REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 50 OF 2018

BETWEEN

ANTHONY MUTUKU MUTUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Kithimani Senior Resident Magistrate – Hon. G. Shikwe in Criminal Case No. 15 of 2017)

REPUBLIC.....PROSECUTOR

VERSUS

1. ANTHONY MUTUKU MUTUA

2. ISAACK MUTINDA.....ACCUSED

JUDGEMENT

1. The appellant, **Anthony Mutuku Mutua,** was charged before Kithimani SRM's Court in Criminal Case No. 15 of 2017 together with **Isaack Mutinda Ndonye** with the offence of gang rape contrary to section 10 of the ***Sexual Offences Act. No. 3 of 2006***. The particulars for the main charge were that on the 2nd day of April, 2017 at 11.30pm in [particulars withheld] Village within Machakos County 13th day of June, 2015, in association with another not before court, did intentionally and unlawfully each caused his penis to penetrate the vagina of **RNM** without her consent.

2. They were alternatively charged with the offence of indecent act contrary to section 11(1) of the same Act the particulars being that on the said date in the same area, they intentionally and wilfully committed an indecent act with one namely **RNM** an adult aged 29 years by touching her vagina.

3. After hearing, the Learned Trial Magistrate found that there was no doubt that the complainant had sexual contact based on the medical evidence which proved that there was evidence of sperm cells in her vagina less than 24 hours after the incident. It was further found that the sex was not consensual and that she had been raped. As regards the person who raped her, the court found that the conditions were favourable for positive identification due to the duration of the encounter and close proximity between the rapist and the complainant. Having discounted the alibi defence raised by the appellant, the court proceeded to find that the case against the appellant was proved to the required standards and convicted him accordingly on the main charge. He proceeded to sentence him to 10 years imprisonment.

4. In support of its case the prosecution called 5 witnesses. PW1, **RNM**, the Complainant herein testified that on 2nd April, 2017 she was at her maiden home in Donyo Sabuk having quarrelled with her husband, PW2, who went to reconcile with her but had to wait for her mother. The two talked up to 10pm when they decided to go to their matrimonial home. Near Kahiga Church they saw torches ahead and on reaching there, the accused persons stopped them and the appellant herein grabbed her shoulder while the 2nd accused chased after PW2 but failed to catch him. The appellant then pulled her to the ground, removed her biker and raped her. However, the 2nd accused suggested that they move to the house which was more private. The appellant then led her by hand while holding her shoulder while the 2nd accused took her bag. On the way the appellant interrogated her asking her name and where she was from. They then took her to an empty homestead and since they did not have the key, she was taken to the kitchen where the appellant spread the curtain on the floor and raped her again. In the meantime,

the 2nd accused and others were demanding that the appellant opens the door to let them in. They then told the appellant that there was a vehicle outside and they ran away and the police and her husband were unable to apprehend them.

5. The police then interrogated her and they spent the night at the police station. The following day they were given a P3 form and they proceeded to the Hospital where she was treated. After the appellant was arrested, she was notified and she identified the appellant since she could see their faces clearly in the moonlight during the entire ordeal. She was able to particularly see the appellant who walked with her and raped her but since the 2nd accused was not close to her, she never identified him clearly but PW2 was able to do so. She identified the P3 form and the medical note.

6. In cross-examination she stated that she tried to scream but the appellant threatened to kill her and led her into the bush away from the road. According to her no one went to her aid apart from PW2 and the police. She however admitted that the kitchen was dark but insisted that they walked in the moonlight hence she was able to recognise the appellant whose face was clear. The appellant however picked his clothes and without wearing them, ran away when he was told that a car was approaching. According to her, when her husband called her on phone the appellant directed her to switch off the phone.

7. PW2, **EMK**, the Complainant's husband testified that on 2nd April 2017 he had gone to reconcile with the Complainant, his wife, at her home and on their return from there at 10pm, they met 3 men on the way, including the two accused persons. According to PW2, he knew the appellant and his father called Ndonye. He also knew the 2nd accused's father.

8. The said persons stopped them near Kwa Mutinga Church and as he tried to pass them, was stopped. When he asked them to identify themselves, the appellant grabbed the Complainant while the 2nd accused and the other person tried to chase him but PW2 repulsed them using stones. He tried to scream but no one went to their help. Still screaming he went to *Kwa Mwaura* Market where he met officers on patrol and informed them about the incident. The said officers radioed for backup and a vehicle arrived and they accompanied by another person, **Mbithi**, proceeded to the scene but did not find the Complainant. When he called her phone, the same was not picked and was then switched off. The said **Mbithi** then took then to the appellant's home but they failed to find him there after which they proceeded to the 2nd accused's home where they found him sleeping and they woke him up through his father. The 2nd accused then took them to one **Meja's** homestead but the appellant and the others ran away and they were unable to apprehend them. They found the Complainant in the home of the said homestead where curtains had been spread on the floor. From there they proceeded to *Kwa Mwaura* Post where they spent the night and recorded their statement the following day after which the Complainant was taken to the Hospital and the appellant was arrested. According to PW2, he knew all of them though not by name since he used to see them at the market. It was his evidence that the moonlight was very bright and he could even tell their clothes and he knew their fathers. It was his evidence that the 2nd accused donned a cap which he saw in his house.

9. PW3, **Cpl Edwin Muiruri**, was on 2nd April, 2017 on normal patrol when he saw a commotion at Mountain Bar where he found 7 people fighting. He separated them and told them to leave the place. He escorted three of them to the edge of the market and upon his return, he heard a man screaming and the man informed him that his wife had been taken away by three people. The description that the man gave matched those of the three people he had just escorted outside the market. Upon inquiring where they lived, he was directed where the appellant lived but they did not find there but upon proceeding to the 2nd accused's they found him and the 2nd accused led them to where another person, **Mutuku**, the third person worked. On approaching the place, they saw the appellant, whom he could identify by his clothes, jumped out grabbing his clothes and ran away. In the house they found the Complainant who informed them she had been raped and they assisted her to the station and booked the 2nd accused in. They searched for the appellant and arrested him the following day. PW3 identified the 3 curtains and stated that the third suspect was still at large.

10. PW4, **Joseph Mwaniki**, a registered clinical officer testified that the Complainant, a 29-year-old female, went to the Hospital on 3rd April, 2017 with allegations of rape claiming that three people raped her in turns. On systematic observation, no abnormalities were seen on the neck and the head and there were no bruises on the thigh. However, her hymen was torn but not fresh and whitish discharge was seen in her vagina which revealed epithelial and sperm cells. Though there was no evidence of sexually transmitted infection, there was intercourse. He produced the P3 form and medical treatment notes as exhibits. He also filled a p3 form for the appellant and upon examination no injuries were noted and there was no discharge or blood on his penis. According to PW4, the appellant claimed that the sex was consensual and stated that he had taken a bath. He produced his P3 form.

11. PW5, **Sgt Janet Kitaisya**, received the report of the incident on 2nd April, 2017 at Ol Donyo Sabuk Police Station. She recorded the statements and interrogated the suspects who were already in custody. She charged the accused persons with the offence and produced the exhibits.

12. At the close of the prosecution's case, the appellant opted to make an unsworn statement in which he stated that on 22nd April, 2017 at 7pm, being a *matatu* driver, he was driving his vehicle from Machakos when his vehicle broke down and he left it there. The following day, 2nd April, 2017 he went to church for a function till 5am when he did shopping before proceeding home, showered and slept. At 5am he was informed by the owner of the *matatu* that it had been repaired and he should go to work. He took tea then proceeded to Kwa Mwaura where he carried passengers among whom was an officer who asked him to drop him at the station but the vehicle was unable to scale the hill. He drove to Tala Market then to Machakos and on returning to Tala Market the OCS asked for him and upon identifying himself, he was informed that he was a suspect. After returning the vehicle to the owner he went to the police station where he met the Complainant. According to him, there was a grudge between him and the arresting officer over a lady.

13. The appellant called one **Abigael Wanjeri**, who stated that she was the appellant's wife, as his witness. According to her, on 2nd August, 2017, Sunday, they went to church and thereafter for a church fundraising at 7pm after which they went home where they ate and slept till the following morning when the appellant left for work. She stated that the appellant called her at 12pm and informed her that he had been arrested.

14. According to her, her mother in law was also present though she was not being called as a witness. It was her evidence that the police did not visit their home at night. She admitted that though she did not know the complainant she used to see her in the village.

Determination

15. I have considered the evidence adduced before the trial court. This is a first appellate court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

> **"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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."**

16. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.**
>
> **2. 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; 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."**

17. In this appeal the appellant contends that the hearing was not conducted in a fair manner since he was not furnished with statements to enable him properly conduct his defence. It is true that there is no evidence on record that the appellant was furnished with the witness statements and the documentary evidence before the first three witnesses testified. Article 50(2)(c) and (j) of the Constitution provides as hereunder:

> ***(2) Every accused person has the right to a fair trial, which includes the right—***
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> ***(c) to have adequate time and facilities to prepare a defence;***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

18. It is therefore clear that the appellant was entitled to be informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence. In **Dennis Edmond Apaa & Others vs. Ethics & Anti Corruption Commission [2012] eKLR** the court had this to say on the same: -

> **"The words of Article 52(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure if made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be update when additional information was received."**

19. In **R vs. Ward [1993] 2 All ER 557**, **Glidewell, Nolan and Steyn, LJJ** held that:-

> ***"The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses."***

20. However, as was held by the Court of Appeal in **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR**:

> **"The record indicates that the appellants were availed all the statements of the prosecution witnesses before those witnesses testified. They also had access to the exhibits that were produced. What we understand the appellants to complain about is that they were not availed the intelligence report that led to their arrest for suspicion of involvement in terrorism acts. Our**

reading of Article 50(2) (j) of the Constitution does not grant the appellants the blanket right to access all the information in possession of the police including intelligence reports. What the appellants were entitled to was the evidence that the police intended to rely on at the trial, and of course any other evidence in possession of the police that could have exonerated them from the charges they were facing, even though the police did not wish to use that evidence. Indeed, even the right to access the evidence that the police intend to rely on is not totally unfettered; it is qualified by the constitutional requirement that the access should be reasonable, the determination of which must depend on the circumstances of each case. In *Bakari Rashid v. Republic [2016] eKLR*, this Court refused to fault the prosecution for failure to produce police informers as witnesses. It stated thus:

"Police officers and crime-busters, most of the time use informers to gather information regarding crime. The informers are normally secretive as they go about their business and to open them up by calling them as witnesses in open court would certainly blow up their cover, compromise them and expose them to danger. That will defeat the very purpose for which they exist. That is why they are never called or are rarely called as witnesses."

We are therefore satisfied that the appellants' right to fair trail under Article 50(2)(j) was not violated because all the evidence that the prosecution produced in support of its case was availed in advance to the appellants."

21. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront. That is my understanding of the decision of the Court of Appeal in **Simon Githaka Malombe vs. Republic [2015] eKLR,** where the said Court expressed itself as follows:

"We do not quite fathom how the appellant can possibly be to blame for the prosecution's failure to supply the witnesses' statements requested by the appellant and ordered by the trial court. It would seem that both courts below somehow considered the appellant to blame for not having money to photocopy the statements. This notwithstanding that he was in custody and had indicated on the record that his kin had not been to see him. To adopt the stance of the two courts would be to stigmatize and even criminalize poverty or inability to pay for statements. It is rather surreal…It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2) (c) and (j) be real."

22. In this case, the record does not indicate at all that the learned trial magistrate inquired as to whether this imperative constitutional command had been adhered to. The duty and obligation to conduct a fair trial rests on the court and therefore it is imperative that the court ensures that the provisions of Article 50 of the Constitution are adhered to at all stages of the trial. Failure to do so may well render an otherwise properly conducted trial fatal. As stated in **Simon Githaka Malombe vs. Republic** (supra) an accused person, particularly where, as in this case, he is acting in person and is in custody, is not to blame for not having money to photocopy the statements and documentary evidence as to do so would amount to stigmatization and even criminalization of poverty or inability to pay for statements. Since it is the prosecution that assembles and retains custody of evidence against an accused person, the duty of disclosure lies with the prosecution and not with the court and in the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Where therefore an accused person indicates inability to make copies, the duty must lie with the State, as represented in criminal trial by the prosecutor, to avail the copies at State's expense. Therefore, it is for that Office to make proper budgetary allocation for that item. Since under Article 48 of the Constitution, it is the State's obligation to ensure access to justice for all persons, only by facilitating the accused persons to get statements and documentary evidence can the constitutional guarantees in said Article and in Article 50(2)(c) and (j) be real.

23. On 12th January, 2018, the appellant asked for the recall of PW1, PW2 and PW3 on the ground that he never had the witness statements prior to that day. That positon was not denied by the prosecution which simply stated that the appellant had always been ready to proceed and cross-examine the witnesses. The Court agreed with the prosecution saying that all through the appellant never raised the matter but signified that he was ready for the hearing and the record revealed that he extensively cross-examined the said witnesses. The Court issue with the fact that subsequently the appellant always applied for adjournment on grounds that he was unwell a conduct which the Court took to be a delaying tactic. The matter was directed to proceed. With due respect the position is that the mere fact that an accused person participates in cross-examining the witnesses relieves the prosecution of its constitutional duty to comply with Article 50(2)(j) aforesaid. Where it is proved to the satisfaction of the court that the said provision was not complied with I agree with the decision in **Simon Githaka Malombe vs. Republic** (supra) that such proceedings are thereby rendered a nullity.

24. In these circumstances it is my view that the possibility of a miscarriage of justice cannot be ruled out. A miscarriage of justice was discussed in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where the Supreme Court of India stated:-

"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretense…The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

25. I agree with **Mativo, J** in **Wilson Kipchirchir Koskei vs. Republic [2019] eKLR** where he expressed himself as hereunder:

> **"6. The starting point is that this court hoists high the constitutional requirement for a fair trial...This court has a duty to study the entire record and satisfy itself that indeed the trial court did not comply with this constitutional requirement. The appeal court must consider whether the misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal bearing in mind that what the Constitution demands is that the accused be given a fair trial.**
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> **7. In** Joseph Ndungu Kagiri vs Republic**, addressing the question of a fair trial, I rendered myself as follows:-**
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> **"In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society."**
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> **8. In the above case I cited the Supreme Court of India where the it stated:-**
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> **"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism."**
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> **And again:- "Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused….."**
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> **9. The right to a fair is among the fundamental rights and freedoms that may not be limited. Article 50(2)(m) correctly interpreted means that an accused person should be able at all stages of the trial to understand the case against him or have the case explained to him in a language that he understands. *The sole purpose of doing so is so is to ensure that an accused at all stages of the trial understands the case against him and avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence*.**
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> **10. The constitutional dictate to a fair trial cannot be met if the accused cannot understand the language of the court. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.**
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> **11. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial includes the grant of fair and proper opportunities to the person concerned, and understanding the nature of the case against him and understanding the language of the court. This must be ensured and observed as it is a constitutional, as well as a human right. Under no circumstances can a person's right to fair trial be jeopardized. On this ground alone, I find and hold that the trial at the lower court was not conducted in a manner that can be said to be consistent with the Constitution. The conviction cannot be allowed to stand.**
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> **……**
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> **41. In conclusion it is my finding that the proceedings in the lower court were not conducted in a manner that can be read to be consistent with the fair trial requirements under Article 50(2) (m) of the Constitution. The appellant cannot be said to have been accorded a fair trial when it is evident that the entire proceedings except his defence were conducted in a language he did not understand. I find that it would be an affront to the letter and spirit of the Constitution to allow the conviction and imprisonment imposed upon the appellant to stand."**
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> [Emphasis mine].

26. In this case it is clear that the manner in which the proceedings were conducted fell short of the constitutional dictates. Being a nullity it is no longer necessary for me to deal with the other grounds of appeal.

27. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial or not? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> **"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;....."**

28. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**: -

"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'

That decision was echoed in the case of Lolimo Ekimat vs. 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.'"

29. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966) EA, 343** the view expressed was that: -

"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

30. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

31. In this case the appellant was convicted on 8th May, 2018, though he was arrested on 3rd April, 2017, some three years ago. The offence with which the appellants were charged was gang rape contrary to section 10 of the ***Sexual Offences Act*** which states:

"any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life."

32. The offence which the appellant faced was therefore a serious one. Just like the Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR** I quash the conviction and set aside the sentence. I set the clock back so the process is restarted on proper footing. In consequence, I direct that the appellant shall be presented before any Magistrate with jurisdiction other than, **Hon. G. Shikwe, SPM** to hear and determine the matter *de novo*. For avoidance of doubt, the judgement does not affect the findings of the trial court as regards the 2nd accused person.

33. However, any resulting sentence, if at all, will where appropriate, take into account the period the appellant spent in custody.

34. This judgement has been delivered pursuant to section 168 of the ***Criminal Procedure Code*** as read with Article 50 of the Constitution in the absence of the accused due to the prevailing restrictions occasioned by COVID 19 pandemic and particularly as the decision is in favour of the Accused Person.

35. Orders accordingly.

Judgement read, signed and delivered online this 23rd day of April, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Otulo for the Respondent

CA Geoffrey