



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 18 OF 2017

JACKSON SAID MUHAMMED.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 598 of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima(RM) on 25th August 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Jackson Said Muhammed was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. The particulars of the main charge were that on the night of 25th July 2015 within Taita Taveta County, he intentionally and unlawfully caused his penis to penetrate the vagina of D M M (hereinafter referred to as PW 4”), a child aged fourteen (14) years.
2. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Sexual Offences Act. The particulars of this charge were that on the aforesaid dates and place, he intentionally touched PW 4’s vagina , a child aged fourteen (14) years with his penis.
3. The matter was heard by the Learned Trial Magistrate, Hon E.M. Kadima, Resident Magistrate. Hon M. Onkoba, Senior Resident Magistrate read the judgment on his behalf in which he convicted the Appellant on the main charge and sentenced him to serve twenty (20) years’ imprisonment.
4. Being dissatisfied with the judgment therein, on 20th March 2017, the Appellant filed a Notice of Motion application to be allowed to file an appeal out of time, which application was allowed and his Appeal deemed as having been duly filed and served. He relied on five (5) Grounds of Appeal.
5. Subsequently, on 11th October 2017, he filed his Written Submissions and Amended Grounds of Appeal. This time he relied on six (6) Amended Grounds of Appeal. He also filed Further Written Submissions on 15th November 2017 in response to the State’s Written Submissions that were dated 30th October 2017 and filed on 1st November 2017.
6. When the matter came up on 13th December 2017, both the Appellant and counsel for the State requested this court to render its decision based on their respective Written Submissions which they were not highlighting but relying upon in their entirety. The Judgment herein is therefore based on the said

Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

8. It did appear to this court that the issues that had been placed before it for determination were really:-

a) Whether the Appellant’s right to fair trial was infringed upon;

b) Whether or not the Prosecution had proved its case beyond reasonable doubt;

9. The court therefore dealt with the said issues under the separate heads shown hereunder.

THE APPELLANT’S RIGHT TO FAIR TRIAL

10. Amended Ground of Appeal No (3) was dealt with under this head as it was a preliminary issue that went into the root of the Appellant’s case.

11. He submitted that there was grave infringement of his constitutional right on three (3) grounds. The first was that he was not accorded legal representation yet he was a layman. Secondly, he stated that he requested that Flora Wali (hereinafter referred to as “PW 2”) be recalled for further Cross-examination but she never attended court and the Trial Court did not extend time for her to attend court. Thirdly, he averred that he was not furnished with all the Witness Statements to enable him prepare for trial.

12. The State argued that it was not in every case that an accused person was assigned legal representation and that such right was progressive in nature. It placed reliance on the case of **Cr Appeal No 497 of 2007 David Njoroge Macharia vs Republic [2014] eKLR** where the court therein explained that legal representation ought to be assigned to an accused person where substantive injustice would occur in complex issues of law or fact, where the accused is unable to conduct his own defence or where public interest requires that representation be provided.

13. Article 50(2)(h) of the Constitution of Kenya, 2010 stipulates as follows:-

“(2)Every accused person has the right to a fair trial, which includes the right—

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”

14. It is clear from the said Article that assignment of legal representation is not limited to persons who have been charged with capital offences only. Legal representation is to be provided to an accused person who is likely to suffer substantial injustice if an advocate is not assigned to him by the State irrespective of the offence he is charged with.

15. The threshold of what would amount to substantial injustice has not been defined in the Constitution of Kenya. Appreciably, no accused person who has been convicted of a capital offence has been sentenced to death in recent years.

16. Unless the situation changes in Kenya, one can safely assume that for now, such a person who has

been sentenced to death is likely to be in prison for the rest of his life without suffering death. In any event, most of the convicted persons who were and have been sentenced to death have benefitted from the commutation of their death sentences to life imprisonment.

17. It was the considered opinion of this court that a person who faces a life sentence finds himself in the same position as a person who is facing a capital offence. He is likely to suffer great injustice if he is not assigned legal representation by the State. In this particular case, the Appellant suffered great injustice because he was not informed of his right to legal representation, even if he was to organise for it privately as envisaged in Article 50(2)(g) of the Constitution of Kenya.

18. There was a high likelihood that the Appellant may not have pleaded guilty to the charge in view of the punitive sentence prescribed under the Act but may have opted to through the rigours of trial. His lack of knowledge of legal technicalities and financial incapacity to hire legal representation put him in a situation where he suffered substantial injustice.

19. Having said so, the limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** when it stated as follows:-

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result’ and to include *all situations where an accused person is charged with an offence whose penalty is death*. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

Again, this Court differently constituted in the case of **Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013**, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person’s right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:

“It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State’s expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation.”

Article 261 of the Constitution provides *inter alia*:-

(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the

Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."

20. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it was took cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to **all**(emphasis court) accused persons will be realised progressively but sooner than later.

21. Going further, this court noted that on 29th February 2016, the Appellant requested for the recall of Dr Stephen Katana (hereinafter referred to as "PW 1") and PW 2, whom he never Cross-examined, which application was allowed by the Learned Trial Magistrate. PW 1 came back to court on 22nd March 2016 and he was duly sworn and adduced evidence. After he adduced his evidence, it was indicated that there was no Re-examination. There was no indication in the proceedings to show if the Appellant Cross-examined him.

22. The Prosecutor further informed the Trial court that PW 2 could not attend court because her child was sick. The Learned Trial Magistrate fixed the matter for further hearing on 31st March 2016. The matter subsequently came for hearing on several days and there was no indication that PW 2 ever came to court. The Appellant did not raise the issue throughout the hearing and neither did the Prosecutor avail PW 2 for Cross-examination by the Appellant as he had sought and allowed by the Learned Trial Magistrate.

23. Whereas the State did not submit on this issue, this court noted that Section 150 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

24. It was therefore the view of this court that failure by the Prosecution to avail PW 2 on 22nd March 2016 and 18th April 2016 for Cross-examination by the Appellant greatly prejudiced him as he was not denied an opportunity to fully ventilate his case.

25. On the issue of the Witness Statements, the State argued that the Learned Trial Court ordered that the Appellant be issued with the same on 1st September 2015 and 26th October 2015 and that he never objected to PW 1 tendering in evidence the P3 Form. It therefore contended that he did not suffer prejudice as he had been supplied with all the Witness Statements.

26. A perusal of the proceedings of the lower court shows that when the Appellant took plea on 27th July 2015, the Learned Trial Magistrate directed that he be furnished with Witness Statements. He mentioned the matter on 1st September 2015 to confirm if he had been supplied with the said Witness Statements and

fixed the matter for hearing on 8th September 2015. On this date, the Prosecutor informed the Learned Trial Magistrate that he had supplied him with the Witness Statements.

27. When the matter was mentioned on 13th September 2015, he again asked that he be given the Witness Statements of the Investigating and Arresting Officers. The Prosecutor undertook to supply the same. On 15th September 2015, PW 1's evidence was taken and the matter adjourned to 26th October 2015.

28. When the matter came for hearing on 19th November 2015, he informed the Trial Court that he had not been furnished with PW 2's Witness Statements. The Prosecutor stated that he had all the time to ask for Witness Statements and that he was furnished with all the Witness Statements on 8th September 2015. The Learned Trial Magistrate therefore rejected his application to adjourn the matter to enable him obtain the Witness Statements and directed that the matter proceeds for hearing. The Learned Trial Magistrate observed that the Appellant had had almost two (2) months to prepare for trial.

29. Article 50(2)(j) of the Constitution of Kenya, 2010 provides as follows:-

“Every accused person has a right to be informed in advance of the evidence the prosecution intends to rely and to have reasonable access to that evidence.”

30. Indeed, courts must not only look at the victim only. They must also take into account the rights of such accused person as the sword of justice cuts both ways.

31. It was not clear if the Prosecution furnished the Appellant with all the Witness Statements at once. What was evident was it furnished him with the said Witness Statements in piecemeal necessitating the court on 13th September 2015, to direct that the Prosecution ensures that he was supplied with all the Witness Statements well before the next hearing date.

32. What this court understood to have been the Appellant's assertions were that he had not been furnished with PW 2's Witness Statement and he could not therefore have prepared for trial. Whether or not he had been furnished with the Witness Statements remained a case of his word against that of the Prosecutor.

33. Appreciably, the fact that the Appellant had sought an adjournment once on account that he was unwell was not sufficient reason to have concluded that his application for adjournment had been made in bad faith as the Learned Trial Magistrate had contended. He had in fact requested for a week to prepare, which request the Learned Trial Magistrate declined to grant. This was prejudicial to the Appellant as the Prosecution had sought an adjournment on 8th September 2015 as the doctor had not come to court to testify, , on 15th September 2015 to call five (5) more witnesses, on 19th November 2015 when PW 4 was said to have been unwell, on 14th December 2015 when the Investigating Officer was said to have been on leave, on 18th December 2015 on account of no witnesses in court and on 22nd March 2016 and 18th April 2016 when PW 2 failed to attend court after being re-called because her child was sick.

34. Failure to inform the Appellant what the entire Prosecution's case was to enable him prepare his defence was an omission that was occasioned by the Prosecution but was not picked up by the Learned Trial Magistrate as he ought to. Where an omission and/or commission during trial is attributed to the trial court, then a re-trial is a good option to cure such irregularities. However, a re-trial is not ordered as a matter of course. It depends on the particular circumstances of a case.

35. In this regard, this court fully associated itself with the holdings in the cases of Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481 and re-stated in Fatehaji Manji vs Republic [1966] E.A. 343 that Mutende and Thuraniira Jaden JJ cited in the case of Jackson Mutunga Matheka vs Republic [2015] eKLR where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be

ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution 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, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”

36. Clearly, the Prosecution sought more adjournments than the Appellant. Weighed against the Appellant’s one (1) request for adjournment, this court took the view that the scales of justice tilted more in favour of the Prosecution, which painted a picture of it having been accorded a higher place during the trial as opposed to the scales of justice being balanced between it and the Appellant herein. Indeed, the Appellant appeared to have been more prejudiced. The irregularities in this matter can only be cured by ordering a Re-trial.

37. In this particular case, the Prosecution adduced evidence that the Learned Trial Magistrate deemed sufficient to convict the Appellant herein. It would therefore be necessary to have the matter heard afresh to given the Appellant an opportunity to defend himself against PW 1’s assertions.

38. In this regard, it was the view of this court that Amended Ground of Appeal No (3) was merited and the same is hereby allowed.

CONCLUSION

39. As this court found that a re-trial would be in the interest of justice in the case herein, it did not therefore address its mind to the remaining Amended Grounds of Appeal to give an opportunity to the new trial court to hear and determine the issues herein.

DISPOSITION

40. The upshot of this court’s decision was that the Appellant’s Petition of Appeal that was lodged on 20th March 2017 was successful. It would therefore be unsafe to allow his conviction to stand. The same is hereby quashed. Consequently, the sentence is also hereby set aside.

41. However, in view of the fact that an offence was alleged to have been committed, it is hereby directed and ordered that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits. The Appellant shall be arraigned afresh before a different magistrate at the Voi Law Courts to hear and determine this matter.

42. In this regard, it is hereby directed and ordered that the Appellant remain in custody for production before the Senior Principal Magistrate Voi Law Courts on 6th March 2018 for purposes of taking a plea and further hearing of this matter. It is the expectation of this court that the new trial court will proceed to hear and determine this matter expeditiously in view of the fact that the Appellant has been in custody since 25th August 2016.

43. It is so ordered.

DATED and DELIVERED at VOI this 27TH day of FEBRUARY 2018

J. KAMAU

JUDGE

In the presence of:-

.....Appellant

.....for State

Susan Sarikoki– Court Clerk