Nyasimi v Republic (Criminal Appeal E022 of 2024) [2025] KEHC 7453 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7453 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E022 OF 2024

TW OUYA, J

MAY 29, 2025

BETWEEN

FRANKLINE MISATI NYASIMI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant herein, Frankline Misati Nyasimi, has appealed to this court against his conviction and sentence for the offence of rape contrary to section 3(1) (c) of the *Sexual Offences Act* No. 3 of 2006, and a sentence of ten (10) years imprisonment imposed on him by the trial court. The particulars of the offence alleged that on the 22nd of April, 2017, at [Particulars withheld] area of Ruiru within Kiambu county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PK .

2. In his amended petition of appeal, the appellant advanced a total of fifteen (15) grounds of appeal in which he faulted the learned trial magistrate for relying on contradictory evidence to convict the appellant; for ignoring the glaring contradictions in the evidence of PW 1 and PW4 which ought to have been resolved in the appellants favor; for convicting the appellant on uncorroborated evidence; for failing to draw an adverse inference on the prosecutions failure to call crucial witnesses; for disregarding the fact that the victim went to hospital two (2) days after the incident.

3. The appellant further faulted the learned trial magistrate for failing to appreciate the evidence that PW1 was highly intoxicated on the night of the alleged rape, which was the reason why she went to hospital two days later; for failing to consider that the rape may have taken place elsewhere as the victim left the party heavily intoxicated in the company of unnamed friends; for failing to consider the appellant's defense and for failing to consider that the complainant's assertions may have been motivated by malice owing to the presence of another woman in the company of the appellant.

4. The appellant also complained that the learned trial magistrate convicted the appellant based on the evidence of the victim while failing to state the reasons why she believed her evidence was truthful; that the learned trial magistrate treated the evidence of DW2 as hearsay evidence without anything to support that finding, hence arriving at an erroneous and unfair decision; that the learned trial magistrate convicted the appellant while there was no sufficient evidence on record to prove the charge; that the learned trial magistrate failed to comply with section 200 of the *Criminal Procedure Code* which was prejudicial to the appellant; and that the learned trial magistrate found that the appellant had a case to answer when the court never had an opportunity to observe the demeanor of any prosecution witnesses that had testified against the accused thereby occasioning a failure of justice .

5. The appeal was canvassed by way of written submissions. The appellant's written submissions dated 17th November, 2024, were filed on his behalf by his learned counsel Isaac W & Associates Advocates, while those by the respondent dated 20th November, 2024, were filed by Ms. Edna Sudi, learned prosecution counsel.

6. In his written submissions, the appellant alleged that the prosecution's case was marred with fundamental contradictions and inconsistencies which caused prejudice to the appellant, and the same ought to have been resolved in favour of the appellant.

7. It was the appellant's submission that whereas the medical report was prepared by Dr. Munke, the said report was produced in court by Dr. Dennis Omondi, who was not the maker of the said document. He submitted that the said medical report, which was procured two (2) days after the alleged incident, did not implicate the appellant in any way.

8. The appellant in his submissions contended that whereas the appellant was subjected to a DNA test, the results of the said DNA were not presented to court to ascertain if it was traced on PW1 or her clothes.

9. The appellant further contended that the trial court failed to consider the testimony of the doctor that the victim went to hospital two days after the alleged incident, that there were no tears in her vagina and that the doctor had indicated that an examination done on the same day is not similar to one that has been done two days later. He submitted that the doctor failed to demonstrate to court how the alleged incident connected to the appellant, considering that no semen or DNA was detected on the victim.

10. The appellant also submitted that the medical report failed to give an explanation as to the likely period when the victim sustained her injuries. It was the appellant's contention that the learned trial magistrate was not the one who heard or recorded the evidence of the victim, as the same was done by her predecessor, as such, the court ought to have stated the reasons why it was satisfied that the complainant was telling the truth.

11. He submitted that the failure by the trial court to record reasons why she believed the victim was a misdirection on her part and went against the provisions of section 124 of the *Evidence Act*, which requires a trial court to record reasons it believes a victim is truthful in a prosecution involving a sexual offence based on the evidence of the victim alone.

12. The appellant submitted that the trial court erred in dismissing the testimony by DW2 as hearsay, considering that the said witness was present at the party, and he gave a first-hand account of what transpired at the said party which was not shaken in cross examination.

13. It was the appellant's submissions, that as per Section 200 of the *Criminal Procedure Code*, the trial court is required to inform the appellant of his right to proceed with the matter from where the previous magistrate left or begin de novo; and that the rationale behind this requirement, is to ensure

that a case is determined as much as is practicable, by a judge or magistrate that had the opportunity of hearing and seeing the witnesses as they testified, so as not to lose the advantage of observing their demeanour and assessing their credibility.

14. The appellant contended that failure to comply with the provision of Section 200 of the *Criminal Procedure Code*, denied the appellant his constitutional right to a fair hearing as contained in Article 49 of *the Constitution*; and went against the principles of a fair trial.

15. The appellant further contended that the learned trial magistrate took up the matter from her predecessors when all the prosecution witnesses had testified, and relied on the testimony of the victim but failed to record reasons why it believed the victim was telling the truth; yet the said court denied the appellant the right to decide if the suit should commence de novo. The appellant in his submissions urged this court to allow his appeal.

16. The respondent on the other hand, submitted that the prosecution can call the number of witnesses it wishes to rely on in order to prove its case; and that the evidence of the prosecution witnesses, more so that of PW2 and PW3 corroborated the evidence of the victim and the evidence of the prosecution witnesses adduced were enough to prove the prosecution's case beyond reasonable doubt.

17. The respondent submitted that the trial court did not violate Section 33 of the *Sexual Offences Act*; and that the evidence tendered showed that a sexual offence was committed under coercive circumstances, which connected the appellant as the assailant.

18. It was the respondent's submissions, that the prosecution adduced overwhelming evidence against the appellant, that proved the charges against him beyond all reasonable doubt. Regarding the sentence of ten (10) years imprisonment meted out on the accused by the trial court, the respondent filed a Notice of Enhancement and alleged that the same should be enhanced to life, owing to the overwhelming evidence adduced by the prosecution against him.

19. I have duly considered the evidence on record together with the grounds of appeal, as well as the parties rival written submissions and all the authorities cited by the appellant. I have also considered the entire proceedings recorded by the trial court and read and understood the impugned judgement.

20. Having done so, I find that it would be prudent to first deal with the appellant's complaint that his constitutional rights to a fair trial were violated in the course of the trial as he was denied an opportunity to make an election regarding whether or not to have witnesses recalled after Hon. D Milimu (SRM) took over the proceedings from Hon. V Kachuodho (SRM).

21. The Appellant in his submissions maintained that failure of the succeeding magistrate to comply with Section 200 (3) of the C.P.C. prejudiced him and made his trial a nullity. I have noted that though the prosecution was duly served with the appellant's submissions, they did not make any response to this claim in its submissions in response.

22. On my part, I have perused the proceedings of the trial court, and I have noted that the hearing of the matter commenced before Hon. V Kachuodho on the 8th of May, 2017. The record of the trial court reveals that the said learned trial magistrate took the evidence of all the prosecution witnesses until the closing of the prosecution's case.

23. I have noted that Hon. D. Milimu took over the case on the 31st of May, 2022; thereafter, the matter came up for defence hearing on the 1st of December, 2022. The records of the trial court confirm that when Hon. D Milimu took over the matter, she did not comply with the mandatory provisions of Section 200 (3) of the *Criminal Procedure Code*, which stipulates as follows: "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 that right"

> 24. Section 200 (4) of the *Criminal Procedure Code* further stipulates as follows: "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."

25. From the aforementioned provision of law, it is clear that a succeeding magistrate has an obligation in law, to inform the accused person of his right to have the matter proceed from where the previous magistrate left or to commence the matter a fresh. It is well settled that failure by a succeeding magistrate to comply with the provision of Section 200 (3) of the *Criminal Procedure Code* is fatal as it renders the trial of a nullity.

26. This position was reiterated by the court of appeal in David Kimani Njuguna versus Republic (2015) KECA 2 (KLR); as follows:

> "...the provisions of Section 200(3) are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or Magistrate complies with it out of a statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity."

27. Additionally, in Anthony Musee Matinge versus Republic (2012) KEHC 5534 (KLR); the court expressed itself as follows:

> "The legal requirements to be complied with in the taking over of proceedings from a previous trial magistrate by a succeeding magistrate are contained in section 200 of the *Criminal Procedure Code* (Cap 75), the relevant part of which provides: -200 (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 summoned and reheard and the succeeding magistrate shall inform the accused person of that right. The above provisions of the law are couched in mandatory terms. It is the accused person, and not the advocate who must be informed by the court of the right to re summon witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. His advocate could not respond for him. The response has to be that of the accused. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality."

28. Guided by the above authorities, I concur with the appellant that failure by the learned trial magistrate to comply with section 200 (3) of the *Criminal Procedure Code* was highly prejudicial to him, and it violated his right to a fair hearing, as enshrined in *the Constitution* of Kenya, 2010. Having come to the conclusion that the proceedings by the trial court was fatal for failure to comply with section 200 (3) of the *Criminal Procedure Code*, this appeal succeeds with the result that the appellant's conviction is quashed and his sentence is set aside.

29. The next issue for determination by this court, is whether it would be in the interest of justice to acquit the appellant or remit the case back to the trial court for a re-trial.

30. The principles that guides a court in deciding whether or not to remit a case for retrial or acquit an appellant were reiterated in the case of Fatehali Manji –versus- Republic [1966] E.A. 343, wherein the court at Page 344 stated as follows; "In general a retrial will be ordered only when the original trial was defective or illegal ; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial ; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered ; each case must depend on its particular facts and circumstance and an order of retrial should only be made where the Interests of Justice require it and should not be ordered where it is likely to cause injustice to the accused person."

31. Having perused the evidence adduced at the trial court, and holding the view that there were gaps in the prosecution's case that may have created doubt as to whether or not the appellant committed the said crime, this court also notes that the prosecution's failure to call a very crucial witness by the name Allan Muriasi, whom the victim alleged she first told of what transpired after incident dealt a blow to the prosecution case. The victim also stated during her cross examination that the said Allan witnessed when the appellant became aggressive towards her, by pulling her. Although she stated that he did not witness the rape. I am of the view that the said Allan was a very crucial witness who would have shed more light on what transpired on that night that the victim alleges to have been raped by the appellant.

32. It should be noted that although under Section 143 of the *Evidence Act*, the prosecution has wide discretion in choosing the witnesses to call to prove its case, where the prosecution fails to call a crucial witness, whose evidence was necessary to establish the truth of the allegation made against an accused, the court is in appropriate cases, entitled to infer that had the witness been called his evidence would have been adverse. The said witness in my view would have helped the court establish the truth of the allegations made against the accused.

33. I am therefore of the view that should this court order that the matter be taken back for a re-trial, the prosecution might take this as an opportunity to fill in the gaps in their case, which in my view would be prejudicial to the appellant. Furthermore, I have noted that the case took a period of about 7 years to be concluded and it might be difficult to trace some of those witnesses to testify a fresh in the case; and considering the long period it has taken to conclude the case, the memory of some of the witnesses of what transpired on that night may have been lost.

34. Based on the above, I am of the considered view that a re-trial would occasion great prejudice to the appellant and it would not be in the interest of justice. In the circumstances, I am of the view and hereby order

35. that the appellant should be set free forthwith, unless lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 29TH MAY, 2025.

HON. T. W. OUYA

JUDGE

For Appellant......Moenga

For Respondent.......Torosi

Court Assistant......Doreen