



**John v Republic (Criminal Appeal E062 of 2021)
[2022] KEHC 10458 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E062 OF 2021
RPV WENDOH, J
JULY 26, 2022**

BETWEEN

EMANUEL RIOBA JOHN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Emanuel Rioba John, the appellant was convicted by Resident Magistrate Kehancha for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offence Act*.
2. The particulars of the charge were that on diverse dates between 23/7/2020 and 16/9/2020 at [Particulars withheld] Village, Kuria West sub-County of Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of MBJ, a child aged 16 years.
3. In the alternative, the appellant faced the charge of committing an indecent act with the child contrary to section 11 (1) of the *Sexual Offence Act*.
4. There was no finding was made on the alternative charge.
5. The appellant was sentenced to serve 15 years imprisonment.
6. The appellant is aggrieved by the Judgment of the trial court and preferred this appeal based on the following grounds;-
 1. That the offence of defilement was not proved to the required standard
 2. That the trial court failed to comply with Article 50 (2) (g) and (h) of *the Constitution*.
 3. That the court failed to take into account his defence and mitigation.



The court directed that the appeal be canvassed by way of written submission and each party duly complied.

7. The appellant filed his submissions on 16/5/2022 in which he generally addressed the issue that the testimony of PW1 was questionable because of her demeanor, for having been engaged in sexual activities with other men before. He urged the court to quash the conviction, set aside the sentence and set him free.
8. The prosecution counsel Mr. Omooria filed his submissions on 18/5/2022. He submitted that the complainant deponed to having been a girlfriend to the appellant and they had been involved in sexual activities several times; that the appellant also admitted to that fact in his defence and that there was overwhelming evidence that the offence was committed.
9. As respects, the ground that Article 50 (2) (g) and (h) of *the Constitution* was not complied with, counsel argued that on page 9 of Record of Appeal, the appellant indicated that he wished to represent himself and could not afford an advocate which indicates that he understood his rights. Counsel referred to Section 43 of *Legal Aid Act* No. 6 of 2016 which provides that lack of representative is not a bar to proceeding against a person. He argued that even though it is required that the court inform the appellant of his rights to legal representation, failure to do so does not prevent the court from proceeding with the matter. He relied on the decision of *Karisa Chango & 2 others vs= Republic* (2015) eKLR and urged that the appellant did not suffer any prejudice; that the sentence of 15 years did not take away the appellants life and hence he was not prejudiced in any way. Counsel urged that court to dismiss the appeal.
10. This being a first appeal, this court is required to exhaustively consider all the evidence tendered in the trial court, evaluate it and come to its own conclusion.
11. The court has to however, bear in mind that the court neither saw nor heard the witnesses testifying in order to assess their demeanor. I am guided by the decision in the case of *Okeno vs= Republic* (1972) EA 32 where the court said:-

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function 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*, [1958] E. A. 424.”

12. The prosecution called a total of 6 witnesses. PW1 MBJ, the complainant; PW2 MGM, the complainant's mother, PW3, PW1's brother; PW4 SNM who helped look for the culprit, PW5 the Clinical Officer; PW6; the Investigating Officer in this case.
13. The accused was called upon to defend himself and he made an unsworn statement in which he admitted having had sexual intercourse with the complainant for two days but that she had gone to his house seeking refuge;
14. Having considered the grounds of Appeal, I think I will first consider whether there was breach of Article 50 (2) (g) and (h) as relates to the appellants' right to fair trial.



15. Article 50 of *the Constitution* guarantees right to fair hearing. Article 50 (2) (g) provides 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 this right promptly.”
16. Courts have delivered themselves on the above Articles, J. Mrima in *Chacha Mwita =vs= Republic* (2010) eKLR.

17. The 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.

20. In Kenya, the Supreme Court in *Petition No. 5 of 2015 Republic -vs- 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.

17. Apart from informing an accused of his rights to counsel, the court must inform the accused of this right promptly, that is, before plea is taken or soon thereafter so that an accused person can prepare his case and decide whether or not he needs to engage counsel. J Nyakundi in *Joseph Kiema Philip =vs=*



Republic (2019) eKLR, stated that the accused must be informed of the right promptly and that the court record must show that the accused was informed of that right before trial commences.

18. In Chacha's case J. Mrima stated as follows at paragraph 28-29
28. Article 50(2)(g) of *the Constitution* dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in Joseph Kiema Philip (supra) stated as follows: -
- ... 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).
29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of *the Constitution* among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.
19. In this case there is no evidence that the court informed the appellant of his right as required by the law.
20. By dint of Article 25, the said right cannot be alienated. It is immaterial that the appellant later told the court that he was ready to proceed and that he had no advocate. As respects Article 50 (2) (h) it requires that the court inform accused of his right to counsel to be assigned to him by State if substantial injustice would result. In my view this right is not absolute because the court has to satisfy itself that substantial 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 to all accused persons.
21. The court cannot be excused from failing to carry out its mandate. May be the appellant would have sought assistance from the Legal Aid Committee by making an application to the said committee to be availed legal counsel. In my view, the failure to inform the appellant of his right under Article 50 (2) (g) rendered the proceedings a nullity. Therefore, there would be no need for this court to delve into the other grounds raised in the appeal. The conviction is hereby quashed and sentence set aside.
22. The question then is whether this court can order a retrial. In the case of *Abmed Sumar Vs= Republic* (1964) EALR 485, the East Africa Court of Appeal considered the conditions precedent to ordering a retrial 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.....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.”



23. Guided by the above decision, in order for this court to order a retrial, the court has to consider whether witnesses will be available, whether the available admissible evidence may result in a conviction and that ordering a retrial will not be prejudicial to the appellant.
24. I have generally considered the testimonies of the witnesses, and there is no doubt that PW1, the complainant was aged 16 years old; there is no doubt that the complainant stayed with the appellant for about two months and that they were involved in sexual activity during that period. The appellant admitted to this fact in his defence. PW3 and PW4 were present when PW1 was found in the appellant's house. Being a child, PW1 had no capacity to consent to intercourse. I am satisfied that the potentially admissible evidence on record is likely to result in a conviction.
25. The offence was allegedly committed between July 2020 and September 2020 and the case was concluded within a year, in October 2021. The appellant was sentenced to 15 years in prison and so far, he has only served one year which is not a substantial part of the sentence and he will therefore not suffer any prejudice. The appellant was charged with serious offence of defilement and it is important that the culprit faces the full force of law. From the foregoing, I am of the considered view that this is suitable case for a retrial. I hereby order that the appellant do undergo a retrial.
26. I hereby order that the appellant be released to Isebania Police Station and be produced before the SPM's Court Kehancha for a fresh trial before any other Magistrate other than Resident Magistrate Honourable Karimi. Case be expedited. Mention at Kehancha Senior Principal Magistrate's Court on 1st August, 2022.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 26TH DAY OF JULY, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Omooria for the Respondent.

Appellant present.

Nyauke Court Assistant

