Kipngetich v Republic (Criminal Appeal E030 of 2022)
[2024] KEHC 2592 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2592 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E030 OF 2022

HM NYAGA, J

MARCH 14, 2024

BETWEEN

KELVIN KIPNGETICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Conviction and Sentence in Criminal Case No. Molo Chief Magistrate's Court Criminal SO No 087 of 2022 (Republic vs Kelvin Kipngetich) which was delivered on the 18th May, 2022 by Hon. M.W.Kamau – RM)

JUDGMENT

1. The Appellant was arraigned before the Chief Magistrate's Court at Molo and was charged as follows;

   Principal Count

   Defilement Contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*.

   The particulars were that on the diverse dates between August 2021 and 28th July,2022 in Kuresoi South Sub-County within Nakuru County internationally caused his penis to penetrate the vagina of B.C. a child aged 17 years.

   Alternative Count

   Committing an Indecent Act with a child Contrary to Section 11(1) of the *Sexual Offences Act*.

   The particulars of this count were that on the diverse dates between August 2021 and 28th July,2022 in Kuresoi South Sub-County within Nakuru County he intentionally touched the vagina of B. C. a child aged 17 years with his penis.

2. The Appellant denied the charges and after full trial, the accused was found guilty, convicted and sentenced to 10 years' imprisonment.

3. Aggrieved by both the conviction and sentence, the Appellant preferred this Appeal through his Grounds of Appeal dated 31st August, 2023. He sets out the following grounds;

    i. That the Learned Magistrate erred both in law and fact by failing to inform the Appellant of his rights to be represented by Counsel thus violating his fundamental right to a fair trial under Article50(2) (g) of *the constitution*.

    ii. That the Learned Magistrate erred both in law and fact in failing by convicting the Appellant on account of insufficient evidence laden with glaring contradictions, gaps, inconsistencies, falsehood, uncorroborated evidence and which evidence in totality did not meet the threshold of proof of beyond reasonable doubt.

    iii. That the Learned Magistrate erred both in law and fact by disregarding and dismissing the Appellant's defence without critically analysing the same.

    iv. That the Learned Magistrate erred both in law and fact by harshly and unlawfully sentencing the appellant to the minimum sentence provided for under the law, which sentence went against the weight of the evidence adduced did not reflect the Appellant's previous record and did not capture the mitigation adduced by the Appellant.

4. The appellant's prayer is that: -

    i. The Appeal be allowed.

    ii. The conviction of the Appellant in Molo Chief Magistrate's Court S.O No. E087 of 2022 be quashed and the resultant sentence be set aside and the Appellant be set free.

5. When the Appeal came up for directions, the court directed the parties to file Written Submissions. Both parties complied with the directions and filed their respective submissions on 25th January,2024.

6. Mr. Bore, Counsel for the Appellant submitted that it is evident from the trial court record that the Appellant was unrepresented throughout the trial and the trial court infringed his constitutional right to be represented by counsel by failing to inform him of the said right as provided under Article 50(2) (g) of *the Constitution*.

7. He placed reliance on the case of Francis Ochieng Osura v Republic [2019] eKLR where the court nullified the entire trial proceedings on grounds that there was proof of derogation of the right under Article 50(2)(g) of *the Constitution*.

8. He also cited the case of Owuor v Republic (Criminal Appeal 16 of 2019) [2022] KECA 18 (KLR) where the court while citing Lord Denning in Pett v Greyhound Racing Association, (1968) 2 All E.R 545, at 549 stated: -

> "The value that legal representation adds to an accused defence in ensuring not only a vigorous but skilled participation in the criminal process cannot be gainsaid. Lord Denning in Pett v Greyhound Racing Association, (1968) 2 All E.R 545, at 549 stated: "It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man

immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"

9. The counsel further relied on the case of South Africa in Fraser vs. ABSA Bank Limited (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court said that an accused person is entitled to legal representation of his/her choice regardless of his or her financial situation.

10. The Counsel argued that In Kenya, the Supreme Court in Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 Others [2017] eKLR while dealing with various aspects of the right to a fair hearing under Article 50 of *the Constitution* stated that right to a fair trial is a fundamental ingredient is to be enjoyed pursuant to the constitutional edict without more and that also the International Convention on Civil and Political Rights (ICCPR) recognizes right to legal representation under Article 14(3)(d).

11. The Counsel submitted that the Parliament enacted The *Legal Aid Act* No. 6 of 2016 to give effect to Articles 19(2), 48, 50(2) (g) and (h) of *the Constitution*. That the court under Section 43(1)(a) of the Act has a duty to promptly inform the accused of his/her right to legal representation.

12. With respect to the stage at which the accused person should be informed of his/her the right of representation, the counsel argued that Article 50(2)(g) requires the accused to be informed of this right promptly. For this Preposition he relied on the case of Joseph Kiema Philip vs Republic [2019] eKLR where the court observed that this right should be informed at the earliest opportunity either at the first appearance before plea is taken, or at the commencement of the proceedings and Francis Ochieng Osura vs Republic (Supra) where the court emphasized that the accused must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether plea would be taken at that point in time or later.

13. He thus submitted that the denial of the appellant's right of representation amounted to gross violation of his right to fair trial.

14. The counsel for the Appellant also argued that in a criminal case, the burden of proof lies with the prosecution to prove the guilt of the accused persons beyond reasonable doubt. In order to discharge this onus, it is argued, the prosecution must adduce evidence and present witnesses in court whose evidence must be consistent, credible, incontrovertible and without contradictions.

15. He further argued that in the present case the prosecution did not discharge the burden of proof. He pointed to the fact that the PW1 testified that she was 17 years old having been born on 13th July,2005 while her brother DKM (PW2) testified that PW1 was born on 15th January,2005.

16. He submitted that based on the evidence of PW2 that she opted the case to proceed as she could not look after his children and a child of B, the Appellant was not arrested for defiling PW1 but for reason that she was pregnant.

17. He posited that the fact that DNA was not conducted on PW1's baby or foetus did not prove beyond reasonable doubt that the Appellant was the one who defiled and impregnated PW1.

18. On account of alleged misleading, inconsistent, contradictory evidence of PW1, he urged the court to be guided by the decision in Ndungu Kimanyi vs Republic [1979] KLR 283 where court held that it is unsafe to rely on the evidence of a witness who appears to be untruthful.

19. The counsel posited that the trial court disregarded in totality the defence of the Appellant.

20. On sentence, the counsel submitted that the sentence was meted out against the Appellant without the court having a benefit of knowing whether a non-custodial sentence was appropriate under the circumstances considering it did not seek a presentence report before sentencing.

21. He also argued that the sentence imposed by the trial court on the appellant was excessive, unreasonable since it did not reflect the weight of the evidence adduced and capture the recent jurisprudence on the same.

22. He relied on Simon Kipkurui Kimori vs Republic [2019] eKLR in which the court while reiterating the view of the Supreme Court with regard to mandatory sentence held that: -

> " In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:
>
> > Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders."

23. He further placed reliance on S vs Malgas 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:

> " What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

24. He prayed that the appeal be allowed.

25. The State Counsel, Loice N. Murunga, submitted that an offence of defilement is committed if three ingredients are established, which are; the age of the victim; the act of penetration; and the identity of the perpetrator.

26. She submitted that the above ingredients were laid down in the case of George Opondo Olunga vs Republic [2016] eKLR.

27. On the age of the victim, the respondent submitted that the victim testified that she was born on 13th July, 2005 and PW4 produced her birth certificate to prove the same. She stated that the victim was indisputably 17 years old at the time of the offence.

28. To buttress her submissions, the state Counsel relied on the case of Francis Omuroni vs Uganda, Court of Appeal Criminal Appeal No. 2 of 2000 where it was held thus:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

29. The state counsel further relied on the case of Edwin Nyambogo Onsongo vs R (2016) eKLR where the court of appeal stated that;

> " The question of proof of age has finally been settled by recent decisions by this court to the effect that it can be proved by documents, evidence such as birth certificates, baptismal card or oral evidence of the parents or guardians or medical evidence among other credible evidence of proof".

30. On the act of penetration, the respondent referred to Section 2 of the *Sexual Offences Act* and submitted that in the instant case the P3 form produced showed that the complainant's hymen was broken and this was a sufficient proof of penetration.

31. On identification of the perpetrator, the Respondent submitted that PW1 knew the appellant well as he was her boyfriend and living with him, and therefore the Appellant was positively identified.

32. On sentence, the state counsel urged the court not to interfere with the same since it was not mandatory and the Appellant took advantage of an orphan who needed his protection but he defiled her.

Analysis and Determination

33. As a first Appellate Court, the duty imposed upon it is as was set out in Okeno vs Republic(1972) EA 32 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."

34. In analyzing the evidence. I will briefly look at the evidence adduced in the lower court, and the defence raised.

35. PW 1 was the complainant. She stated that she was born on 13th July,2005. She said on 28th July,2022 she met the Appellant standing on the roadside. While there Nyumba Kumi, her brother and Mzee wa mtaa came and took the Appellant and detained him. She said she was just talking with the Appellant and that he was her boyfriend since August 2021. She said they used to do "mapenzi" and the Appellant would touch her private parts using his penis, and that her and the accused had been intimate severally. She said there were problems at her home, her mother died and Appellant would pay her school fees. She said her brother detained the appellant because he found them talking. She said she had not had a relationship with any one else other than the Appellant.

36. PW2 was DKM, a brother of the complainant. He testified that on the material day, PW1 did not return home. Prior to that he had suspected that her and the Appellant was in a relationship because there was a time she went home wearing the Appellant's jacket. He stated that he went to the Appellant's place with Mzee wa Mtaa and Nyumba Kumi where they found the Complainant. He said mzee wa mtaa and nyumba kumi took the Appellant to Olenguruone police station. He said PW1

was examined and was found pregnant and he opted the case to proceed as he could not look after his children and that of PW1.

37. PW3 was Gideon Bartenge, a clinical officer from Olenguruone Sub-County Hospital. He examined PW1 on 30th July, 2017 and confirmed that she tested positive for pregnancy. It was his testimony that PW1's hymen had an old scar and he concluded that she had been defiled. He produced the P3 form as Exhibit no. 2a, medical notes as exhibit no. 2b and PRC form as Exhibit 3.

38. PW4, was PC Aviston Angore. He was the investigating officer in this matter. He said on 29th July,2022, at around 1. 00p.m he arrived at the station and found that he had been tasked to investigate this case. He said the appellant had already been placed in the cell. He interrogated the appellant and the victim. He produced the victim's birth certificate as P. Exhibit No.1, he said the victim ran away from home and her whereabouts were unknown so DNA could not be conducted.

39. The Appellant in his defence stated that PW1 went to his house in his absence and when he arrived he found her there, and the villagers came and took him to the police station,

Issues for Determination

40. The issues that arise for determination are: -

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

    b) Whether there was sufficient evidence to support the conviction

    c) whether the sentence is harsh and excessive.

Issue No.1

41. Article 50(2) of *the Constitution* provides safeguards of an Accused's Right to fair trial. Amongst the tenets of fair trial is the Right to choose, and be represented by an advocate and to be informed of this right promptly. It 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;"

42. In Thomas Alugha Ndegwa vs Republic [2016] eKLR the Court of Appeal stated:

> " In Kenya, Section 43(1) of the *Legal Aid Act* sets out the duties of the court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person... it is clear the framework for full implementation of Article 50 (h) is now in place as required by *the Constitution*. Section 40 of the Act requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right.

43. Further in Republic vs Karisa Chengo & 2 others [2017] eKLR the Supreme Court stated:

> " It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:
>
> (i) the seriousness of the offence;
>
> (ii) the severity of the sentence;
>
> (iii) the ability of the accused person to pay for his own legal representation;
>
> (iv) whether the accused is a minor;
>
> (v) the literacy of the accused;
>
> (vi) the complexity of the charge against the accused;"

44. In Dominic Kamau Macharia vs R CR App No. 72 of 2012, {2014} eKLR the court explained that substantive injustice would occur in cases such as where there are 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. The court went on to explain that substantial injustice may be said to be subject to three test.

45. First, is the complexity of the case. This is discernible from the issues of fact and law which may not be comprehended by the accused. The second test relates to the seriousness or nature of the offence in question. A serious offence may attract public interest to the extent that the public may require that some form of representation to be accorded to the accused owing to the nature of the offence. The third and final test relates to the ability of the accused person to conduct his own defence. Language difficulties experienced during the trial may be a perfect indicator of an accused person's inability to conduct a defence.

46. In this case, I note on 1st August,2022 the Appellant told court that he was 25 years. During his testimony he stated that he was a boda boda rider. Throughout the trial the trial court did not inform him of his right to representation. Considering the nature or gravity of the offence he was charged with and the severity of the sentence that could result therefrom, I find as a matter of constitutional duty and in the interests of justice, the trial magistrate ought to have made a preliminary inquiry at the earliest opportunity possible and determine whether or not the Appellant would require legal representation before embarking on the hearing the appellant.

47. I am thus of the opinion that in the circumstances of this case, the failure to inform the appellant of the said right led to a miscarriage of justice. The provisions by *the Constitution* and the Act are not mere words. They place an onus on the court to give breath to the spirit thereof.

48. Further, looking at the trial court record, the same shows that on the date of plea, the principal count was read to him and he replied that;

> 'Ni kweli . I am 25 years old.....'

49. When he was warned of the severity of the sentence the appellant stated that;

> 'Ningetaka nafasi ya kujitetea...'

50. The next thing that the trial court did was to enter a plea of not guilty. I agree that where an accused tries to explain himself as to the occurrence of the offence, the court ought to enter a plea of not guilty.

51. The alternative count was never read to him.

52. When the matter came for hearing on 14th September 2022, the accused had not been supplied with the statements and this was done on that day. The record further shows that on the same day, at 11:40 am, the accused was called upon to state whether he was ready to proceed and he said he was. Two witnesses testified on that day.

53. Now, even if the accused said he was ready, the trial court ought to have been a little cautious on proceeding with the matter on that same day. It is arguable that the appellant, in being given statements just hours to the commencement of the trial, was not accorded sufficient time to prepare his defence, especially given the fact that he was unrepresented. Article 50 (2) (j) provides that an accused has the right;

> " (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

53. The two hours or so in my view and in the circumstances of the case herein, cannot be deemed to comply with the provisions of the said Article.

54. In stating the above I must make myself clear that I am not saying that it is in every case where the accused is given a statement or any evidence on the day of the trial or late for that matter, would be deemed to infringe his right to a fair trial. The court ought to look at the unique circumstances of each case. In the instant case I am of the view that the circumstances clearly point to the failure to allow the appellant adequate time to prepare for his defence.

55. After considering the first ground of appeal, I am in agreement with Mr. Bore that the trial and the subsequent conviction and sentence of the appellant cannot pass the test of a fair trial.

56. Consequently, I proceed to quash and set aside the conviction and sentence of the appellant.

57. That being the case, I find that it would be a futile exercise to proceed to analyse the other issues addressed in this appeal.

58. So what is the court to do next? The court has two options after quashing the conviction and sentence, to either set the appellant at liberty or order a retrial.

59. The law as to when a retrial should be ordered has long been settled. In the case of Fatehali Manji Vs Republic [1966] EA 343 the Court of Appeal when dealing with the same issue, gave the following guideline: -

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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; each case must depend

on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it." (See Philip Kipngetich Terer –vs- Republic [2015] eKLR)

60. In Muiruri vs R [2003] KLR 552, the Court held that: -

> " It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

61. Further in Mwangi vs Republic [1983] KLR 522, the Court of Appeal held at page 538 that: -

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

62. The principles in these cases are in sync with those expounded in Ahmed Sumar vs Republic (1964) EA 483 where the court held 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."

63. Given the nature of the offence and the impact on the victim I think that a retrial is the fairest and just option. I note that the trial took place in 2022 and the appellant was convicted in March 2023. Only 4 witnesses testified. Thus it may not be difficult in tracing the witnesses for the trial to restart.

60. I therefore direct that the appellant be presented before the Chief Magistrate's Court at Molo for fresh plea taking on a date that I shall give shortly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF MARCH, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Oleperon

State Counsel Ms Okok

Appellant present

Mr. Bore for Appellant