



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 21 OF 2019

ACK.....APPELLANT

VERSUS

BAB.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Marende Necheza Advocates for the appellant

Lughanje for the respondent

JUDGMENT

This appeal concerns the right to a fair hearing under Article 50 of the Constitution. From the record, the trial of the petition for divorce proceeded without the participation of the appellant or his legal counsel.

The fundamental point is the approach taken to limit that right on grounds that the date had been taken by consent. Secondly, the petitioner was due to travel to Kuwait for a job placement. A conceptually severable and textually faithful account of the right to a fair hearing is whether the impugned limitation was justifiable. A limitation to a constitutional guarantee will be sustained once the following conditions are met.

(a). First, the objective of the legislation must be pressing and substantial.

(b). Second, the means chosen to attain this legislative and must be reasonably and demonstrably justifiable in a free and democratic society. Real evidence was obtained in a manner that violated Article 50.

(c). For the appellant to have adequate time to prepare for the defence, Article 50 (G) on right to legal representation and 50 (K) to adduce and challenge evidence by the petitioner. The right to be heard by a competent, independent and impartial tribunal right to equal arms.

The broader concept of a fair civil trial can be seen from this perspective:

(1). Access to court.

(2). Institutional guarantees providing the necessary environment and qualities that the adjudicator or trier of facts possess to ensure delivery of proper justice.

(3). Procedural guarantees which define the characteristics of the proper handling of the case.

The right to be equal before the court entails the right to have equal judicial opportunities. In **Burton v R {1980} 147 CLR 75 Mason C. J.** said:

“The right to a fair trial is more commonly manifested in rules of law and of practice designed to regulate the course of the trial. But there is no reason why the right should not extend to the whole course of the civil process and it is inconceivable that a trial which could not fairly proceed should be compelled to take place on the grounds that such a course did not constitute an abuse of process.”

To make matters worse courts are reluctant to give crystal clear enforcement of the substantive content of the fairness requirement in civil administration of justice.

In the present appeal, this trial was mainly between the appellant and the respondent. A failure of the courts to streamline the trial process through effective case management, such as setting a pretrial schedule with set dates can have adverse impact on the right to a fair trial. While determining the right to a speedy trial it was incumbent of the trial court to have regard to all attendant circumstances, including pretrial conference, close of pleadings, discovery and any other relevant factors to guarantee a fair trial.

Unfortunately, in my view this did not seem to have happened in this case. It is neither practicable nor advisable to proceed with a hearing in absence of legal counsel to a party on grounds that scheduled date was taken by consent.

The Law laid down governing trials is that one cannot lock out a party to a proceedings including his or her legal counsel of his choice. An exception to the rule can only be justified in the interest of proper administration of justice.

The right to a fair trial is recognized in various human rights treaties which includes ones right to instruct legal counsel of his choice at the trial. As stipulated in Article 50 (G) of our constitution and universal declaration of Human Rights, the ICCPR, under Article (b) a party to a civil proceedings has the right to have the proceeding decided by a competent, independent and impartial tribunal after a fair and public hearing together with the right to defend himself personally or through legal counsel chosen by him or her.

I am therefore of the view that in the circumstances as they are in this appeal, the trial of the case was unfair and carried the risk of prejudice and failure of justice.

In reaching the decision to proceed it was mainly motivated by the action that the respondent was travelling to Kuwait for a job placement.

I disagree with respondent counsel that the decision not to grant an adjournment or stay made in the exercise of the inherent jurisdiction of the court ensured fairness of the proceedings before it.

For the above reasons the evidence adduced by the respondent stand quashed for being improper and irregularly admitted without observance of the rights of fair trial.

Accordingly, the trial court to re-open the proceedings to the extent that the appellant or his counsel would have an opportunity to cross-examine the witness.

The appeal partially succeeds as this evidence was the main stay of Judgment. The declaratory orders so issued and there being an error on the face of the record are also quashed. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF FEBRUARY 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Achieng for the respondent