Achiki v Republic (Criminal Appeal 155 of 2017)
[2023] KECA 846 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 846 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 155 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

JULY 7, 2023

BETWEEN

HEZRON RIOBA ACHIKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Kisii (C.B. Nagillah, J) Dated 29th May, 2015 in HCCRA No. 267 of 2012)

JUDGMENT

1. Hezron Rioba Achiki is serving a life sentence having been charged and convicted for the offence of grievous harm contrary to section 234 of the *Penal Code*. His first appeal was before the High Court at Kisii in Criminal Appeal No 267 of 2012. After appreciating the role of a first appellate court as set out in *Okeno Vs Republic (1972) EA 32*, the learned Judge, in an atypically short decision, concluded:

> ' Having read the trial court proceedings and the evidence as adduced at the trial, and having evaluated the same, I reached an independent conclusion that the conviction and sentence was proper. Accordingly, I confirm the said conviction and sentence of the trial court. Therefore, the appeal filed on December 11, 2012 by the appellant be and is hereby dismissed.'

2. The learned Judge did not submit the evidence to a fresh and exhaustive examination. Indeed, no examination of the evidence was carried out at all. As a consequence, the learned Judge could neither make his own findings nor draw his own conclusions. The decision essentially rendered the hearing of the first appeal a nullity and the respondent to the appeal conceded to this appeal, as it had to.

3. What then is the proper order to make? This Court is a second appellate court and cannot arrogate to itself the role of a first appellate court and we can think of three reasons why we should not do so. Our

role as a second appeal Court is restricted by statute in section 361(1) of the *Criminal Procedure Code* to hearing and determining issues of law only. There is a sharp difference between this jurisdiction and that of a first appeal court which deals with both matters of fact and law. There is also a constitutional right implication. If, like here, the law prescribes a two-tier appeal process then the right of the appellant is abridged when the second appellate court takes up both its role and that of the first appellate court. Then, there is a policy objective. It is not only beneficial to the parties but also for the growth of jurisprudence when matters are ventilated at the various levels and the courts at those levels make known the view and positions of the matters raised. So, the inclination would be to have this matter remanded to the High Court for rehearing of the first appeal.

4. Yet there would be instances when an order to remand a matter for rehearing in first appeal would be inappropriate. Say for instance where the record of appeal from the trial court is no longer available so that no meaningful appeal can be conducted or where the appellant has served a substantial part of sentence so that any further delay that a re-hearing entails is prejudicial to the appellant.

5. Here the offence for which the appellant was convicted was grievous harm pursuant to section 234 of the Penal Code. The offence is a felony and the trial court saw it fit to impose the harshest sentence prescribed for that offence, imprisonment for life. In doing so the trial magistrate remarked:

> ' From the evidence the person who did grievous harm by chopping off the left hand is A3. I proceed to sentence A3 to life imprisonment.'

6. The offence was serious and the victim suffered an amputation to part of her left upper limb. That may be reason for having the first appeal reheard so that the matter can be resolved on merit without simply releasing the appellant.

7. We must however weigh that with the long period already served by the appellant. The appellant lost his freedom just before October 14, 2011 when he was first arraigned in court for plea taking and has not regained it to date. That would be close to 12 years; a long time! Yet when taken against the life sentence he is serving at a youthful age, then he may still have some time to go. In a sense, therefore, the portion already served may not be a substantial part of his entire sentence.

8. These are strong reasons for us to remand this matter back for hearing of the first appeal.

9. In the end, we set aside the judgement dated May 29, 2015 of CB Nagillah, J and order this the first appeal be remanded back to the High Court for accelerated hearing and disposal. We are aware the learned Judge has since retired from the High Court and so the matter will be heard, as it should, by a different Judge.

10. Those are our orders.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.