Ivala & another v Republic (Criminal Appeal 4 & 3 & 8 of 2020 (Consolidated)) [2023] KEHC 3770 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3770 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 4 & 3 & 8 OF 2020 (CONSOLIDATED)

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

HUMPHREY IVALA ..... 1ST APPELLANT

GEOFFREY MAINA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

((From original conviction and sentence, in Kakamega CMC Sexual Offence Case No. 116 of 2018, by Hon. Hazel Wandere, Senior Principal Magistrate, SPM, of 17th January 2020)

JUDGMENT

1. The appellants were convicted by Hon. Wandere, SPM, of gang rape, contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006, and were accordingly sentenced to 15 years imprisonment. The particulars of the charges against the appellants were that on the night of September 22, 2018, at 2.00 AM, at [Particulars withheld] area of [Particulars Withheld] Sub-County, within Kakamega County, they gang raped RAC . They also faced an alternative charge of committing an indecent act with an adult, contrary to section 11(A) of the *Sexual Offences Act*, founded on the same facts. They pleaded not guilty to the charges, a trial was conducted, where 5 witnesses testified.

2. The complainant, RAC, testified as PW1. She explained how she, and DM and BL, were going home at 2.00 AM, from a funeral wake, when they were attacked by the appellants. She was held by the neck by the 1st appellant, who then raped her. When he colleagues questioned that aCt, the 1st appellant left her, and chased them away. He was armed with a panga. 2 other men, being the 2nd and 3rd appellants, held her, beat her and dragged her to a nearby bush. They then raped her in turns. The 1st appellant pulled off her clothes, while the 2nd appellant held her by her hands, and the 3rd appellant placed a panga on her, telling her not to resist, otherwise she would be cut with it. The 1st appellant then raped her, followed by the other 2 appellants. Rescue came from PA, DM and A. The appellants ran away when

the rescuers emerged. The rescuers dressed her, and walked her home, during which the appellants attacked and injured PA on the neck. They visited the local village elder to report, who referred them to the police. She went to hospital thereafter. She said that she had attended school with all 3 appellants. She said that during the rape, she heard the voices of the 2nd and 3rd appellants, who were former school mates and neighbours. They talked while threatening her.

3. DM testified as PW2. He was going home that early morning with PW1, his sister, and BL. There was moonlight. 3 people emerged from behind them. The 1st and 2nd appellants had slashers, with which they hit him and BL. One of them held PW1 by the neck, and started running with her into the bush. They were shocked, and they decided to rush back to the home, where the wake was, for assistance. They found A and PA, and they explained to them what had happened, and the 2 accompanied them back to the scene. When they got back, they found the 3 appellants, who again attacked them with the slashers, and managed to cut PA. PW1 then emerged from the bushes crying. They fought the appellants until they fled. They went and reported to the village elder, who advised them to go to the police. He explained that PW1 told him and his colleagues that the 3 appellants took her into the bush, removed her clothes, and raped her. He said that it was PW1 who knew the appellants, as she had attended school with them. He said that he knew the 3rd appellant as Junior.

4. BL, PW3, was a brother of PW1. He stated that he knew the 2nd and 3rd appellants, as he had attended school with them, and the 3rd appellant was also a motorcycle taxi operator. He said that he was walking home , with PW1 and others, when the 3 appellants followed them, armed with pangas. They attacked them with the pangas, grabbed PW1, and ran with her into the bush, which forced him and the others to rush back to the home, where the vigil was, for assistance. They met A and PA, who accompanied them back to the scene. The 3 appellants attacked them, but they fought them, and they fled. PW1 emerged, and informed that she had been raped. She was not able to walk properly. They took her to a village elder, and later to the police. He stated that he saw all the 3 appellants in the moonlight, and was able to recognize them.

5. Patrick Mambili, PW4, was the clinical officer, who produced the medical records in the case, on behalf of Dr. Wekesa, who had attended to PW1. He stated that PW1 was attended by the doctor the same day, at 2.00 PM. It was established that she was not a virgin, and she had 2 children. Urine tests were done, which revealed blood pus cells. No spermatozoa was found, and, therefore, the medical evidence did not connect anyone to the offence. PW5 was No. 83308 Corporal Cavies Wandera. He was the officer who took over the matter from the original investigators, Police Constables Karakacha and Juma, who had gone on transfer. He detailed the steps that had been taken in the course of the investigations.

6. The appellants were put on their defence. The 1st appellant, Humphrey Ivala, testified as DW1. He gave a sworn statement. He denied the charges, saying that he was not involved. He testified on his arrest, saying that he met PW1 at the police station, for the first time. The 2nd appellant, Geoffrey Maina, was DW2. He gave an unsworn statement. He denied the charges. He pointed out that 2 individuals, Allan and Philip Memali, did not testify. The 3rd appellant testified as DW3. He said that he was at the scene at the material day.

7. After reviewing the evidence, the trial court convicted them of gang rape, contrary to section 10 of the *Sexual Offences Act*, and sentenced them to 15 years imprisonment.

8. Being dissatisfied with the conviction and sentence, the appellants appealed to this court and raised several grounds of appeal. They raised issues around contravention of section 198(4) of the *Criminal Procedure Code*, cap 75, Laws of Kenya; not being subjected to medical examination as required by section 36(1)(2) of the *Sexual Offences Act*; the evidence not being corroborated; the sentence being harsh and excessive; the defences being rejected without evaluation; articles 49(1)(f) and 50(2)(g)(h)(j)

(k)(4) of the *Constitution* being violated; the charges being a frame-up; the offence not being proved beyond reasonable doubt; crucial witnesses not called; convicting on weak and inconclusive medical evidence; the identification; burden of proof being shifted to them; the defence of alibi not being considered or evaluated; and the evidence on penetration being flimsy and inadequate.

9. Directions were given on May 6, 2021, for disposal of the appeal by way of written submissions. All 3 appellants filed written submissions. The 1st and 3rd appellants submit on article 50(2)(g) of the *Constitution*, saying that he was poor and unrepresented. He pleads that he is remorseful, and should be treated as a first offender, and that section 333(2) of the *Criminal Procedure Code* ought to be reckoned. The submissions by the 2nd appellant are more substantive. They turn on identification, the lighting, the medical evidence, alibi and mitigation, and the content of the judgment.

10. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. *Okeno v Republic* (1972) EA 32 (Sir William Duffus P, Law & Lutta JJA) has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:

> "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

11. I shall limit my analysis to the issues raised in the written submissions, for I shall presume that the appellants have chosen to argue their case only around the issues raised therein. I shall not consider anything that is not raised in the written submissions.

12. I will start with the alleged constitutional violations, as disposal on the issues around these provisions could determine the issue finally, without having to consider the other issues or grounds submitted on. Article 49(1)(f) of the *Constitution* is about being produced in court within 24 hours. This is a pre-trial issue, as opposed to a fair trial issue. It is a matter outside of the court, for it would be under the control of the police and the prosecution. The courts have held that pre-trial detention, before production in court, should have no impact on the trial, unless the pretrial detention is unreasonably prolonged as to make the trial a farce. In this case, the appellants have not disclosed for how long they were held in pre-trial custody, before being arraigned, to assist me assess whether or not the detention was unreasonably prolonged as to render the subsequent trial a farce. The offences were committed at 2.00 AM on September 22, 2018. The appellants were arraigned on September 24, 2018. The charge sheet indicates that the arrests were effected on September 22, 2022. The first 24 hours expired at 2.00 AM on September 23, 2022, and production in court on 24th September was outside 24 hours. However, although not explained by the respondent, the detention before arraignment was not inordinate. The trial was not rendered illegal by that, and there is a remedy in civil law and the civil process.

13. Article 50(2)(g)(h) of the *Constitution*, is about being entitled to legal representation of one's choice, or at State expense, in case of being indigent, and being informed of those rights, in either case. Article 50(2)(g)(h) makes it a fair trial right for an accused person to be entitled to be informed of his right to choose an Advocate to represent him in the proceedings; and where he cannot afford one, to have one assigned to him, if substantial injustice would otherwise occur. The provision places a burden on the

trial court, so that before it commences the trial, even before plea is taken, for trial commences when an accused person is arraigned for the reading of the charges to him, for he would require legal advice on how to plead, he should be informed of his rights, including that to appoint an Advocate of his own choice, and where he cannot afford one, to have one assigned to him at State expense. Whether or not an accused person can afford to appoint an Advocate of his own choice, is a matter to be addressed when he is first arraigned. Regarding whether substantial injustice would otherwise arise, it would appear that in any case where the accused faces a charge where his liberty is likely to be taken away for a long time, substantial injustice could arise, if he does not have the benefit of legal representation. Gang rape attracts a minimum penalty of 15 years in jail, and a maximum of life in prison, according to section 10 of the *Sexual Offences Act*, subject, of course, to the principles stated in *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HC Petition No. E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J). The penalty for gang rape clearly points to substantial injustice occurring, where the accused could face a long jail term, upon conviction, and should attract the benefit of article 50(2)(g)(h) of the *Constitution*, particularly where he is indigent. The severity of the charge and the penalty should be trigger, for the trial court to inform the accused of those rights, and to especially consider whether the accused would have capacity to defend himself, in terms of being able to face and confront his accusers, or to instruct an Advocate of his own choice.

14. Article 50(2)(g)(h) of the *Constitution* ought to be read together with the provisions of the *Legal Aid Act*, No. 6 of 2016. 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. See 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 themselves.

15. From these provisions, it ought to be abundantly clear that informing accused of their rights, under article 50(2)(g)(h) of the *Constitution*, and assessing whether the accused require 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 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 persons 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 persons 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 violation of the *Constitution*.

16. Were these constitutional fair trial prerequisites applicable in this case? The offences were allegedly committed in 2018. The *Constitution* of Kenya, 2010, commenced on August 27, 2010; while the *Legal Aid Act* commenced on May 10, 2016. It would mean that as at 2018 when the appellants were being arraigned in court, both the *Constitution* and the *Legal Aid Act* were in application, and the court before whom they were produced was bound by article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act*. The said court was obliged to comply with article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act*, to inform the appellants of their right to legal representation of their own choice, and the right to legal aid from the State in the event that they were indigent. The duty on the court was to assess whether the appellants were 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 charges that they faced and the sentence they were liable to be given in the event of conviction.

17. So, what happened here? Were the constitutional prerequisites in article 50(2)(g)(h) complied with? As stated hereabove, 2 of the appellants were arraigned on September 24, 2018, before Hon. T Mwangi, Senior Principal Magistrate, and the charges were read to them, in an undisclosed language. Upon pleading not guilty, the court admitted them to bond, allocated a date for hearing and recorded that they had been furnished with witness statements in court. There was a consolidation of the charges, on November 22, 2018, before Hon. Wandere, SPM, to bring in the 3rd appellant. The consolidated charge was read to them, they pleaded not guilty, but the court found the charge to be defective, on account of some undisclosed anomalies, and directed the prosecution to bring an amended charge. The amended consolidated charge was read to the appellants, on November 28, 2018, and the appellants pleaded not guilty. At the time plea was taken, the issue of compliance with article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act* did not arise. The court did not inform the appellants of their right to legal representation and to legal aid services by the State. The court did not consider whether there was a likelihood of the appellant suffering substantial injustice, along the lines of section 43(1A) of the *Legal Aid Act*, on account of severity of the charges and sentence, the complexity of the charge and the capacity of the appellants to defend themselves. Under the *Legal Aid Act*, the court has to be alive to issues around the indigence of the accused, their capacity to afford Advocates, whether they are marginalized, and, therefore, in need of being included, to avoid being treated in a discriminatory manner, on account of their social status. These are the factors that the court should consider and address whenever persons from the lower end of the social strata are presented to it for plea, with respect to charges that expose them to long terms in jail.

18. 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 appellants were subjected to an unfair trial. article 2(4) of the *Constitution* provides for what happens whenever an act violates the *Constitution*. It states that "... any act or omission in contravention of this Constitution is invalid." The omission or failure to comply with article 50(2)(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 section 43 of the *Legal Aid Act* meant that the objectives of that 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 those available to persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.

19. The appellants also cite article 50(2)(j)(k) of the *Constitution*. Article 50(2)(j) is about pretrial disclosure of evidence. It requires the prosecution to share the evidence they intend to present in court with the defence in advance, to facilitate the defence prepare for the case, to avoid ambush. That

was complied with, at the time plea was taken on September 24, 2018. The court recorded that the appellants had received copies of the witness statements in court, in the presence of the trial magistrate.

20. Article 50(2)(k) is about the right to adduce and challenge evidence. The record indicates that the appellants cross-examined the prosecution witnesses, and, therefore, there was compliance witharticle 50(2)(k), on the aspect of challenging evidence. Regarding the other aspect, that of adducing evidence, I note that the appellants were put on their defence. It is not clear when the ruling to that effect was delivered, for there are 2 dates, November 6, 2019and November 7, 2019. Whatever the case, the appellants were given a chance to make their defence statements, which they did on December 2, 2019. They did not call witnesses, and the record is silent on whether they were informed of their right to do so. Section 211 of the *Criminal Procedure Code* makes it mandatory, that where it is ruled that the accused have a case to answer, their rights at defence hearing should be explained to them, that they can make statements, either under oath or not, or can opt to keep silence, and may call witnesses. The failure to comply with that provision is fatal, as it is mandatory. Perhaps they could have called witnesses, if the right had been explained to them, perhaps not. Section 211 of the *Criminal Procedure Code* implements article 50(2)(k) of the *Constitution*, and the omission to comply with it would mean that article 50(2)(k) would have been violated.

21. Did the appellants suffer prejudice as a result? The failure or omission to obey constitutional commands by itself was fatal to the prosecution. The *Constitution* is the supreme law, and what it commands must override everything else. Anyhow, looking at the record, the appellants did cross-examine the witnesses, but the cross-examination was not extensive, suggesting that it was not effective. When they were put on their defence, they did not say much in their defence statements. Of course, they were not obliged to say anything in defence, but when damning evidence is adduced, it would be a good strategy for the accused to make statements, to explain away evidence which tends to incriminate them. Given the serious charges and the severity of sentence, and given that the appellants were individuals of modest education, legal representation would have been crucial, in ensuring that they got a fair trial, where there was opportunity to vigorously test the prosecution evidence.

22. They have also citedarticle 50(4) of the *Constitution*, on reliance on evidence obtained "in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice." The appellants have not pointed out the evidence which they believe was obtained in violation of fundamental rights. I have gone through the record, and I have not come across a piece of evidence that can be said to have been so obtained. I am unable to hold that article 50(4) was violated.

23. The discussion above clearly demonstrates that the constitutional fair trial rights were not honoured and complied with, which rendered the trial unfair. That would mean that the trial did not reach the constitutional threshold for fairness. As indicated, the omission to comply with the *Constitution* sounds a death knell for any trial. The appellants have raised other issues, but it would be academic to discuss the same, in view of the failure or omissions to comply with the constitutional dictates.

24. This is my last word on this. That the configuration for plea taking, or for what should happen at arraignment, changed fundamentally upon the coming into force of the *Constitution* of Kenya, 2010. There was a paradigm shift, that courts presiding over a plea taking exercise should come to terms with. Previously it was enough to just have the charges read to the accused, have him plead to them, consider whether to release him on bond, and thereafter allocate a date for hearing. Caselaw later dictated that where the accused has difficulty understanding the 2 languages of the court, English and Kiswahili, the court would be obliged to find an interpreter, who would translate the charges to the accused in a language that he understands. Later, caselaw commanded a prior or advance disclosure of the prosecution case, by furnishing the documents to be used at prosecution to the

accused. To that article 50 has added a host of others things that the court taking plea must do. These are constitutional commands, and failure to comply with them would render the trial unconstitutional or not compliant with the *Constitution*. Bond is now available for all offences, to be denied only for compelling reasons. Advance disclosure of the case by the prosecution is now a constitutional requirement. The *Constitution* has done away with certain aspects of the presumption that everyone knows the law, and imposes a duty, on the court presiding over plea-taking, to inform the accused of their legal rights, with respect to the right to be represented by an Advocate of their own choice, and, where the accused is indigent, to inform them of their right to an Advocate paid for by the State, where their case meets certain conditions. The plea taking exercise is now more loaded than before. The court has to go the extra mile, and assess whether the accused person before it is indigent or not, whether he or she has capacity to defend themselves or not, whether they need an Advocate paid for by the State or not, and, if they do, set in motion the process for them getting such an Advocate.

25. So, what should I do in the circumstances? The usual practice is to declare a mistrial, and order a retrial. There are considerations that the court has to have for ordering a retrial. However, whether to order a retrial or not, should be looked at in view of the current constitutional dispensation, which gives the Director of Public Prosecutions unfettered discretion to determine whether or not to prosecute. That is stated in article 157(10), to effect that the "... Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority." In view of article 157(10), although I do have power to order a mistrial, I doubt whether I have jurisdiction to order a retrial, as that should lie with the exclusive prosecutorial jurisdiction of the Director of Public Prosecutions, to determine whether a fresh prosecution is to be mounted or not.

26. The final order is that I hereby find and hold that there was a mistrial of the appellants, in Kakamega CMCSO No. 116 of 2018, for the reasons given above. I shall, nevertheless, order a retrial, in view ofarticle 157(10) of the *Constitution*, and I shall leave it to the Director of Public Prosecutions, to decide whether he should prosecute the appellants afresh or not. In case the Director of Public Prosecutions elects to prosecute the appellants afresh, the Kakamega Chief Magistrate's court shall conduct a retrial. Consequently, the conviction on record is quashed, the sentence is set aside. The appellants shall be handed over to the police, for presentation before the Kakamega Chief Magistrate's Court, at the earliest possible time. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Humphrey Ivala, Geoffrey Maina and Johnstone Imonje, the appellants in person.

Ms. Kagai, instructed by the Director or Public Prosecutions, for the respondent.