



REPUBLIC OF KENYA



KENYA LAW
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**Rono v Republic (Criminal Appeal E029 of 2021)
[2022] KEHC 10193 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E029 OF 2021**

**JM NGUGI, J
JUNE 22, 2022**

BETWEEN

ERIC KIPTOO RONO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrates Court at Molo (R. Yator - Principal Magistrate) delivered on 28/09/2021 in Molo Sexual Offence Case No. 66 of 2018)

JUDGMENT

1. Article 50(2) of *the Constitution* of Kenya 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;
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.
2. As this provisions make clear, *the Constitution* makes it mandatory for an Accused Person to be promptly informed of the right to be represented by an Advocate of his choice before the trial commences.
3. In *Joseph Kiema Philip vs. Republic* [2019] eKLR, (Nyakundi J), the Court described this non-derogable right as as follows:
The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before



the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under Article 50 of *the Constitution* of Kenya 2010... it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation ... In this instance the appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the trial court, the appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice.

4. Similarly, in *Jared Onguti Nyantika vs. Republic* [2019] eKLR, Ngenye- Macharia J. described the right in the following words:

It is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing.

5. In the present case, one of the Appellant's principal grievances against the conviction and sentence arising from his trial in Molo Sexual Offence Case No. 66 of 2018 is that he was not accorded this right; and that this fatally vitiates the conviction.
6. The State's response to this grievance is the retort that the Appellant was accorded a fair hearing since he fully participated in the proceedings which were in a language he understood. It is also the State's submission that the Appellant has not demonstrated any prejudice he suffered from the omission of the Court to inform him of his right to Counsel. It relies on the case of *FEO v Republic* [2019] eKLR.
7. I am required to consider the appeal on the whole, with the keen evaluative eye demanded of a first Appellate Court. See *Okeno v R* [1972] EA 32 and *Kariuki Karanja v R* [1986] KLR 190. Having looked at the entirety of the Lower Court's record, it is fairly obvious that the Appellant was not informed of his right to be represented by Counsel as demanded by *the Constitution*. As our Courts have numerously held, this right is non-derogable and the omission to comply with it is fatal to a conviction. This would be enough to set aside the conviction in this case.
8. There is a second reason to set aside the conviction: the Appellant is that he was not given access to the material relied upon by the Prosecution. The purpose of this provision is closely tied with sub article (c) in that giving the Accused person access to the Prosecution's evidence allows him time to properly prepare his defence. Again, from the record of the Lower Court, there is no indication that the Appellant was given access to the Prosecution's evidence. The Appellant having been unrepresented, it was the duty of both the Prosecution and the Court to ensure that he was aware of his right to access such evidence.
9. There is no need to belabor the point: the trial, as conducted, fell afoul of the constitutional standards, and, in particular Article 50(2)(j) of *the Constitution*. Article 50(2)(j) of *the Constitution* of Kenya provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. Article 50(2)(c), on the other hand, provides for the right of the accused to have adequate time and facilities to prepare his defence.
10. Long before the promulgation of *the Constitution* in 2010, the Court of Appeal had explained the imperative nature of the duty of the Prosecution to supply witness statements in obeying this norm



of fair trial in *Thomas Patrick Gilbert Cholmondeley vs Republic* [2008] eKLR. In that case, the Court held as follows:

We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under..... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.

11. Our Courts have uniformly interpreted the constitutional provisions on fair trial to include the duty of the Prosecution to furnish the Accused Person with witness statements and exhibits which the Prosecution intends to rely on in their defence in advance of the criminal trial.
12. The obvious conclusion is that the omission of the Court to inform the Accused Person of his right to be represented by Counsel and to ensure that he was given witness statements and other materials relied on by the Prosecution so that he could prepare for his defence amount to a substantial breach of his fair trial rights and fatally vitiates the guilty verdict from the trial. I, therefore, conclude that the trial was unfair and the conviction unsafe. Consequently, the conviction and sentence are both set aside.
13. I have looked at the other grounds of appeal proffered by the Appellant. Due to the orders I have given in the appeal, I will not delve into the other grounds of appeal.
14. Having set aside the conviction and sentence, I must now consider whether this is a fit case for re-trial. The principles governing whether or not a retrial should be ordered are now well settled. The East Africa Court of Appeal captured the principles succinctly in *Fatehali Manji v Republic* [1966] EA 343 as follows:

In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.

15. The Court of Appeal added an important consideration in *Mwangi v Republic* [1983] KLR 522:

We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.
16. The main question here, then, is whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial. Given the nature of the offence; the interests of the victims of the crime; the availability of witnesses; and the reason for setting aside the conviction and sentence, after perusing the Trial Court record as part of this appeal, I have come to the conclusion that this is a fit case for re-trial.
17. Consequently, the orders and directions of the Court are as follows:
 - a. The conviction entered in Molo Chief Magistrate's Sexual Offence Case no. 66 of 2018 is hereby set aside.



- b. The sentenced imposed on the Appellant is hereby consequently set aside.
 - c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Molo Chief Magistrates' Court for a retrial.
 - d. The Appellant shall be presented before the Chief Magistrate's Court, Molo on Monday, 27th June, 2020 to take plea.
18. The Deputy Registrar is directed to send back the Trial Court file in Molo Chief Magistrate's Sexual Offence Case no. 66 of 2018 and a copy of this Judgment to the Chief Magistrate's Court, Molo for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned R. Yator.
19. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF JUNE, 2022.

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JOEL NGUGI

JUDGE

