



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**HIGH COURT CRIMINAL APPEAL NO. 72 OF 2016[SOA]**

**(CORAM: R.E. ABURILI – J.)**

**K O A.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal against sentence and conviction dated 20.7.2016 in PM Criminal Case No. 31 of 2016 in Ukwala Law Court before Hon. C.N. Wanyama – SRM).*

**JUDGMENT**

1. This appeal arises from the Judgment and Sentence of 20 years imprisonment meted imposed on the Appellant **K O A** vide Siaya P.M. Criminal Case No. 31 of 2016 by Hon C.N. Wanyama, R.M.

2. The Appellant was charged, tried and convicted for the offence of **defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. He was sentenced to serve 20 years in prison on 20<sup>th</sup> July, 2016.

3. Being dissatisfied with the said conviction and sentence, he filed this appeal on 26.7.2016 complaining that:

*1. The Learned trial Magistrate relied on a case that the Complainant did not give testimony;*

*2. That the evidence on record was not sufficient to earn a conviction;*

*3. That the trial Magistrate erred in Law and fact in admitting medical evidence that had not been conclusively proved i.e. necessary for proof of DNA testing to prove ownership (sic) of the child born.*

*4. That I cannot recall all that transverse hence pray for trial records to adduce sufficient grounds.*

4. At the hearing of this appeal on 26.3.2019, the Appellant filed his written submission in which he contended that:

*a) Non-compliance with Article 50 (2) (k) of the Constitution under this head, he submitted that he was not given adequate time to prepare for his defence because he was arrested on 22.1.2016 and the hearing commenced on the same day. That the trial Court failed to observe that the Appellant was not supplied with copies of relevant evidence that the Prosecution intended to rely upon for purposes of preparing his defence;*

*b) Non-compliance with Section 19 of the Oaths and Statutory Declaration Act.*

5. The Appellant submitted that the victim was allegedly a minor aged 15 years old and that the trial Court failed to ascertain her level of intelligence as to the meaning of Oath through a *voire dire* examination. Reliance was placed on the case of **Masikiri V. R. [1987] KLR 69** where the Court is said to have held that the Court under **Section 19 (a) 15** must determine whether the witness understands the nature of an Oath and if not then satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

6. Further reliance was placed on the case of **R Vs. TEW (1855) DEARS 429 and Section 125 (2) of the Evidence Act** to the effect that a mentally disordered person, or a lunatic is not incompetent to testify unless he, or she is prevented by his/her condition from understanding the question put to them and giving rationale answers to those questions.

7. In this case it was submitted that there was no medical evidence proving any allegation of mental disorder exhibited 3 lack of forensic analysis.
8. The Appellant submitted that the trial Court failed to observe that the Prosecution failed to conduct a DNA as part of their DNA as part of their investigations hence the case was poorly investigated.
9. That the evidence revealed that a pregnancy resulted from the said act thus the trial Court failed to ascertain the Appellant's connection with the offence by conducting the said DNA.
10. In Court, the Appellant who was unrepresented submitted Orally in a rejoinder to the Prosecution's submission that he had a grudge with the Complainant's Father who framed him for the offence. That the Complainant is his Cousin and that the Petitioner is 56 years old.
11. Miss Makokha Prosecution Counsel submitted opposing the appeal and urging this Court to dismiss the appeal on account that the Prosecution proved its case against the Appellant beyond reasonable doubt.
12. That the Complainant knew the Appellant very well and that Medical documents corroborated the victim's testimony.
13. That the Appellant gave his defence and was accorded an opportunity to mitigate. That sentence was lawful as the offence was serious requiring deterrent sentence Counsel urged the Court to uphold the conviction and sentence imposed on the Appellant.
14. This being a first Appellate Court, this Court is obliged to subject the whole evidence before the trial Court to a fresh and exhaustive examination (Pandya V. R [1957] E.A. 336 and to make its own independent decision bearing in mind the fact that it did not hear or see the witnesses as they testified. (Okeno V. R [1972] E.A. 32, 36.
15. Examining the trial Court record, the evidence as adduced by the Prosecution witnesses is that PW1, M.A. a minor aged 15 years as per the P3 and Birth Certificate produced in Court gave unsworn evidence after *voire dire* examination on 22.1.2016 assisted by J.A.O., an intermediary and stated that she was a class 5 pupil at [particulars withheld] Primary School.
16. That she knew the Accused who was called J. That the Accused asked her to remove her clothes and he removed his and slept on her when she had gone to fetch firewood in the forest. The trial Court observed that the minor who had been described as being of average intelligence looked scared and faced the wall necessitating the Court to send out of the Court room the Accused at a distance where he could hear the proceedings.
17. The Complainant stated that the Accused took his penis and put it inside her without her consent and that he told her not to tell anyone so she kept it a secret.
18. According to the trial record, I observed that the witness was sweating and looking very scared. She stated that the Accused gave her Sh.10/= and 2 mandazis. That her father was told by someone and she was later taken to hospital and to the Police.
19. PW2, L.O. from Bar Anyanga Masat testified that on 27.12.2015 he received a report that the Accused had made PW1 to be his wife so he escorted her to hospital. He learnt that she was defiled when she had gone to fetch firewood near the Accused Person's home and he gave her Sh.10/= to silence her. He escorted her to hospital where she was examined and found to be expectant and infected with diseases. He reported to Ben Onyango the Chief at Sifuyo who escorted the child to Ukwala Police Station where he also recorded his statement. He stated that the Child was aged 15 years. He identified her Birth Certificate. He also identified the Accused in Court and stated that he knew him very well.
20. On being cross-examined by the Accused, PW2 stated that the Accused used to defile the Complainant everyday albeit she did not tell him when this started. That the victim used to fetch firewood at about the same place. That PW2 was informed by his elder Sister-in-law that the victim had informed her that the Accused defiled her.
21. PW3 Benedict Odongo Omondi the Assistant Chief of Sifuyo Sub-Location testified that on 12.1.2016 at about 3.00 a.m. he was at his office in Ratado when PW2 went and reported to PW3 that PW2's daughter had been defiled and impregnated by a person known to her.
22. PW3 directed that the Child be escorted to Sifuyo Health Centre which was done and he called the Children's Officer who advised that the Accused be arrested and escorted to the Police. PW3 sent APC Kipruto and Kimengich to go and arrest the suspect and took him to the Assistant Chief's Office where the Suspect admitted defiling the minor claiming he was possessed by the devil. They escorted him to Ukwala Police Station where he recorded his statement. PW3 identified the Accused in Court as K O O a.k.a J.
23. On being cross-examined by the Accused Person PW3 stated that the Child did not say that the Accused did not defile her and that the Accused stated that he gave her Shs.100/= and 2 Mandazis and that she identified the Accused as the defiler.
24. PW4 No. 83700 Sgt. Chalote Mwiga based at Ukwala Police Station testified that on 20.1.2016 he was at the Station when he received the Complainant aged 15 years old, escorted by her father, the Children's Officer and the area Assistant Chief claiming that she had been defiled by the Accused several times in his house when he asked her to do household chores and gave her Mandazi. He issued her with a P3 form and escorted her to Ukwala Hospital where she was found pregnant. The P3 form was filled. Statements were recorded and the Accused was arrested although he had been arrested earlier. He produced her Birth Certificate showing her date of birth as 12.3.2001 and stated that he did not know the Accused before.
25. On being cross-examined by the Accused person, PW4 stated that PW1 told him that the Accused had defiled her when she went to fetch

firewood in a bush. He denied taking the Accused to Hospital for examination. That she only complained about the Accused.

26. PW5 **Judith Akoth** a Clinical Officer, attached to Ukwala Sub-County Hospital testified on behalf of Patrick Okere her colleague with whom she had worked for 8 months and was acquainted with his handwriting and signature. She confirmed that the victims P3 was filled by Mr. Patrick Okere on 25.1.2016 when she gave the history of having been defiled by a person known to her. The victim was given antifungal treatment and found to be pregnant. And that there was evidence of defilement. She produced a P.3. Form as P. Ex No. 1 (a) and Health Pass Book for M.A. dated 20.1.2016 Ex P 1 (b).

27. On being placed on his defence, the Accused/now Appellant testified on Oath and stated that he was K O A from Bar Anyanga, Masat, a grass slasher. He denied committing the offence and stated that he was arrested on 20.1.2016 when he left his house and found APs from Ratado who arrested him in the company of PW2.

28. In cross-examination, he admitted knowing PW1 and stated that he used to talk to her. He denied giving her any money but stated that she used to go to his home where he lived with his mother. He denied defiling her.

29. In his Judgment, the trial Magistrate framed two issues namely whether the Accused person used his penis to penetrate the Complainant's vagina and whether the Complainant was a minor.

30. After analyzing the evidence on record and taking into account the defence by the Accused person and which he dismissed, the trial Court found that on the evidence adduced, the Accused was the person who defiled the victim as she knew him well and he believed her evidence which he found truthful. He also found that she was a minor aged 15 years as per the P3 form and Birth Certificate produced in Court hence she could not have had the capacity to consent to sexual assault.

31. The trial court found that the Prosecution had proved its case against the Accused beyond reasonable doubt. He convicted the appellant and after considering his mitigations, he sentenced him to mandatory 20 years imprisonment.

32. Having considered the above trial Court record of evidence and findings by the trial Court, and the submissions in support of and against the appeal herein, in my humble view, the issues for determination are: ***Whether the trial Court failed to comply with Article 50 (2) of the Constitution by commencing the hearing immediately on 22.1.2016 without giving the Appellant ample time to prepare for the defence and whether the trial Court erred in failing to observe that the Appellant was not supplied with copies of the relevant evidence that the Prosecution intended to rely on to enable him prepare for the defence.***

33. Article 50 of the Constitution of Kenya, 2010 is on the right to fair hearing. Under Article 50 (2) (k), the Constitution guarantees every Accused person the right to a fair trial which includes the right to: ***(k) to adduce and challenge evidence.*** The same Article also guarantees the Accused person Under Sub Article 2 (c) ***the right to have adequate time and facilities to prepare a defence and (e) to have trial begin and concluded without unreasonable delay.*** In addition, clause (j) guarantees the Accused person ***the right to be informed in advance of the evidence of the Prosecution intends to rely on, and to have reasonable access to that evidence.***

34. The record in the trial Court shows that the Appellant was arrested on 22.1.2016 and taken to Court on 22.1.2016 when the plea of not guilty was entered against him. On the same day, the Prosecution availed the victim on whom ***voire dire*** examination was conducted and the Court observed that she was so uncomfortable that she needed the assistance of an intermediary hence the Court adjourned the hearing to 25.1.2016 when the intermediary was availed and the evidence of PW1 was concluded on the same date, the Court granted bail to the Appellant.

35. This Court concurs with the Appellant that he was entitled to the adequate time to prepare his defence and to be supplied with witness statements and documents that the Prosecution intended to rely on at the trial.

36. The Court indeed observes that it was on the same plea date that the Applicant's case commenced with a hearing and despite the fact that the appellant was unrepresented, the trial court did not ensure that the appellant had witness statements or documents relied on by the prosecution.

37. The trial was expeditious in accordance with **Article 50 (2) (e)**. However, there was no indication that the Court informed the Appellant of his right to be supplied with witness statements and documents intended to be relied on by the Prosecution and neither was the Prosecution directed on that day, after the trial was adjourned, to supply the Accused Person with the said witness Statements and documents.

38. The **"two sided speed Trial problem"** was considered by **Shon Hopwood** who invoked the doctrine of **"Justice delayed is Justice denied."** And considered the flipside of it stating that there is an equal real danger of a rushed unconsidered justice.

39. The Constitution contemplates a two sided speedy Justice that is not too fast and one that is not too slow. The trial should not be to the detriment of the Accused person. This is because a rushed trial can turn out to be an inefficient trial.

40. An Accused person enjoys the right to be presumed innocent until proven guilty. He is also entitled to fair trial where no justice is miscarried to the prejudice of the Accused person.

41. In the present case, there was no indication that the Accused would interfere with witnesses or that the Complainant was at risk as a Witness. The trial Court in my humble view did not discharge the duty of according to the Appellant time to prepare for defence as stipulated in **Article 50 (2) of the Constitution**. In my humble view, that trial was prejudicial to the Accused person.

42. This leads me to the question of whether failure to supply to the Accused person Witnesses Statements and documents amounted to

violation of the Appellant's right to a fair trial.

43. The trial record, as earlier stated, shows that the trial commenced on 22.1.2016 when the plea was taken and PW1 called to give evidence. There was no mention by the trial Court that the Accused was entitled to Witness Statements or documents to enable him prepare for the trial.

44. Even after the hearing was adjourned to 25.1.2016 to avail the intermediary to assist the Complainant, there was no opportunity accorded to the Appellant to examine the evidence which the Prosecution intended to rely on. **Article 50 (2) (j) of the Constitution** guarantees the Accused person the right to be informed in advance of the evidence the Prosecution intends to rely on and to have reasonable access to that evidence. Clause (c) guarantees the Accused person adequate time and facilities, to prepare his defence considering that the Appellant was unrepresented throughout trial, it was the duty of the Court to ensure a fair trial for the Appellant and that Justice was not only done but seen to done to him.

45. The right to a fair trial is not limited. It is absolute as stipulated in **Article 25 of the Constitution (See Thomas Patrick Gilbert Cholmondeley v R. Criminal Appeal No. 116 of 2007 [2008] eKLR, where the Court of Appeal stated:**

*“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under Section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.”*

46. The purpose of requiring provision to the Accused person in advance of witnesses statements and documents that the Prosecution intends to rely on at the trial is to enable the Accused challenge the Prosecution's case.

47. An Accused person cannot enjoy the right to a fair trial under **Article 50 (2) (c)** if he/she is not provided with the witness statements and documents or evidence that the Prosecution intends to rely on at the trial. As the right to fair trial cannot be limited under **Article 24 of the Constitution**, it is the duty of the Prosecution and by extension, the Court to ensure that the Accused person is supplied with such evidence to enable him prepare for his defence.

48. Accordingly I find and hold that the failure by the Prosecution to supply to the Appellant evidence intended to be relied on at the trial, unlawful. Albeit the Appellant did not ask for time to prepare for the trial or to be supplied by such evidence or to be accorded adequate time to prepare for the trial, the duty is imposed on the state to ensure a fair trial for the Accused who was unrepresented.

49. Accordingly, I find the argument by the Appellant that he was denied a fair trial justifiable and it is immaterial that the Appellant fully participated in the proceedings without complaining as there is no indication that he acquiesced to the default. This failure on the part of the Prosecution and the Court occasioned a miscarriage of Justice and vitiated the trial.

50. On the issue of whether the trial Court failed to comply with **Section 19 of the Oaths and Statutory Declarations Act**, I find the Complaint lacking in merit as the handwritten proceedings starting from the file cover on 22.1.2016 show that *voire dire* examination was done on PW1 who was found to be of average intelligence and as a result, the trial Court ordered that she gives unsworn evidence which she eventually did with the assistance of an intermediary. There was no evidence that the victim was of unsound mind as suggested by the Appellant. I find the Complaint not merited. It is dismissed.

51. On the third issue of lack of forensic analysis, the Appellant contends that the Prosecution failed to adduce evidence of DNA results connecting him to the pregnancy child. However, this Court finds that the complaint is unwarranted because as at the time of the trial which was speedily conducted, there was no evidence that the victim had delivered a child for DNA test to be done to determine the paternity or connection with the Appellant.

52. In addition, the Appellant did not urge this Court to allow him to adduce additional evidence on the paternity of the child who may have been born after the alleged defilement of PW1. A DNA paternity test can only be carried out on a born child not otherwise, to ascertain the paternity of the child.

53. Having said all the above, I find and hold that the trial of the Appellant was vitiated by failure by the trial Court to ensure the Appellant's trial was fair on stipulated in **Article 50(2) (c), (e), (k) and (j) of the Constitution**.

54. Accordingly, I find and hold that the Conviction of the Appellant was unsafe it must be quashed. I hereby quash the conviction of the Appellant.

55. Having quashed the conviction of the Appellant for want of fair trial, the prison sentence of 20 years cannot stand. The same is hereby set aside. The Appellant is hereby set at liberty forthwith unless otherwise lawfully held.

56. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 25<sup>th</sup> day of June 2019.**

**R. E. ABURILI**

**JUDGE**

57. **Obiter:** whereas it is highly probably that the Appellant could have defiled the minor (PW1) who is his niece and impregnated her, and whereas it is the duty of this Court to protect children from abuse and any form of violence, it is the duty of this Court to uphold and protect, the Constitution and its principles and values of which fair trial is one of them and more so, the Bill of Rights espoused therein. The Right to fair trial as espoused in **Article 50 (2) of the Constitution** cannot be limited and therefore it is the duty of every trial Court and the Prosecution to ensure that that right is promoted, protected and upheld failure to which this Court would not hesitate to quash any conviction that is achieved through arbitrary trial of Accused persons.

**Dated, Signed and Delivered at Siaya this 25<sup>th</sup> day of June 2019.**

**R. E. ABURILI**

**JUDGE**

**In the presence of:**

Appellant in person

Mr Okachi Snr Pr. Prosecution Counsel for State

CA: Brenda and Modestar