



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NO. 178 OF 2016

ALEX KWASO OTIENO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the lower court of Kenya at Nakuru – Hon. J.N.

Nthuku Senior Resident Magistrate – dated 23rd November 2-16 in Adult criminal I case No. 148 of 2013)

JUDGMENT

1. The Appellant is serving a 25 years imprisonment upon conviction 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 (SOA)**.

He was alleged to have defiled a 13 years old female child namely KWM on diverse dates between 30th April 2013 and 3rd July 2013 within Nakuru County.

2. Being dissatisfied with the conviction and the sentence, he lodged this appeal by a petition of appeal and a supplementary petition dated the 21st June 2017, by his advocate Mr. David Monge'ri upon grounds that he was not accorded fair hearing by being denied an opportunity to tender his defence nor being provided with the relevant documents that the prosecution relied upon, being witness statements, prior to the commencement of the hearing of the case. It is further urged that the appellant was convicted on insufficient and contradictory evidence.

He thus prays that the appeal be allowed with a result that the conviction and sentence be quashed.

3. Fair hearing

Article 50 of the Constitution gives every accused person the right to a fair hearing which includes

- (a) To be presumed innocent until the contrary is proved.**
- (b) To be informed of the charge with sufficient detail to answer it.**
- (c) To have adequate time and facilities to prepare a defence.**
- (e) To have the trial begin and conclude without unreasonable delay.**
- (j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.**
- (k) To adduce and challenge evidence – (emphasis added).**

4. The duty of the first appellate court is to marshal the evidence on record, re-evaluate and re-examine the same and if found flawed, may set aside the entire proceedings, if the trial court breached constitutional imperatives or ignored statutory provisions or crucial evidence or if material evidence is ignored – **Joseph Ndungu Kagiri –vs- Republic (2016) e KLR**.

5. I have re-examined the record of proceedings. The plea was taken on the 1st August 2013, and a hearing date taken. The trial magistrate ordered the prosecution to provide the accused person with witness statements on the 6th November 2013. At the time, the accused was duly

represented by an Advocate Mr. Simiyu, who actively participated in the proceedings by cross examination of PW1, PW2 and PW3.

6. When the case came up for further hearing on the 10th November 2014, the accused's advocate failed to attend court. The accused then requested for time to engage another advocate which was granted.

7. On the 13th August 2015 almost nine months later, when the case came up for further hearing, the accused sought for time to engage an advocate for the second time. The request was denied by the court stating that he had been given enough time, and the evidence of PW4, PW5 – was taken. The accused cross examined these witnesses and requested to have PW1, PW2 and PW3 recalled for cross examination. Once again the court obliged. He cross examined them.

8 Upon close of the prosecution case, the accused was called upon to defend himself. I note that provisions of **Section 211 of Criminal Procedure Code** were explained to the accused upon which he opted to give sworn evidence, and was informed of his rights and that he would be cross examined.

9. At this point, the accused person requested to be supplied with exhibits, being P3 and PCR forms. They were supplied to him.

When the case came up for defence hearing, this is the conversation that took place:

Accused: I will not defend myself unless the court supplies me with the outpatient card for the complainant.

Court: This document is not in the court file and I cannot supply a document not in my custody.

I do not understand why the issue was not raised on 3rd October 2013 when other forms were supplied.

Accused: I will not defend myself without that document.

Court: Having been given a chance to defend himself, the accused has said he will not defend himself. Defence case is hereby marked as closed. Judgment on 9th November 2016.

10. In her judgment the trial magistrate found that the prosecution had proved its case beyond reasonable doubt and convicted the accused. I have read the judgment. The trial magistrate did not mention or refer to the appellant's conduct aforementioned, nor that he failed to mitigate.

It is upon the above evidence that the appellant submits that he was not accorded a fair hearing.

11. It is evident that the appellant had not been supplied with the necessary documents envisaged under **Article 50(i)**.

It may be that his former advocate may have been given though the record is silent on this. The trial magistrate was under an obligation to direct and order the prosecution to provide to the accused person all the documents including the P3, PCR and treatment notes to facilitate the accused (appellant) to prepare his defence adequately, a right guaranteed under the constitution.

12. The conversation cited in verbatim says more than meets the eye. In my opinion it seems that the trial court was sufficiently agitated by the appellant's insistence of being given the documents the prosecution was relying on, in its evidence against him.

To state the least, this was not necessary as the court would have, without raising eyebrows, directed provision of those document instead of brushing aside a genuine request by the accused (appellant).

13. In very similar circumstances the court (**Kamau J**) in **Cr. Appeal No. 52 of 2016 Jacob Mwangama Mwandigha –vs- Republic (2017) e KLR**, rendered that in a case where errors or omissions have been made by a trial court, the case was not a good one to order re-trial as it would prejudice the accused. The conviction was thus quashed.

For the glaring omissions by the trial court this court has been urged to set aside the conviction on account of violation of the appellant's rights under **Article 50 of the Constitution**.

14. In my considered opinion this ground of appeal is the gravamen of the appeal.

Without fair hearing there cannot be fair determination of any case by a court of law.

In **Ann Njogu & 5 Others –vs- Republic Misc. Appl. No 551 of 2007**, the court rendered that

“Upon determination that the constitutional rights of the applicants have been violated any prosecution against them or any of them, on the basis of the events --- is null and void, and will remain so, irrespective of the weight of the evidence that the police might have in support of their case. This is on the simple reason that such a prosecution would be based on an illegality and a null and void case --- that there is no yet known cure for the nullity --- once it is shown that his/her constitutional and fundamental rights were violated...”

For clarity purposes the appellant in the case above had not been supplied with witness statements, and in fact, the appellant cross examined

the prosecution witnesses without the benefit of the witness statements. Very similar circumstances in this appeal.

15. The Supreme Court of **India in Rattiram –vs- State of M.P. (12)** rendered that

“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 ostracise injustice prejudice, dishonestly and favouritism.....”

16. In **Thomas Patrick Gilbert Cholmondeley –vs- Republic (2008) e KLR** the court in very similar situation rendered that

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial copies of documentary exhibits to be produced at the trial and such like items....”

17. It is trite that fair trial is the object of criminal procedure. The court is thus under an obligation to ensure that the prerequisites of provision of witness statements and copies of exhibits are provided to the accused before the start of the case, and that failure to do so prejudices the accused, whatever the outcome may be.

18. Was the prosecution’s and the court’s failure to provide these vital documents and exhibits fatal to the prosecution’s case?

Breach of **Article 50 of the Constitution** does not always result to an automatic acquittal of an accused person. Each case has to be considered on its peculiar circumstances, and character.

Any prejudice occasioned to an accused is an important factor for consideration. In **Simon Githaka Malombe –vs- Republic Nyeri CA Cr. Appeal No. 314 of 2010 (2015) e KLR, the Court of Appeal** quashed the conviction on ground that the prosecution had failed to furnish witness statements to the appellant despite requesting for them, stating that

“denial of witness statements in the present case reduced the trial to a fabricated sham.”

19. In **MEM –vs- Republic Nakuru HCCRA No. 314 of 2015 – (2018) e KLR** the court expressed the view that:

Failure by a Court to record whether or not any accused person has been furnished with witness statements verges on a technically, that instead, our case law provides a more functional approach.

While it is a salutary price for a trial court to record, to indicate that it has given no orders or an accused person to be provided with the statements, or had facilitated their supply, failure to record this is not necessarily fatal.”

20. In the present appeal, the court adamantly refused to direct the prosecution to furnish the appellant with the exhibits upon which the appellant wished to rely on in his defence. Further, there is no indication that the witness statements had been given to him.

21. Despite the prosecution submitting that all the documents were furnished to the appellant, it failed to answer as to the court’s failure to direct the prosecution to provide them when the trial magistrate stated that she cannot provide that which she did not have. This in my view was confirmation by the court itself that the appellant was denied the documents.

22. In the case **Juma & Others –vs- AG. (2003) 2EA 461** the court held that

“The onus of establishing the justification for a violation of any such fundamental rights guaranteed by the protection of the law, provisions of the constitution must be on the party alleging such justification to derogate from the constitutional guarantee.”

23. By the foregoing, I am persuaded and more so due to the court’s open bias against the appellant, that the appellant’s fundamental rights guaranteed under the Constitution, **pursuant to Article 50**, were violated which violation prejudiced the appellant in the defence of the case facing him.

24. **I therefore allow the appeal, quash the conviction and sentence, and set the appellant at liberty, unless otherwise lawfully held.**

Delivered, Signed and Dated at Nakuru this 24th Day of October 2019.

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J.N. MULWA

JUDGE