Adede v Republic (Criminal Appeal E007 of 2024)
[2024] KEHC 7731 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7731 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E007 OF 2024

RE ABURILI, J

JUNE 28, 2024

BETWEEN

PASCAL ADEDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence by the Hon. R.M. Oanda on the 5.2.2024 in the Senior Principle Magistrate's Court at Winam in Criminal Case No. E348 of 2023)

JUDGMENT

Introduction

1. The appellant Pascal Adede was charged and convicted of the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* and sentenced to 15 years' imprisonment. The particulars of the offence were that on the 30th September 2023 at Moi Stadium Kisumu in Kisumu Central sub-county within Kisumu County, jointly with others not before court, the appellant robbed one Joseph Oluoch Obwollo of his mobile phone valued at Kshs. 45,000 make Taifa Positivo BGH IMEI No. 2408951, National ID Card and college ID card and immediately before the robbery beat the said Joseph Oluoch Obwollo using an empty soda bottle.

2. The trial court after considering and weighing the evidence adduced by the prosecution and the defence found the appellant guilty of the charge of robbery with violence and after considering the appellant's mitigation as well as the fact that the appellant was a first time offender, sentenced him to serve 15 years' imprisonment.

3. The appellant was aggrieved by the conviction and the sentence and filed a petition of appeal dated 19th February 2024 as well as a supplementary petition of appeal dated 12th April 2024 raising the following grounds of appeal;

i. That the learned magistrate erred in law and in fact by convicting the appellant based on the insufficient and unattributable evidence by the prosecution.

ii. That the learned magistrate erred in law and in fact by failing to note the inconsistencies and contradiction among the prosecution witnesses.

iii. That the learned magistrate erred in law and in fact by not taking into consideration that the appellant was not properly identified by way of recognition thus unsafe to convict in the circumstances.

iv. That the learned magistrate erred in law and fact by failing to find that the two prosecution witnesses who claimed to be robbed by the appellant did not lodge a complaint of robbery with violence.

v. That the learned magistrate erred in law and in fact by failing to give consideration to the evidence of the defence while at the same time giving much weight to the uncorroborated and inconsistent prosecution evidence.

vi. That the learned magistrate failed to appreciate the law and facts to the case thus arriving at an erroneous decision not supported by evidence.

vii. That the trial magistrate erred in law and fact when he failed to consider the potential of the appellant to experience substantial injustice, necessitating the provision of counsel at the state's expense.

4. The appellant filed written submissions while the respondent made oral submissions to canvass the appeal.

The Appellant's Submissions

5. The appellant's counsel Mr. Omondi Abande identified the following three issues for determination:

    1. Whether the appellant was entitled to legal representation

    2. Whether the prosecution proved its case beyond reasonable doubt

    3. Whether the trial court considered the appellant's alibi defence.

6. In support of the first issue, counsel for the appellant submitted that the appellant was not provided with legal counsel as per Article 50(2)(h) of the *Constitution*, 2010 despite being charged with a capital offence thereby resulting in his constitutional rights being violated thereby rendering the proceedings a nullity. Reliance was placed on the cases of *Domenic Kariuki v Republic* [2018] eKLR and the Court of Appeal case of *Karisa Chengo & 2 others v Republic* [2015] eKLR.

7. It was submitted that at the time of the hearing, the appellant was not informed of his right to legal representation or explained for the seriousness of the offense that he was charged with and the penalty prescribed to it. That the trial court merely adjourned the hearing to a later date and instructed the appellant to get the services of legal counsel (see page 3 of the record of appeal).

8. It was submitted that on the date that the matter was listed for hearing, there is no indication on the record that the court inquired whether the appellant had obtained legal representation or waived this right. That the appellant was merely asked whether he was ready to proceed to which he indicated that he was as he had no other choice at the moment. (see page 3 of the record of appeal).

9. It was submitted that the appellant, being a lay person, was unfamiliar with trial proceedings and was unaware of his option to request more time to find legal representation. Given his student and family man status at the time, the appellant faced financial challenges in securing legal services, ultimately being left to navigate a complex legal system on his own. He was therefore liable to incur substantial injustice as he only had less than a week to prepare for his case as the record reveals that he only received copies of the proceedings four days before the hearing commenced. (see page 3 of the record of appeal).

10. It was therefore submitted that the lack of legal representation for the appellant during the trial violated his right to a fair trial, which is enshrined in Article 25 of the *Constitution* as an inalienable right hence this honorable court deems the trial a nullity and orders a re-trial.

11. On whether the prosecution proved its case beyond reasonable doubt, it was submitted that during the prosecution's case, six witnesses were called to testify against the appellant in a robbery with violence offense. Among these witnesses, three individuals - PW1, PW2, and PW6 - explicitly accused the appellant of robbing them. That they all claimed that the appellant forcibly took their mobile phones, and during the act of robbery, passed the items to an accomplice who was not present in court. Additionally, that each witness alleged that the appellant physically assaulted them using various weapons such as a knife or empty soda bottles.

12. It was submitted that from the court testimonies, it is alleged that the appellant targeted and robbed PW6, a bodaboda rider named Eugene Okello, after the latter attended a game at Moi Stadium. That according to PW6, he was attacked inside the stadium corridor, where the appellant reportedly kicked him, wielded a knife and stole his phone and that despite a struggle, PW6 managed to apprehend the accused near the stadium's main gate following another robbery incident. It was submitted that PW6 mentioned the appellant possessed three knives during the offense, which were not presented as evidence in court.

13. The appellant's counsel also challenged the sequence of events suggested that the appellant also assaulted and robbed PW1, Joseph Oluoch Obudo, in the presence of PW2, Steve Biko, both students of Kisumu Polytechnic. PW1 recounted being surrounded by a group of armed youths while walking along the stadium fence, resulting in the loss of his belongings. He highlighted the appellant's involvement in the theft of his mobile phone and identification cards, which was subsequently handed to another individual within the group who supposedly took off immediately. PW2 collaborated with PW1's narrative, detailing a similar incident where he too was attacked, robbed, and assisted by members of the public and later police officers after raising an alarm.

14. Counsel further submitted that PW1 despite the incident occurring on September 30, 2023, PW1 sought medical attention at the hospital on October 1, 2023. That PW3 noted that PW1's clothing was stained with blood, which was not previously mentioned by PW1 nor was the bloodied garment presented as evidence in court. Additionally, that there was no mention at whatever time by PW1 that he had sustained injuries that resulted in him bleeding at the scene as he only said that he had been injured on the mouth and limbs (see page 4 of the record of appeal.) Further submission was that the eye witness, PW2 also failed to note the same while giving evidence in court.

15. It was submitted that upon comparing the testimonies of the eye witnesses and the complainant, certain inquiries arise which cast doubt on the prosecution's case. Firstly, that it seems implausible for the appellant to have assaulted and robbed both PW1 and PW2 while being pursued by PW6 after allegedly robbing him. Counsel questioned why PW6 failed to mention that the appellant was accompanied by other individuals during the first robbery, yet he later claimed that the appellant acted alone in the subsequent incidents? He submitted that if the appellant was already being chased by

PW6 and the group had dispersed, how did PW2 manage to observe ten (10) individuals, including the appellant, near Moi Stadium?

16. It was therefore submitted in contention that that the alleged offense described by the prosecution witnesses appears to be distinct from the one involving the appellant and that the appellant was being unfairly targeted in order to assign blame, which conclusion, according to counsel, was supported by the fact that only PW1 is listed as the complainant in this case, despite all three eye witnesses claiming to have been robbed by the appellant.

17. It was also submitted that while weapons such as knives and a soda bottle were mentioned as being used in the attacks, they were not presented as evidence during the trial. That although PW6 mentioned the appellant's possession of three knives upon his arrest, these were not produced in court and CPL Fredrick Okoth confirmed that the soda bottles were not recovered despite initially claiming that the appellant had been caught red handed (see page 8 of the record of appeal).

18. Further, that given that not PW6 stated that it was the appellant's job to take his phone at the time of the attack, then the appellant should have been found to be in possession of at least one on the stolen phones at the time of his arrest.

19. Regarding the issue of recognition, it was submitted that despite the appellant being identified as the individual responsible for the crime of robbery with violence, the level of recognition provided was insufficient. That albeit both PW1 and PW2, who were the victims of the crime attested to being familiar with the appellant's physical appearance and maintained that among the group of ten individuals present, it was only the appellant who was known to them, these witnesses did not elaborate on the extent of their familiarity with the appellant or the frequency of their interactions with him, which are crucial factors in establishing proper identification. Further submission on this aspect was that neither witness confirmed whether the appellant was a fellow student at Kisumu Polytechnic or shared the same course with them.

20. Counsel further submitted that PW6 also failed to adequately identify the appellant. That PW6 mentioned that he resided in Kibos and worked as a bodaboda rider, whereas the appellant claimed to come from Koyango, a distinctly different location. That PW6 did not provide clarification on how he recognized the appellant or how their paths crossed. Further, that PW6 admitted to learning the appellant's name at the police station (see page 10 of the record of appeal) and also that PW6 acknowledged the presence of numerous individuals in the vicinity at the time of the crime, suggesting a likelihood of mistaken identity by the witnesses.

21. It was further submitted that although the Investigating Officer (PW5) reported conducting interviews with local business owners in the vicinity of the crime scene, who reportedly identified the appellant as the perpetrator, this claim lacks substantiation as the alleged businessmen were not formally asked by the investigating officer to specifically identify the appellant via identification parade or otherwise, nor were they summoned to provide testimony during the court proceedings.

22. It was submitted that the testimonies presented by the prosecution witnesses, particularly PW1, PW2, and PW3, are therefore subject to bias, and the absence of an impartial witness to corroborate their accounts on the offence and most importantly identification of the appellant is noteworthy.

23. Counsel concluded that there was no concrete evidence linking the appellant directly to the crime, beyond the fact of his arrest and subsequent detainment at the police post and that it is evident that inconsistencies exist at the very root of this case.

24. It was therefore Consequently, submitted that these inconsistencies undermine the credibility of the appellant's conviction, rendering the judgment and subsequent sentencing unsafe. Counsel urged this

honourable court to find that doubt has arisen due to these inconsistencies and to therefore find in favour of the appellant. He relied on the case of *Richard Munene v Republic* [2018] eKLR, where the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

> " Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

25. Based on the foregoing arguments, this court was urged to find that the prosecution failed to prove its case beyond reasonable doubt.

26. Onto whether the trial court considered the appellant's alibi defence, it was submitted that the appellant stated that on the material date, he was at Moi Stadium watching the football match which he clearly remembered was between Obunga FC and Awendo FC. That he was not in the company of any person as he even did not mention being there with a friend/companion. He stated that while he was within the stadium he was arrested and taken to the police post on the accusation that he had stolen phones. He denied having stolen the phones. When questioned about selling the phones, he also denied the same.

27. It was therefore his submission that the appellant was very clear in his defence which was not offer a mere denial but was very clear about the circumstances of his arrest and of his non-involvement in the offence. That a football match usually attracts a large crowd and considering that PW6 also confirmed that there were many people in the area at the time of the offence, this may very well be a case of mistaken identity as already stated hence, the recognition of the appellant was not sufficiently done and no independent witness was called to present evidence naming the appellant as the person who robbed PW1, PW2 and PW6. Reliance was placed on the case of *Mkirani v Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 377 (KLR) (17 December 2021) (Judgment) where the court explained:

> The Supreme Court of Nigeria in *Ozaki and another v The State* Case No. 130 of 1988.stated that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In *Uganda v Sebyala & Others* {1969} EA 204, the court had this to say: -
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> "The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts."
>
> 35. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.[37] Once an accused person discharges the evidential burden of adducing evidence of alibi, it is the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the evidence adduced by the prosecution and if there is doubt in the mind of the court, the same is resolved in favour of the accused.

29. It was therefore submitted urging this honorable court to take into account the appellant's defense and determine that it is not simply a denial, but rather a sufficient explanation of the appellant's actions. That this is particularly important as no weapon: knife or soda bottle was found at the scene or presented as evidence in court, and none of the phones that were allegedly stolen were recovered and presented as evidence in court.

The Respondent's Submissions

29. Mr. Marete Principal Prosecution Counsel for the respondent submitted that the appellant suffered no injustice as alleged due to lack of an advocate as he participated in proceedings and actively cross-examined the witnesses.

30. He further submitted that should the court find that there was an injustice, the court should order for a retrial as this is a new matter and the evidence convicting the appellant was overwhelming.

Analysis and Determination

29. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the applicable law in this appeal. The issues for determination emanating therein are as follows;

    Whether the appellant's right to a fair trial was violated

    Whether the prosecution's case was proven beyond reasonable doubt and

    Whether the appellant's sentence was excessive and harsh.

29. The appellant has challenged his conviction on the basis of failure to accord him a counsel. It was argued on his behalf that this was in violation of his rights under Article 50(2) (h). Article 50 (2) (h) of the *Constitution* provides for provision of legal representation by the state where substantial injustice would occur. Further, in its decision in *Republic vs Karisa Chengo & 2 Others* [2017] eKLR, the Supreme Court considered the issue of legal representation at state expense and stated:

> "(87) Article 50(2) (h) of the *Constitution* provides that "[every accused person has the right to a fair trial, which includes the right...to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in *David Macharia Njoroge vs Republic*, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result...." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in *Thomas Alugha Ndegwa vs Republic*; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

(88] In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the *Constitution* is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the *Constitution*, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

29. In the case of *Bernard Kiprono Koech v Republic* [2017] eKLR, the Court considered an argument similar to what is now before this court and stated as follows: Mumbi J (as she was then):

> " 39. Secondly, there is now a framework in place, which was not in place at the time of the appellant's trial, under which an accused person can apply under section 40 of the Legal Aid Act No. 6 of 2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:
>
> 43.
>
> (1) A court before which an unrepresented accused person is presented shall —
>
> (a) promptly inform the accused of his or her right to legal representation;
>
> (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
>
> (c) inform the Service to provide legal aid to the accused person.
>
> 40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose."

29. In the present appeal, I note that the appellant was able to cross-examine witnesses. However, the appellant is about 22 years old from my interrogation of him at the hearing of this appeal. He was a student and there is no evidence that he was accorded that opportunity to be represented by an advocate but elected not to. He was informed on the 12/10/2023 which was a hearing date when witnesses did not appear, of that right as follows: " the accused to get services of counsel" but at the hearing when witnesses attended court, the court did not establish from him whether he was in a position to proceed with the trial without an advocate. This court appreciates that the state must strive, through the Legal Aid Service, to provide legal representation in cases where substantial injustice may result and that it is

not in all cases that legal aid will be accorded. However, the court must assess such need and record in the proceedings. The charge of robbery with violence attracts punishment of death, upon conviction. Although the appellant was sentenced to serve 15 years imprisonment, that exercise of discretion in sentencing did not lessen the seriousness of the offence as contemplated in section 296(2) of the *Penal Code*.

30. It is for that reason that I find that without delving into the merits of the other grounds of appeal as argued and therefore whether the charge was proved against him beyond reasonable doubt, or whether the alibi defence was considered, that I find and hold that there was mistrial of the appellant as his right to legal representation was violated and that as a result, substantial injustice occurred.

31. In the end, I find this appeal merited. I allow it to the extent stated above. The conviction of the appellant is quashed and sentence of 15 years imprisonment set aside. However, as the offence was serious and as the case is a 2023 case, taking into account the rights of the victims of offences, the appellant shall be presented before Winam SPM's Court for retrial with the same offence.

32. I further direct the trial courts to, at all times, adhere to the provisions of Article 50 (2) of the *Constitution* on the rights of accused persons and the provisions of the *Legal Aid Act* and only proceed without counsel if satisfied that no substantial justice will occur, having regard to the circumstances of each case.

33. The lower court file to be returned forthwith, with a copy of this judgment.

34. The prosecution to take up the matter with DCI and act as appropriate.

35. Signal to issue.

36. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE