Mkiita v Republic (Criminal Appeal E010 of 2023)
[2023] KEHC 27019 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E010 OF 2023

RPV WENDOH, J

DECEMBER 20, 2023

BETWEEN

RANGE GATI MKIITA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction and sentence by Hon. M. O. Obiero – Senior Principal Magistrate in Senior Principal Magistrate's Court Kehancha Criminal Case NO. 26 OF 2020 delivered on 28/10/2022)

JUDGMENT

1. Range Gati Mwita, has filed this appeal against the judgment of the Senior Principal Magistrate Kehancha.

   The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.

2. In the alternative, he had been charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

   The particulars of the charge are that on 11/10/2020 at [Particulars withheld] village Nyabasi North Location, intentionally caused his penis to penetrate the vagina of E. M. a girl aged fifteen (15) years or that he touched the vagina of the girl E. M.

3. Upon conviction, he was sentenced to serve ten (10) years imprisonment.

4. Aggrieved by the conviction and sentence, he has filed this appeal relying on the following grounds:-

   1. That the trial court did not comply with Article 50(2)(g), (h) and (f) of *the Constitution*;That the trial court breached Article 25 (2)(c) of *the constitution*;

2. That the charge was not proved to the required standard;

3. That the sentence is harsh and excessive.

5. The appellant therefore prays that the conviction be quashed and sentence be set aside. In his supplementary grounds, and submissions he lamented that his Constitutional rights on fair hearing were not explained to him; that he was arraigned in court on 14/4/2020 and the complainant's evidence was taken on the same day without him being accorded time to prepare his defence and his right to fair hearing was breached.

6. The prosecution counsel, Mr. Kaino filed submissions and conceded the appeal admitting that the appellant's right to fair hearing was indeed breached first because he was not informed of his right to counsel as required by Article 50(2)(g) of *the Constitution* and secondly, that Article 25(2)(c) of *the Constitution* was also violated because the appellant was not given adequate time to prepare his case because the complainant was heard on the date of plea. Counsel relied on J. Mrima's decision in Joseph Ndungu Kagiri vs. Republic (2016) eKLR where a similar scenario arose and the court intervened to quash the conviction.

7. Having alleged breached of his Constitutional rights, even before delving into the other grounds of appeal this Court must deal with the said allegations first because proved, it might dismiss of the appeal. Article 50(2) guarantees an accused person's right to fair hearing. Article 50(2)(g) and (h) of *the Constitution* provides as follows:-

50

(2) Every accused person has the right to a fair trial, which includes the right-

(c) to have adequate time and facilities to prepare a defence.

(g) to choose, and be represented by an advocate, and to be informed of this right promptly.

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

8. Under the above provision, the court has the duty to promptly inform an accused of his right to engage counsel of his choice if he so wishes. To confirm whether the said provision was complied with one needs to look at the record. Having looked at the record, it is noteworthy that the appellant was arraigned in court for plea on 14/4/2020, the charge was read to him. He denied the charge and immediately, the complainant who was in court was put in the dock. He was never informed of the right to counsel nor was he given time to get an advocate. The courts have over and over stated that the said right has to be explained to an accused before plea is taken or soon thereafter to enable the accused make a decision whether or not to get counsel.

9. In the Southern African case of Mphukwa vs. S (CA& R 360 /2004) (2012) ZAECGHC 6 the court in dealing with a similar situation stated as follows:-

> " A general duty on the part of judicial officers to ensure that unrepresented accused fully understood their rights and the recognition that in the absence of such understanding a fair trial may not take place.
>
> If there is a duty upon Judicial Officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of

them especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused. Such an accused should be informed of the seriousness of the charge and of the possible consequences of conviction. He should also be informed in appropriate cases that he is entitled to apply to the legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in unfair trial in which there may well be a complete failure of justice.

12. The same position was adopted in Joseph Kiema Philip vs. Republic (2019) EKLR where J. Nyakundi said

> " ……it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced."

13. In this case the appellants right to be informed of his right to choose counsel was infringed.

14. Article 50(2)(c) provides as follows:-

> " Every accused person has the right to a fair trial, which includes the right –
>
> (c) to have adequate time and facilities to prepare a defence."

15. As regards Article 50(2)(c) the said provision requires an accused to be allowed adequate time to prepare his case. In this case, the prosecution called the complainant to testify immediately after plea. Even when the appellant was still trying to come to terms with the reality of being charged, the hearing of his case had commenced. The court could have even adjourned for a day or two to allow him exercise his right to hire counsel or look at witness statements and proceed in person or apply to the Legal Aid Board for representation. Though the case was adjourned after that, when the case came up on 14/5/2020 and the appellant sought adjournment to allow him seek treatment again the court declined and insisted on proceeding. This was grossly unfair to deny an accused an opportunity to seek treatment. There is no evidence to show that he was cheating. I think that though this case was not concluded in a record seven (7) days as the Joseph Ndungu case (supra), it has many similarities. In Joseph Ndungu case, the court said as follows:-

> " First, whether the speedy manner in which the trial was conducted in the lower court caused any prejudice to the accused persons. On this issue, considering the time frames mentioned above, an innocent observer can easily be pardoned for praising the learned Magistrate and the prosecution for the zealous manner and the remarkable speed with which the proceedings were hurriedly conducted. Within a record of seven days as stated above, the prosecution had closed its case, a rare achievement in this country by any standard. The defense hearing was fixed within a record of seven days as stated above, the prosecution had closed its case, a rare achievement in this country by any standard. The defense hearing was fixed within seven days from the date the prosecution closed its case, another rare happening in practice and reality. This, to an innocent observer appears to be a perfect and religious observance of the provisions of Article 50(2)(e) of *the Constitution* of Kenya 2010 which guarantees an accused person the right to have his trial begin and be concluded without unreasonable delay. However, this remarkable speed raises serious fundamental constitutional issues among them whether or not the appellants right to a fair trial was infringed and whether or not the provisions of eh Criminal Procedure Code were violated.

In my considered opinion, the speedy trial provided for in our constitution is not "a rushed and unconsidered justice" No it cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a criminal justice system that is not too fast, and not too slow, but just right. To me that is the proper meaning of the phrase 'to have the trial begin and concluded without unreasonable delay' Th drafters of *the constitution* never anticipated a trial that is too speedy to the detriment of an accused person. I reiterate that the flip side of the maxim 'justice delayed is justice denied,,,' is a rushed, unconsidered, unprocedural and unconstitutional trial that undermines sound criminal justice system. The effect is that such a trial is a sham and has absolutely no place in our constitutionalism."

16. The court said that the speedy trial provided for in *the constitution* is not a rushed and unconsidered justice. I totally agree. The trial court seemed to be keen on rushing to determine the case without ensuring that justice was done to both parties. I find that Article 25(2)(c) was infringed.

17. The sum total of the infringement of the provisions of *the Constitution* is that the proceedings are rendered a nullity.

18. The question then is whether the court can order a retrial?

    The principles for ordering a retrial were set down in the case of Ahamad Sumar vs. Republic 1964 where the court said:-

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

19. In this case, having considered the evidence on record, this court is satisfied that the potentially admissible evidence is likely to result in a conviction. The appellant was sentenced to ten (10) years imprisonment on 28/10/2022. He has just served one year out of the ten (10) years and it is not a substantial part of the sentence. Besides, the accused was charged with a very serious offence. This court has to consider the victims' rights too so that this matter should proceed to full trial and if the culprit is found guilty, should face the full force of the law. In my view a retrial will not prejudice the appellant.

20. For the above reasons, I hereby order a retrial. The appellant be released to the Kehancha Police Station produced before Kehancha Senior Principal Court for plea on 28th December, 2023 but be heard by another magistrate other than Mr. Obiero Senior Principal Magistrate who partially heard the case.

21. Being a retrial, the hearing of the case should be expediated.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF DECEMBER, 2023.

R. WENDOH

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In presence of; -

Ms. Kaino for the state

Appellant Absent