REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 153 OF 2018

HARRISON OCHILO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The accused herein was charged, in Butere SRMCRC No. 1 of 2018, with the offence of assault causing actual bodily harm, contrary to section 251 of the Penal Code, Cap 63, Laws of Kenya, and was convicted.

2. Being dissatisfied with the conviction, and the sentence to serve 3 years imprisonment, the appellant lodged an appeal, vide a petition of appeal, dated 1st November 2018. In his petition of appeal, he raised six grounds of appeal, which stated as follows: that the sentence was harsh , the trial court erred in having the appellant's case closed without the appellant calling witnesses, the trial court erred in failing to afford the appellant chance and opportunity to avail his witnesses as per the directions taken under section 211 of the Criminal Procedure Code, Cap 75, Laws of Kenya, the trial court erred in failing to consider the mitigation of the appellant, the trial court erred in convicting of the appellant in the face of contradicting evidence, the trial court erred in failing to afford the appellant a chance to cross-examine his co-accused who had implicated him in his defence.

3. The duty of a first appellate court was stated in the *Okeno vs. Republic* [1972] EA 32, as follows:

"The primary duty of an appellate court is to re-analyse and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions."

4. It is, therefore, the duty of this court in this case to re-evaluate the evidence adduced by the prosecution in support of the charges and by the defence, and to make its conclusion on whether the commission of the offence by the appellant in the main charge of assault, with respect to the complainant, were proved and whether the appellant was responsible.

5. One of the grounds of appeal is whether the trial court erred by rejecting the appellant's right to call his witness. The appellant's second and third grounds are that that section 211 of the Criminal Procedure Code was not complied with. According to the appellant, after the prosecution closed its case, he was not allowed to call his witness. The respondent's response is that the court complied with this section and that the appellant, after giving his testimony, closed his case. I have considered the record of the court which indicates, at page 14 of the record of appeal, that the provisions of section 211 of the Criminal Procedure Code were explained to the appellant. He elected to give unsworn evidence, and to call one witness. He gave his unsworn statement and he proceeded to close his case. There was, therefore, no denial of his right to a fair trial as it was his choice not to call his witness. It is my finding that these grounds have no merit.

6. The other ground of appeal related to non-compliance with section 208(3) of the Criminal Procedure Code, on the right to cross-examine the co-accused. Section 208 of the Penal Code provides as follows:

"Procedure on plea of not guilty

1) If the accused person does not admit the truth of the charge, the Court shall proceed to hear the complainant and is witnesses and other evidence (if any).

2) The accused person or his advocate may put questions to each witness produced against him.

3) If the accused person does not employ an advocate, the Court shall at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."

7. The Court of Appeal, in *Tedium Roger Leneni Mzungu & Another vs. Republic* [2007] eKLR , said:

"We agree with Mr. Wachira that the right to cross-examination is a fundamental one, and we would repeat what His Majesty's Court of Appeal for Eastern Africa said in Edward s/o Msenga vs. Reginam, (1942) EA CA 553 which was one of the cases relied on by Mr. Wachira. There, the Court held that:-

"The failure to give the appellant an opportunity to cross-examine the second accused was the denial of a fundamental right which was fatal to the conviction on the first count."

What happened in that case was that a co-accused gave evidence on oath and implicated MSENGA on count one of the charge. The prosecutor cross-examined the co-accused but:-

"the first accused (Msenga) was refused permission to do so."

We do not know if the 2nd Appellant had been "refused permission" to cross-examine the 1st Appellant but before coming to the conclusion which we have already set out herein, the Court in Msenga's case examined the nature of the evidence which the co-accused had given against Msenga.

The Judges there said at page 554:-

"We find it impossible to say that the refusal by the learned trial Magistrate to allow the appellant to cross-examine the second accused did not prejudice the appellant in his defence and did not result in a miscarriage of justice. The evidence given by the second accused undoubtedly tended to incriminate the appellant, particularly his evidence that the appellant did not hand over the money to him for, if the appellant did not hand over the money, the only reasonable inference which could be drawn was that the appellant had stolen the money himself. But if doubt were thrown on the truth of the second accused's testimony, a reasonable doubt might well have been raised as to the guilt of the appellant. It was, therefore, clearly in the interests of justice that the appellant should have been given an opportunity of testing by cross-examination the truth of the evidence given against him by the 2nd accused. Although it is true that the prosecutor cross-examined the second accused on most of the points on which the appellant says he wished to cross-examine, we are unable to agree with the conclusion of the learned appellate Judge that 'had the appellant been allowed to cross-examine, there is no reason whatsoever to believe that the 2nd accused would have answered differently.' It cannot be assumed that the second accused would not have answered differently if he had been cross-examined by the appellant. The appellant might well have material which was unknown to the prosecutor and which would have enabled him to cross-examine more effectively than the prosecutor. We think that the failure to give the appellant the opportunity to cross-examine the 2nd accused was a denial of a fundamental right which was fatal to the conviction on the first count."

We have found it necessary to set out in extenso the reasoning of the Court in the Msenga case because the Court actually went into detail with regard to the nature of the evidence which Msenga's co-accused had given against him and upon which he had not been allowed to cross-examine. What was the nature of the evidence which the 1st Appellant had given against the 2nd Appellant and on which the 2nd Appellant was not given an opportunity to cross-examine" We think it is necessary for us to set out that evidence in full. In his evidence-in-chief the 1st Appellant had said:-

"My name is Tedium Rogers Mzungu. I reside in Mathare 4A. I sell second-hand clothes. I also play football. I am a Wundanyi citizen, and a footballer Mathare Member Club. I live with my parents. If it was [not] for the 2nd accused I would not have to (sic) Kiambu. When we arrived at Kiambu, the second accused asked me to wait at the matatu stage. He entered in plot known to him.

All of a sudden I saw people running towards where I was. I started following the main road. The 2nd accused diverted to a maize plantation. I was arrested. I had no malice. I had no knowledge whether we were coming to steal. He had asked me to accompany him to assist him carry the items. That is all."

What we understand from this evidence is that the 1st Appellant had no business at all in Kiambu but that the 2nd Appellant asked him to go with him (2nd Appellant) to help the 2nd Appellant carry certain items from there. He (1st Appellant) was left at the "matatu" stage while the 2nd Appellant went into some plot from which he came out running. The 2nd Appellant, as we have seen said nothing about 4th July, 2000 and the evidence of the 1st Appellant was directly placing him at Kiambu and in a plot from which he came out being chased. Clearly, the 2nd Appellant was entitled to cross-examine the 1st Appellant on this evidence. The 2nd Appellant might well have suggested to the 1st Appellant that he (2nd Appellant) was not at and did not go to Kiambu with the 1st Appellant and that the 1st Appellant was lying in his evidence. The failure by the trial Magistrate to give the 2nd Appellant the opportunity to cross-examine the 1st Appellant was a denial of a fundamental right. In 1942 when Msenga's case was decided, Kenya did not have a written Constitution or any Constitution at all. We were a colony. Now we have a written Constitution and section 77 (2) (e) thereof specifically enshrines in it the right to cross-examine witnesses giving evidence adverse to an accused person. The 1st Appellant was denied that right as regards the adverse evidence given against him by the 1st Appellant. The 2nd Appellant will have the benefit of that holding."

8. The Court of Appeal, in *HOW vs. Republic* [2014] eKLR stated as follows:

"The first such matters and which is the main one is on point of procedure which in law, we feel fundamentally prejudiced the entire case and the appellant. This is that the complainant, J.S. who was a minor was taken through voire dire examination and this was proper in law for whatever evidence was given on age, she was not above twelve (12) years in age. The learned trial Magistrate found as a result of voire dire examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross-examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately the appellant was unrepresented and clearly could not apprehend his right to cross-examine the witness. He clearly relied on the trial court which had a duty to invite him, at the end of the witnesses' evidence in chief to cross-examine the witness, which invitation did not come forth in respect of this witness. We can find no reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross-examined so would any witness who gives unsworn evidence not be cross-examined. Of course that was a misapprehension of the law. An accused person who chooses to give unsworn statement in his defence does so as a result of the provisions of the Criminal Procedure Code which protect him from being cross-examined if he chooses to give unsworn statement in his defence. It must be appreciated that the accused person cannot in law be charged with the offence of perjury in respect of a statement he gives in defence of himself in a criminal case brought against him. That protection is not available to a witness in a criminal case. Section 208 of the Criminal Procedure Code is clear on this aspect."

9. In this case, the 1st accused, Peter Okumu, gave evidence on oath. After his testimony, he was cross-examined by the prosecutor and there is no record that either of the co-accused cross-examined his or that he was asked whether he wished to cross-examine them. This was clearly a serious omission on the part of the trial court.

10. The 1st accused herein at page 15 of the proceedings testified in cross examination that

"…I saw the 2nd Accused rushing to the tractor .He started arguing with the complainant .I tried intervening but the complainant was rude and so I made a mistake and slapped her .The 2nd accused also slapped the complainant several times."

11. The evidence by the 1st accused clearly implicated the appellant and thus the failure to allow him to cross-examine the co accused was fatal to the prosecution for being prejudicial to the appellant.

12. The next question is whether, because of the prejudice caused to the appellant, through failure to allow him to cross examine the co accused, he should be set free or should the court order a retrial, bearing in mind the maxim that justice cuts both ways. In *Obedi Kilonzo Kevevo Vs. Republic* (2015) eKLR**,** the Court of Appeal held that:

"Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant.

In the case of Muiruri vs. Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:-

"Generally whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.""

13. In *Jackson Githinji Karani vs. Republic* [2019] eKLR the court observed:

"The criminal justice system requires that the court balances the rights of the accused and those of the victim and the society at large.

26. Where the trial was flawed, the court orders a retrial. This calls for consideration as to whether the accused has had a proper trial. A retrial will be ordered where a trial was illegal or defective. This depends on the circumstances of each case. A retrial will be ordered where the interests of justice so require and will not occasion an injustice to the appellant.

27. In the Case of Muiruri –vs- Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia

1. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

2. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

14. The same principle was applied in the case of *William Ambetsa vs. Republic* [2019] eKLR.

15. The appellant herein was charged with the offence of assault and was sentenced to 3 years imprisonment. Save for the trial court's failure to inform him of his right to cross-examine, the evidence on record appears to be fairly strong.

16. It is, therefore, my finding and holding that there was a mistrial. The appeal herein is allowed on that account. The conviction of the appellant is hereby quashed, and the sentence set aside. The trial court record shall be remitted to the Butere Principal Magistrate's Court for the retrial of the appellant by a magistrate other than Hon Makoyo, Senior Resident Magistrate.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF December 2020

W MUSYOKA

JUDGE