find themselves on the wrong side of the law, like the appellant in this case. They must be taken through a process that they understand. A process that they are capable of participating in. Not a process where they would be rank outsiders. Not a process, which is about them, but in which they have no role, or are not capable of playing any meaningful role.

17. The process has to be accountable and transparent. The prosecution process starts with the police receiving a complaint, which is then investigated. The results of the investigation form the basis for the prosecution and the trial. The material gathered in the course of the investigations, to be used in the prosecution and trial, must be made available to the accused person. That is what transparency is about. The accused should be able to access the material gathered against him, and which is intended to be used against him in the prosecution and the trial. It should not be of exclusive consumption by the police, the prosecution and the court. The case is about the accused. The material is on or about him. He should be its first consumer. So, it should be disclosed to him. That is what transparency and accountability is about. Accountability is also about how that information was collected, hence the need for the accused person to be given investigation diaries, and the for the court to scrupulously record compliance with Article 50(2). Anything short of that would not be transparent and accountable, and there would be a deficiency, which ought to vitiate the trial process, regardless of the strength of the case marshalled by the prosecution, in terms of the evidence presented.

18. Most of these provisions were designed to deliver justice to the poor in Kenya, that cohort of Kenyans who would have challenges navigating their way through an adversarial system of justice. For such, the hands-off approach, by the court, suitable in an adversarial system, to address certain issues only when invited by the parties, is not recommended by *the Constitution*. The court is required to descend into the fray, and educate the accused person on his rights in the trial process, and ensure that the other actors, in the system, provide the accused person with what he would require, for him to participate meaningfully in his own trial. An accused person is not, by any means, a spectator in his own trial. The trial is about him. What he is alleged to have done is the reason for it. He is at the centre of it. The trial court has to ensure that he plays a critical role, if he has no Advocate, to speak for him, and that he has all the facilitate that, to make his trial truly meaningful.

19. On the investigations being inadequate or inaccurate, I will start by stating that the trial court would not be concerned with investigations, whether they were accurate, reliable or shoddy. The court is only concerned with evidence gathered in those investigations. The trial is not an audit of the investigations, but of the evidence gathered and presented in court. The question would be whether such evidence is adequate to establish the charge presented. In view, of what I have discussed in the preceding paragraphs, on compliance with Article 50(2), I will refrain from discussing the strength or otherwise of the evidence adduced before the trial court.

20. On the alibi defence, the same is about the accused establishing that he was not at the scene of the alleged offence. The appellant placed himself at the scene, and so did the witnesses, including his co-accused. He could not possibly raise an alibi defence. His defence, if I understood him, was that he did not do it, and that others did it. That is a defence, however, it is not an alibi defence.

21. On sentence, I will start by stating that it is always at the discretion of the court, for the law has vested the court with discretionary powers on that. Exercise of discretion is dependent on the circumstances of each case. The injuries proved to have been sustained by PW1 militated against a non-custodial

sentence, and, upon conviction, no other form of sanction would have been commensurate with the harm caused on PW1, by the perpetrators of the offence.

22. On the court being externally influenced and manipulated against him, I find no evidence from the record. If there was external influence or manipulation, that would not be an issue to be established from the record, and it cannot possibly be dealt with on appeal.

23. My final conclusion is that the trial of the appellant did not meet the constitutional threshold, for the trial court did not address itself to the constitutional fair trial safeguards in Article 50(2) of *the Constitution*. To that extent, the trial was deficient and not fair. It would appear that there was enough evidence to support a conviction. However, the process of trial was as important as the substance of the case itself. Fair trial, in criminal cases, is about both the process and the substance of the case. Justice is not done, until the accused person is subjected to a fair process, whose prerequisites are detailed in Article 50(2). It is about constitutionalism and the rule of law.

24. Consequently, I hereby quash the conviction of the appellant, in Port Victoria SRMCCRC No. E116 of 2023. The sentence, imposed upon him, is hereby set aside. I hereby order a re-trial of the appellant, in which the fair trial rights, in Article 50(2), shall be strictly observed. That re-trial shall be conducted by a court differently constituted. The appellant shall be released from prison custody forthwith, and shall be handed over to the police, for the purpose of being presented to the Busia Chief Magistrate's Court for the re-trial. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 3RD DAY OF OCTOBER 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Peter Ndege, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.