



REPUBLIC OF KENYA



**Awiti v Republic (Criminal Appeal 73 of 2019)
[2023] KEHC 1321 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL 73 OF 2019
RPV WENDOH, J
FEBRUARY 21, 2023**

BETWEEN

MESHACK ANDERO AWITI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Senior Principal Magistrate's Criminal Case No. 18 of 2017 delivered on 30/10/2019)

JUDGMENT

1. Meshack Andero Awiti has filed his appeal against the judgment of the Senior Resident Magistrate Migori, dated October 30, 2019. His appeal is based on amended grounds of appeal which are as follows;-
 - 1) That the trial court failed to comply with article 50 (2) (g) and (h) of the Constitution.
 - 2) That the prosecution failed to call some crucial witnesses;
 - 3) That the offence was not proved.
 - 4) That the court failed to consider the appellants defence.
2. The appellant was charged with the offence of defilement contrary to section 8 (1) and (2) of the Sexual Offences Act.
3. The particulars of the charge were that on September 8, 2017 at Oruba village in Migori county, intentionally caused his penis to penetrate the vagina of CA a child aged 7 years.



4. In the alternative, he faced a charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
5. The appellant was convicted on the said charge and sentenced to serve 30 years in prison.
6. He prays that the conviction be quashed and sentence set aside and he be set at liberty forthwith.
7. In support of the grounds of appeal, the appellant filed submissions. He reiterated the grounds of appeal on the several grounds. He urged that the prosecution failed to call the doctor who first examined the complainant at Pastor Machage hospital; that failure to call the doctor denied the appellant an opportunity to test the evidence. It was also submitted that there was contradictory evidence as to the age of the complainant, whether she was 6 or 7 years; that despite the contradictory evidence, the prosecution did not bother to amend the charge.
8. The appellant further submitted that the trial court did not give reasons for rejecting his defence and that the evidence on record did not connect the appellant to the offence.
9. The prosecution counsel, Mr Omooria filed written submissions.
10. He submitted that there was sufficient evidence adduced to prove the offence; that there was evidence, i.e assessment report, that proved the complainant's age as six (6) years. Counsel relied on the case of *Mwalango Chichoro v Republic* MSAC Appeal No 24 of 2015 (UR) which held that age can be proved in different ways; that PW1's testimony confirmed an act of penetration was committed which evidence was corroborated by the evidence of PW3 the clinician.
11. As to the identity of the perpetrator, the complainant knew the appellant who lived in their plot and that the torch was shone on her and she was able to see him.
12. Counsel submitted that the appellant's defence lacks any weight and relied on the case of *Amber May v Republic* [1999] KLR 38; That the appellant did not raise any ground of appeal under article 50 (2) (g) and (h).
13. This being a first appeal, it is required of the court to examine all the evidence on record, evaluate and analyse it. The court must reach its own conclusions. The court has however to make allowance for the fact that it did not see or hear the witnesses testifying an opportunity which the trial court had. This court is guided by the decision in *Okeno v Republic* [1972] EA 32.
14. The prosecution called a total of four (4) witnesses in support of their case. PW1, CA a child aged about 6 years gave unsworn evidence on how the appellant who lived in the same plot went to her sister's house about 11:00pm and inserted something in her private parts; PW2 Ruth Achieng is a sister to PW1 and who lived with PW1. She came back home to find that PW1 had been sexually assaulted; PW3 Justus Magati examined the minor on September 8, 2017 and found that she had fresh bruises and lacerations to the labia minora and majora, fresh blood oozing from her vagina and between the vagina and anus; PW4 PC Nahashon Akumu was the investigating officer in the matter and arrested the appellant .
15. The appellant gave unsworn evidence in his defence. He gave an unsworn defence; that he left home on September 10, 2017, went for a funeral at Kakrao and returned on 11th and was arrested on 13th; that the complainant's sister had a grudge against him and framed him.
16. Although the prosecution counsel submitted that the appellant did not raise any grounds of appeal relating to violation of his rights under article 50 (2) (g) and (h), the amended grounds of appeal are clear. The appellant did raise that ground and it is my view that the court must deal with it first.



17. Article 50 of the Constitution guarantees an accused person's right to fair hearing. The said rights under article 50 cannot be derogated.

18. Article 50 (2) (g) and (h) provide as follows:-

“ 50 (2) Every accused person has the right to a fair trial, which include 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 his right promptly.”

20. Sub article 2 (g) requires that the trial court do inform an accused of his rights to counsel. The court should inform a accused of the said right promptly so that the accused can prepare his case and if necessary seek counsel or legal aid through the committee on legal aid.

21. The courts have held that failure to comply with the above provision renders the proceedings nullity. Justice Mrima in NMT alisa Aunty v Republic CRA 44 of 2019 and Chacha Mwita v Republic Criminal Appeal No 33 of 2019 dealt with the said provisions at length. In petition No 5 of 2015 Republic v Karisa Chengo & 2 others [2017] eKLR, the court said :-

“The right to legal representation.... under the said article, is a fundamental ingredient of the right to fair trial and is to be enjoyed pursuant to the constitutional edict with out more”

In Pett v Greyhound Racisng Association [1968] 2 AL E. R.545 where Lord Denning said:-

“It is not every man who has ability to defend himself on his own. He cannot Bring outthe point in his own favour or 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 question you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?”

22. To determine whether the court complied with article 50 (2) (g) one has to look at the record. A perusal of the court record clearly shows that the trial court did not comply with the said right. It therefore follows that the appellants right to fair trial was violated.

23. As respects article 50 (2), (h) a duty is placed on the state to assign counsel to an accused at the state expense if substantial injustice will otherwise result. It has to be demonstrated that if counsel is not availed to an accused person, then injustice will result. An example is where the case is very complex, the sentence serve and accused cannot understand the language.

24. To some extend the entitlement to the right is not automatic. In this case the court did not inform the appellant of his right but the appellant did not demonstrate that injustice will result to him if he was not assigned counsel.

25. Having found that article 50 (2) (g) was violated, the proceedings before the trial court are rendered null and void. As a result the conviction is quashed and sentence set aside.

Can this court order a retrial?



26. The case of *Ahmed Sumar v Republic* [1964] considered that grounds upon which a retrial may be ordered. The court said ;-

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered..... In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”

In *Lolimo Ekimat v Republic* CRANo 151 of 2004 , the court also said;-

.....the principle that has been accepted to courts is that each case must depend on the particular facts and circumstance of that each case but an order for the retrial should only be made where interest of justie require it.

27. I have carefully considered the evidence tendered in the trial court. No doubt the complainant who was only aged about 6 years was defiled and suffered very serious injuries. She indentified the appellant as the culprit and I found that the potentially admisable evidence on record is likely to result in a conviction.
29. This case started in 2017. However, the appellant absconded for sometime till his arrest in 2019. He was sentenced on October 30, 2019 about 3 ½ years ago. He was sentenced to 30 years imprisonment. He has served only about 3 ½ years out of the 30 years. The complainant is a child of tender years who suffered trauma and serious injuries to her body and it is only fair that this case be heard and determined so that justice is done to both parties. For the above reasons, I do order a retrial.
30. The appellant is hereby released to the officer commanding Migori police station who will present the appellant to Migori Chief Magistrate’s Court for fresh plea on. February 27, 2023.
31. This being a retrial , the case should be given priority.

DELIVERED, DATED and SIGNED at MIGORI this 21st day of February, 2023.

R. WENDOH

JUDGE

In presence of ;-

Mr. Oduor for state

Appellant - Present

Ms. Nyauke –Court Assistant

