Akhuya v Republic

REPUBLIC OF KENYA

Court of Appeal, at Kisumu **July 12, 2002**

Kwach, Tunoi & Bosire JJ A

Criminal Appeal No 42 of 2002

(Appeal from the Judgment of the High Court of Kenya at Kisumu

(Tanui and Mbito, JJ) dated July 15, 1999 in H. C. CR. No 246 of 1998)

Criminal Practice and Procedure *– submissions – whether submissions at close of defence need be in writing – need for submissions to be made in open court.*

The appellant was charged before the Chief Magistrate's Court at Kakamega with attempted robbery with violence and unlawfully being in possession of a firearm contrary to Sections 297(2) of the Penal Code and Section 4(1) of the Firearms Act respectively. His case proceeded to hearing where at the close of the defence case and at the request of counsel for the appellant, the trial magistrate directed that both the prosecution and defence file written submissions and submit the same to the registry. He then gave a date for the judgment.

Held:

1. The trial procedures before the High Court are covered under Part IX of the Criminal Procedure Code which give the prosecution and the defence the right to address the court by ay of submissions. A careful examination of the provisions shows that the submisssions must be made in open court in the presence of the accused.

2. Moreover, even the Constitution in section 77(2) makes it mandatory for an accused person to be present at the hearing of his case except where voluntary consents to stay away or where due to his conduct, the court excludes him from the court room.

3. That a presiding officer of a court is expected to orally hear such submissions as both sides in a criminal case wish to make and to seek clarification of such submissions as found necessary in order to appreciate each sides case before delivering his opinion.

4. The accused person is also supposed to hear the submissions and has the right to clarify any point raised or to object to it being raised where he considers it necessary for his benefit.

5. The trial cannot be said to be complete unless the record shows that both sides were granted an opportunity of addressing the court on the merits or otherwise of the case against the accused.

6. Written submissions do not have any sanction of the law. Magistrates and judges who ask for or accept them deny the accused person a statutory right of orally persuading the court to grant him an acquittal.

7. That whether or not to order a retrial largely depends on whether the trial of the accused was illegal or defective.

Cases

1. Dean Salan v Republic [1966] EA 272

2. Njeru v Republic [1980] KLR 108

Statutes

1. Penal Code (cap 63) section 297(2)

2. Criminal Procedure Code (cap 75) sections 213, 310, 361, 382

3. Firearms Act (cap 114) section 4(1)

4. Constitution of Kenya section 77(2)

Advocates

Mr Onsongo for the Appellant

Mr Gacivih for the Republic/Respondent

July 12, 2002, the following Judgment of the Court was delivered.

This appeal raises a very important issue which due to its nature, has made us agonize upon it at great length. None of us in our respective careers, which are of considerable length, has ever heard, until now, final submissions in a criminal case being given in writing. So the issue which arises and which as we said earlier, is important, is whether, as happened in this case, the trial court in the appellant's case acted in accordance with the law by agreeing to written submissions being put in at the conclusion of the appellant's trial.

The appellant was charged before the Chief Magistrate's Court, at Kakamega, with firstly, attempted robbery with violence contrary to section 297(2) of the Penal Code, secondly, unlawfully being in possession of firearm contrary to section 4(1) of the Firearms Act and lastly, unlawfully being in possession of ammunition contrary to the same section of the Firearms Act. He pleaded not guilty after which his case was fixed for hearing. At the said hearing the prosecution called its witnesses who testified in support of the charges, were cross-examined and re-examined by the appellant's counsel. At the close of the prosecution case the trial magistrate ruled that the appellant had a case to answer and therefore put him on his defence. At the close of the defence case and at the request of counsel for the appellant, the trial magistrate directed that both the prosecution and defence file written submissions, which from our reading of the record were to be submitted to the court registry. He then gave a date for judgment. In doing all that the trial magistrate was purporting to comply with the provisions of section 213 of the Criminal Procedure Code, which reads thus:

> "213. The prosecutor or his advocate and the accused or his advocate shall be entitled to address the Court in the same manner and order as in a trial under this Code before the High Court."

The trial procedures before the High Court are covered under Part IX of the Criminal Procedure Code (CPC). The relevant provisions of that part give the prosecution and the defence the right to address the Court by way of submissions. A careful examination of the said provisions clearly shows that the submissions must be made in open court in the presence of the accused. Sections 213 and 310 CPC use the phrase "address the court", which in ordinary parlance means talk to or lecture to an audience. But even without those provisions section 77(2) of the Constitution of Kenya makes it mandatory for an

accused person in a criminal case to be present at the hearing of his case, except where he voluntarily consents to stay away or due to his own conduct continuation of proceedings in his presence is rendered impracticable, and the Court has made an order excluding him from the Court room. That section, in pertinent part, provides as follows:

> "77 (2) Every person who is charged with a criminal offence
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> (a) .....
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> (b) .....
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> (c) .....
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> (d) Shall be permitted to defend himself before the Court in person or by a legal representative of his own choice;
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> (e) .....
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> (f) ..... and except with his consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence".

But the question which then presents itself is whether the preparation and tender to the Court of the written submissions by both the prosecutor and defence counsel forms part of the trial so as to be caught up by the provisions of section 77(2) above?

As we stated earlier final submissions are by dint of the provisions of the CPC supposed to be orally made in open court at the close of the hearing of the case for the prosecution and the defence respectively. The submissions, it would clearly appear, are part of the trial procedures, and are provided for in the CPC. The trial cannot be said to be complete unless the record shows that both sides were granted an opportunity of addressing the Court on the merits or otherwise of the case against the accused.

In *Salau Dean v Republic* [1966] EA 272 the Court of Appeal for East Africa, was faced with a more or less similar situation. In that case part of the evidence against the appellant was tape recorded evidence in Punjabi and a translation thereof. Between the conclusion of the hearing of the case before the trial court and the delivery of judgment the trial magistrate called for and had the record played over in the privacy of his chambers in the presence of two police officers and the Punjabi court interpreter, but in the absence of the appellant, his counsel and the prosecutor. The Court of Appeal for East Africa, in its judgment remarked in regard to that, as follows:

> "The learned magistrate's main concern was we think to satisfy himself beyond all doubt that the English transcript was correct. He reasoned that there could be nothing wrong in making a check with the aid of Hardial Singh (the interpreter). We must disagree. It can of course be said that if, as indeed happened here, the interpreter confirms the accuracy of an English transcript no harm has been done, but it is clearly wrong, we think to adopt a procedure which may lead to an amendment in private of a transcript on the basis of which both the prosecution and the defence has argued their case.
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> We would say also, though here we may appear hypercritical, that if the tape recording has not been played in court it is probably wrong for the magistrate to play it to himself in the privacy of his chambers. We do not think that a magistrate or judge should hear in chambers what he has not heard in court, and in certain cases much may be gathered from the tone of the recorded voices of the speakers".

On our part we say this. The CPC provides a procedure for the making of submissions to the Court. In no part of the legislation is there a mention of written submissions. A presiding officer of a court is expected

to orally hear such submissions as both sides in a criminal case wish to make and to seek clarification of such submissions as found necessary, in order to appreciate each side's case before delivering his opinion. The accused person is also supposed to hear those submissions and has the right to clarify any point raised or to object to it being raised where he considers it necessary for his benefit. Written submissions deny the accused that fundamental right. It is fundamental because if it were not so, the drafters of the Constitution of this Republic would not have entrenched it in the Constitution. An accused has a constitutional right to listen to and understand all that is said at his trial. His freedom and in certain cases his life is at stake. It is no excuse as Mr Gacivih, Senior Principal State Counsel, submitted, that the written submissions were given at the request of the appellant's counsel. The request by the appellant's counsel must have been made in ignorance of the relevant provision of the Constitution and not in pursuance of it. Learned counsel for the accused, it would appear to us, mistakenly believed that the giving of written submissions was permissible under the law and would serve to save judicial time. This Court has in the past deprecated written submissions in civil cases.

We do not consider it burdensome to reiterate and emphasize that written submissions do not have any sanction of the law. Consequently magistrates and judges who ask for or accept them are, in effect, denying the accused person a statutory right of orally persuading the Court to grant them an acquittal. It is not uncommon for a presiding officer of a court being mistaken on a matter but upon hearing submissions from both sides, changes his mind and adopts a different view altogether. The practice of asking for or accepting written submissions in all manner of judicial proceedings, except where the law expressly sanctions it, must stop forthwith.

In the result we do not think that the appellant was given a full and fair hearing. The Superior Court did not advert to the irregularity we have considered above. Nor was the matter raised either before it or before us by Mr Onsongo for the appellant. We raised it Suo Motu. This, we think, is a fundamental irregularity which goes to the root of the appellant's conviction. It is not the sort of irregularity which is curable under section 382 CPC. That being our view of the matter we cannot but allow this appeal, quash the appellant's conviction on the three counts aforesaid and set aside the sentences of death in the first count, and the imprisonment terms of 5 years and 3 years respectively on the 2nd and 3rd counts.

We have agonized on whether or not we should order a retrial as suggested by Mr Gacivih. Ordinarily whether or not to order a retrial largely depends on whether the trial of the accused was illegal or defective (see *Njeru v R* [1980] KLR 108). In certain rare cases however, circumstances may exist which would militate against ordering a retrial notwithstanding that the trial was unsatisfactory. In the event an appellate court would normally order the release of the accused.

In our case, the appellant was arrested on 1st August, 1995. He has been in custody since then. It is a long time. However, that notwithstanding, the offences the appellant was charged with are of a serious nature. The trial magistrate conducted the trial well except for the irregularity he committed by overlooking the mandatory provisions of the law with regard to final submissions. We do not think that this is a fit case for the immediate release of the appellant. Clearly the trial was defective. In the circumstances what are the powers of this Court? Section 382 CPC donates to this Court the power to reverse, alter or revise a decision brought before it by way of an appeal if an error, omission or irregularity in, among other aspects, the proceedings leading to the decision has occasioned a failure of justice. In the event the Court has power under section 361 CPC to remit the case either to the first appellate court or the trial court for determination, "whether or not by way of rehearing, with such directions" as it may think necessary. In exercise of that power we think that this is a proper case for a rehearing before another magistrate competent to hear the matter.

Consequently we order that the written submissions which were submitted to the trial magistrate be expunged from the record, and the order which gave rise to them be set aside. The appellant shall be produced at the earliest possible time, before the trial court for fresh hearing dates to be fixed and the matter be heard a fresh according to law. Those are our orders.