REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 83 OF 2017

JULIUS LUCHEMO BUYACHI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(from the original conviction and sentence in Butere PMC Criminal Case No. 473 of 2016 by M. I. Shimenga, R.M., dated 9/7/2017)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to 25 years imprisonment. He was dissatisfied with the conviction and sentence and filed this appeal. The grounds of appeal are that:-

> *(1) The learned trial magistrate grossly erred and/or misdirected himself in law in taking the appellant through trial without enabling him access to witness statements and informing the appellant of his other rights thereby infringing on the provisions of Article 50 of the Constitution.*
>
> *(2) The learned trial magistrate grossly erred in law and facts in founding a conviction on inconclusive medical investigations and without inquiring into the failure by prosecution to tender corresponding medical results on the part of the appellant.*
>
> *(3) The learned trial magistrate erred in law and facts in placing inordinate weight on presumptions, flimsy fabricated and doubtful evidence of the prosecution.*
>
> *(4) The learned trial magistrate grossly erred in law and facts in presuming that the appellant was and is sexually active without conclusive evidence on the same.*
>
> *(5) The learned trial magistrate gravely erred in law and facts in failing to consider the appellant's defence.*

2. The grounds of appeal were expounded by the written submissions of **Mr. Malalah**, Advocate for the appellant. The State did not file any submissions in the appeal but instead relied on the record of the lower court.

3. The particulars of the offence against the appellant were that on the 29th day of June, 2016 in Khwisero Sub-County, within Kakamega County he intentionally caused his penis to penetrate the vagina of CA (herein referred to as the complainant), a girl aged 12 years.

Case for Prosecution -

4. The case for the prosecution was that the complainant was at the material time a pupil at [particulars withheld] Primary School. The appellant was a watchman at the school.

5. The complainant testified that on the material day at 5 p.m. she was collecting firewood in the school compound when the appellant went to the place and pushed her into the classroom for Standard 4 pupils. He forced her to lie down. He removed her inner pant. He told her to wait for him there as he was going to tie the cows. He locked her in the classroom. After the appellant went away she escaped out of the room through the window. She went towards where the other pupils were at the tax room. She found the appellant near Class 1 classroom. He took her to the tax room and locked the door with desks. He forced her to lie on the floor. He dropped his trousers to his thighs. He inserted his penis into her private parts. He was holding a panga on one hand. He threatened to cut her if she screamed.

6. Meanwhile a teacher at [particulars withheld] Secondary School Mr. W PW2 went to the Primary School to pick some papers. At the Primary school gate he was informed by some pupils that the watchman and a school girl had entered into the tax room. He went to the tax room and opened the door. The appellant came out of the room with his zip down and a loose belt. He asked him what he was doing and he

said that he was closing work. The appellant took a slasher and a panga and put them on his bicycle. PW2 then saw a pupil inside a classroom. The appellant then forced him to leave. He went behind the classroom. He did not see anybody coming out of the classroom. He, PW2, went back and found the appellant opening the door to the classroom. The complainant came out of the classroom. He asked her what was happening. She told him that she had been defiled by the appellant. A teacher at the school PW3 was informed. The headteacher was called. The complainant was taken to Khwisero Police Station and a report made. The appellant was taken to the police station. Cpl. Gilbert Birgen PW5 took the complainant and the appellant to Khwisero Health Centre. The complainant was examined by a clinical officer PW4 who found her with whitish discharge from her vagina, laceration around the vaginal orifice and missing hymen. Age assessment was done. Later PW4 completed the P3 form. The appellant was charged with the offence. During the hearing the clinical officer PW4 produced the complainant's P3 form, treatment notes and the Post Rape Care form as exhibits, P.Ex 1 – 3 respectively. The appellant was also examined. His treatment notes and P3 form were produced as exhibits P.Ex 4 and 5 respectively.

Defence Case –

7. When placed to his defence, the appellant stated in an unsworn statement that he is not sexually active. That he did not know why the complainant fabricated the case.

Submissions -

8. The advocate for the appellant, **Mr. Malalah**, submitted that the appellant was not supplied with copies of witness statements that the prosecution was to rely on in the case. That this was a denial of the appellant's constitutional right to fair trial as envisaged in Article 50 (2) of the Constitution of Kenya. Counsel cited the cases of **Joseph Ndungu Kagiri –Vs- Republic (2016) eKLR** and **Simon Githaika Malombe –Vs- Republic (2015)** in that respect.

Analysis and Determination -

9. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing witnesses testify – See **Okeno –Vs- Republic (1972) EA 32** and **Kiilu & Another –Vs- Republic (2005) IKLR 174**.

10. The conviction was challenged on the grounds that there was inconclusive medical evidence; that there was insufficient evidence; that there was no conclusive evidence that the appellant was sexually active; that the trial magistrate did not consider the appellant's defence and that the appellant was not supplied with witness statements thereby violating his right to fair trial under Article 50 of the Constitution.

11. The examination at the Khwisero Heal Centre revealed laceration around the vaginal orifice and absent hymen. The trial magistrate in her judgment held that the absence of hymen and the presence of laceration in the vagina was sufficient evidence to proof penetration. However neither the treatment notes, the Post Rape Care form nor the P3 form indicated whether the hymen was freshly broken. The absence of hymen without evidence that it was freshly broken did not prove penetration.

12. The position of the law in respect to proof of defilement is that it can be proved not only by medical evidence but also by oral and circumstantial evidence – See **AML –Vs- Republic (2012) eKLR** and **Kassim Ali –Vs- Republic, Msa COA Cr. App. No. 84 of 2005.** In that case a court can convict in a defilement case even in the absence of medical evidence.

13. The appellant contended that the trial magistrate did not consider his defence. The appellant's defence was that he was not sexually active. The judgment of the trial magistrate indicates that the defence was considered and dismissed. There is no evidence that the appellant raised the defence that he was not sexually active during the investigations so that the police could investigate it. He did not raise the defence when he was examined by the clinical officer PW4. He did not ask the investigating officer PW6 about it when he cross-examined him or when he cross-examined any of the other prosecution witnesses. The defence was raised at the tail end of the case. The defence can only have been an afterthought.

14. The advocate for the appellant Mr. Malalah submitted that the appellant was not given witness statements and exhibits during the hearing. That this was a violation of constitutional right to fair trial as envisioned under Article 50 (2) of the Constitution of Kenya.

15. Article 50 (2) (j) of the Constitution grants an accused person the right to be informed of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. There is no record that the appellant was provided with copies of witness statements during the hearing.

16. In **Simon Githaka Malombe –Vs- Republic (2015) eKLR** where the prosecution failed to provide the appellant witness statements despite orders by the court for the prosecution to do so the Court of Appeal held that the denial of witness statements in the case reduced the trial to a farcical sham.

17. In **Joseph Ndungu Kagiri –Vs- Republic (2016) eKLR** where the appellants were not provided with witness statements before or during the trial Mativo J. held that:-

> ***"I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50 (2) (j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused person with the witness statements***

prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to violation of their constitutional rights to a fair trial."

18. In **Simon Ndichu Kahoro –Vs- Republic Nairobi Criminal Appeal No. 69 of 2015 (2016) eKLR** where the trial magistrate had ordered that witness statements be furnished to the appellant but the trial proceeded without the appellant being furnished with the same, the Court of Appeal held that the accused's right to a fair trial were violated on that account. Said the court:-

"All constitutional provisions are important. Article 50 enshrines rights to a fair trial under the Bill of rights. It is our duty as Judges to whom the people of Kenya rely to protect their rights and a fundamental freedoms to live up to their expectations. It is not lost to us that the right to a fair trial is one of the fundamental rights and freedoms which may not be limited by virtue of the provisions of Article 25 (c) of the same constitution. We do not think for a moment that the fact the appellant cross-examined the witnesses cured the breach of his said rights. After all, the right to cross-examine is itself an independent right by virtue of Sub-article 2 (k) of Article 50."

The court however gave a rider that:-

"We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case."

19. From the above authorities it is clear that the right to know the evidence that the prosecution has against an accused person is a cardinal principle of our Constitution. The appellant herein was not provided with copies of witness statements before or during the trial. I find that this was a violation of his right to fair trial under Article 50 (2) (j) of the Constitution. The appeal therefore succeeds on this ground. The proceedings in the lower court are thereby declared a mistrial. The conviction is quashed and sentence set aside.

20. The question then is whether I should order for a re-trial.

The general principle in regard to re-trials is that a re-trial should only be ordered where it is unlikely to cause injustice to the accused. In **Obedi Kilonzo Kevevo –Vs- Republic (2015) eKLR** the Court of Appeal held that:-

"Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of **Muiruri –Vs- Republic (2003) KLR 552**, the court considered a similar situation and held as follows, inter alia:-

"Generally whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

21. In **Samuel Wahini Ngugi –Vs- Republic (2012) eKLR** the said court held that:-

"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases 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'

22. The appellant was arraigned in July, 2016 and convicted in July, 2017. It is most likely that witnesses are available. The evidence indicates that the prosecution has a strong case against the appellant. The appellant will not suffer any injustice if he is re-tried of the offence. In the premises I order that the appellant be retried of the charge before another magistrate of competent jurisdiction other than the one who tried him.

Delivered, dated and signed in open court at Kakamega this 27th day of February, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Miss Mburu for Appellant

Mr. Mutua for State/Respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.