Barasa v Republic (Criminal Appeal 21 of 2020)
[2023] KEHC 26695 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26695 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL 21 OF 2020

WM MUSYOKA, J

DECEMBER 20, 2023

BETWEEN

JOSEPH BARASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. RN Ng'ang'a, Resident Magistrate, RM, in Busia CMCSO No. 55 of 2019, of 26th June 2020)

JUDGMENT

1. The appellant, Joseph Barasa, had been charged before the primary court, of the offence of defilement, contrary to section 8(1), as read with section 8(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 28th April 2019, in Teso North, within Busia County, he intentionally caused his penis to penetrate the vagina of FN, a child aged 9 years. The appellant denied the charges, and a trial ensued, where 7 witnesses testified.

2. PW1, TA, a pupil at [Particulars Withheld] Primary School, was the complainant. She described how, on 28th April 2019, the appellant met her along a path, as she was going home from the shops, and he took her by her hand, to an abandoned kitchen, where he defiled her. After she left the kitchen, he followed her and offered her money, and asked her to get into a toilet at a church, so that they could have more sex. She ran away. Later on, she reported to her parents., who took her to the police, and for medical care. PW2, INS , was the mother of PW1. PW1 informed her of what had transpireed. She inspected her private parts, and noted that they were opened up, the clitoris was loose, there was dirt, and there was a whitish discharge with sperms. She described the private parts as torn. She took PW1 to the police, and onwards to the health centre. She put the date of birth for PW1 as 18th July 2010. PW3, ME, was the father of PW1. He was present when PW1 reported that she had been defiled

by the appellant. He reported the matter to the police, who arrested the appellant. He and PW2 also took PW1 to a health centre. PW4, JB, was a minor, who said that on the material day, 24th April 2019, he passed by the abandoned kitchen referred to by PW1, saw PW1 and the appellant inside the kitchen, with the appellant holding PW1, having pulled up her dress. On his way back, he found them at the same scene. PW1 was not walking properly. PW5 No. 91393 Police Constable Evans Yegon, was the officer who received the report of the incident from PW1, PW2 and PW3, and he arrested the appellant. PW6, Protus Wafula Omondi, was the clinical officer who produced the medical evidence. The documents had been prepared by another clinical officer, called Okumu. The records showed that the vulva region was wet, with a bloody whitish discharge, but no bleeding. Laboratory tests showed that there was presence of epithelial cells, which he explained could be caused by friction. PW7, No. 111820 Police Constable Kimweno Daniel, was the investigating officer.

3. The appellant was put on his defence, vide a ruling that was delivered on 3rd December 2019. He made an unsworn statement, on 18th December 2019. He denied the charges. He explained how he was arrested, taken to hospital for tests, before he was arraigned in court.

4. In its judgment, delivered on 28th May 2020, 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 25th June 2020.

5. The appellant was aggrieved, and brought the instant appeal, revolving around the charge being defective, for contradicting the particulars thereof; the evidence was full of hearsay and contradictions; the sentence was harsh and untenable; and his constitutional rights to a fair trial were violated. He later filed supplementary grounds of appeal, which largely revolve around the same issues.

6. The appeal was canvassed by way of written submissions.

7. In his written submissions, the appellant submits on the age of the complainant; the testimony of PW1 not being truthful; contradictions and inconsistencies in the testimonies of the prosecution witnesses; the medical evidence not disclosing defilement; and the sentence being excessive. He cites Kelvin Kiprotich Amos alias Rotich v Republic Bungoma HCCRA No. 89 of 2016, Stephen Ouma Opiyo v Republic Kisumu HCCRA No. 46 of 2009 and Julius Kitsao Manyeso v Republic Malindi CACRA No. 12 of 2021.

8. On its part, the respondent submits on the charge being defective, for the particulars were contradictory; on the prosecution evidence being largely hearsay and contradictory; on the sentence being harsh and untenable; and violation of *the Constitution*. The respondent has cited section 134 of the Criminal Procedure Code, Cap 75, Laws of Kenya; Article 50(2) of *the Constitution*; Kinyatti v Republic [1984] eKLR; Munene v Republic [2018] eKLR; Julius Kitsao Manyeso v Republic CACRA No. 12 of 2021; Fappyton Mutuku Ngui v Republic CACRA No. 296 of 2010; Samuel Mburu Wanyoike v Republic [2018] eKLR.

9. On the charge being defective, for having contradicting particulars, I have read and re-read the charge as stated in the charge sheet, and I am unable to see the point the appellant is raising. The statement of the charge identifies the offence as defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, which defines the offence of defilement, and prescribes the penalty. The particulars of the charge allege that on a specified date, and at a specified place, the appellant caused his penis the penetrate the vagina of a specified minor of a specified age. To my understanding of the particulars, they are aligned to the charge of defilement. I see no merit in this ground of appeal.

10. On contradictions, the appellant points at statements made by witnesses, without looking at the said statements in light of the entire evidence given by that witness, and other witnesses. Statements by

witnesses ought not to be considered in isolation, but in the context of the whole evidence. I have carefully gone through the recorded evidence of all the 7 witnesses presented by the prosecution, and I have not noted any significant contradictions and inconsistencies. The only one that I noted is that by PW4, when he referred to 24th April 2019, as the date when the incident happened, instead of the 28th April 2019, which appears in the charge, and which is the date referred to by the other witnesses. However, such an inconsistency, does not render the testimony of that witness unreliable. It could be that it was an issue of recording of the evidence by the trial court. What PW4 informed the court tallies in material particulars with the testimony of PW1. She stated that she saw PW4, while at the abandoned kitchen with the appellant, through holes on the wall. In any event, contradictions and inconsistencies in evidence are not altogether unexpected. In fact, courts have stated that evidence lacking contradictions and inconsistencies could also be treated as suspect, on account of being rehearsed and choreographed. Inconsistences and contradictions are only relevant, if they go to the core of the matter, so as to render the entire evidence tendered as wholly unreliable and unbelievable. See John Cancio De Sa v VN Amin [1934] 1 EACA 13 (Abrahams CJ & Ag. P, Sir Joseph Sheridan CJ & Lucie-Smith Ag. CJ), Joseph Maina Mwangi v Republic [2000] eKLR (Tunoi, Lakha & Bosire, JJA), Twehangane Alfred v Uganda [2003] UGCA 6 (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), Dickson Elia Nsamba ShaPWata & Another v The Republic, Cr. App. No. 92 of 2007 (unreported), Erick Onyango Ondeng v Republic [2014] eKLR (Githinji, Musinga & M'Inoti, JJA), Philip Nzaka Watu v Republic [2016] eKLR (Makhandia, Ouko & M'Inoti JJA) and Richard Munene v Republic [2018] eKLR (Ouko, P, Sichale & Kantai, JJA).

11. The appellant has submitted that PW1 was labelled an untruthful witness by PW4, and, therefore, the trial court should not rely on her testimony. There was a context in which that statement was made- by PW4. PW1 had been defiled, she was hesitant about disclosing what had happened to her, and PW4 was called upon to disclose what he knew. The fact that PW1 was reluctant to disclose the circumstances of her defilement, was not unusual, in offences of this nature, and it did not render her testimony unreliable. In any case, the narrative she gave in court was flowing and straightforward, and there is nothing in it which points to any untruthfulness.

12. There was the issue of the age of PW1 not being proved, largely because the medical records, placed on evidence, appeared to state different ages. The age of a child can be proved by other evidence, apart from a birth certificate. See Kenneth Kiplangat Rono vRepublic [2010] eKLR (O'Kubasu, Waki & Aganyanya, JJA) and Saruni Manguyu v Republic (2011) KLR (Ouko, J). The parents of PW1 testified. No evidence on the birth of a child can be better than that of the parents of the child. PW2, the mother of PW1, stated that she was born on 18th July 2010, and no evidence can be better than that. As at 28th April 2019, PW1 was roughly 8 years, 9 months and 11 days old, which could quite properly be approximated to 9 years. I am not persuaded the age of PW1 was uncertain, or was not proved.

13. There is also the issue of the medical evidence not disclosing defilement. The medical evidence was presented by PW6. He was not the one who attended to PW1, and was not the maker of the documents that he presented. That of itself did not diminish the reliability of his evidence. The appellant did not object to PW6 producing those documents, and it is permissible for documents being produced by another witness, who is familiar with the handwriting of the maker of the documents. He recited the contents of those documents. The medical notes for 28th April 2019, indicated that PW1 had already changed clothes, and had taken a bath. No physical injuries were discernible on the outer part of the sexual organs, and no discharge was noted, and no signs of bleedings were noted, hence PW1 was referred to laboratory investigation. The P3 form indicates that there was a non-bloody vaginal discharge, whitish in colour. I agree, the medical evidence was not very clear, for it would appear that when PW1 bathed, some of the forensic material was lost. However, sexual offences are not to be proved only through forensics. The trial court can always rely on other evidence. See Kassim Ali v

Republic [2006] eKLR (Omolo, Bosire & Githinji, JJA), AML v Republic [2012] eKLR (Odero, J), Fappyton Mutuku Ngui v Republic [2014] eKLR (Kihara Kariuki PCA, Maraga & J. Mohammed, JJA), Robert Mutungi Muumbi v Republic [2015] eKLR (Makhandia, Ouko & M'Inoti, JJA), George Muchika Lumbasi v Republic [2016] eKLR (Mwita, J), Williamson Sowa Mbwanga v Republic (2016) eKLR (Makhandia, Ouko & M'Inoti, JJA) and Samwel Mburu Wanyoike v Republic [2018] eKLR (Nambuye, Warsame & Gatembu, JJA). Such evidence was available. PW1 was clear that the appellant defiled her, and there was adequate corroborative evidence from PW2, PW3 and PW4.

14. On the sentence being excessive and untenable, the provision on sentence is section 8(2) of the *Sexual Offences Act*, which provides for a mandatory sentence of life imprisonment, where the victim was a child of tender years. Of course, there has been quite some development in jurisprudence in this area. It started with Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), which stated that mandatory sentences were unconstitutional. However, Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) followed, to clarify that Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) was only meant to apply to mandatory sentences with respect to murder convictions, despite Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) being worded in broad terms, which could accommodate mandatory sentences with respect to other offences. The High Court, however, made pronouncements thereafter, in Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another [2022] eKLR (Odunga, J) and Edwin Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J), along Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), with regard to mandatory sentences with respect to offences created under the *Sexual Offences Act*, stating that such sentences were unconstitutional, and that trial courts have discretion to sentence offenders for those offences without regard to the mandatory prescriptions. Regarding life sentences, Julius Kitsao Manyeso v Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA)(unreported) has declared the sentence of life imprisonment, whether prescribed as mandatory or not, is unconstitutional. I believe that the appellant is riding on these decisions, to invite the High Court to revisit his sentence, with a view to revising it. At the time the judgement of the trial court came out, on 28th May 2020, Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) had been pronounced, but not the Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another [2022] eKLR (Odunga, J), Edwin Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J) and Julius Kitsao Manyeso v Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA). Going by Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), with regard to mandatory sentences in sexual offences, the position prevailing was that prior to Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), and, therefore, the trial court did not err in imposing the mandatory life imprisonment. However, in view of Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another [2022] eKLR (Odunga, J), Edwin Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J) and Julius Kitsao Manyeso v Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA)(unreported), that sentence is no longer tenable, and should be substituted with a definite sentence of imprisonment. Recent determinations appear to point to life imprisonment translating to 30 years imprisonment. See Evans Nyamari Ayako v Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported).

15. On the issue of violation of the constitutional fair trial principles, the appellant did not pinpoint the particular violations that he had in mind. Should I consider the issue? Yes, I should. As a first appellate court, I have a duty to review the record of the trial court, and to come up with my own conclusions. See Okeno v Republic (1972) EA 32 (Sir William Duffus P, Law & Lutta, JJA). That evaluation should include considering whether the trial court was faithful to Article 50(2) of *the Constitution*, on ensuring that the appellant had the benefit of fair trial principles stated in that provision, which include presumption of innocence, to be informed of the charge in sufficient details to respond to it, provision of adequate facilities to prepare a defence, a public trial, a speedy trial, being present during the trial, right to legal representation of own choice and to be informed of the right promptly, have Advocates assigned at State expense and the right to be informed of that right, to remain silent and not to testify during the proceedings, pre-trial disclosure of evidence, to adduce and challenge evidence, interpretation/translation, legality of the charge, to benefit from the least severe punishment and appeal.

16. Let me consider these one by one. On presumption of innocence, I do not think anything arise here. The appellant was subjected to a full trial. After the charge was read to him, he denied it, and the respondent presented witnesses to establish the charge against him. After the court found and held that he had a case to answer, the appellant was put on his defence, and was given an opportunity to make a statement in defence, which he did. That whole process was undertaken on the basis that the appellant was innocent, and that the respondent was obliged to marshal evidence to establish the charge, that the appellant was guilty as charged, which it did. The appellant had the benefit of presumption of innocence, hence the conduct of the trial.

17. On the right to being informed of the charge, with sufficient detail to answer to it, I deduce from the trial record that that was done. I cannot tell whether the appellant was informed of that charge before he was brought to court, because the court was not in charge of that process, and had no control of what was happening when the police were investigating, and at the time when the Director of Public Prosecutions was evaluating the material to enable that office determine whether to charge or not. Based on the court record, I see a charge sheet, which carries the charge, and the details or particulars of it. That charge was read to the appellant, and he was given a chance to respond to it. However, the record is not clear as to whether a copy of that charge sheet had been availed to the appellant, to enable him understand the charge that he was facing, and to consume the details or particulars of it, to enable him answer to the charge. What I see from the record is that the charge was read on 30th April 2019, and on 8th May 2019 the appellant was still informing the court that he did not have the statements. Those statements were not supplied until 4th July 2019. That would mean that the appellant might not have had adequate details of the charge that he faced, as he had no access to material that would have disclosed the case against him, to enable him effectively answer to the charge. I am not persuaded that the provisions in Article 50(2)(b)(j) of *the Constitution* were complied with. It is critical that the evidence that informs the charge be availed to the accused in advance, prior to arraignment, so that it helps him decide on how to answer to the charge. Supplying such evidence after plea has been taken is not the way to comply with these provisions.

18. Was the trial conducted in public? Yes, it was. The trial record is clear on it. There is a record showing that the trial was conducted in public, presided over by a magistrate, in the presence of the appellant, the prosecution, and witnesses. Did the trial begin and conclude without unreasonable delay? Largely it did, although the prosecution could have done better. The arraignment was on 30th April 2019, when plea was taken. The hearing did not start in earnest until 10th July 2019, roughly or slightly 2 months thereafter, because the prosecution delayed in supplying the appellant with evidence. The prosecution terminated on 20th November 2019, 4½ months later. Defence happened on 18th December 2019.

Judgement came on 28th May 2020. The trial court did fairly well, but the prosecution did not satisfy the constitutional prescriptions, with respect to informing the appellant of the charge, with sufficient details to answer to it, and it did not inform him of the evidence it intended to rely on, and to have reasonable access to it.

19. The issue of being informed of the charge with adequate details and of evidence in advance, is tied up with the issue of being afforded adequate time and facilities to prepare a defence. The statements and other evidence were supplied on 4th July 2019, and the trial commenced on 10th July 2019. Was that adequate for the appellant to prepare his defence? The appellant had been admitted to bond/bail on 30th April 2019. The bond was not processed, hence, from what I see from the record, the appellant remained in custody throughout the trial. The question is, were the 5 days given to the appellant, to prepare for trial adequate, taking into account that he was in remand custody at the time?

20. Was the appellant allowed to be present during his trial, or was he excluded at any stage, for whatever reason? The record indicates that he was present throughout the trial, and occasion did not arise at any stage for his exclusion from the trial. Did he exercise his right to remain silent, and not to testify at the trial? Did he exercise his right to adduce and challenge evidence? From what I see from the record, the appellant did not choose to remain silent, and he did not choose not to testify. He exercised his constitutional right to cross-examine witnesses, and to testify at his trial. Did he exercise right to refuse to give self-incriminating evidence? Yes, he was not compelled to give evidence one way or the other. Indeed, he chose to give evidence in a manner that did not expose him to cross-examination, and, therefore, eliminating the possibility of giving evidence that could lead to self-incrimination. The issue of interpretation did not arise, as the proceedings were conducted in the 2 languages of the court, English and Kiswahili, where English is usually translated into Kiswahili. Legality of the charge also does not arise, as the offences charged are both offences under Kenyan and international law, and the issues of autrefois acquit and autrefois convict did not arise as the appellant had not been previously tried of similar charges.

21. That leaves me with Article 50(2)(g)(h) of *the Constitution*. I have looked through the proceedings, and I note that Article 50(2)(g)(h) of *the Constitution* was not complied with. Article 50(2)(g)(h) of *the Constitution* is about the constitutional right to legal representation by an Advocate of one's choice. These provisions are about being entitled to legal representation by an Advocate 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 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, before it commences the trial, to ensure that the accused person is 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 instruct an Advocate of his own choice, is a matter to be addressed when he is first arraigned.

22. 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. Defilement of minors of tender years attracts a mandatory penalty of life in jail, according to section 8(2) of the *Sexual Offences Act*, subject, to Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another [2022] eKLR (Odunga, J), Edwin Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J) and Julius Kitsao Manyeso v Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA)(unreported).

23. The appellant was charged with defilement of a minor of tender years, contrary to section 8(2) of the *Sexual Offences Act*, where the punishment is pretty stiff, for it attracts a maximum of life imprisonment. That penalty clearly points to substantial injustice occurring, where the accused could face a long jail term, should he be convicted, and should attract the benefit of Article 50(2)(g)(h) of *the Constitution*, particularly where the accused person is indigent. The severity of the charge and the penalty should be the 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 capable of conducting his own defence, or to instruct an Advocate of his own choice.

24. Article 50(2)(g)(h) of *the Constitution* should be read together with the *Legal Aid Act*, No. 6 of 2016. The preamble to the *Legal Aid Act* states it 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." The *Legal Aid Act* operationalizes Article 50(2)(g)(h) of *the Constitution*. Article 50(2)(g)(h) of *the Constitution* and the *Legal Aid Act* deal with access to justice, by providing legal aid services to indigent persons in Kenya. They provide for inclusion, non-discrimination and protection of marginalized groups. Sections 3 and 4 of the *Legal Aid Act* are particularly to the point. Section 43 of the *Legal Aid Act* imposes a duty on the court, before whom an unrepresented person is presented in court, especially for plea-taking, 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 is found to require such aid, to 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*, in determining whether substantial injustice is likely to occur, the court should take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend himself.

25. Informing an accused person of his rights, under Article 50(2)(g)(h) of *the Constitution*, and assessing whether the accused requires legal aid from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. These rights are constitutional imperatives, commanded by *the Constitution*, and 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*.

26. I need to consider whether these constitutional fair trial prerequisites are applicable in this case. The offences that the appellant faced at the trial court were allegedly committed in 2019. When these offences were allegedly being committed *the Constitution* of Kenya, 2010, which commenced on 27th August 2010, and the *Legal Aid Act*, which commenced on 10th May 2016, were in force, and applied to the instant case, 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 inform the appellant of his right to legal representation by an Advocate of his own choice, and the right to legal aid from the State in the event that he was indigent. The court was bound 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 charges that he faced and the sentence he was liable to be given in the event of conviction.

27. I have carefully scrutinized the trial court record. When plea was taken on 30th April 2019, Article 50(2)(g)(h) of *the Constitution* and section 43 of the *Legal Aid Act* were not complied with. The court did not inform the appellant of his right to legal representation and to legal aid services by the State, in case he was indigent. 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 appellant to defend himself. The failure to comply with the fair trial principles in Article 50(2)(g)(h) of *the Constitution* and section 43 of the *Legal Aid Act* meant that the appellant was subjected to an unfair trial. Article 2(4) of *the Constitution* 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 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. It is not lost on me, that the appellant was granted bond, but the same was never processed, hence he remained in remand custody throughout his trial, suggesting that he was indigent. I have also noted that his cross-examination of the prosecution witnesses was largely very brief, which should speak to his capacity to mount a defence.

28. Should I overlook the non-compliance on the basis that the appellant did not suffer prejudice as a result? Whether the appellant suffered prejudice or not, from the non-compliance, is not even an issue, for the failure or omission to obey constitutional commands by itself renders the prosecution invalid. *The Constitution* is the supreme law, and what it commands must override everything else. The constitutional fair trial rights, in this case, were not upheld, which rendered the trial unfair. The trial did not reach the constitutional threshold for fairness, which rendered the trial unconstitutional, in view of the failure or omission to comply with the constitutional dictates. I agree with the appellant, his trial did not meet the constitutional threshold, which, by dint of Article 2(4) of *the Constitution*, reduced it to a nullity.

29. The configuration, for what should happen at arraignment, changed fundamentally upon the coming into force of *the Constitution* of Kenya, 2010, and courts presiding over a plea taking exercise should come to terms with it. It is no longer 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. All the constitutional prerequisites for a fair trial, stated in Article 50(2) of *the Constitution*, must be adhered to. For some of them, there has to be compliance before the trial kicks off in earnest, and a trial court, which decides to plough on with the trial, in disregard of Article 50(2), wastes precious judicial time, for the entire exercise would be totally a nullity.

30. As there was non-compliance with the constitutional requirements regarding fair trial, in this case, the trial herein was unfair, and was rendered a nullity thereby. There was a mistrial, and the conviction of the appellant cannot possibly stand. I shall accordingly order a mistrial. The conviction and sentence of the appellant in Busia CMCSO No. 55 of 2019 are hereby quashed and set aside, and I order a retrial. The appellant shall be released, by the prison service, who have custody of him, to the police, who shall present him to the Busia Chief Magistrate's court, forthwith, for a retrial. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 20TH DAY OF DECEMBER 2023

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Joseph Barasa, the appellant, in person.

Advocates

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