Ndegwa v Republic (Criminal Appeal 76 of 2016)
[2024] KECA 294 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 294 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 76 OF 2016

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

MARCH 8, 2024

BETWEEN

MICHAEL WAWERU NDEGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the against the conviction and sentence of the High Court at Nyeri (J.M. Mativo, J.) dated 14th September 2016 in HCCR. No. 290'A' of 2010)

JUDGMENT

1. Michael Waweru Ndegwa, the Appellant, was charged, tried and convicted by the Chief Magistrate's Court at Nyeri on two counts of soliciting for a benefit contrary to section 39(3)(a) as read with section 48(1) of the *Anti-corruption and Economic Crimes Act*, and two counts of receiving a benefit contrary to section 39(3)(a) as read with section 48(1) of the same *Act*.

2. The particulars of the charges in the different counts were that he solicited for a benefit to release land consent application forms and received a benefit to release the said land consent application forms from Elizabeth Wangui Kangethe. He denied the charges but after a full trial, he was found guilty and upon conviction, he was fined Kshs.50,000 or twelve months imprisonment on each count. In addition, he was fined twice the amount said to have been solicited and benefited.

3. Dissatisfied with the decision of the trial court, the appellant challenged both conviction and sentence before the High Court but his appeal was unsuccessful with the result that the High Court affirmed his conviction and sentence.

4. In order to place this appeal in proper perspective, we give a brief account of the circumstances leading to the appellant's arrest and arraignment before the court. Elizabeth Wangui, the complainant, told the court that after their father died, she and her siblings inherited a piece of land which was supposed to be subdivided between his three houses. This meant that they needed to go to the Lands Office to

have the land surveyed. The process required the consent of the Land Control Board. They needed to complete some forms which they were told were to be issued from the appellant's office.

5. They went to the appellant's office and requested him to avail the said forms, but the appellant is said to have asked them for Ksh.30,000 so that he could assist them to present the forms to the Land Control Board. According to the complainant, she consulted the other members of the family and they managed to raise Ksh.20,000 which they took to the appellant. The appellant is said to have taken the money, but insisted that without the balance of Ksh.10,000 he could not release the forms to them.

6. They got frustrated, and went to the Anti-Corruption authorities where they reported the matter, and that is when they were advised to play along with the appellant and a trap would be set to catch him taking the bribe. The complainant was given a tape recorder to record her conversation with the appellant and also some marked money to give him when he asked for it. To cut a long story short, the money was given to the applicant and the conversation was recorded, and he was arrested by the anti-corruption officers. He was taken to the police station and eventually charged with the four counts as stated earlier. The recording and the money, whose serial numbers had been taken by their anti-corruption officers were produced before the trial court as exhibits.

7. In his defence, which was tendered on oath, the appellant denied having had a conversation with the complainant saying that the voice in the recording was not his, and that the money removed from his pocket was put there by the officer who frisked him. He, therefore, denied all the charges that were levelled against him.

8. After considering the evidence before the court, along with the submissions filed by both parties, the court found the appellant guilty on all four counts and convicted him accordingly and meted out the sentence we have referred to earlier.

9. His appeal to the High Court, in which he proffered nine grounds of appeal was dismissed. Aggrieved by that decision the appellant has come to this Court on his second and last appeal against both conviction and sentence, citing the following grounds of appeal:

    a. Whether the prosecution proved its case;

    b. Failure to comply with section 200 of the criminal procedure code;

    c. Whether the appellants defense was considered; and

    d. Courts discretion in sentencing.

10. Both learned counsel filed written submissions which they adopted and relied on during the plenary hearing without making any oral highlights. We have considered the said submissions along with the entire record before us, and more particularly the proceedings and the judgment of the High Court now impugned. We will consider the above along with the grounds of appeal before us, bearing in mind our remit as a second appellate Court.

11. The jurisdiction of this Court on second appeal is limited to consideration of matters of law only. Section 361 of the *Criminal Procedure Code* provides that:-

    361.(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

        a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

12. This Court in *Chemagong -vs- Republic* [1984] KLR 213 stated as follows:-

> " A second appeal must be confirmed to points of law and this Court will noy intereferewith findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whethe the trial court could find as it did. (Reuben Karoro s/o Karanja -vs- Republic [1950] 17 EACA 146)"
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> See also *Keringo -vs- R* [1982] KLR 213.

13. We start with the ground on non-compliance with section 200 of the Criminal Procedure Code. According to learned counsel for the appellant, the first appellate court dealt with that point in a very perfunctory manner. Counsel insisted that failure to comply with that provision was prejudicial to the appellant, and the High Court ought to have declared a mistrial. On the other hand, Mr. Ngetich, learned State counsel, submitted that the oversight was not prejudicial to the appellant as he was represented by counsel throughout the hearing and he was able to cross-examine the witnesses fully. Several cases were cited to us in support of the opposing positions taken by counsel.

14. We have gone through the record, and confirm that section 200 of the *Criminal Procedure Code* was never raised before the trial court by any of the parties. It is important to reproduce the provisions of Sections 200(3) and (4) of the *Criminal Procedure Code* below:-

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of the right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may if it is of the opinion that the accused person was materially prejudiced thereby set aside the conviction and may order a new trial." (Emphasis added).

15. It is important to emphasize that for the High Court to set aside a conviction on the ground of non-compliance with section 200 (4) cited above, it must form the opinion that the accused person was "materially prejudiced."

16. We note that the magistrate who took the plea proceeded with the matter and went half way with PW1. Before PW1 completed her evidence in chief, the matter was taken over by another magistrate on 14th October, 2010. The witness was recalled to the witness box and this was in the presence of the appellant, his counsel and the court prosecutor. None of them even indicated that it was necessary to explain the provisions of section 200 of the Criminal Procedure Code to the appellant.

17. We agree that it is the right of an accused person to have the said provision explained to him and it is upto the accused person to decide whether or not to apply for recall of a witness. Thereafter, the decision as to whether to allow a recall of the witnesses or not lies with the court.

18. In determining whether non-compliance with the said law is fatal, or whether it has compromised the accused person's right to fair trial, the court looks at the overall picture and the circumstances surrounding the matter. Non-compliance with section 200 of the *Criminal Procedure Code* per se does not, *ipso facto*, render proceedings a nullity. See this Court's decisions in *Joseph Kamau Gichuki -vs-*

Republic [2013]eKLR and *James Omari Nyabuto & another -vs- Republic* [2009]eKLR. In this case, we observe that the first witness had not even completed her evidence in chief. If there was an aspect of her evidence that counsel for the appellant wanted repeated, he would have asked the witness, either in chief or on cross-examination. The issue of recalling PW1 did not arise as she was still in the witness box. We find that there was no prejudice occasioned to the appellant in any way by the non-compliance of section 200 of the *Criminal Procedure Code*. That ground, therefore, fails.

19. On whether the prosecution proved its case against him beyond all reasonable doubt, we note that the two courts below accepted the facts as narrated by the prosecution. We do not find any reason to doubt the veracity of the witnesses. The narration by PW1 was very clear. She went to the Anti- Corruption authority and reported the matter only after frustrations by the appellant who refused to release the forms, even after being given part of the money he had asked for and after the complainant was unable to raise the balance. There was evidence of the serial numbers of the marked money used as a trap; the recording and the recovery of the said money from the appellant and the direct evidence of the eye witnesses. The evidence was simply overwhelming.

20. On the ground that the trial court failed to consider the appellant's defence, we have gone through the record and we do not think that assertion is accurate. The appellant's defence was considered along with the prosecution evidence, and the same was found not to be sufficient to dislodge the otherwise strong evidence adduced by the prosecution. That ground also fails.

21. We are satisfied that the prosecution proved its case against the appellant on all counts to the required standard, of beyond reasonable doubt. The conviction on all the counts was safe, and the appeal before the High Court was properly dismissed. On the sentence, the same was lawful and by dint of section 361(2) severity of sentence is a question of fact and we have no jurisdiction to interfere with the same.

22. Accordingly, we find this appeal devoid of merit and dismiss it in its entirety.

DELIVERED AND DATED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR