Ita & another v Republic (Criminal Appeal E018 of 2024)
[2025] KECA 167 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KECA 167 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL E018 OF 2024

J MOHAMMED, JW LESSIT & A ALI-ARONI, JJA

JANUARY 23, 2025

BETWEEN

WILLIAM NGARI ITA ..... 1ST APPELLANT

ITA NGURU ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Embu (Njuguna, J.) delivered on 24th January 2024 in H.C.CRA No. E002 of 2023)

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court (Njuguna, J.) dismissing the appeal arising from Siakago Chief Magistrates Court Criminal Case No. 650 of 2020. William Ngari Ita and Cyrus Ita Nguru, the appellants had been jointly charged with another for the offence of causing grievous harm contrary to section 234 of the Penal Code. The appellants were found guilty and convicted of the lesser offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The 1st appellant was sentenced to three years' imprisonment, while the 2nd appellant was sentenced to a fine of Kshs.50, 000/= in default 12 months' imprisonment. He paid the fine.

2. Both appellants were aggrieved by the conviction and sentence and filed the first appeal to the High Court, which was dismissed. They have now appealed to this Court. Their memorandum of appeal lists 11 grounds of appeal, with the last two grounds having sub-paragraphs. These grounds are long-winded and repetitive and are framed contrary to rule 86 of the Court of Appeal Rules which demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. See Robinson Kiplagat Tuwei vs. Felix Kipchoge Limo Langat [2020] eKLR.

3. That said, we have summarized the grounds in the memorandum of appeal into four grounds. The appellants fault the learned Judge of the High Court of erring in law for failing to find:

   i. That the appellants were denied their rights to fair trial under Articles 24 (1), (2), 3) 25 (C), and 50 (2) of *the Constitution* of Kenya;

   ii. That section 211 of the Criminal Procedure Code was violated when the trial court declared the appellants' defence closed without hearing them through their preferred mode of defence;

   iii. The trial court's failure to comply with section 211 denied the appellants the opportunity to adduce and challenge the prosecution's evidence thus contravening the Appellants' rights to fair trial under Article 50 (2)(k) of *the Constitution* of Kenya;

   iv. The trial court's failure to give appellants a chance to instruct another advocate or afford their advocate the opportunity to defend them virtually denied them adequate time and facilities to effectively prosecute their defence as guaranteed by *the Constitution* of the Kenya.

4. A brief background of the case before the trial court is that the appellants were charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 11th September 2020, they caused grievous harm to Mike Njunja Mugo, PW1 in the case.

5. PW1 told the court that on the material day, he was working on his farm with his workers transplanting onions and had lit a fire to burn the stumps. Simultaneously, the neighbouring farm owned by the 2nd appellant was engaged in similar activity and were also burning stumps. The court was informed further, that the fire at the 2nd appellant's farm got out of control, prompting the complainant and his farmhands to go to the neighbor's land to help put out the fire. While there, the complainant and his workers were attacked by the appellants, who beat them with sticks and pangas. The complainant suffered two deep cuts on the head, cuts to the left hand, and an injury to the left eye.

6. The evidence of PW1 was corroborated by PW2, the complainant's farm manager who was in his company when he and others went to the appellants' farm to help put out the fire and wound up being attacked. He testified that the complainant was beaten by the appellants using a panga. That he, PW2 fled the attack, called PW1's wife to the scene and that she, PW4 managed to take PW1 to the hospital. PW5, a brother of PW1 was working at a different part of the farm and received the information of the attack from PW2.

7. The Medical Officer who filled the P3 form testified as PW3 and confirmed that the complainant suffered an assault, which resulted in a deep cut wound on the head, a cut on the left ring finger, and bruising on the arm. The probable weapon was described as sharp. He classified the degree of damage as grievous harm.

8. When the appellants were placed on their defence, they sought an adjournment as their advocate, Mr. Gachuba was engaged in another court. The file was placed aside to allow them get him. However, the matter did not proceed and was adjourned to give the defence more time. The defence filed an application in the high court seeking to have the matter transferred from Siakago Law Courts, but since no stay of the proceedings was granted, the trial court directed the appellants to proceed to give their defence before the outcome of their application. The appellants chose not to give their defence, and the trial court marked the defence case as closed and proceeded to deliver judgment on the 13th February 2023. The trial court convicted the appellants of the offence of assault causing actual bodily harm, instead of the offence of grievous harm as originally charged.

9. On 21st February 2023, after considering the mitigation by the appellants and pre-sentence reports, the trial court sentenced the 1st appellant to serve 3 years imprisonment while the 2nd appellant was sentenced to a fine of Kshs.50,000 or in default serve 12 months imprisonment. The 3rd accused was acquitted due to lack of evidence against him.

10. Being aggrieved with the decision of the trial court, the appellants filed Embu HCCRA No. E002 of 2023 stating that they were denied a fair trial because they were not given adequate time to prepare their defence; that the court was not impartial and that they did not have representation nor adequate time to prepare a defence. They also stated that the prosecution case was not proved to the required standard and the sentence meted on them was harsh.

11. The prosecution opposed the appeal. The High Court delivered judgment on 24th January 2024 and dismissed the appeal in its entirety, upholding the conviction and confirming the sentence.

12. The appellants were aggrieved with the judgment of the High Court and are now before us with this second appeal.

13. We heard the appeal through the GoTo virtual platform on 11th December 2024. There was no appearance by learned counsel Mr. Nyamweya for the appellants despite service with the hearing notice on 19th November 2024. The 1st appellant was present and insisted on proceeding with his appeal in person. He also informed us that the 2nd appellant was his father and had paid the fine. Mr. Solomon Naulikha, Senior Assistant Director of Public Prosecutions was present for the State. The appellant relied on the submissions filed on his behalf by Mr. Nyamweya dated 3rd day of December, 2024 and Mr. Naulikha relied on his submissions dated 5th December 2024.

14. We have considered the appeal by the 1st appellant, hereinafter the appellant. The appeal by the 2nd appellant was considered as abated for non-appearance. We have also considered the submissions by both the appellant and the State and the cases cited by both, as well as the record of the appeal.

15. This being a second appeal, our mandate arises from section 361(1) of the Criminal Procedure Code that was well reiterated by this Court in the case of ENL vs. *Republic (Criminal Appeal 11 of 2020)* [2022] KECA 736 (KLR) where the Court stated:

> "Our mandate on a second appeal like this one is limited by Section 361 (1)(a) Criminal Procedure Code to consider only issues of law, if any, and we are obligated in law to resist the temptation to consider matters of fact which the trial court considered and arrived at findings which the first appellate court re- evaluated – and dismissed the appellant's first appeal."

16. As stated earlier, our mandate on second appeals is on matters of law only. We rely on the decision of the Supreme Court in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 3 Others [2014] eKLR where the Court set out three elements of the phrase "matters of law" as characterized as follows:

> "a. the technical element: involving the interpretation of a constitutional or statutory provision;
>
> b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record;
>
> c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

17. In this appeal the matters of law raised are; whether the learned trial Judge erred when she failed to find that the trial court denied the appellant his constitutional right to a fair trial under Article 50 of *the Constitution* by conducting rushed proceedings; by failing to comply with procedural law when she failed to explain to the appellant his rights under section 211 of the CPC to defend himself, and denying the appellant a fair opportunity to defend himself.

18. The appellant submitted that he was denied a fair trial and was condemned unheard when the trial court forced him and his co-accused to represent themselves when their advocate was unavailable. He urged that the trial court erred in conducting a rushed and un-procedural trial in violation of sections 200, 79 and 80 of the Criminal Procedural Code [hereinafter CPC] first by stating that she was on transfer and on instructions to complete her matters and secondly, by denying him an opportunity to be heard in his defence and violating section 211 of the CPC by failing to explain to him his rights under that section of the law. In the written submissions reliance was placed on the case of Joseph Ndungu Kagiri vs. Republic [2016] eKLR.

19. Mr. Naulikha for the State admits that the record does not reflect whether section 211 of the CPC was read to the appellants. However, the respondent was of the view that the appellants were given enough time to prepare a defence, but failed to do so, prompting the court to close the defence case suo moto. Learned Prosecution counsel submitted that looking at the record of the trial court, the appellant was disrespectful of the court and stubborn and gave the trial court a difficult time. He urged that the appellant is a law student and knew that once placed on his defence he was required to defend himself, that instead, he declined to participate by giving his defence. He urged that the court's decision was in order and not prejudicial to the appellant. The prosecution urged the Court to dismiss the appeal entirely, terming it as devoid of merit.

20. The appellant has raised issues of constitutional violation of his right to fair trial, we find it is important to look into the facts relevant to the issues raised in order to contextualize them for a proper consideration. It is a fundamental principle of law that there has to be clear evidence of the violations complained of to support such a proposition since constitutional rights are not mere technicality it is essential that such complaints must be supported by clear evidence of the facts of the case in order not to trivialize the Constitutional principles on which they are based. In other words, it is not enough for one to claim that their constitutional rights were violated, it should be supported by evidence.

21. The record of appeal reflects that the appellants were placed on their defence on 20th January 2022. And the defence hearing was initially set for 12th May 2022 but was adjourned to 26th June 2022. When the matter came up on 26th June 2022, the appellant's counsel requested to have the matter transferred to another court. A mention date was set for 15th August 2022 to confirm if the file had been transferred, which it seemingly had not. On 15th August 2022, the matter was once again given a date for defence, namely 22nd August 2022.

22. On 22nd August 2022, the 3 accused persons therein indicated that they were not ready to proceed with the defence case for reason that there was a matter pending at the High Court. The court declined to allow an adjournment and set down the matter for hearing. When the matter was called again, all the accused persons maintained that they were not ready to proceed on account of the existence of an application at the High Court, and for the additional reason that their Advocate was not present.

23. The trial court delivered itself thus:

> " I note that this matter came up for defence hearing on 20/6/2022. Mr. Gachuba advocate sought to have the matter transferred from Siakago court and was granted the opportunity to

have the application filed for the said transfer. Matter was slated for mention on 15/8/2022 to confirm the transfer of the case from Siakago Law Courts. On 15/8/2022 no transfer orders had been issued and the matter was slated for defence hearing on 22/8/2022 being today. The court is on transfer and ordered to finalize the matters that are part- heard. I find that the defence had been given ample time to file the application for transfer which they have not done to date. Matter to proceed to hearing."

24. When asked individually to proceed to give their defence, each indicated their unwillingness to proceed as there was an application before the High Court which was still pending. It is upon those remarks by the appellant and his co-accused that the learned judge marked the defence as closed and set the judgment date for 8th September 2022. However, the judgment was not delivered as the appellants served the trial court on the scheduled date with an order dated the same day staying the proceedings of the lower court. The appellants' application before the High Court was eventually heard and dismissed by an order dated 25th October 2022. The file was then transmitted to the trial magistrate and then on transfer to another station. She proceeded to write a judgment that she delivered personally on 13th February 2023.

25. The issue is whether the learned trial court accorded the appellant a fair trial as required under Article 50 of *the Constitution*. The complaints made were; that the appellant was not allowed to obtain the attendance of his counsel on a date convenient to counsel; that due to the great rash in which the trial magistrate was in due to her transfer, he was not given sufficient opportunity to prepare and present his defence; and that his defence was closed by the court before being informed of the options available for defending himself.

26. The record shows that the advocate for the appellant informed the trial court of the intention to file an application to have the file transferred to another court for the reason that the complainant had informed the appellant that he had 'pocketed the court and the prosecution' and therefore they would not get any justice in that court. The learned judge gave the defence time to seek the transfer; from 22nd June 2022 to 15th August 2022. The act of giving the defence time to seek transfer of the case from the trial court to another carried an unspoken message that the court was accommodative of such a move and secondly, it was in the appellant and his co- accused's right to seek such a transfer.

27. We note that when the trial court mentioned the matter on 15th August to find out the status of the matter before the High Court, the defence counsel was absent. The date for the defence hearing was given in his absence. On 22nd September 2022 date set for the defence hearing, counsel was absent and the appellant's request to have him attend was declined.

28. The issue of whether the right to legal representation forms what constitutes a fair trial came up for interpretation before this Court in the case of Macharia vs. Republic, HCCRA 12 of 2012, [2014] eKLR where this Court after reviewing the past and current law stated that as follows:

> " Art 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial

injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."

29. Article 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate of his choice or one appointed by the State. In this case, there was a defence counsel for the appellant and the court was aware as he had participated at the hearing of the prosecution case. Article 50(1) & (2)(c) of *the Constitution* speaks to this and it provides that:

> " 50. Fair hearing
>
> 1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
>
> 2. Every accused person has the right to a fair trial, which includes the right-
>
> a... b...
>
> c. to have adequate time and facilities to prepare a defence;
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (k) to adduce and challenge evidence;"

30. We find that by giving a date for the defence hearing in the absence of defence counsel and then declining an adjournment was not just a deliberate violation of the appellant's right to representation, but an unfair exercise of judicial discretion as the court overlooked that it fixed the date ex parte. We find that excluding counsel from the case through fixing the case in his absence was a denial of a constitutional right to legal representation, which amounts to a violation of the right to a fair trial.

31. We also identify with the following observations of Nyakundi, J. in Joseph Kiema Philip vs. Republic [2019] eKLR: where he stated as follows:

> " The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial."

32. The other violation complained of was that due to the great rush in which the trial magistrate was in, due to her transfer, the appellant was not given sufficient opportunity to prepare and present his defence, the opportunity having been taken away by the trial court suo moto. In addition to our finding that the defence counsel was unfairly excluded from the trial by fixing the defence case ex parte, we noted that the basis on which the court declined to entertain any further adjournment is clear from the wording of the ruling, included herein above. The learned trial court stated in part:

> " On 15/8/2022 no transfer orders had been issued and the matter was slated for defence hearing on 22/8/2022 being today. The court is on transfer and ordered to finalize the matters that are part- heard. I find that the defence had been given ample time to file

the application for transfer which they have not done to date. Matter to proceed to hearing." [Emphasis added]

33. It is clear that the impending transfer to a different station and an administrative directive to finalize her part heard matters were the driving force for the court to decline adjournment and to close the defence case of its own volition. We think that a transfer and an administrative direction are extraneous considerations when it came to judicial function. Furthermore, constitutional provisions complained of are coached in mandatory terms and compliance with them makes it imperative for the court to adhere to.

34. The other complaint made by the appellant was the trial court's failure to inform the appellant of his rights under section 211(1) of the CPC. The record shows that on the 22nd August 2022, the day scheduled for defence hearing, there was a bit of back and forth between the appellant and his co-accused on one side and the trial court on the other. As the issue was to place the appellant and his co-accused on their defence, before declaring the defence case closed, the court had to comply with the procedural law, as spelt out as a step to be taken by the trial court before close of the defence case. Clearly, the trial court overlooked the provisions of section 211 (1) of the CPC which provides:

> " At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)."

35. Learned prosecution counsel suggested that the appellant being a law student knew his options under Section 211 of the CPC. We agree with the appellant who said it was his right to be informed of the said provision irrespective of his status. The entire Court system in Kenya is obligated to operate from and within the principles in Article 159(2)(a)(b) and (d) that;

> " i) Justice shall be done to all irrespective of status.
>
> ii) Justice shall not be delayed.
>
> ii) Justice shall be administered without undue regard to technicalities."

36. We are satisfied that there was the failure to inform the appellant and his co-accused of the procedure under section 211 was fatal to the case. As courts have stated time and time again, it must always be remembered that an accused is the favourite child of the law, and every effort should be made to ensure that he effectively and meaningfully benefits from all the rights accorded to him by the law.

37. Regarding the rushed hearing, the appellant relied on the case Joseph Ndungu Kagiri vs. Republic [2016] eKLR where the Court held that;

> " In my considered opinion, the speedy trial provided for in our constitution is not "a rushed and unconsidered justice. No. It cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a criminal justice system that is not too fast, and not too slow,

> but just right. I reiterate that the flip side of the maxim "justice delayed is justice denied ... is a rushed, unconsidered, un-procedural and unconstitutional trial that undermines sound criminal justice system."

38. We agree with the defence that the learned trial court conducted a rushed hearing, considered extraneous matters rather than doing justice to the parties before it. We think that even though expeditious disposal of cases is necessary, cases cannot be expedited at the expense of fair trial and justice. Justice cannot be sacrificed at the altar of expedition. The appellant and his co-accused had this perception that they may not get justice due to comments said to have been made by the complainant. The learned magistrate was informed of it and she seemed to appreciate the importance of giving the defence a chance to pursue transfer of the case from her court. She should have waited for the outcome of that application. Having given a chance to the defence once, what was difficult in waiting to know the outcome of the application? Had she waited, and the outcome came out negative as it did, she could have completed the trial.

39. We must point out that the administrative direction to finalize part heard cases did not vitiate statutory provisions. Under Section 200 of the CPC several options are provided. Under subsection (1) and (2) a trial can be succeeded by another magistrate and concluded, while under subsection (3) provides an option to an accused person to demand to re-call some or all the witnesses either for further cross-examination or to testify afresh; or ask for the trial to start afresh. Under subsection (4) thereof the High Court may, if it is of the opinion that the accused person was materially prejudiced, set aside the conviction and may order a new trial where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate. The case could have also proceeded before another magistrate if the learned trial magistrate was unable to complete the trial judiciously.

40. In the case of Ahmed Sumar vs. R (1964) EALR 483, (Sir Daniel Grawshaw, Sir Clement De Lestang & Duffus JJ.A) the predecessor of this Court held:

> "It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered... In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."

41. We have found that the violations committed by the learned trial court were fatal to the case and therefore the conviction cannot stand. We accordingly quash the conviction and set aside the sentence.

42. Having done so, the next consideration is to determine whether we shall order a retrial of the case. The appellant has been in jail since 21st February 2023, a period of 1 year and 11 months as of the date of this judgment. Having been sentenced to three years, the appellant has served a substantial part of his sentence. It will not serve the interest of justice to have him go through the trial again. That will be tantamount to causing the appellant suffer double jeopardy, which is undesirable.

43. In the result, the conviction entered by the trial court stands quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF JANUARY, 2025

J. MOHAMMED

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR