



REPUBLIC OF KENYA



KENYA LAW
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**Kinyua v Republic (Criminal Appeal E006 of 2021)
[2024] KEHC 9469 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E006 OF 2021
WM MUSYOKA, J
JULY 31, 2024**

BETWEEN

PC JAMES KINYUA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia CMCSOC No. 89 of 2018, of 25th February 2021)

JUDGMENT

1. The appellant, PC James Kinyua, had been charged before the primary court, of the offence of rape, contrary to section 3(1)(a)(b)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with an adult, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on August 23, 2018, at Kotur Police Patrol Base, at Amukura Division, within Busia County, he intentionally and unlawfully caused his genital organ to penetrate the genital organ of SA, a girl aged 19 years, without her consent. A trial was conducted, where 12 witnesses testified. The appellant was put on his defence, and he gave a sworn statement. He was eventually convicted, and was sentenced to serve 10 years in jail.
2. The appellant was aggrieved, and he brought the instant appeal, revolving around the trial court not taking into account the character and conduct of the complainant; the sexual act not being proved; the case being a frame-up; the fair trial principles, in article 50(2) of *the Constitution*, not being applied; vital witnesses not being called; and his alibi defence being disregarded.
3. The appeal was canvassed by way of written submissions. Both sides have filed written submissions.
4. I have perused the trial record, and before I recite the proceedings, and the written submissions, let me first address aspects of the trial process that I have found rather disturbing. Whether I will determine



this appeal, on its merits, may well depend on the conclusions that I will come to upon discussing those aspects.

5. The trial record reflects that the matter commenced on 28th August 2018. The appellant was absent, but the charge was, nevertheless, read, after which an application was made for a warrant to be issued, for the arrest of the appellant. That order was made, and the matter was fixed for mention on 10th September 2018. The appellant was presented in court on 31st August 2018. The matter was handled at 2.45 PM on that day. The record is silent on whether the charges were read to the appellant before he responded, to the effect that they were not true, and before a plea of not guilty was recorded, setting the stage for a full trial to be conducted.
6. 2 trials were conducted. In the first trial 2 witnesses testified. That trial was abandoned, after the initial presiding magistrate was transferred, and another magistrate took over, whereupon section 200 of the Criminal Procedure Code, Cap 75, Laws of Kenya, was complied with, and it was decided that the matter would start de novo. The second trial did not commence with the charges being read to the appellant afresh, but with the prosecution witnesses taking to the witness stand afresh, on 16th July 2019, and the proceedings going on from there till conviction and sentence.
7. For avoidance of doubt, this is what is recorded, as having transpired on 28th August 2018, when the matter first came up in court. The said record reads:

“Date 28/8/2018

Magistrate -Hon. MA Nanzushi – SRM

Prosecutor/State Counsel – Sakari

Court Clerk – Diana & Brian

Accused – Absent

English/Kiswahili

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language that he/she understand, who being asked whether he/she admits or denies the truth of the charge(s) replies:

Prosecutor-

I pray for warrant of arrest against the accused.

Court-

Warrant of arrest to issue. Mention 10/9/2018.

Hon. MA Nanzushi

Senior Resident Magistrate”

8. The record for August 31, 2018, when the appellant was produced in court, reads as follows:

“31/8/2018

Before Hon. MA Nanzushi -SRM

State Counsel – Gacharia

Court Assistant – Diana



Interpretation – English/Kiswahili

Accused – present

Prosecutor-

Accused has not been called. Can we take plea at 2.00 PM.

Court-

Mention 2.00 PM.

2.45 PM

Accused-

It is not true.

Court-

Plea of not guilty entered.

Alternative Count Accused-

It is not true,

Court

Plea of not guilty entered.

...

Hon. MA Nanzushi

Senior Resident Magistrate”

9. I have compared the typewritten version of the handwritten notes of the trial court, and I am satisfied that the typescript is a replica of the handwritten notes.
10. The trial was founded on proceedings where the charges were not formally read to the appellant. Was that fatal?
11. *The Constitution* is the supreme law in Kenya. It has something to say about what should happen in criminal trials. Article 50(2) states the fair trial principles. The principle relevant to this part of this judgment is that relating to being informed of the charges he faces, before he answers to them. It is stated in Article 50(2)(b), in the following terms:
 - “(2) Every accused person has the right to a fair trial, which includes the right— (a) ... (b) to be informed of the charge, with sufficient detail to answer it; (c) ...”
12. Criminal trials and related processes are governed and regulated by the Criminal Procedure Code. Section 207 sets out the process of plea-taking at the magistrate’s court, and it is required that the charge should be stated to the accused person by the court, after which the court should ask him how he is to plead, whether guilty, or not guilty, or autrefois acquit, or autrefois convict, or whichever plea he would be pleased to make, after which the court notes the plea, and if it be of not guilty, the matter proceeds to hearing.
13. For avoidance of doubt, the relevant portions of section 207 state as follows:

207. Accused to be called upon to plead



- (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
- (2) ...
- (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.
- (4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.
- (5) If the accused pleads—
 - (a) that he has been previously convicted or acquitted on the same facts of the same offence; or
 - (b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.”

14. Quite obviously, section 207(1) of the Criminal Procedure Code was not complied with, for the charge was not stated to the appellant, before he was called upon to plead to it. A fundamental requirement in the criminal process was skipped, and the appellant was subjected to a trial process when he had not been informed of the charges that he was facing. Both *the Constitution* and the Criminal Procedure Code make that requirement, and no presumptions ought to be made, in criminal matters, as to whether an accused person understands the charges he faces, when the said charges were not stated or read to him at arraignment, or when he was not informed of them at that stage.
15. The requirements of Article 50(2)(b) of *the Constitution* and section 207(1) of the Criminal Procedure Code were not complied with. The plea-taking process was bungled, to the extent that the appellant was required to plead to charges before they were read and stated, and explained to him, and the trial proceeded that notwithstanding. Was it fatal? Yes, it was. The foundation of the entire trial process is what transpires at the plea-taking. That process sets the stage for what happens later at the trial. The legitimacy of the process depends fundamentally on it. Where the same is not handled well, it would mean that the trial starts on a wrong footing, and the accused person would not have been handled fairly at the outset, setting the stage for a flawed process.
16. In addition to Article 50(2)(b) of *the Constitution*, there is also article 50(2)(g)(h) of *the Constitution*, which should be read together with section 43 of the *Legal Aid Act*, Cap 16A, Laws of Kenya, which state the right to legal representation. Article 50(2)(g) is about the right to choose and to be represented by an Advocate, and to be informed of the right promptly. Ideally, the proper time to be informed of the right to choose an Advocate of one's choice, to conduct the defence, should be before plea is taken, for the advice by the Advocate would be critical, on how the accused person is to plead. *The Constitution* places a duty on the trial court to inform the accused person of this right to legal representation of his choice at the trial, and to do so promptly. Failure to comply with this prerequisite, would render the trial unfair. It is a constitutional command, and the trial court is bound to comply. The record before me indicates that the right of the appellant, to be represented in the proceedings, by an Advocate of his own choice, was not raised, by the trial court, the duty bearer, at any stage of the proceedings, and he



- was not informed of that right. It did not come up on 31st August 2018, when the trial court purported to take plea, and it did not arise thereafter. The trial court did not comply with Article 50(2)(g) of [the Constitution](#), and the trial of the appellant was unfair to that extent.
17. Article 50(h) is about the right to have an Advocate assigned to the accused person, by the State and at State expense, if substantial injustice would otherwise result. This right, like that under Article 50(2)(g), should be communicated promptly to the accused. With regard to when the right ought to be communicated, ideally, it ought to be at the time of arraignment, particularly before plea is taken, so that the accused can benefit from legal advice on how to plead to the charge. In this case, the trial court did not inform the appellant of this right at arraignment, neither was it adverted to thereafter. The duty is imposed by [the Constitution](#), on trial courts, and the omission to inform the appellant of this right rendered the trial unfair.
 18. Would substantial injustice have occurred in this case, to require an Advocate being allocated to the appellant by the State and at State expense? At the time the appellant herein was being arraigned in court, on 31st August 2018, the appellant herein was exposed to being sentenced, upon conviction, to life imprisonment, being the prescribed maximum penalty, for a conviction for the offence for which he stood charged. That is a very lengthy time to spend in prison. Exposure to such sentence would require that an accused person be subjected to a trial where there is a vigorous scrutiny of the evidence being adduced, and strict observance of the rules of procedure.
 19. The object of the [Legal Aid Act](#) is stated in the preamble, to be “An Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of [the Constitution](#) to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes.” So, the [Legal Aid Act](#) is meant to operationalize Article 50(2)(g)(h) of [the Constitution](#). Article 50(2)(g)(h) of [the Constitution](#) and the [Legal Aid Act](#) are about access to justice, by providing legal aid services to indigent persons in Kenya. It is about inclusion, non-discrimination and protection of marginalized groups, according to sections 3 and 4 of the [Legal Aid Act](#). Section 43 of the [Legal Aid Act](#) imposes duties on the court, before whom an unrepresented person is presented, to comply with Article 50(2)(g)(h) of [the Constitution](#), by informing that person of his right to legal representation of his own choice, and where substantial injustice is likely to arise, to inform him of his right to be assigned an Advocate by the State, and where the accused requires legal aid, or is found to require such aid, inform the National Legal Aid Service to provide legal aid service to the accused person. According to section 43(1A) of the [Legal Aid Act](#), that in determining whether substantial injustice is likely to occur, the court ought to take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend himself.
 20. Informing an accused person of their rights, under Article 50(2)(g)(h) of [the Constitution](#), and assessing whether the accused person requires legal aid services from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. It should be noted that the rights under the [Legal Aid Act](#) should even be invoked right after the arrest of the suspects, and before their presentation in court, because the [Legal Aid Act](#) also operationalizes Article 49 of [the Constitution](#), on the rights of an arrested person, as section 42 of the Act provides for a person in lawful custody, and casts a duty on the officer in charge of the custodial facility, where the person is held, to inform the person of availability of legal aid, and to facilitate applications by a person who may wish to access such legal aid. These rights are constitutional imperatives, commanded by [the Constitution](#). Trial courts have a duty to ensure that they are complied with, and failure to comply ought to automatically render the subsequent trial null and void, for non-compliance with [the Constitution](#).
 21. Were these constitutional fair trial prerequisites applicable in this case? The offence, the subject of these proceedings, was allegedly committed in 2018. [The Constitution](#) of Kenya, 2010, commenced on 27th



August 2010. It would mean that, as at 2018, when the appellant was being arraigned in court, the Constitution 2010 was in application, and the court, before whom he was produced, was bound by Article 50(2)(g)(h) of the Constitution. The said court was obliged to comply with Article 50(2)(g)(h) of the Constitution, to inform the appellant of his right to legal representation of his own choice, and the right to legal aid from the State, in the event that he was indigent. Similarly, the Legal Aid Act had commenced by the time of his arraignment, for that law was operationalised on 10th May 2016. The trial court ought to have given effect to the mandatory requirements in section 43 thereof. The duty on the court was to assess whether the appellant was at risk of being exposed to substantial injustice, and to suffer lack of access to justice, on account of being indigent, or belonging to a marginalized or vulnerable group, and on account of the severity of the charge that he faced, and the sentence he was liable to be given, in the event of conviction. That was not done.

22. As the fair trial principles in Article 50(2)(g)(h) of the Constitution, and section 43 of the Legal Aid Act, were not complied with, the appellant herein was subjected to an unfair trial. Article 2(4) of the Constitution provides for what happens whenever some act violates or contravenes the Constitution. It states that "... any act or omission in contravention of this Constitution is invalid." The omission or failure, herein, to comply with Article 50(2)(b)(g)(h) of the Constitution amounted to a contravention of that provision, and of the Constitution, and rendered the entire trial invalid. The failure to comply with those provisions meant that the objectives of that the Constitution and the Legal Aid Act were not met, in terms of making justice accessible to all, creating a level playing ground for all, ensuring that the indigent in society get to access the same facilities as persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.
23. The discussion above clearly demonstrates that some of the constitutional fair trial rights were not honoured and upheld, in the trial the subject of this appeal, which rendered the trial unfair. That would mean that the trial did not reach the constitutional threshold for fairness. The omission to comply with the Constitution sounds a death knell for any trial, given that the Constitution is the supreme law in Kenya. Whatever it commands must be honoured and complied with. Constitutional provisions are not decorative. They have to be complied with. Failure to comply with them renders useless whatever else is done after the impugned or invalid act, regardless of whether the subsequent proceedings are conducted fully in compliance with the Constitution and the applicable laws. Article 2(4) of the Constitution renders invalid any act or omission which amounts to a non-compliance with provisions of the Constitution. The non-compliances that I have discussed above, rendered invalid and a nullity the criminal proceedings, that were conducted against the appellant in Busia CMCSOC No. 89 of 2018. That would mean that the outcome of those proceedings was invalid and a nullity.
24. I note that the appellant was a police constable at the time of the alleged commission of the offence. There could be a temptation to presume that he knew what to expect in a criminal trial, he could defend himself effectively, he knew about the twin rights relating to legal representation, and he could afford to instruct counsel. There ought to be no room for the making of such presumptions. The trial court had before it an accused person, and it was bound to treat that accused person in the manner prescribed in law, without regard to his status and position in society. Doing otherwise would be discriminative, and would fall afoul of Article 27 of the Constitution. The appellant was entitled to be treated equally with any other accused person who found himself before the trial court.
25. In view of the above, I hereby declare a mistrial. Trial courts ought to be vigilant in the way they handle trials, to ensure that justice is done for both the victim of the offence and the perpetrator. Justice cuts both ways. The victim is entitled to have her tormentor subjected to punishment; while the accused is entitled to a fair trial, which meets the constitutional and legal thresholds. The trial conducted in Busia CMCSOC No. 89 of 2018, did not meet those thresholds. Consequently, I shall quash the conviction



of the appellant in that matter, on 25th February 2021, and set aside the sentence that was imposed on him the same day. I shall, accordingly, order a retrial. The appellant shall be handed over to the police, forthwith, who shall present him to the Chief Magistrate's court at Busia, for a fresh trial. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 31ST DAY OF JULY 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

PC James Kinyua, the appellant, in person.

Advocates

Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

