



Arusei v Republic through State Counsel (Constitutional Petition E013 of 2023) [2024] KEHC 13401 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13401 (KLR)

CRIMINAL CASE NO.168 OF 2018

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E013 OF 2023**

**RPV WENDOH, J
OCTOBER 30, 2024**

BETWEEN

CLINTON ARUSEI PETITIONER

AND

THE REPUBLIC THROUGH STATE COUNSEL RESPONDENT

RULING

- Clinton Arusei, the applicant, was convicted by the Principal Magistrate’s Court Kitale for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* of the *Criminal Procedure Code* and was sentenced to serve 20 years imprisonment. He has filed this petition pursuant to Article 50(1), 50(2)(h), Article 165(3)(a) of the *Constitution* and Section 137F (a)(vi).
- He contends that the trial court violated his right to fair hearing under Article 50(g)(h), of the *Constitution* by not informing of his right to counsel provided at State expense; that Article 50(2)(j) was also infringed in that he was not notified of the evidence that the prosecution were going to rely upon, that Article 27 was therefore breached because he was not accorded equal protection. He also alleged that Section 137 F(a)(vi) *Criminal Procedure Code* was not complied with. He did not explain how the court failed to comply with that section.
- The prosecution counsel, Ms Kiptoo, the Assistant Director Public Prosecution filed a replying affidavit dated 16/10/2024 and submissions of the same date. She submitted that upon perusal of the court record, she found that the appellant was not informed of his right to counsel provided at state expense, and relied on this court’s decision in *JOO v Republic* Criminal Appeal E009/2020 where the court held that failure to inform an accused of his right to be represented or right to an advocate at State expense was breach of an accused’s rights. Counsel also relied on *Joseph Kiama v Republic* (2019)eKLR. Counsel conceded the application but recommended that the court do order a retrial because the



- applicant had not yet served a substantive part of his sentence and that the possible admissible evidence on record was likely to result in a conviction.
4. I have carefully considered the petition, grounds and the rival submissions. I have also perused the lower court record.
 5. The applicant claims that Section 137 F(a)(vi) Criminal Procedure Code was breached. However, the said section does not apply to this case. Section 137A-M Criminal Procedure Code deals with plea bargain and plea agreements. There was also no plea agreement in his case. Besides the applicant never pleaded guilty to the charge and the allegation relating to Section 137 F(a) (vi) is misplaced.
 6. Article 50 of the Constitution guarantees the right to fair hearing for all accused.
 7. Article 50(2) provides;
 - “ Every accused person has the right to a fair trial, which includes the right
 - (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....
 - (j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.”
 8. As regards alleged breach of Article 50 (2) (j) of the Constitution, I have looked at the court record and on 3/10/2018 when the matter came up for mention after plea, the appellant is recorded as saying that he had received the witness statements. Witness statement make the evidence of the prosecution. That ground is therefore untenable.
 9. As regards breach of Article 50 (2) (h) of the Constitution, the right thereunder is not absolute. An advocate can only be assigned to an accused at state expense if the court is satisfied that substantial injustice will result before enforcing it.
 10. The Supreme Court in Petition 5/2015 Karisa Chengo & Others, when considering Article 50(2) (h) of the Constitution, said as follows;
 - “In determining whether substantial injustice would be suffered in criminal matters, a court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which included;
 - a. the seriousness of the offence,
 - b. the severity of the sentence,
 - c. the ability of the accused person to pay for his own legal representation,
 - d. whether the accused was a minor,
 - e. the literacy of the accused; and
 - f. the complexity of the charge against the accused
 11. The applicant has not attempted to demonstrate that he has suffered any substantial injustice to warrant the court to find that the right was infringed. It is not just enough to allege.



12. *JOO's case (supra)*, which the prosecution counsel relied on, is distinguishable in that the appellant in that case alleged infringement of both Article 50(2)(g) and (h) of the *Constitution*. The right under Article 50(2)(g) cannot be limited by dent of Article 25(c) of the *Constitution* while the right under Article 50(2)(h) which is not absolute, and can be limited.
13. In the end, I find that the applicant has not proved that any of his rights to fair hearing have been breached and the petition is without merit and hereby dismissed.
14. It is so ordered

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF OCTOBER 2024.

LADY JUSTICE R.WENDOH

