Ojiambo v Republic (Criminal Appeal 15 of 2020)
[2023] KEHC 24201 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24201 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL 15 OF 2020

WM MUSYOKA, J

OCTOBER 27, 2023

BETWEEN

GEOFFREY ALACHA OJIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. MA Nanzushi, Senior Resident Magistrate, SRM, in Busia CMCSO No. E117 of 2017, of 11th July 2019)

JUDGMENT

1. The appellant, Geoffrey Alacha Ojiambo, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 3rd January 2013 at Nambuku Location, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of JN, a child aged 7 years. The appellant denied the charges, and a trial ensued, where 4 witnesses testified.

2. PW1, NJ, a PP2 pupil at [Particulars withheld] Primary School, was the complainant. She described how the appellant took her by hand to the back of a house, undressed her, and inserted his penis in her vagina. She felt pain. She said he threatened to kill her, and had covered her mouth. PW2, Felix Otieno, produced the medical records relating to PW1. He was not the one who had medically treated her, for she had been treated by another officer. PW1 had bruises on her calf, vagina, thighs and perineum. It was concluded that she had been defiled. He testified that the appellant had also been medically examined, 2 days after the incident. PW3, HO, a brother of PW1, was informed of the incident, and came home. PW1 told him that she had been defiled by the appellant. He took PW1 to the police, who referred them to hospital. He stated that PW1 was born on 20th March 2006. PW4, No. 91058 Police Corporal Lopiyol Alfred, was the investigating officer.

3. The appellant was put on his defence, *vide* a ruling that was delivered on 17th October 2018. He made an unsworn statement, on 14th January 2019. He denied the charges.

4. In its judgment, delivered on 15th July 2019, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to life imprisonment, on the same date.

5. The appellant was aggrieved, and brought the instant appeal, revolving around the plea of guilty; the evidence not being adequate to sustain a conviction; the trial court relying on evidence that had not been adduced; misapplication of section 32(1) of the *Evidence Act*, Cap 80, Laws of Kenya; anomalies in the prosecution case, especially about the expert evidence; convicting on the basis of a confession which was not presented as evidence; and basing the conviction on circumstantial evidence.

6. Directions were given on 22nd September 2023, for canvassing of the appeal by way of written submissions. Both sides filed written submissions, which I have read through, and taken note of the arguments made.

7. In his written submissions, the appellant submitted on the charge being defective or non-existent; penetration not being proved; the treatment notes, and "incredible" witnesses; vital or crucial witnesses, alibi defence and sentence. He submits that the charge was defective, to the extent that it accused him of defilement contrary to section 8(1)(2) of the *Sexual Offences Act*, rather than section 8(1) as read with section 8(2) of the *Sexual Offences Act*. He submits that there was no proof of penetration, as there were no tears, no discharge, and that the fact the hymen was torn was not necessarily proof of defilement. Regarding the treatment notes, the appellant submits that the maker of those notes was not called to the witness stand, and that denied him a chance to cross-examine him on the lack of discharges or semen or blood on PW1, given that he was the person who physically examined PW2. He submits that PW1, PW2, PW3 and PW4 were not credible witnesses, as they did not provide any evidence of penetration of PW1. On contradictions, he points at the testimonies of PW1, PW2 and PW3 about the clothes she wore on the day of the incident, and when she went to report to the police and the hospital. He also points at portions of the testimonies of PW1, PW2 and PW3 on the age of PW1. He raises issue with the date when the offence was committed. On vital or crucial witnesses not being called to testify, the appellant points at the testimonies of PW1 and PW3, on persons who were with PW1 just before the incident happened, and those to whom the incident was immediately reported. He submits that his alibi defence was not tested by the police. He finally submits about the sentence of life imprisonment imposed on him, in view of recent developments in jurisprudence.

8. On its part, the respondent submits on the matter of the plea, insufficiency of the evidence, the trial court relying on evidence that was not adduced; anomalies in the prosecution case being disregarded by the trial court; the misapplication of section 32(1) of the *Evidence Act*; the conviction being founded on a confession; and the trial court relying on circumstantial evidence. It is submitted that the appellant pleaded not guilty, and a full trial had to be conducted in the circumstances. On proof of the elements of the offence, it is submitted that all 3, that is to say the age of PW1, penetration and the fact that penetration was by the appellant, were all proved to the required standard. On the trial court convicting on evidence that was not adduced, it is submitted that the trial court relied only on the testimonies of the 4 witnesses presented by the prosecution. On anomalies in the evidence, the respondent cites *Richard Munene vs. Republic* [2018] eKLR (Ouko, P, Sichale & Kantai, JJA), to submit that only fundamental and substantial contradictions and inconsistencies are of value. It is submitted that section 32(1) of the *Evidence Act* is of no application to this matter, as it relates to cases where accused persons are charged jointly, which was not the case here. On the alleged confession, which the trial court allegedly relied on, it is submitted that the court did not rely on any confession. On reliance on circumstantial evidence, it is submitted that the law does allow convictions on it for sexual offences.

9. The submissions made by the appellant did not align with all his grounds of appeal, as set out in his petition of appeal. He submitted on some of those grounds, and introduced fresh ones. I shall only deal with the grounds submitted on, and presume that the appellant has abandoned the other grounds.

10. On the charge being defective, for framing the offence charged as brought under section 8(1)(2) of the *Sexual Offences Act*, instead of section 8(1) as read with section 8(2), I believe the answer lies with what Kiarie J said in Busia HCCRA No. 11 of 2015. That appeal matter had arisen from a conviction of the appellant herein, in Busia CMCCRC No. 14 of 2013, which had arisen from the same facts, that is the defilement of PW1 by the appellant, on 3rd January 2013. That conviction was quashed, on a technicality, and a retrial was ordered, which culminated in the same being brought in Busia CMCSO No. 117 of 2017. Kiarie J addressed himself to the charge being on section 8(1)(2) of the *Sexual Offences Act*, instead of section 8(1) as read with section 8(2), and found that it was defective, but the appellant was not prejudiced, and the charge was curable. Given that holding, there would be no basis for the appellant to raise that argument. For avoidance of doubt, Kiarie J said, in his judgment, in Busia HCCRA No. 11 of 2015, with regard to that, that: "I have noticed that the charge was erroneously drafted. It ought to have read contrary "... to section 8(1) as read with section 8(2)..." From the record, it is clear that the appellant understood the charge before pleading to it. He subsequently participated fully in the trial. I make a finding that he was not prejudiced in any way and the defect is curable under section 382 of the Criminal Procedure Code."

11. I agree entirely with Kiarie J, and I would go further and state that I do not subscribe to the view that a charge, brought under section 8(1)(2), rather than section 8(1) as read with section 8(2), is defective. In my opinion, there is nothing wrong with phrasing or framing a charge that way. It is not defective. It matters little whether the charge reads section 8(1)(2) or section 8(1) as read with section 8(2). Both mean the same thing. They convey the same information. What matters is that the accused person understands the charge, with respect to the provision creating or defining the offence, and that prescribing the sentence. Nothing, absolutely, should turn on the argument that a charge under section 8(1)(2) is defective, and that the correct charge is that which is brought under section 8(1) as read with section 8(2). It is a game of semantics that adds little value to framing charges.

12. On there being no proof of penetration, as there was no evidence that there were tears on the vaginal surface of PW1, no semen was found, no blood, nor discharges of any kind. The appellant has not made clear as to why he would have expected that evidence ought to have been led on these items. Perhaps, because PW1 was said to be a child of tender years, who was expected to suffer injuries, from a sexual encounter with a 30-year-man. However, the trial record does refer to injuries on the genital area. PW2 is recorded as saying: "... she had a bruise on the calf muscle. Her vagina had bruises as to perineum and thighs. She had no hymen ... She had bruises at the lower limbs." My understanding of this is that PW1 sustained injuries in that ordeal, some of which were in her vagina. Whether the genital injuries took the form of tears or bruises is neither here nor there. The said injuries are elaborated in the P3 form, as well as the treatment notes used for filling it. The treatment notes refer to "Bruises visible over the upper 1/3 thighs medially bilaterally as well as labia minor. No hymenal lines visible." The P3 form says "bruises on both labia minora/majora. Hymen torn."

13. Regarding discharges, whether of blood or spermatozoa or pus or other, PW2 did not testify on that, but the medical records speak to that. The treatment notes indicate that "no bleeding visible," and the laboratory tests indicate "no spermatozoa." In the P3 form, it is noted "no discharge nor infection noted secondary to having taken a bath." The offence was allegedly committed on 3rd January 2013, according to the P3 form, and PW1 was taken for medical examination on 4th January 2013, after having taken a bath. Taking a bath cannot wash away physical injuries, but can clean out discharges such as spermatozoa and blood. I believe that the medical evidence is clear on why there were no discharges

noted in the medical evidence. In any event, penetration ought not be proved only by presence of such discharges or even a torn hymen, the testimony of the complainant, by dint of section 124 of the *Evidence Act*, would be adequate, so long as it sounds credible and believable to the trial court.

14. On the maker of the medical treatment notes not being called, yet the appellant wished to cross-examine him, I have noted, from the trial record, that the appellant did not object to PW2 testifying, and he did not insist or ask the court, to have the person who attended to PW1, testify. If anything, he acquiesced to the production of those notes. In the handwritten trial notes, the prosecutor is recorded as asking the court to allow her to produce the notes and the P3 form, and the appellant indicating that he did not object. He cannot now turn around, on appeal, to say that the maker of the medical treatment notes should have testified, as he did not object to his notes being produced by another witness. For avoidance of doubt, the handwritten notes state: "... He has since been transferred. I know his writing well. Pr. I pray that he is allowed to produce the documents. Ac. No objection ... I wish to produce the documents as exhibits. P. Exh 1 – treatment notes. P. Exh 2 – P3 form."

15. On penetration, and whether the testimonies of the witnesses were credible on it, PW1 was the victim of the crime. She testified that it happened to her. She described it to the court. She made reports of it to various persons. The law provides, at section 124 of the *Evidence Act*, that defilement and rape are not to be proved only by medical evidence, and the testimonies of what transpired, from the victims, alone, without any corroborative evidence would be adequate proof, if the trial court found the accounts truthful and reliable. The trial court record has a narration by PW1 of what transpired. She is recorded, from the handwritten notes, which I find more liable than the typescript, as saying: "... Ojiambo raped me. I was at home. I was with O. He is younger than me. I was playing with O. Ojiambo came and held my hand. It was during the day. He took me behind the house. Our house. He removed my panty. He laid on me. He covered my mouth. He said if I told anyone, he would kill me. I had a skirt and a blouse. He slept on me and raped me. He entered his thing. It is called penis (sanei). He put in my vagina (sanei)... I started feeling pain in my private parts."

16. From that narration, it would be clear that PW1 talked of her vagina being penetrated, by the appellant, who she referred to by his name, Ojiambo. She said that the appellant removed her underwear, laid on top of her, inserted his penis into her vagina, and that caused her pain. That would suffice for evidence on penetration. She was the one who was penetrated, and she described how it happened. No evidence can be better than that. When the appellant got a chance to cross-examine her, he did not dwell on that evidence. He did not cross-examine on the evidence adduced by PW1 on how he penetrated her vagina with his penis. PW2 corroborated that evidence, with the medical records that he produced. He referred to bruises that were noted on the vagina of PW1. The injuries were on both the labia and the majora, and her hymen was also missing or torn. There was no discharge, which was unsurprising, as, according to the P3 form entries, she had taken a bath, which washed away that aspect of the evidence. However, that did not wash away the bruises or the torn hymen. PW3 narrated how PW1 reported to her about what had happened to her. The evidence that the vagina of PW1 was penetrated is overwhelming, and there is equally overwhelming evidence that the penetration was by the penis of the appellant.

17. On contradictions, the appellant points at what PW1, PW2 and PW3 narrated about the clothes that she was wearing. With respect to PW1, he submits that she said, in evidence in chief, that she had a blouse and a skirt, and, during cross-examination, said that she had clothes on, and the same were torn. He submits that those torn clothes were not produced in court. Regarding PW2, he submits that he told the court that PW1 did not have the clothes that she had during the incident. He submits that PW3 told the court that PW1 went with the same clothes to the police station that she had at the hospital. He points out that the P3 form indicated that the clothes that PW1 had during the incident were not made available during the medical examination. I see no contradiction at all, with respect to

what the appellant is pointing out. PW1 testified that the only piece of garment that the appellant removed from her body was her underpants, and she was defiled while still wearing her blouse and skirt. She stated that the clothes were torn, but she did not say that the appellant tore them. The issue of what PW1 wore at the material time is relevant in 1 respect only, whether they carried any forensic material that could aid in connecting the appellant to the offence. The prosecution has not relied on those clothes, so they are of little evidential value, whether produced or not. The issue about them, that is their production, whether torn or not or whether bearing any forensic material or not, is neither here nor there. The prosecution has not constructed its case around them, but on other evidence. About whether PW1 had those clothes when she was presented for treatment, is, again, not relevant for the same reasons, and the same applies to the fact that the said clothes were not presented for the purpose of filling the P3 form.

18. The other alleged contradiction or discrepancy is with respect to the age of PW1. The appellant points out that she said that she was 13, but PW2 said the treatment notes put her age at 7, while the P3 form put her age at 8. Again, nothing much should turn on this. PW1 testified on 11th November 2018, and was telling the court that, as at that date, she was 13 years old. Her brother, PW3, testified that she was born on 20th March 2006, and he produced her certificate of birth, which supports that date. As at 11th November 2018, when she testified, PW1 was 12 years 8 months old, just 4 months shy of celebrating her 13th birthday. When 12 years 8 months is approximated, it would be nearer to 13 years than 12 years. The offence was allegedly committed on 3rd January 2013, when she was 6 years 10 months old, which was more proximate to 7 years of age. The P3 form was filled in 2 parts, one part by a police officer, and the other by a medical officer. Both estimated the age of PW1 to be 8 years. These entries are not scientific, and are estimates, which do not fall too far from age 7, as to amount to an inconsistency or contradiction, which would be material. The treatment notes also refer to age 8, which is corrected by red pen to read 7.

19. A related issue is about the date of the commission of the offence. The charge refers to 3rd January 2013. When PW1 testified, she did not state the date when it happened. PW2 stated that PW1 was treated on 5th January 2013. PW3 stated that he was informed of the incident on 4th January 2013. PW4, the investigator, stated that the report was made on 4th January 2013, but the incident had happened on 3rd January 2013. The P3 form indicates that the offence happened on 3rd January 2013, and was reported on 4th January 2013. The treatment notes indicate that treatment was sought on 4th January 2013, but states that the incident had happened the previous day, which was 3rd January 2013. From the documents, it should be abundantly clear that the incident happened on 3rd January 2013. The oral testimonies ought to have been handled more effectively, as they were meant to bespeak the documents. I appreciate, however, that oral statements, made by witnesses in court, depend largely on how they are led in examination-in-chief by the prosecutor, and if questions as to the date when the offence was committed are not put to them, the witnesses cannot volunteer answers to them. The quality of the answers given by witnesses depend on the quality of the questions put to them. I am also alive to the fact that the events happened in January 2013, yet the trial, the subject of this appeal, was in 2018. This was a retrial. However, my conclusion is that the oral evidence, by way of examination of the witnesses, was not properly handled by the prosecution, but the documents placed on record salvaged the situation, as they are clear that the incident was on 3rd January 2013.

20. The other issue is with respect to crucial witnesses not being called, that is to say the other child who was with PW1, the aunt to whom she reported the incident, and the maker of the treatment notes. I will start with the maker of the treatment notes. I have dealt with that issue above, and I shall not advert to it here. Regarding the other witnesses, the law is that the prosecution is not required to call a particular number of witnesses, or to call every other person who has some information on the matter.

The prosecution is required to call such number of witnesses as are relevant and adequate to establish the case against the accused person. There would be no need to call witnesses to come and regurgitate what previous witnesses had already told the court. There is generally no need to belabour a point made by previous witnesses. The aunt of PW1 would have given evidence similar to that given by PW3. Regarding the other child, O, he was younger than PW1, who was 7 when it happened, and there was a possibility that he might have been too young to testify. In any case, the testimony by PW1 was fairly straightforward, and there was no need to have a second person testify as to whether the appellant was in the vicinity. The incident happened in broad daylight, and PW1 knew the appellant, the issue of identification did not arise, as this was a clear case of recognition. The failure to call those witnesses did not weaken the prosecution case.

21. On his alibi defence not being considered, he stated that he was away the whole day, at Funyula, and he came home to a report that he had defiled a child. Firstly, I note that the appellant was careful to give an unsworn statement, which shielded him from any form of cross-examination, or probing by the prosecution. Secondly, an unsworn statement is the weakest of evidence, for it is untested. Thirdly, PW1 gave evidence that was fairly clear, in terms of what transpired. Of particular note, these events happened at daytime, and she knew her tormentor, a neighbour. Fourthly, there was evidential burden on the appellant, which shifted to him after he was put on his defence. He did not attempt to demonstrate that he was in Funyula at the material time, even after he was placed at the scene by PW1.

22. On the sentence of life imprisonment, I will start by stating that section 8(2) of the *Sexual Offences Act* prescribes a mandatory penalty of life imprisonment, where victims of sexual offences are below the age of 12. There has been some development in jurisprudence with regard to mandatory sentences of such nature, by the superior courts, in such cases as Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), Philip Mueke Maingi & 5 others vs. Director of Public Prosecutions & another [2022] eKLR (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J), which have declared mandatory sentences unconstitutional, and have stated that the trial courts had discretion to consider other sentences, otherwise it would have imposed the mandatory life imprisonment sentence, prescribed under section 8(2). Julius Kitsao Manyeso vs. Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), decided sometime this year, has gone on to declare that life imprisonment, as a sentence, whether mandatory or not, is unconstitutional. The victim of the defilement herein was just 7 years old, at the material time, a child of tender years, who would require the sort of protection implicit in that sentence, and the trial court acted quite properly in awarding the same. However, the same cannot now stand, in view of Philip Mueke Maingi & 5 others vs. Director of Public Prosecutions & another [2022] eKLR (Odunga, J), Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J) and Julius Kitsao Manyeso vs. Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA).

23. There were issues that were not raised by the parties, but which have come to my notice, and which have caused me some anxiety. The first relates to the fact that PW1 gave an unsworn statement. PW1 had testified in the initial trial, in 2013, which was overturned on appeal, in Busia HCCRA No. 11 of 2015, primarily on grounds that there was no indication whether she had testified on oath, and more crucially whether she was subjected to voir dire examination, to assess her level of intelligence, to aid the court determine whether she should testify at all, and, if she was found intelligent enough to testify, whether she could testify on oath. At the time, she was 7 years old. She should have been subjected to voir dire, and she could testify unsworn, if the trial court found her intelligent enough to testify. However, in the retrial, she was 13 years old. She was no longer a child of tender years. There was no requirement or need for her to be subjected to a voir dire examination, and she should have given sworn evidence.

24. I find it surprising that the trial court fell into this error, given that Kiarie J had, in Busia HCCRA No. 11 of 2015, addressed that issue, and had cited portions of the relevant statutes and case law. On who a child of tender years is, Kiarie J lifted section 2 of the *Children Act*, No. 8 of 2001, and recited the same in the judgment, as saying ""Child of tender years" means a child under the age of ten years." That definition has disappeared in the recent amendments to the *Children Act*, but it was in application as at 15th July 2019, when judgment was delivered in Busia CMCSO No. 117 of 2017. Kiarie J then recited section 19(1) of the *Oaths and Statutory Declarations Act*, Cap 15, Laws of Kenya, which says: "Where, in any proceedings before any court or persons having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if , in the opinion of the court, or such person as aforesaid, he is possessed of such intelligence to justify the reception of the evidence, and understands the duty of speaking the truth, and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with the provisions of section 223 of the Criminal Procedure Code, shall be determined to be a deposition within the meaning of that section." (Emphasis mine). Kiarie J then went on to cite Kinyua vs. R [2004] 1 KLR 256 (although this decision is widely cited, and expressed as appearing in [2004] 1 KLR 256, it does not appear in [2004] 1 KLR 256, and I have been unable to trace the law report where it in fact appears, however, John Wambua Mutunga vs. Republic [2005] eKLR (Tunoi, O'Kubasu & Waki, JJA), has a comparable holding), where the court detailed what a trial court ought to do, by way of steps, in compliance with section 19(1) of the *Oaths and Statutory Declarations Act*. In other words, what a court ought to do in order to assess the intelligence of a child of tender years, to determine whether he should testify, and, if he should, whether he should do so on oath.

25. The gist of the definition of child of tender years in the then section 2 of the *Children Act* and section 19(1) of the *Oaths and Statutory Declarations Act* was, and I believe it still is, that a child of tender years can testify in court proceedings. There is nothing in law that precludes such a child from giving evidence. However, precautions have to be taken to assess whether such a child is intelligent enough to testify at all. If he is found intelligent enough to testify, the precaution would be whether he should testify on oath or not. He will testify on oath if he understands the duty of speaking the truth. If he does not have an appreciation of that duty, then his evidence will be taken unsworn. Voir dire examination is intended to assist the court make those assessments. However, by dint of section 19(1) of the *Oaths and Statutory Declarations Act*, voir dire examination is not for all classes of children, that is to say all individuals under 18 years of age. It is only for the class of children categorized as of tender years. It is only for this category of children that a court has to worry as to whether they have capacity to testify at all, and, if it finds that they could testify, whether they should do so under oath or not.

26. PW1 was 13 years old on 11th November 2018, when she testified. She was not a child of tender years, as per section 2 of the *Children Act* then. There was no requirement for the trial court to comply with section 19(1) of the *Oaths and Statutory Declarations Act*, to conduct a voir dire examination to assess whether she could testify on oath, for she was not in the category of children of tender years. The law presumes that a child of 13 years is old enough to understand the duty to tell the truth. She should have given evidence on oath. Section 151 of the *Evidence Act* requires that "Every witness in a criminal cause or matter shall be examined upon oath..." That would be with the exception of the witnesses the subject of section 19(1) of the *Oaths and Statutory Declarations Act*. That would mean that the appellant was convicted on the unsworn testimony of a witness who should have been sworn. That is critical, given that the testimony of that witness was pivotal in establishing penetration.

27. The second concern is with compliance with Article 50(2)(g)(h) of *the Constitution* and section 43 of the *Legal Aid Act*, No 6 of 2016. 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 his advice 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. It did not come up at arraignment on 14th November 2017, 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.

28. 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.

29. 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 17th November 2017, the principles, stated in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), had not been pronounced, for that judgment was delivered on 14th December 2017. The statutory minimum sentences under the *Sexual Offences Act* had not been declared unconstitutional. That then meant that the appellant herein was exposed to being sentenced, upon conviction, to life imprisonment, as indeed happened. 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. The appellant here described himself as a peasant farmer, when he gave his defence statement. He, no doubt, needed support from an Advocate, to ensure that he got a fair trial, given the exposure.

30. 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 himself.

31. 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 violation of *the Constitution*.

32. Were these constitutional fair trial prerequisites applicable in this case? The offence, the subject of these proceedings, was allegedly committed in 2013. *The Constitution* of Kenya, 2010, commenced on 27th August 2010; while the *Legal Aid Act* commenced on 10th May 2016. It would mean that, as at 2017, when the appellant was being arraigned in court, for a second time, both *the Constitution* and the *Legal Aid Act* were in application, and the court, before whom he was 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 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. 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.

33. As the fair trial principles in Article 50(2)(g)(h) of *the Constitution* 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)(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 persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.

34. 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 the purported act. Article 2(4) of *the Constitution* renders invalid any act or omission which amounts to a violation or disobedience of provisions of *the Constitution*. The violations that I have discussed above, rendered invalid and a nullity the criminal proceedings, that were conducted against the appellant in Busia CMCSO No. 117 of 2017. That would mean that the outcome of those proceedings was invalid and a nullity.

35. The promulgation of *the Constitution* of Kenya, 2010, completely changed the configuration for plea taking. The paradigm shifted, which is something 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. Article 50 has added a host of other things that the court taking plea must do or observe. These are constitutional commands, and failure to comply with them would render the trial unconstitutional or non-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. The court has to go the extra mile, particularly in the more complex and serious offences, and assess whether the accused person, before it, is indigent or not, whether he or she has capacity to defend himself or not, or whether he needs an Advocate paid for by the State or not, and, if he does, set in motion the process for him getting such an Advocate.

36. In view of the above, I shall declare a mistrial, for a second time. Kiarie J had, in Busia HCCRA No. 11 of 2015, declared the first trial of the appellant a mistrial, on 7th November 2017, and ordered the first retrial, which culminated in the second trial, which is the subject of this appeal. 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 CMCSO No. 117 of 2017, did not meet that threshold. Consequently, I shall quash the conviction of the appellant in that matter, of 15th July 2019, and I set aside the sentence that was imposed on him the same day. He was subjected to a first retrial, following the judgment in Busia HCCRA No. 11 of 2015, of 7th November 2017. It would be unfair and unjust to subject him to a third trial. I shall, accordingly, not order a second retrial. The appellant shall, instead, be set free from prison, unless he is otherwise lawfully held.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF OCTOBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Geoffrey Alacha Ojiambo, the appellant, in person.

Advocates

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