Ayo v Republic (Criminal Appeal E015 of 2021)
[2022] KEHC 11145 (KLR) (21 June 2022) (Judgment)

Neutral citation: [2022] KEHC 11145 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E015 OF 2021

RE ABURILI, J

JUNE 21, 2022

BETWEEN

DANIEL MISEWE AYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence delivered by the Hon. J.P. Nandi on the 20.4.2021 in the Principal Magistrate's Court in Bondo Sexual Offence Case No. 46 of 2020)

JUDGMENT

Introduction

1. The appellant herein Daniel Misewe Ayoo was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on unknown dates within the month of May 2020 at unknown hours at [Particulars Withheld] village, Central Sakwa location in Bondo sub-county within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of CA a child aged 15 years.

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

3. The appellant pleaded not guilty and after a full trial, the trial magistrate after considering the evidence adduced by the four prosecution witnesses and the accused person in his defence found that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted the appellant and sentenced him to 15 years' imprisonment.

4. Aggrieved by the trial court's judgment and sentence, the appellant initially filed his petition of appeal on the 5.7.2021 in which he raised the following grounds:

    a) That the trial court failed to observe that the investigations tendered was shoddy.

b) That the trial court failed to consider that the prosecution evidence was full of contradictions hence unsafe to base a conviction upon.

c) That the trial court failed to consider that the sentence imposed was against the weight of the evidence adduced.

d) That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.

e) That I be served with the certified copy of the trial court records to enable me erect more grounds of appeal.

5. On the 1.4.2022, the appellant filed amended grounds of appeal stating as follows:

a) That, the appellant's fundamental rights and freedoms provided in the Bill of Rights were violated contrary to Article 49(1) (a) (c) U. 50(2) (g) (h) (j) of *the Constitution* of Kenya.

b) That, the charge sheet is completely defective considering the name of another person arising in the alternative charge herein that was not the appellant's name.

c) That, the prosecution failed to summon its crucial witnesses to rebut the appellant's defence contrary to section 212 of the C.P.C such as the said Evans Otieno Ochieng mentioned in the alternative charge,

d) That, the 15 years' imprisonment upon the appellant is unconstitutional, excessive and inhuman and amounts to unsafe trial.

e) That, the prosecution's evidences were full of contradictions hence unsafe to base a conviction.

f) That, the trial magistrate failed to acknowledge that the investigation was shoddy to rely on.

g) That, the trial Court failed in fact and law by not considering that there was forensic medical link linking me with the said allegations.

h) That, the trial magistrate failed in law and facts to base his judgment upon the suspicion stated upon the family.

i) That, the penetration was not proved scientifically through scientific medical experts considering my health status which could be the matter of contention in this case.

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

The Appellant's Submissions

7. The appellant submitted that that the prosecution failed in its duty to prove its case to the required standard by failing to take a sample from the accused as well as the complainant for the purpose of D.N.A. Forensic and scientific tests as required by section 36 of the *sexual offences Act* No.3 of 2006.

8. The appellant further submitted that PW1 in her Voire Dire test proved that she was aged enough to swear as per the law and thus the trial magistrate failed in matters of law as the appellant was not accorded the right to procedural due process (sic) as provided for by Article 25(c) as read with Article 50(2) (a) of *the Constitution* thus rendering serious miscarriage of justice upon him. Reliance was placed on the Court of Appeal case of *Peter Kariba Ndegwa v Republic* [1985] KLR.

9. The appellant submitted that there was a grave contradiction in the charge sheet where the name of the perpetrator was alleged to be the appellant while the alternative charge provided for somebody's else's name specifically Evans Otieno Ochieng.

10. The appellant further submitted that the learned magistrate grossly erred in both law and facts by failing to consider the appellant's defence as well as his mitigation considering the appellant's defence was very strong in that he stated that he was not Evans Otieno Ochieng as indicated in the charge sheet relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact may be proved (sic).

11. The appellant submitted that his fundamental rights were threatened and denied as he was not informed of the reasons for the arrest, that he was not given an opportunity to communicate with an advocate or other person whose assistance was necessary and neither was he informed of his right to choose or be represented by an advocate and similarly he was not provided with any advocate at government's cost. The appellant relied on the case of *Pett v Greyhound Racing Association* (1968)2 ALL ER S45.

12. The appellant further submitted that the prosecution delayed the case for unnecessary reasons and further that the prosecution failed in its duty to disclose to the defence relevant evidence which it was under duty to disclose as per Article 50(2). Reliance was placed on the case of *R v Ward* [1993]2 ALL ER 557.

13. The appellant further submitted that he was convicted over a defective charge sheet and that no amendment was made during the trial and hence this prejudiced him. The appellant cited the case of *Tongo v R* [1983] KLR.

14. It was submitted that penetration was not proved and that the allegation against him were fabricated due to misunderstandings between the appellant and the wife. The appellant also submitted that the case against him was full of suspicion as he was not well medically associated with the alleged offence.

15. The appellant submitted that that the prosecution failed to call the essential witness who was mentioned in the charge sheet in the alternative charge as he may have been the one who defiled the said minor.

The Respondent's Submissions

16. It was submitted that the age of the complainant was proved through the provision of birth certificate that showed the complainant was born on 17.4.2005 and was thus a class 6 pupil aged 15 years.

17. On penetration it was submitted that the same was proved as PW1 gave graphic details of how she was defiled on several occasions by the appellant and further that PW4 a clinical officer corroborated the evidence of PW1.

18. On identification of the appellant, the respondent submitted that the appellant was a neighbour and a person well known to both PW1 and PW2 and that on all occasions the complainant was defiled during the day.

19. On the grounds of appeal raised by the appellant, it was submitted that the evidence disclosed the offence of defilement therefore investigations were properly done and not shoddy as claimed by the appellant.

20. On claims by the appellant that the prosecution evidence was contradictory, the respondent submitted that the evidence was flawless without any contradiction whatsoever.

21. On claims that the sentence imposed on the appellant was unconstitutional, the respondent submitted that the complainant was aged 15 years and as such the proper sentence ought to have been 20 years' imprisonment.

Evidence

22. The evidence adduced before the trial court was as follows: The complainant CA testified as PW1 and stated that she was aged 15 years. She recalled that in the month of May 2020, she was sent by her mother to go buy sugar at Jabondo's house where he operated a shop. She testified that she went as directed, entered the house and sat on the chair after which Jabondo then closed the door and took her to his bed where he started touching her breasts and private parts. It was her testimony that he removed her pant and inserted his penis into her vagina then gave her the balance of the money and she went home.

23. The complainant further testified that on the of the same day, she took cattle to drink water where Jabondo found her in the bush, warned her not to tell anyone of what had happened and threatened to stab her with a knife if she told anyone. She stated that he had sex with her in the bush before he threatened her. PW1 further testified that the third time while she was herding cattle, Jabondo went and told her to bend and he had sex with her and also threatened her. It was her testimony that she sustained injuries on the knees. The complainant further testified that after that, Jabondo again found her herding cattle and would have sexual intercourse with her. She testified that they had sexual intercourse five times.

24. PW1 testified that one day, Jabondo fought with his wife and her name was mentioned and when her mother who had been called to make peace later questioned her, she confirmed that she had been having sex with Jabondo. It was her testimony that her mother called the area chief and planned on how to arrest Jabondo. She further testified that Jabondo heard about the issue and from then, he did not return to where she was herding cattle. It was her testimony that she was taken to Nango Health Centre then to Bondo sub county hospital where she was examined and treated. It was her testimony that she had known Jabondo before as he used to visit her home although she did not know his other name. She identified Jabondo as the accused in the dock.

25. In cross-examination, PW1 testified that on that day, the appellant was in the house alone and that he had a wife and children. She further testified that she did not tell her mother or anyone what had happened to her as the appellant threatened to stab her with a knife. It was her testimony that she herds the cattle with small children.

26. PW1 further stated that it was a lie for the appellant to say that her mother conspired with his wife to set him up. She further testified that she recalled meeting with the appellant while she was herding cattle and that she asked him about what he had spoken with his wife. It was her testimony that the last day she went to the shop the appellant defiled her. She further testified that the appellant wanted to construct a house for her and not his mother.

27. PW2, SO, the complainant's aunt testified that on the 19/6/2020 at 10pm the appellant and his wife were fighting so she was called to go and bring peace. She testified that she talked to the appellant who told her that it was her daughter who had caused all problems. She further testified that the appellant's wife said that the appellant wanted to construct house for PWI and they started fighting and that the appellant's wife said that the appellant and PW1 had a love affair.

28. PW2 testified that the complainant told her that the appellant had been forcefully defiling her and that she had been defiled five times by the accused. She testified that she called the Chief and informed

him what had happened. It was her testimony that she took PW1 to Nango hospital where she was found to have a discharge and was referred to Bondo sub-county hospital where she was examined and treated. She testified that she reported the matter to Bondo Police station and that the accused was arrested later. She testified that she had known the accused before as she was the village elder and she identified him in court.

29. In cross-examination, PW1 stated that she had known the appellant for six months. She stated that she never tried to frame anyone for defiling her daughter. It was her testimony that the appellant fought with his wife on account that he wanted to construct a house for PW1. PW1 denied conspiring with his wife to frame the appellant with the offence. She stated that she did not owe the appellant any money.

30. PW3 No. 247255 PC Laureen Obongo testified that she was the investigating officer in the matter and that on the 22/6/2020 at 1255hrs, the complainant's mother took the complainant to the station and reported that on unknown dates in the month of May 2020, she was sent to the appellant's shop to buy sugar where the appellant took her to his bedroom and started touching her private parts.

31. PW3 testified that the complainant told her that the appellant threw the complainant on the bed and removed her clothes and defiled her. PW3 reiterated the complainant's testimony on the number of times she was defiled and how the appellant was eventually arrested. She identified the appellant in the dock. She produced the complainant's birth certificate showing the date of birth as 17/4/2004 with serial number xxxx as exhibit-3.

32. In cross-examination, PW3 stated that the complainant went to the station in June when she had changed clothes and that the offence took place in May. She further testified that it was the Chief who arrested him and that the appellant alleged that it was his wife who reported him to the station which was not true.

33. PW4, Samuel Aluda, a Clinical Officer working at Bondo sub-county hospital produced the PRC form as Exhibit 1 and the P3 form as exhibit 2. He testified that he examined the complainant and found her hymen to be broken but her genitalia were normal. He stated that the complainant was on her menstrual period and that the lab tests revealed pus cells in the urine. PW4 testified that the complainant presented to the facility after more than two weeks. He further testified that the other examinations were negative and that the fact that the hymen was broken meant that there was penetration.

34. Placed on his defence the appellant denied the charges. He testified that on the 29/6/2020 at 6am, the village elder went to his house and found him and asked where his wife was and he told him that she was inside the house. He testified that the village elder entered the house and got out with his wife but his wife returned shortly with two motorcycles. He testified that he was arrested by the Chief and taken to Bondo Police Station and the following day he was taken to hospital for some tests.

35. He testified that he was charged with the offence of which he knew nothing about. He stated that he was not called Evans Otieno Ochieng. He stated that he had differences with his wife as she had wrongly used his money.

Analysis and Determination

36. I have considered the grounds of appeal, the submissions for and against the appeal and the evidence adduced before the trial court. I find the following issues for determination:

    a) Whether the charge sheet against the appellant was defective,

    b) Whether the appellant's constitutional rights were infringed,

c) Whether the prosecution proved its case beyond reasonable doubt,

d) Whether the appellant's sentence was unconstitutional, excessive and inhuman.

37. This being a first appeal, this court is alive to and takes into account the principles laid down in the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal for Eastern Africa stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination [*Pandya v R* 1975] E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (S*hantilal M. Ruwala v R* [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters v Sunday Post* [1978] E.A. 424."

38. I have already considered the evidence as adduced before the trial court. I now consider the issues arising from the material before this court.

39. On the question of whether the charge sheet brought against the appellant was defective, the appellant pleaded and submitted that he was convicted over a defective charge sheet and that no amendment was made during the trial and hence this prejudiced him and further that there was a grave contradiction in the charge sheet where the name of the perpetrator was alleged to be the appellant while the alternative charge provided for somebody's else's name specificallyEvans Otieno Ochieng

40. I have perused the alternative charge and note that it provides as follows:

> Evans Otieno Ochieng:On the diverse dates on the month of May 2020 at unknown time at Rabango village, Central Sakwa location in Bondo sub county within Siaya County intentionally and unlawfully touched the vagina of CA a child aged 15 years.

41. The main charge for which the appellant was convicted and sentenced gives the name of Daniel Misewe Ayoo, which the appellant in his defence introduced himself by hence there is no issue with it.In the case of *Isaac Omambia v Republic*, [1995] eKLR the court considered the ingredients necessary in a charge sheet and stated as follows:

> " In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

42. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR cited the Isaac Omambia (supra) case with approval and further stated that:

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [198] eKLR that:

"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

(ii) when for such reason it does not accord with the evidence given at the trial."

43. The Court of Appeal in the Peter Ngure (supra) case was further informed by the case of *Peter Sabem Leitu v R*, Cr. App No. 482 of 2007 (UR) where the Court held thus:

> "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

44. The trial court record reveals that the charge sheet was read out to the appellant in open court and he pleaded not guilty. The appellant pleaded not guilty and proceeded to carry out his defence. From the record, it is clear that the misnaming of the appellant in the alternative charge did not occasion a failure of justice. This was clearly an error that did not prejudice the appellant and did not occasion any miscarriage of justice or violate the appellant's rights as the appellant was never convicted on the alternative charge.

45. In addition, Section 382 of the Criminal Procedure Code provides that:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

46. Accordingly, it is my finding that the use of the name Evans Otieno Ochieng in the alternative charge against the appellant was a mistake that did not occasion a failure of justice upon the appellant as he was aware of the charge against him and was able to carry out his defense before the trial court. Furthermore, the appellant was convicted on the main charge and not on the alternative charge which was defective.

47. As to whether the appellant's constitutional rights were infringed, the appellant submitted that his fundamental rights were threatened and denied as he was not informed of the reasons for the arrest, he was not given an opportunity to communicate with an advocate or other person whose assistance was necessary and neither was he informed of his right to choose or be represented by an advocate and similarly, that he was not provided with any advocate at the government's cost.

48. It is now well settled that the rights under the Bill of Rights are very specific and a petitioner who comes before the court must set out with some level of particularity of the specific right allegedly breached and how that right is violated. The principle was set out in the case of *Anarita Karimi Njeru v Republic No.1* [1979] I KLR, 54 and echoed in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* Civil APP.290/2012 [2013] eKLR where the court stated that:

> "If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

49. In the Mumo Matemu (supra) Case, the Court held that:

> "...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

50. In the instant appeal, it is clear that the appellant failed to raise the issues of not being given a reason for his arrest before the trial court so as to enable the court address the same. The same seems to be an afterthought at this stage.

51. Regarding the appellant's claim that he was not provided with an advocate or legal aid, Article 50 (2) (h) of *the Constitution* provides for provision of legal representation by the state where substantial injustice would occur. In *Republic v Karisa Chengo & 2 Others* [2017] eKLR, the Supreme Court considered the issue of legal representation at state expense and stated inter alia that:

> "that the right to legal representation at state expense, under the said Article, was a fundamental ingredient of the right to a fair trial and was to be enjoyed pursuant to the constitutional edict without more however in accordance with the language of *the Constitution*, this particular right was not open ended but only became available "if substantial injustice would otherwise result".

52. The legal framework under which an accused person can apply for legal aid and legal representation at the state expense is under section 40 of the *Legal Aid Act* No. 6 of 2016. Further, section 43 of the said Act imposes a duty on the court to inform an accused person of his right to apply for such legal aid and legal representation. The section stipulates that:

> "43.
>
> (1) A court before which an unrepresented accused person is presented shall —
>
> (a) promptly inform the accused of his or her right to legal representation;
>
> (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person.

53. In *Joseph Kiema Philip v Republic* [2019] eKLR the court stated that:

> " ...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.....
>
> The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings... (emphasis added).

54. From the trial court record, I note that the trial magistrate expressed himself as follows at the commencement of the proceedings:

> " Accused given documents. He is granted bond of Kshs. 100,000 with one surety of a similar amount Hearing on 5/8/2020. Mention on 14/7/2020, court one.
>
> Accused to engage an advocate if he wishes before hearing date."

55. The issue is whether the statement above amounts to compliance with Article 50 (2) (h) of *the Constitution* and Section 43 of the *Legal Aid Act* No. 6 of 2016. In my view this statement by the trial court falls short of compliance with in the strict sense with the law aforementioned.

56. Accordingly, I find and hold that the trial court failed to explain to the accused person/appellant herein the right to legal representation and hence the Appellant was in my view not accorded a fair trial in accordance with Article 50(2)(g) of *the Constitution*.

57. This does not, however, mean that the right to legal aid and legal representation at the state expense as stipulated in Article 50(2) (h) of *the Constitution* and section 43(1) (b) of the *Legal Aid Act*, 2016 is absolute or automatic but qualified and therefore legal representation at the expense of the state is only available where there is likelihood of substantial injustice to occur to the detriment of an unrepresented accused person.

58. What amounts to substantial injustice was considered by the Court of Appeal in the case of *David Njoroge Macharia v Republic* [2011] eKLR where the court stated that:

> " Article 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."

59. In *Karisa Chengo & 2 Others v R,* CR NOs 44, 45 & 76 of 2014, it was stated that:

> "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result? And to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

60. From the above judicial pronouncements, it is clear that a court ought to consider in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include: the serious or nature of the offence in question. Thus, serious offences may attract public interest to the extent that the public may require some form of representation to be accorded to the accused person to conduct his own defence; the severity of the sentence, thus legal representation is to be provided where the offence carries a death sentence and or life imprisonment; the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the ability of the court to comprehend the court proceedings thus the literacy of the accused and the complexity of the case which is discernible from the issues of fact and law which may not be comprehend by the accused. (See the case of Joseph Kiema Philip (supra)

61. In this case, the appellant was charged with an offence which carries a mandatory minimum and severe sentence of twenty years' imprisonment but was not made aware of his right to legal representation as required by law. In that regard, I find that substantial injustice would result.

62. The trial court ought to have at least informed him of this right. The mandatory duties imposed on the trial courts by section 43(1) of the said Legal Act and Article 50 of *the Constitution* were not complied with, and in the circumstances I find that the trial proceedings were conducted in a manner prejudicial to the appellant and caused grave injustice to the appellant. Such proceedings cannot stand.

63. On whether this court should release the appellant or order for a retrial, the law on whether the appellate court should order a retrial is now well settled. In the case of *Ahmed Sumar v Republic* [1964] EA 481, at page 483, the predecessor to the Court of Appeal stated as follows:

> "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."

64. The Court further stated that:

> "We are also referred to the judgment in *Pascal Crement Braganza v R* [1951] EA 152. 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."

65. That decision was echoed by the Court of Appeal in the case of *Benard Lolimo Ekimat v Republic* [2005] eKLR, where the court stated as follows:

> " There are many decisions on the question of which appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where interests of justice require it."

66. In this case, I find that the ends of justice for both the appellant and the complainant require that a retrial be ordered. Accordingly, I allow this appeal on both conviction and sentence which conviction is hereby quashed and sentence set aside. In its place, I order that the appellant shall be retried before Bondo PM's Court with the same offence before a different magistrate.

67. This judgment and the trial court file be returned to Bondo PM's Court expeditiously and the appellant be presented to Bondo PM's Court on 27th June, 2022 for a fresh trial. The prosecution to take note and secure all the exhibits contained in the court file for purposes of a retrial.

68. I so Order.

69. This file is now closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF JUNE, 2022

R.E. ABURILI

JUDGE