



**Mashimo v Republic (Criminal Appeal E066 of 2021)
[2022] KEHC 11255 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E066 OF 2021
RPV WENDOH, J
JULY 27, 2022**

BETWEEN

MATHAYO MASUNGA MASHIMO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Mathayo Masunga Mashimo 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](#), by Hon. Mesa Principal Magistrate Kehancha on 25/9/2020.
2. The particulars of the charge were that on 3/8/2019 at [particulars withheld] Village in Kuria West Sub County of Migori County, caused his penis to penetrate the vagina of A. K. O. a child aged fifteen (15) years.
3. In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) and no finding was made on the alternative charge. Being dissatisfied with the judgment of the court, the appellant filed this appeal citing the following grounds of appeal:-
 1. That the Court failed to comply with article 50(2) (g) and (h) of [the Constitution](#).
 2. That the offence of defilement was not proved to the required standard.
 3. That the sentence meted on the appellant was manifestly harsh and excessive.
4. He therefore prayed that the conviction be quashed and sentence set aside..
5. The court directed that the appeal proceeds through filing of submissions which the parties complied with.



6. The appellant filed his submissions in which he openly sought the courts leniency and urged the court to reduce his sentence or to release him on humanitarian grounds. He seemed to have abandoned his appeal on conviction.
7. Mr. Omooria observed that the appellant seemed to have abandoned his appeal on conviction and therefore only submitted on sentence. It was his view that the sentence of seven (7) years imprisonment is very lenient because this court applied the principles in *Muruatetu vs. Republic* SP 15 OF 2019 in sentencing yet the Supreme Court clarified the position, later and said that the *Muruatetu* Case only applies to murder cases.
8. This being a first appeal, it is required of this court to re-examine all the evidence tendered in the trial court , analyse it and arrive at its own conclusion but bearing in mind that this court neither saw nor heard the witnesses testifying and therefore wee not in a position to weigh their demeanour. Or this proposition, I am guided by the decision in *Okeno vs. Republic* [1972] EA 32.
9. The prosecution called a total of five witnesses in support of their case. PW1 A. K., the complainant at the time of testifying was 16 years old; PW2 Ochieng Daniel, a clinical officer based at Isebania District Hospital, examined the complainant. PW3 MH the complainant’s mother, PW4 PM, the complainant’s uncle who helped trace the complainant and arrest the appellant and PW5, PC Roselyne Ojwok the investigating officer in the matter.
10. When called upon to defend himself the appellant made an unsworn statement in which he denied knowing why he was arrested nor did he know anything about the complainant.
11. Though the appellant seemed to be abandoning the appeal on conviction, yet he did not specifically state so. H e had raised the ground that his rights under article 50 (2) (g) and (h) of *the Constitution* were infringed in that the court did not inform him of his right to counsel and the right to counsel assigned to him by the State at all. I think that it is important that the court starts by considering this ground of appeal because if allowed, it may determine the appeal.
12. Article 50 guarantees an accused persons right to fair trial. Article 50(2) (g) and (h) provide as follows:-
 - (2) Every accused person has the right to a fair trial, which includes the right-
 - (g) to choose, and be represented by, an advocate, and to be informed of his 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.”
13. Under article 50 (2) (g) the court has a duty to inform an accused person of his right to be represented by an advocate of his choice. Under article 25, the said right cannot be alienated or limited. The courts have considered, this provision before J. Mrima in *Chacha Mwita v Republic* Criminal Appeal 33 of 2019 and Criminal Appeal 44 of 2019, alias *Aunty v Republic*. In Chacha’s case J Mrima said:
 17. he right under article 50(2)(g) of *the Constitution* must be distinguished from the right under article 50(2)(h) of *the Constitution* given that in many instances the rights under article 50(2)(g) and (h) of *the Constitution* are dealt with contemporaneously. The right under Article 50(2)(h) of *the Constitution* on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of *the Constitution* on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one’s choice further to giving necessary information to the accused person and calling him/her to



make a choice on his/her legal representation. Put differently, the right under article 50(2) (h) of *the Constitution* deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of *the Constitution* is among those rights that cannot be limited in any way whatsoever courtesy of article 25 of *the Constitution*.

18. Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In *Pett vs. Greyhound Racing Association* (1968) 2 All ER 545 Lord Denning presented himself thus: -

It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.

19. In South Africa in *Fraser vs. ABSA Bank Limited* (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -

Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of *the Constitution* does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation....

20. In Kenya, the Supreme Court in Petition No. 5 of 2015 *Republic v Karisa Chengo & 2 others* [2017] eKLR while dealing with various aspects of the right to a fair hearing under article 50 of *the Constitution* stated as follows: -

the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

14. I have perused the court file and no where did the trial magistrate record that he had informed the appellant of that right.
15. J. Nyakundi in *Joseph Kiema Philip v Republic* (2019)eKLR said that the accused should be informed of the said right promptly and the court record should indicate that the court did inform the accused of the said right. The court said
16. 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 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.”
17. The accused should be informed of this right promptly so that he can make an informed decision whether or not to procure the services of counsel. Having failed to inform the appellant of his right under article 50 (2) (g), that omission rendered the proceedings a nullity.
18. As regard article 50(2) (h) of *the Constitution*, the said right is not absolute because the court has to satisfy itself that injustice may result before the right can be enforced. Presently, the State only provides



free legal services to child offenders and murder suspects. The State has not fully operationalized a fund for provision of free legal services for all accused persons.

19. The conviction is hereby quashed and sentence set aside. Can this court order a retrial? The principles for ordering a retrial were considered in the celebrated case of *Ahmed Sumar v Republic* (1964) EALR 483 when the then East African Court of Appeal held:-
20. 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.”
21. One of the considerations before ordering a retrial is whether the witnesses will be available and whether the potentially admissible evidence is likely to result in a conviction. The evidence of PW1, PW2 and PW3 confirmed that the complainant disappeared from home and was found staying with the appellant. PW1 said that the appellant had asked her to marry him and during the time, they lived together, they engaged in sexual intercourse. I find that the evidence on record is likely to result in a conviction.
22. Besides, the appellant was sentenced to seven years imprisonment. He was imprisoned on 25/9/2020 and so far, he has only served one year and about nine months. He has not served a substantial part of the sentence and he will not suffer prejudice. Besides, the offence with which the accused was charged is very serious and if found guilty he should face the full force of the law. For the above reasons, I find that this is a good case for retrial. I hereby order that the appellant undergo a fresh trial. The appellant is released to Isebania Police Station to be presented before Kehancha Senior Principal Magistrate’s Court for fresh trial. I direct that trial be expedited. Mention before Kehancha Court on August 2, 2022.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 27TH DAY OF JULY, 2022.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Omooria for the Respondent.

Appellant present.

Nyauke Court Assistant

