Mboya v Republic (Criminal Appeal 180 of 2023)
[2024] KEHC 5978 (KLR) (28 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5978 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 180 OF 2023

DR KAVEDZA, J

MAY 28, 2024

BETWEEN

TOM OYWA MBOYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. M. Mutua (C.M) on 6th October 2021 at Milimani Chief Magistrate's Court Criminal Case No. 2000 of 2016 Republic vs. Tom Oywa Mboya)

JUDGMENT

1. The appellant herein, Tom Oywa Mboya, was charged with two counts of Attempted Murder contrary to Section 220 (b) of the *Penal Code*. Particulars in count 1 were that on the 1st day of December, 2016 at garden estate within Kasarani Subcounty of Nairobi County, he attempted to unlawfully cause the death of William Osewe Guda by shooting him. Particulars in count 2 were similar, save that he unlawfully attempted to cause the death of Wilfred Ombunya Tembula.

2. After a full trial by the subordinate court, the appellant was convicted in count 1 for the offence of attempted murder contrary to section 220(a) of the *Penal Code*. He was also convicted in count 2 for the offence of unlawful wounding contrary to section 237(a) of the *Penal Code*. He was sentenced to serve twenty (20) years and three (3) years respectively for the two counts.

3. Being aggrieved the appellant filed this appeal and relied on 22 various grounds as contained in his petition of appeal dated 21st October 2021. These grounds are: The appellant challenges the Trial Court's findings on several grounds, arguing that the Magistrate erred in law and fact by denying the appellant's constitutional right to present additional evidence, failing to ensure a fair trial, and improperly shifting the burden of proof. The appellant contends that the prosecution did not establish its case beyond reasonable doubt, ignored inconsistencies in the respondent's evidence, and failed

to recognize that the actions of the first victim provoked the appellant. The appellant also disputes the conviction for attempted murder and unlawful wounding, citing issues such as the handling of witness testimonies, misinterpretation of the intent and circumstances of the shooting, and the Magistrate's alleged bias and hostility. Additionally, the appellant points out that he was unfit for custodial sentencing due to illness.

4. The appellant filed written submissions, which he relied on entirely.

5. This being a first appellate court, I am required to conduct a fresh and exhaustive evaluation of all the evidence tendered in the lower court and to come to an independent conclusion as to whether or not to uphold the conviction and sentence. However, as I do so, I do bear in mind that I did not have the advantage (as the learned trial magistrate had) of hearing and seeing the witnesses and I give allowance for that. (See *Okeno v Republic* 1972 (EA) 32).

6. However, before evaluating the evidence on record on its merits, it is pertinent that the constitutional issue raised by the appellant be addressed. In his written submissions, the appellant argued that the trial process was flawed and failed to meet the tenets of a fair trial. He relied on the provisions of Article 50 (2) (k) of *the constitution* which provide that every accused person has the right to adduce and challenge evidence, and further that Article 25(c) guarantees that this right to a fair trial cannot be limited. It was submitted that the import of these provisions is that an accused person cannot be prevented from adducing evidence which can exonerate him at any stage, even after conviction.

7. The appellant submitted that at the trial court, he filed an application dated 17th September 2021, wherein he sought to arrest the judgement of the trial court which was scheduled for 23rd September 2021, and to be allowed to adduce extra evidence through summoning four other witnesses, whose testimony would have been pivotal to the just determination of the case. However, on 27th September 2021, the trial court dismissed the said application on the ground that there was no law to support such an application in Kenya. The court further opined that the defence was seeking to patch up its case and that the witnesses should have come early, before the close of the defence case.

8. According to the appellant, this finding of the trial court was fundamentally erroneous as there is indeed a law, to wit, section 150 of the *Criminal Procedure Code*. He relied on the case of *Stephen Mburu Kinyua v Republic* [2016] eKLR, where Justice Prof. Joel Ngugi (as he then was), extensively highlighted the law and power of the court to summon witnesses, who may be instrumental in establishing the truth and administering justice, to adduce more evidence. He concluded that there is, therefore, sufficient law, both constitutional and statutory, that equips the court with the power to summon witnesses, either suo moto or if called by any party (prosecution or defence), to adduce more evidence for just determination of the case.

9. The appellant further submitted that the trial court did not even consider whether the evidence that was sought to be adduced by the witnesses that the defence intended to call was essential to the just decision of the case as mandatory required in law. Furthermore, the finding that there was no law supporting the application was a misdirection and a fundamental error in law.

10. The appellant further submitted that after delivering the ruling, the trial court proceeded to deliver the judgement, despite the application by the defence counsel to defer the judgement of the court to allow the appellant to seek revision of the impugned ruling. According to the appellant, the court denied him the opportunity to seek recourse in the form of a revision of its decision to this Honourable Court as guaranteed under articles 165(6) & (7) of *the constitution* and sections 362 and 364 of the *Criminal Procedure Code*. The conclusion on this ground was that the appellant's fundamental constitutional right to a fair hearing, liberty, and human dignity was violated by the rushed flawed criminal process.

11. The first question of law that falls for consideration in this appeal is whether the trial court erred by dismissing the application to call additional defence witnesses in accordance with section 150 of the *Criminal Procedure Code*. It is pertinent to cite the provision in contention herein;

> " 150. Power to summon witnesses, or examine person present
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> A court may at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

12. A plain reading of the provision indicates that a court is empowered to summon or recall any witness at any stage of the trial if the evidence of such witness is critical to the just decision of a case. In *Kulukana Otim v R* [1963] EA 257, cited by J. Ngugi, J (as he then was) in *Stephen Mburu Kinyua v Republic* [2016] eKLR, the Court of Appeal of Uganda, in considering Section 146 of the *Ugandan Criminal Procedure Code*, which is similar to our Section 150 of the *CPC*, stated that:

> " It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself...."

13. The learned judge went ahead and held, and I concur with him, that it was necessary for the court to form an opinion that it would be essential to the just decision of the case to call or recall a witness. This is what the learned judge said:

> " This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first discretionary part of section 150 of the *CPC*."

14. In this case, the trial magistrate dismissed the application without determining whether the evidence the defence intended to present was essential to a just decision, as required by law. Moreover, the finding that no law supported the application was in error.

15. The trial court denied the defence's application to reopen their case to avoid delaying the conclusion of the trial. However, the court failed to fully consider the case and the evidence as a whole. This oversight prevented the aggrieved party from challenging the court's decision on revision. Once the application was dismissed, the trial court immediately delivered its judgment on September 27, 2021. It

is important to note that the application was made at the close of the defence case before the judgment was rendered.

16. In my view, the court's decision was prejudicial to the appellant. This could have been remedied by allowing the defence to call additional witnesses and permitting the prosecution to cross-examine them before the judgment.

17. While the trial magistrate aimed to ensure substantive justice by concluding the case promptly, her actions in this instance prejudiced the appellant. Allowing additional defence witnesses would not have prejudiced the prosecution.

18. In my view, while a trial court has the discretion to summon new witnesses or recall those who have testified, this discretion should be exercised judiciously. It is better to let the parties present their cases as they see fit. The prosecution should choose its witnesses, and the defence should decide on its own witnesses. By denying the defence the opportunity to call a witness, the trial magistrate violated the appellant's right to a fair hearing under Article 50 of *the Constitution* of Kenya. Therefore, the decision of September 27, 2021, is vitiated.

19. I thus find that it was incorrect and irregular for the trial magistrate to dismiss the application by the defence to call additional witnesses. The order issued on 27th September 2021 dismissing the application and the judgement delivered pursuant to it is set aside.

20. There is the question as to whether the matter should be transferred to another magistrate. The trial had not reached its conclusion. The defence still intends to call additional witnesses. I note that there is nothing on record to show that the trial magistrate was driven by ill motive, but when she dismissed the application, the appellant maintained that the court was biased. In the interest of justice therefore direct the matter to be transferred to another magistrate for the purpose of taking the evidence of the additional defence witnesses only.

21. The Deputy Registrar is directed to remit the file to the subordinate court, together with this decision to the Chief Magistrate for the purpose of reallocation for the just conclusion of the matter.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Musando h/b for Makokha for the Appellant

Ms. Tumaini for the Respondent

Joy Court Assistant.