Gitonga v Republic (Criminal Appeal E048 of 2023)
[2024] KEHC 10743 (KLR) (29 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E048 OF 2023

LW GITARI, J

AUGUST 29, 2024

BETWEEN

DENNIS GITONGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appeal arises from the proceedings in the Chief Magistrate's Court Meru Sexual Offence Case No.E004 of 2021 where in the appellant was charged with the offences of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 two counts thereof with the alternative charges of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006.

2. The appellant denied the charges and a full trial he was found guilty, convicted on the charges of defilement and ordered to serve life imprisonment on each count. Sentence was ordered to run concurrently.

3. The appellant was dissatisfied with the sentence and the conviction. He filed this appeal based on amended supplementary grounds of appeal which are as follows:-

    1. That every person has inherent dignity and the right to have that dignity respected and protected under Article 28 of the *Constitution*.

    2. That the learned trial magistrate erred in both matters of law and fact for failing to indicate in the record whether he had inquired on the language the appellant understood before the charge was read to him.

3. That the learned trial magistrate erred in both matters of law and fact for failing to inform the appellant his rights to an advocate under Article 50(2) (g) and (h) of the *Constitution*. Taking into account the severity of the charges and sentence he was facing.

4. That the learned trial magistrate erred in both matters of law and fact by failing to notice that the evidence of the key prosecution witnesses was marred with contradictions and material discrepancies.

5. That the life sentence imposed on the appellant is excessive, arbitrary, and inhuman and it violates the appellant's right to a fair trial under Article 25(c) of the *Constitution*.

6. That the mitigation factors of the appellant were not considered by the trial court during sentencing.

7. That the time limit for life sentence me meted on the appellant is not known

8. That the appellant urges that this court has powers to impose a lesser sentence in conformity with the Judgment of the Supreme Court in *Francis Karioko Muruatetu & Another –v- Republic* Petition (2017) eKLR.

4. The respondent has opposed the appeal and prays that it be dismissed.

The prosecution's case:

5. The appellant was alleged to have defiled two minors aged seven years by causing his genital organ namely penis to penetrate their genital organs namely vigina. The evidence was adduced by six witnesses. PW1 was D.S aged seven (7) years and a student at Grade 2 in [Particulars Withheld] School. After a voire dire examination, she gave evidence without being sworn. She told the court that it was during school holidays that she was playing with her friend who is PW2- in this case. The two then went to the house of the appellant who they had known before as he had gone to construct their house. While in the house of the appellant he took them to his bed where he removed her skintight and her pant and defiled her by inserting his penis in her vigina. The appellant did the same to PW2 and PW3. She then went home and reported to her mother and father. She told the court that she did not fell pain and she went to school the following day.

6. PW2 IMM testified that she was seven years old and she was a student in grade 2 at [Particulars Withheld] School. She was not sworn as the trial court found that she was too young and did not seem to understand the oath. She told the court it was during school holidays when her friend (PW2) told her to take her to go and look for her sweater. PW2 accompanied PW1 to the house of the appellant where they found him. The appellant removed his trouser and underwear and slept on her. The appellant used his penis which he inserted in her vagina. The appellant had placed her on his bed when he did that. The appellant then released her and she went home. The appellant warned her to tell anyone or else he would cut his neck PW1 informed her mother what had happened and she inturn informed her mother. PW2 confirmed to her mother that what PW1 told her was true. She was taken to hospital where she was given some drugs.

7. PW3 J.K is the mother of PW1. She produced the birth certificate of PW1 showing that she was born on 22/6/2014. On 12/8/2021 the PW1 had lost her sweater and on asking her where it was she stated that it was at her friend's home. She told her to go for it. The next day she asked PW1 where her sweater was and she disclosed that it was not at the home of her friend but was at the house of a man (Mzee) PW1 got shocked and reported to her husband. She then told PW1 to take him to the home of the mzee and she took her to the house of the appellant who was living in the neighbourhood. They found

the door closed and the appellant was not there. PW1 disclosed to her that they used to go to the house of the appellant with D 1, 1 and B and the appellant would defile them by inserting his penis in their vigina, PW3 went and informed the mother of PW2 and told her to enquire from PW2. She did and PW2 confirmed that they used to go to the house of the appellant and he would defile them.

8. The matter was then reported to the police when they wanted to go the house of the appellant and get the truth, the appellant brought the sweater and gave it to her husband. The appellant was then arrested.

9. The minors were then taken to hospital and they were treated. The P3 form and P.C.R form for PW1 was filled on 25/8/2021. The doctor disclosed to her that the children had been defiled. The appellant used to give the children sweets and money and promised to buy them more sweets. That PW1 used to complain of pain her private parts but had not imagined that she was defiled. PW3 stated that she had given a person some work and he came with the appellant as one of his workmen. She had no grudge with the appellant and she did not interact with him directly.

10. PW4 was P.W who testified that she is IM's (PW2) mother. She produced PW2's birth certificate showing that she was born on 15/1/2014, exhibit 4. She told the court on 15/8/2021 PW3 went to her house at 7.00 am and informed her that PW2 had gone to a man's house where they were defiled. PW4 enquired from PW2 and she confirmed that she had gone to the house of the appellant with PW1 to look for her sweater and while there the appellant defiled her. She went and reported at Timau Police Station and she took the child to hospital. A P3 form and PCR Form was filled, exhibit 5 & 6. The (PW2) informed her that the man who defiled her was called Denis and she identified him to her when they came to court.

11. PW5 Doctor Gideon Mutahi Kirimi is the one who examined the complainants at Timau Sub-County Hospital. PW1 D.S.S was examined on 17/8/2021 by Doctor Teresa Mulenga who is his workmate and knew his hand writing and signature. He produced the P3 form on her behalf. PW5 testified on being examined, PW1 had no bruises on her genitalia, the hymen and was form but not freshly. She had a whitish discharge and urinary tests showed that she had an infection. She was treated and her P3 form was filled on 25/8/2021. PW5 testified that PW2 IM was examined on 17/8/2024 on allegation that she was defiled by her neighbor who was known to her. She had no vaginal discharge but there bruises on the viginal lining. The hymen was torn but not fresh. She was treated and her P3 form was filled and was produced as exhibit 5 and P.R.C care form as exhibit 6.

12. On cross examination, PW5 testified that the degree of injury was grievous harm because of the effect/ impact the act has on the victim. That the act of defilement has psychological effect on the life of the victim.

13. No.73087 Segeant Everlyne Makena (PW6) attached at Timau Police Station Gender Desk was the investigating officer having taken over from her colleague who was transferred to Nakuru. On 26/8/2021 the complainants were taken to the police Station on allegation that they were defiled by a person they regarded as uncle and was constructing at the plot where they were living. The children were two boys and two girls. They were referred to hospital where they were examined and their P3 forms were filled. The girls were aged seven which was confirmed buy their birth certificates which she produced as exhibit 1a & b. The appellant had defiled the children for a number of days and he could defile them every time they went to his house. The appellant used to threaten them and give them money. The case involving the boys was filed separately.

The Defence Case

14. The appellant stated that PW3 had made sexual advances to him when he demanded his money from her. He declined and PW3 told him she would teach him a lesson. Later she went with police officers and had him arrested. He was then informed that he had defiled two children. He was then charged.

15. The appeal was canvassed by way of written submissions. The appellant submitted that he had a right to have his dignity respected. That the court did not enquire the language which he understands. He further alleges that the learned trial magistrate did not inform him of his rights under Article 50(2) (g) & (h) of the *Constitution*. Yet he was facing a serious offence. He further submits that the prosecution's case was riddled with contradictions and inconsistencies. The appellant further submits that the mandatory life imprisonment sentence violates his rights to fair trial. He relies on Dennis Kinyua Njeru –v- Republic [2017] eKLR.

16. He submits that the life imprisonment sentence is arbitrary and excessive and inhuman and violates his rights to fair trial under Section 25(2) (c) of the *Constitution*. His mitigation was not considered.

17. The Respondent submits that the ingredients of the charge of defilement, to wit age of the victims, penetration and the identity of the perpetrator were proved beyond any reasonable doubts. He relies on *Charles Wamukoya Kanani-v- Republic* and *Joseph Kieti Seet –v- Republic* [2014] eKLR.

18. It is further submitted that there were no contradictions and inconsistencies. He further submitted that the sentence imposed was a lawful sentence which is set out under Section 8(2) of the *Sexual Offences Act*.

Analysis and Determination:

19. This is a 1st appeal and this court has a duty to analyse the evidence, evaluate it and come up with its own independent finding. This court has to bear in mind that it neither saw nor record the witnesses when they testified and leave room for that. See *Okeno-v-Republic* (1972) E.A 32. I have considered the record of appeal and the submissions. I will consider two issues for determination:-

    1. Whether the learned magistrate failed to conduct the proceedings in a language that the appellants understands.

    2. Whether the learned trial magistrate erred by failing to inform the appellant of his right to choose to be represented by an advocate as provided under Article 50(2) (g) (h) of the *Constitution*.

i. Whether the learned magistrate failed to conduct the proceedings in a language that appellant understands.

20. The law requires that at the 1st appearance, the court is required to satisfy itself that an accused understands the language of the court and if he does not, to provide him with an interpreter at State expense. Article 50 (2) (m) o the *Constitution* provides that. "the accused has a right to an interpreter if he does not understand the language of the court."

21. The Court of Appeal has held that the violation of the right of an accused to have an interpreter may lead to the proceedings being a mistrial and the quashing of the victim. See Hairo Ibrahim-v- Republic, Court of Appeal Nyeri Criminal Appeal No.46/2014. The trial court has a duty to ensure that the language used is the one that accused understand. Section 207 of the *Criminal Procedure Code* (Cap 75 Laws of Kenya) provides that:

207. (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) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

> Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(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."

22. The court is required to ensure that the charge and all elements of the charge are explained to the accused in a language that he or she understands. See *Adan-v- Republic* (1973) E.A 445. The official language of the court is English and Kiswahili as provided under Section 33(1) *Court of Appeal (Organization and Administration Act)*, Section 34(1) *High Court (Organization and Administration Act*.)

23. The record of the court shows that on 18/8/2021 when the appellant first appeared in court the language or the court was indicated as English/Kiswahili. The substance of the charge and every element it was read to the accused in the language that he understands and on being asked whether he/she admits or denies the truth of the charge replies:

> " Ni uongo". The appellant therefore answered to the charge in Kiswahili language. At page 33 of the record, upon being put on his defence the appellant gave his unsworn statement of defence in Kiswahili. The duty of the court was to ensure that the appellant understood the language and not necessarily that the language used was the mother tongue. See Court of Appeal Decision in Kyalo Kalani-v- Republic Nairobi Criminal Appeal No.586/2010 throughout the proceedings, the record of the court shows that there was a Court Assistant. The role of the court of a Court Assistant is inter-alia to interpret the proceedings if the person accused does not understand any of the two official languages of the court. The appellant participated actively in the proceedings using Kiswahili language. He never applied to the court to be supplied with an interpreter. The reasonable conclusion to be drawn is that he understood the language of the court and was not prejudiced in any way.

By noting that the appellant was conversant in Kiswahili, the trial court cannot be faulted in conducting the proceedings in English and Kiswahili. This ground is without merits.

ii) Whether the learned trial magistrate erred by failing to inform the appellant of his right to legal representation.

24. Article 50 (2) (g) & (h) of the *Constitution* provides that :

> "Every accused person has a right to a fair trial, which includes the right-
>
> (g) to choose, and be represented by an advocate and to be informed of this right promptly;
>
> (h) 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."

25. The record shows that when the appellant appeared before the learned magistrate on 18/8/2021 the charges were read to him and he pleaded not guilty. Thereafter on 8/9/2021 the trial started on 15/9/2021 and witnesses were called to testify. There is nothing on record to show that the trial magistrate informed the appellant of his right to legal representation by an advocate of his choice. Since this court relies on the record of appeal understand what transpired in the lower court, the record must show that the provision of Article 50(2) (g) & (h) of the *Constitution* was complied with. The appellant was not informed of the right to choose to be represented by an advocate either promptly at his first appearance in court or at the stage of the trial and at the time of giving his defence. The term promptly at Article 50(2) (g) of the *Constitution* must intone that he has the right to be informed at the earliest possible time. In my view since the duty to inform him of this right is on the trial court, he must be informed of the right at his very first appearance in court before a Judge or Magistrate. The Supreme Court of Kenya while dealing with the right of legal representation under Article 50 of the *Constitution* in Petition 5 of 2015, Republic –v- Karisa Chengo & 2 Others (2017) eKLR was emphatic that-

> " the right to legal representation under Article 50 is a fundamental ingredients of the right to fair trial and is enjoyed pursuant to the constitutional edict without more" In the case of Pett-v- Greyhound Racing Association (1968) 2 All ER 545 Lord Denning stated as follows on the right to legal representation.
>
> "it is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour and the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: you can ask any questions you like, whereupon the man immediately starts to make a speech. If justice is to be done he has to have the help of someone to speak for him and who else is before than a lawyer who has been trained for the task."

26. the *Constitution* gives an accused person the right to choose to be represented by a counsel of his own choice under Article 50(2) (g) of the *Constitution* and to enjoy the right he/she must be informed and in the words of the *Constitution*, promptly of this right to legal representation by an advocate of his own choice to be able to choose whether to be represented. It is clear from the proceedings in this case that the trial magistrate did not inform the appellant of his right to be represented by an advocate of his own choice. The next question that the court must ask is what is the consequence of the derogation

of the right under Article 50(2)(g) of the *Constitution*. This question was addressed by Justice Mrima in *Chacha Mwita –v- Republic* Criminal Appeal No.33/2019.

> " ..... under Article 50(2) (g) it remains the unwavering duty of this court to enforce the provision of the *Constitution*. I therefore associate myself with the school that fronts the position that upon proof of derogation of the right under Article 50 (2)(g) of the *Constitution*, then the trial is a nullity."

27. I am persuaded by this decision. Having found that the right under Article 50(2) (g) of the *Constitution* was violated, the proceedings before the trial court were a nullity. The courts have held that where proceedings are null and void, they were not proceeding and nothing is derived from them, and where the proceedings amounted to nothing the court should order a retrial. The court should then consider whether to order a retrial. In *Ahmed Suma –v- Republic* (1964) E.A.L.R 483, Court of Appeal, it was stated-

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence at the first trial..... Each case depends on its particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause injustice to an accused person."
>
> See also the decision of the Court of Appeal in *Loumo Ekimat-v Republic* (2004) KLR. In Fatehali Maji- Republic (1966) E.A 343
>
> Although some factors may be considered such as illegalities or defects in the original trial the length of time elapse since arrest and arraignment of the appellant, whether mistakes leading to the quash of the conviction were entirely of the prosecutions making or not, whether a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial, at the end of the day, such a case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it."

28. In this case the offence was alleged to have been committed in month of April 2021 and August 2021. It was concluded on 30/3/23. The appellant has only served a sentence of one year and five months. The victims were minor children who were under the care of their parents and are still school going. The offence committed was very serious.

29. Article 53 (2) of the *Constitution* provides as follows:

> " A child best interests are of paramount importance in every matter concerning the child."

40. It is in the best interest of the children that a proper trial be conducted. The appellant shall not be prejudiced as he will be afforded a fair trial.

41. Before I concluded, I wish to address an issue which I noted in this proceedings whereby the learned trial magistrate ordered that the victims of the crime would not be cross-examined owing to their age and that they had given unsworn testimony. One of the rights of an accused to fair trial is the right to challenge evidence. Article 50(2) (k) states as follows:-

> " An accused person has the right to a fair trial which includes the right-

(k) to adduce and challenge evidence."

42. The right to challenge in the trial is exercised through cross-examination upon giving evidence –in chief, the witness is cross-examined by the accused person or the defence advocate. Section 145(2) of the *Evidence Act* provides as follows:-

> "(145(2). The examination of a witness by the adverse party shall be called his cross-examination."

43. The rights of the accused, or the accused advocate's to cross-examine witnesses called by prosecution is guaranteed under Article 50(2) (k) of the *Constitution*. A denial of this right will vitiate a conviction. See *Simon Githaka Malobe –v- Republic* Court of Appeal Nyeri Criminal Appeal No.314/2010. It is a cardinal rule of law that all witnesses who testify in a criminal trial must be cross-examined by the adverse party. The *Oaths and Statutory Declarations Act* allows the reception of unsworn evidence of minor witness who may not qualify to testify on Oath. The Court of Appeal in the case of Jamaar Omari Hussein-v- Republic (2019) eKLR considered the issue of the unsworn evidence of a minor child of tender years and stated that:

> " This is nonetheless to say that unsworn evidence is totally worthless. It only means that the court in considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter."

44. It was therefore wrong for the trial magistrate to deny the appellant the right to cross-examine the complainants. Though he eventually allowed him to cross-examine and ask limited questions, the learned trial magistrate should always ensure that the right of an accused which is guaranteed under Article 50 (2) (k) of the *Constitution* should not be denied.

45. For the reasons stated, I find that the right of the appellant under Article 50 (2) (g) were violated. The trial was a nullity. I order that the appeal has merits.

Conclusion:

1. The appeal is allowed and the conviction is quashed and sentence set aside.
2. A retrial shall be conducted before another magistrate other than the one who heard the case.
3. The appellant shall be released from the Prison and be remanded at Timau Police Station. He shall be produced before the Chief Magistrate's Court at Isiolo for the retrial. The retrial shall be concluded within six months.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

29/8/2024

Appellant – present

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

29/8/2024