



REPUBLIC OF KENYA



**Mwita & another v Republic (Criminal Appeal E022 of 2021)
[2022] KEHC 12681 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E022 OF 2021
RPV WENDOH, J
JULY 26, 2022**

BETWEEN

RAJAB MITA CHACHA MWITA 1ST APPELLANT

JOHN NYAMAKOMU MWITA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Rajab Mita Chacha Mwita and John Nyamakomu Mwita were convicted by Hon Mesa, Principal Magistrate Kehancha, in Criminal Case no 34 of 2020 for the offence of gang rape contrary to section 10 of the *Sexual Offences Act* 3 of 2006. The particulars of the charge were that on May 13, 2020 in Kuria West, intentionally and unlawfully caused their penis as to penetrate the vagina of MC without her consent.
2. In the alternative, the two faced the charge of committing an indecent act contrary to section 11(a) of the *Sexual Offences Act*.
No finding was made on the alternative charge.
3. Upon being convicted on the main charge, each was sentenced to serve ten (10) years imprisonment. They have appealed against the judgment of the court. Rajab filed criminal E022 of 2021 while John filed E023 of 2021 and being appeals arising from the same transaction, they have been consolidated to proceed in Criminal Appeal E022 of 2021.

The grounds of appeal are three: that

1. The charge was not proved to the required standard;
2. That the sentence was harsh and excessive;



3. That the court failed to comply with article 50(2)(g) and (h) of the Constitution.
4. Both appellants filed submissions which are similar in which reiterate the grounds of appeal that the charge was not proved and that there were contradictions in the prosecution evidence and that failure to comply with article 50(2)(g) rendered the proceedings defective.
5. The prosecution counsel Mr Omooria filed his written submissions urging that the two appellants are persons who were known to the complainant as neighbours, that PW1's evidence was corroborated by PW2 and PW3; that all the ingredients of the offence were proved, in that PW1 was found to have injuries to her genitalia and that the two appellants had a common intention.
6. Counsel however, submitted that the court record had revealed that article 50(2)(g) of the Constitution was not complied with and failure to comply rendered the proceedings a nullity. He urged this court to order a retrial as witnesses are readily available and there was overwhelming evidence against the appellants.
7. As was held in *Okeno vs Republic* (1972) EA 32, the first appellate court has the duty to exhaustively re-examine all the evidence tendered in court, analyse and evaluate it and arrive at its own independent findings.
8. The prosecution called a total of six (6) witnesses, PW1 MMC, the complainant; PW2 is SB the complainant's aunt; PW3 is SMM the complainant's mother; PW4 Marwa David Ikari a clinical officer from Isebania Sub County Hospital, PW5 was Gregory Gititere Nchama, Senior Chief of Bugumbe who rearrested the appellants from members of public and lastly PW6 I. P. Antonina Ruto the investigating officer in this matter.
9. Both accused persons testified on oath in their defences denying the offence.
10. Having considered the grounds of appeal, I think that it is necessary to first dispose of the allegation that the proceedings are null and void because the court did not comply with article 50(2) (g) and (h) of the Constitution. This is because if the court agrees with the appellants, that ground alone is likely to determine the appeal.

Article 50(2) (g) and (h) provides as follows:-

50(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 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.

11. Article 50 guarantees an accused persons right to fair trial. 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. J Mrima in *Chacha Mwita vs Republic* Criminal Appeal 33 of 2019 and Criminal Appeal 44 of 2019 *M M T alias Aunty vs Republic* death with a similar issue where he held that the said requirement is mandatory and failure by the court to comply renders the proceedings a nullity. In Chacha's case at paragraph 18 and 20, the court said as follows:

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 v 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.

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.

12. I have perused the court file and no where did the trial magistrate record that she had informed the appellants of that right. When dealing with an alleged infringement of Article 50(2)(g) J Nyakundi in *Joseph Kiema Philip v Republic* [2019] eKLR said as follows:

“.....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. The courts have held that it is the duty of trial court to inform the accused of the said right at the earliest possible time either before plea or so soon thereafter so that an accused can make an informed decision whether or not to get a lawyer to defend him/her.
14. As respects article 50 (2) (h), it requires that the court inform the accused of his right to counsel to be assigned to him by the state if substantial injustice would result. In my view, this 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 service to child offenders and murder suspects. The State has not fully operationalized a fund for provision of free legal service for all accused persons.
15. Having failed to inform the appellants of the said right under article 50 (2) (g) and yet they faced a serious offence that is punishable by a maximum sentence of life, the court was in error and the said omission rendered the proceedings a nullity. To that end the conviction is hereby quashed and sentence set aside.
16. The next question then is what does the court do, can the court order a retrial as suggested by the prosecution?
17. The law as regards what the court should consider on whether or not to order retrial is now settled. In the case of *Ahmed Sumar v Republic* [1964] EALR 483, the then Eastern African Court of Appeal held:-

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

That decision was echoed in the case of Lolimo Ekimat v R, Criminal Appeal no 151 of 2004 (unreported)when this Court stated as follows:

...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.

18. Some of the conditions to ordering a retrial are whether the available admissible evidence is likely to result in a conviction. In the instant case, PW1 testified that she was accosted about 6:30 p m, by people she knew since childhood as neighbours. PW2 and PW3 confirmed that fact. PW2 met PW1 as she fled from the accused naked and that accused 1 had her clothes which he handed over. PW1's testimony that she was raped was corroborated by the clinical officer findings who found injuries to the genitalia upon examining her the next day. I am satisfied that the potentially admissible evidence is likely to result in a conviction.
19. The next consideration is the time taken since the offence was committed. The offence was committed on May 12, 2020, the accused were convicted on April 21, 2021 and sentenced on April 28, 2021. So far they have served about one year and two months out of the ten years they were sentenced to. There is no doubt that the witnesses will be found. Since the accused faced such serious charge it is only fair that the perpetrators face the full force of the law as the court should not only consider the appellants rights but those of the victim too.
20. Bearing the above in mind, I find that the appellants will not be prejudiced if a retrial is ordered and I hereby order that there be a retrial. The appellants are released to Isebania Police Station and they should be produced before the Senior Principal Magistrate's Court Kehancha for a fresh trial on August 1, 2022. The case should be expedited.

It is so ordered.

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

R WENDOH

JUDGE

Judgment delivered in the presence of

Mr Omooria, for the state.

Both appellants present in person.

Evelyne Nyauke- court assistant

