Kirimi v Republic (Criminal Appeal E001 of 2024)
[2024] KEHC 8152 (KLR) (9 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8152 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E001 OF 2024

JM OMIDO, J

JULY 9, 2024

BETWEEN

DENNIS MAWIRA KIRIMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement and conviction of Hon. M. Kinyanjui, SPM delivered on 30th October, 2023 and the subsequent sentence of Hon. M.A. Opondo, SPM rendered on 20th December, 2023 in Kiambu Sexual Offence Case No. 10 of 2017, Republic v Dennis Mawira Kirimi))

JUDGMENT

1. This appeal emanates from the judgement and conviction of Hon. M. Kinyanjui, SPM delivered on 30th October, 2023 and the subsequent sentence of Hon. M.A. Opondo, SPM rendered on 20th December, 2023 in Kiambu Sexual Offence Case No. 10 of 2017, Republic v Dennis Mawira Kirimi). It is however noteworthy that the matter proceeded before three (3) Magistrates, Hon. S. Atambo SPM, Hon. M. Kinyanjui and Hon. M.A. Opondo.

2. The Appellant Dennis Mawira Kirimi was charged with the offence of sexual assault contrary to Section 5(1)(a)(i) and 5(2) of the *Sexual Offences Act* Cap 63A Laws of Kenya (formerly Act No. 3 of 2006).

3. As is instructive from the charge sheet, the particulars of the offence were that on 13th February, 2017 within Kasarani Subcounty in Nairobi City County, the Appellant intentionally used his fingers to penetrate the vagina of JW (name withheld, hereinafter referred to as "the Survivor") a child aged eight (8) years.

4. The Appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of six (6) witnesses. The defence evidence comprised the sworn testimony of the Appellant and the evidence of his single defence witness.

5. There are nine cited grounds of appeal presented by the Appellant vide the Memorandum of Appeal (I suppose Petition of Appeal) dated 3rd December, 2023 upon which the Appellant seeks to upset the conviction and sentence. However, the grounds of appeal that the Appellant addressed in his submissions may be summarized as follows:

    a. The learned trial Magistrate erred in law by relying on the evidence of PW1 which was unsworn and convicting the Appellant solely on the said evidence.

    b. The learned trial Magistrate erred in law and in fact by failing to order the appearance of PW4 and PW5 for purposes of being further cross-examined despite an application for their recall for further cross-examination having been allowed by the ourt, resulting in the violation of the Appellant's right to a fair trial.

    c. The learned trial Magistrate erred in finding that the prosecution proved its case beyond reasonable doubt.

6. On 4th June, 2024, this appeal was placed before me for purposes of giving directions on the Appellant's application by way of Notice of Motion dated 1st March, 2024 that sought for an order of bail pending appeal. For purposes of expediency and considering that the matter had been allocated to me under the Judiciary's Rapid Result Initiative, rather than proceed with the application, I ordered that the same be dispensed with and directed the parties to file submissions on the appeal.

7. Effectively, the court directed that the appeal be canvassed by way of written submissions. The Appellant filed his submissions and list of authorities in compliance with the court's directions.

8. The Respondent did not file submissions and no reason was given for the failure to do so. Nevertheless, the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence (see Odhiambo v Republic [2008] KLR 565).

9. Be that as it may, I have had the occasion to peruse the petition of appeal, the submissions by the Appellant, the Record of Appeal and the lower court record.

10. This court has a legal duty to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify (See Okeno vs Republic [1972] E.A, 32 at page 36, Pandya vs Republic [1957] EA 336, Shantilal M. Ruwala vs Republic [1957] EA 570 and Peter vs Sunday Post [1958] EA 424.

11. The record of the lower court indicates that on 4th October, 2017, the trial Magistrate conducted voir dire examination to determine the competency of the Survivor who testified as PW1, and the admissibility of her evidence. The trial court observed as follows:

> " The intended PW1 is a female child indicated (to be) about 9 years old. After voir dire examination, the court is of the opinion that despite her tender age, she is very intelligent and understands her surroundings well. She understands further the duty to tell the truth and the nature of an oath."

12. With that, PW1 proceeded to testify. However, it would seem that despite the trial court (Hon. S. Atambo) finding after the voir dire examination that the Survivor understood the nature of an oath and the duty to tell the truth, the Survivor was not sworn as would have been expected. I will later on in this judgement address this issue, being among those raised by the Appellant.

13. In her testimony, the Survivor told the court that she was a class 4 pupil at XY Primary School (particulars withheld). She stated that she went to borrow a book from a boy who was a neighbour and while on her way, she met a neighbour whom she knew as Deno sitting at a shop near her home. The witness pointed out the Appellant as that neighbour.

14. The Survivor explained that the Appellant pulled her by her hands and took her to his house, where he undressed her and made her to lie down facing upwards. He then put his fingers in her private parts, which she described as the place where she urinates from. She screamed and the Appellant's neighbour opened the door. The neighbour found the Survivor lying on a chair naked while the Appellant was on his feet, fully dressed.

15. PW1 told the trial Magistrate that the neighbour dressed her up, took her out of the house and asked her not to return to the Appellant's house. She then went back to her home. She was in pain but did not inform her mother of what had happened as she feared that she would be chastised. The Survivor later informed her teacher at her school as she was experiencing pain in her private parts.

16. It was the further evidence of the Survivor that her guidance and counselling teacher informed her mother that the Survivor had been sexually violated. At that point, the Survivor's mother was summoned to her school and the Survivor narrated to her mother what had transpired at the appellant's house. She was then taken to Kiamumbi Police Station where a formal report was made, following which she was escorted to hospital where she was examined and treated.

17. The second prosecution witness was PM (PW2) (name withheld), a guidance and counselling teacher at XY Primary School. The witness told the trial court that on 14th February, 2018 at about 8am, she was requested by her colleague teacher to talk to the Survivor, whom the latter said had a problem as she had noticed that she was walking with a gait and seemed to be in pain. PW2 then interviewed the Survivor who told her that a man had taken her to his house the previous evening and had sexually violated her by undressing her and defiling her.

18. At that instance, PW2 called the Survivor's mother who was then told of the events of the previous evening. The Survivor stated that she felt pain when passing urine. She was then taken to hospital.

19. Upon being cross examined, the witness told the trial court that the Survivor narrated to her while crying, that the assailant undressed her and did "bad manners" to her.

20. The state called CWG (name withheld), the survivor's mother as the third witness (PW3). The witness narrated to the trial court the events of 14th February, 2017 and stated that on that day at about 8pm, the Survivor returned home about 30 minutes after stepping out to borrow a book from a neighbour's child. The two then went to bed.

21. The witness explained further that the next morning, she saw off her daughter to school. On that afternoon at about 1pm, PW3 was summoned to her daughter's school by PW2 and was informed on arrival that her daughter was walking "awkwardly" and had reported that one Dennis had had put his fingers into her "private parts". The witness examined the Survivor and noted that there was reddening in her vagina.

22. PW3 stated further that the Survivor told her that she felt pain when urinating. PW3 then took the minor to Kiamumbi Police Station where she made a report. She then took her to hospital where she was examined and treated and where it was confirmed that there had been no sexual activity/ penetration but that something had touched her vagina.

23. PW3 identified the Survivor's medical report form and post rape care form (popularly known as P3 and PRC forms respectively). She also identified a copy of the Survivor's certificate of birth which showed that she was born on 26th June, 2008. PW3 stated that the Appellant was well known to her as he was her friend.

24. Upon being cross examined, PW3 told the trial court that the Survivor narrated to her that she screamed when the Appellant put his fingers in her vagina and that she was saved by a neighbour who was a relative of the Appellant. She stated that when she asked the neighbour, the neighbour denied knowing the Survivor.

25. The prosecution called Dr. Warda Hassan of Kiambu Level Five Hospital who testified as PW4. The witness testified and produced as PExh3 on behalf of her colleague Dr. Kevin, the Survivor's P3 form that the latter completed on 30th March, 2017.

26. According to the document, the Survivor presented a history of having been touched in her private parts. Upon examining the Survivor, Dr. Kevin documented that her hymen was intact but her vaginal walls were reddened, an indicator that she had been penetrated with an object. She stated that the vaginal injuries were consistent with penetration, most probably with a finger.

27. PW5 was Police Constable Frida Mwari of Kiamumbi Police Station. In her testimony before the trial Court, the witness stated that the role she took in the matter was that of an investigator. She stated that she informed MSF doctors of the reported incident who then proceeded to examine and treat the Survivor. PW5 recorded witness statements, visited the scene and compiled the police file. She caused the Appellant to be charged after concluding investigations. She produced a copy of the Survivor's certificate of birth (PExh4).

28. It is instructive from the lower court's record that on 7th August, 2018, the Appellant made an application to recall PW4 and PW5 for purposes of further cross examination on the ground that his Advocate was not present in court when the two witnesses testified. Although the application was opposed, the court exercised its discretion under Section 146(4) of the *Evidence Act*, Cap 80 Laws of Kenya and ruled in favour of the defence, allowing the application.

29. It appears from the record that the matter was listed for hearing on 27th September, 2018, 29th November, 2018 and 14th March, 2019 and was adjourned on all three occasions mainly on the grounds that the police file was not in court and/or that PW4 and PW5 were not present. There is no indicator that the two witnesses were bonded or otherwise informed of those hearing dates. The court nevertheless granted the prosecution a last adjournment on 14th March, 2019.

30. The file was subsequently slated for hearing on 23rd May, 2019 when it was adjourned on the ground that the Prosecution Counsel in conduct of the matter had an emergency. The matter was to proceed on 8th August, 2019 but was again adjourned on the ground that PW4 and PW5 were not present. When the same came up for hearing on 7th November, 2019, it was again adjourned at the behest of the State as the Prosecution Counsel was indisposed. On all these occasions, the trial court was not informed whether the two witnesses had been bonded to attend court and their absence was therefore not explained.

31. Other applications for adjournment that were made by the prosecution were allowed on 19th February, 2020, 9th March, 2021, 12th May, 2021, 8th July, 2021, 9th September, 2021, 10th November, 2021, 15th March, 2022, 19th July, 2022 and 22nd November, 2022. On all these occasions, PW4 and PW5 were not present in court. Ultimately, the two witnesses were not presented for purposes of being cross examined by the defence.

32. Be that as it may, the prosecution called its last witness, Milka Mwikali John (PW6 but listed as PW7 in the trial court's record), a Clinical Officer who testified and produced as PExh1 and PExh2 the MSF report and PRC form respectively on behalf of her colleague Barbara Salome. She told the trial Court that her colleague examined the Survivor, who was in pain and noted that her vagina was pink and moist and that there was mild hyperemia or reddening of the inner walls. Penile penetration was ruled out. The examination was done on 14th February, 2017.

33. The prosecution closed its case at that stage and in its ruling rendered on 14th March, 2023, the court reached a finding that the prosecution had made out a prima facie case against the Appellant and the he was placed on his defence.

34. In his sworn testimony, the Appellant told the trial court that he was a nursing student. He stated that on 13th February, 2017 he was living with his brother. He stated that although he knew the Survivor as a neighbour's child, he did not see the Survivor on 13th February, 2017. He denied ever committing the offence that he was charged with.

35. The Appellant called his sister in law EWW as his witness. The witness told the trial court that she was with the Appellant, who was staying in her house, the entire day of 13th February, 2017 and that nothing unusual happened that day. She further stated that the Survivor never visited her house on any occasion and that the Survivor's mother was not known to her. She stated that there was no grudge between her family and that of the Survivor.

36. The defence case was closed at that stage.

37. Upon considering the evidence of the six (6) prosecution witnesses, the Appellant's defence and the evidence of his witness, the learned trial Magistrate, Hon. M. Kinyanjui found that the prosecution had satisfied all the ingredients of the offence and thus had proved its case beyond reasonable doubt and convicted the Appellant of the offence of sexual assault. The Appellant was subsequently sentenced by Hon. M.A. Opondo to serve three and a half years imprisonment. He preferred the instant appeal, being aggrieved by the conviction and sentence.

38. I have considered the grounds of appeal, the filed submissions, the evidence adduced before the trial court and the lower court's record in its entirety, I will deduce the issues that I am now tasked to determine which culminate in the question whether the prosecution proved the offence of sexual assault beyond reasonable doubt, as follows:

    a. Whether the trial Magistrate erred in law in admitting the evidence of the Survivor (PW1), who was not sworn in spite of the finding that she understood and appreciated the solemnity of the oath and the duty to tell the truth.

    b. Whether the failure by the Prosecution to present the two witnesses (PW4 and PW5) in respect of whom the Appellant had successfully made an application to recall prejudiced the Appellant's defence.

    c. Whether the offence was proved beyond reasonable doubt.

39. Inevitably, this court after determining the issues stated above must satisfy itself that the ingredients of the offence of sexual assault were proved against the Appellant beyond reasonable doubt, as is the requirement in law.

40. The offence of sexual assault is provided for under Section 5 of the *Sexual Offences Act*, Cap 63A Laws of Kenya (formerly Act No. 3 of 2006) as follows:

5. Sexual assault

(1) Any person who unlawfully –

(a) penetrates the genital organs of another person with –

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body; is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

41. From the provisions above, the offence of sexual assault is committed when the following ingredients are established:

a. The offender penetrates the genital organ(s) of another person with; any part of the body of another or that person; or with an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes; or

b. The offender manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ(s) into or by any part of the other person's body.

42. The main evidence that links the appellant to the commission of the offence is that ofthe Survivor. Considering that, one of the grounds that the Appellant presents, if I understood him well, is that the trial court wrongly relied on the narration of the Survivor, a child of tender years, being the only witness on what transpired on 13th February, 2017. The Appellant's complaint is that it was unsafe to rely on the Survivor's evidence because the same was not taken on oath even after the trial court reached the opinion that the Survivor understood the nature of an oath and was possessed of sufficient intelligence to understand the duty of speaking the truth.

43. I will now proceed to address the first issue that I am to determine. The manner in which to treat the evidence of a child of tender years was discussed in the case of Johnson Muiruri v Republic [1983] KLR 445 where the court held as follows;

> " 1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
>
> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the course the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

44. I hear the court in the decision above to say, inter alia, that where the trial Magistrate reaches the opinion, after conducting a voir dire examination, that the child of tender years understands and appreciates the solemnity of an oath and the duty to tell the truth, the evidence of the child ought to be on oath.

45. I have looked at the both the original and typed record and confirm the position taken by the Appellant that the evidence of the Survivor was not taken on oath despite the trial court opining that she understood the nature of an oath and her duty to the court to tell the truth. How is the evidence of the Survivor to be treated, in the circumstances?

46. The provision of the law that is attendant to such evidence is Section 151 of the Criminal Procedure Code, Cap 75 Laws of Kenya, which provides as follows:

151. Evidence to be given on oath –

Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.

47. In buttressing the Appellant's argument on the issue, Mr. Mwenda Kinyua, learned Counsel for the Appellant stated in his submissions that the Survivor's evidence ought to have been mandatorily taken on oath, the learned trial Magistrate having observed that she was fit to give a sworn testimony and that failure to take the evidence of the witness on oath dealt a fatal blow to the prosecution case. The Respondent said nothing on this issue as the ODPP opted not to file any submissions.

48. The persuasive decision of Lawrence Frank Wanyama & another v Republic [2020] eKLR relied upon by the Appellant is helpful and provides enlightenment on the issue. In that case, the High Court (G.W. Ngenye – Macharia J. as she then was), confronted with a similar issue, very elaborately addressed the subject as follows:

24. It is not in issue that the record of proceedings, both written and typed indicates that the complainant was not sworn when she gave her evidence. Indeed, this fact is the basis on which the application by the Respondent for leave to adduce additional evidence was hinged. The onus of this court is thus simple; to determine whether the defect violated the law and in turn vitiated the trial.

25. Evidence in criminal trials is required to be taken on oath, with the only exception being in the circumstances of a child of tender age who does not understand the nature of the oath but is possessed of sufficient intelligence to justify reception of her evidence under Section 19 of the Oaths and Declarations Act.

26. Section 151 of the Criminal Procedure Code on the other hand requires the taking of evidence in criminal cases on oath as follows:

> " Every witness in a criminal cause or matter shall be examined upon oath, and the Court before which any witness shall appear shall have full power and authority to administer the usual oath".

27. Section 151 appears to impose a total bar to unsworn evidence. The Court of Appeal in the case of Amber May v Republic [1979] eKLR held with respect to the unsworn testimony of an accused person that:

> " An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."

28. Justice Edward Muriithi in the case of Rashid Wachilu Kasheka v Republic [2015] eKLR stated as follows regarding an unsworn statement by a prosecution witness:

> " In Odongo v. Republic [1983] KLR 301, the Court held that the unsworn statement of an accused is not evidence and could therefore not be used against his co-accused. If the statement of an accused made on oath is consistently rejected by the courts as being 'not evidence' as in Odongo, supra, and May before it and others after it, it must follow that the consequences of unsworn evidence given by a prosecution witness who should have been sworn is equally worthless and cannot be relied upon to found a conviction. Moreover, in permitting the receipt of unsworn evidence, whether by mistake or otherwise, is an illegality that renders the trial defective and a 'nullity' as in R. v. Marsham ex. parte Pethick Lawrence [1912] 2 K.B 362 DC..."

29. The honourable judge went on to hold that the failure to swear the two prosecution witnesses rendered the trial of the Appellant therein defective and a nullity hence ordered for retrial.

30. The contestation by the Respondent in this case is that although the record of proceedings does indeed show that PW1 was not sworn, she in fact was sworn before she testified and the more reason she was cross examined by the defence. But one fact must be undisputed; that this court being a court of record relies on what is written in proceedings. The court was not present when the evidence was taken. It has no way to determine whether or not PW1 was sworn before she testified. This ultimately implies that there is overwhelming likelihood that the Appellants were convicted on the basis of an unsworn testimony, in total violation of Section 151 of the Criminal Procedure Code. This kind of violation can in no way be curable under Section 382 of the Criminal Procedure Code. It vitiates the entire proceedings.

31. In so holding, I align myself with Court of Appeal decision in the case of Samuel Muriithi Mwangi V Republic [2006] eKLR where the Court of Appeal stated as follows:

> " The usual practice of all the courts in Kenya is of course to show in the record that a witness has taken an oath before testifying. In the record before us, there is no way in which we can determine one way or the other that the witnesses were or were

not sworn before they gave their evidence. Most likely they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of Section 151 of the Criminal Procedure Code and the provisions we have set out herein. That in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code."

32. Similarly, I would make an even finding; that it may probably be that PW1 was sworn before she testified. But as the record shows, she may not have been sworn rendering to a faulty conviction. The rationale for this is because the veracity of the evidence adduced is put in question. For this reason, I would not hesitate to hold that the proceedings were a total mistrial. (underlined emphasis mine).

49. The jurisprudence that emerges from the decision of Wanyama (supra) and the other authorities relied upon therein by the learned Judge is that a conviction based on evidence that is not sworn, taken in violation of Section 151 of the Criminal Procedure Code is a faulty conviction as such evidence vitiates the entire trial.

50. In the result, being of the same view of the findings in the above decisions, I agree with the submissions of Mr. Mwenda Kinyua, learned Counsel for the Appellant that the learned trial Magistrate grossly erred in failing to cause the Survivor's evidence to be taken on oath and in relying on the unsworn evidence to convict the Appellant. The proceedings before the trial court led to a mistrial.

51. On that alone, this appeal would succeed. I note that the common manner in which the courts in all the decisions above proceeded was to order for a retrial. I will address the other pertinent ground of appeal before determining whether the best course to take in this matter is to order for a retrial or an acquittal.

52. The second apposite issue that the Appellant raised was in respect of the evidence of PW4. I would say that the position also applies to the testimony of PW5. The protestation by the Appellant was that although he successfully applied before the trial court for the two witnesses to be recalled for further cross examination, the prosecution failed to present the witnesses on at least sixteen (16) different occasions (as indicated in paragraphs *29* to *32* of this judgement), prejudicing the Appellant by denying him the opportunity to test their evidence through further cross-examination. He urged that as a result, his right to a fair hearing was violated hence a conviction that ought not to have resulted.

53. I have looked at the lower court record and confirm that the trial court on 7th August, 2018 allowed the Appellant's application and ordered that the two witnesses be recalled for further cross examination by the defence. As I have noted above, the prosecution stretched the trial court and was granted at least sixteen (16) opportunities, spanning over a period of three years, to present the said witnesses but failed to do so. No tenable reasons were given as to why the witnesses failed to appear before the trial court on any of those numerous occasions. The prosecution in the end closed its case without presenting the two witnesses for further cross examination.

54. Section 146 of the *Evidence Act*, whose marginal note refers to "Order and direction of examinations" permits the recall of witnesses for further cross-examination. Subsection (4) provides as follows:

> "(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

55. The above provision gives the court discretion to consider and allow or refuse an application to recall witnesses either for further examination-in-chief or for further cross-examination. It therefore follows that in allowing the Appellant's application to recall the two witnesses, the court exercised its discretion.

56. In my view, an accused person who successfully makes an application to recall witnesses for purposes of further cross-examining them has the right to challenge the evidence of such witnesses by being granted the opportunity accruing from the successful application.

57. I therefore take the position that once a trial court judiciously exercises its discretion and orders that a witness be recalled for further cross examination, the resulting order confers upon the accused person the right to further cross-examine that witness and upon the prosecution the duty to present the witness for that purpose, unless the prosecution, for tenable reasons which must be presented before the court, is unable to do so.

58. Article 50 (2) of *the Constitution* of Kenya provides that an accused person has a right to a fair hearing which inter alia includes the right to adduce and challenge the evidence of the prosecution. Article 25(c) of *the Constitution* further provides that a right to fair trial shall not be limited. The right to a fair trial is a non-derogable right and is therefore one of the jus cogens rights.

59. As I have observed above, no reasons were given as to why the two witnesses in respect of whom the order for recall was made were not presented by the prosecution. From my standpoint, failure to present the two witnesses greatly prejudiced the Appellant as his right to a fair trial, particularly his right to challenge their evidence by further cross examining them was curtailed.

60. In Moses Ndichu Kariuki Vs Republic [2009] eKLR, the Appellant claimed his right to fair trial had been breached when he was not afforded an opportunity to further cross-examine the Complainant. The Court of Appeal considered the provisions of Section 77 of the retired Constitution which is similar to Article 50 of *the Constitution* stated thus:

> " In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant."

61. Having stated as much, I am of the persuasion that the fact that the two witnesses were without reasonable cause not availed for further cross-examination, vitiated the trial and the ground presented by the Appellant is well merited and succeeds.

62. My findings on the two issues above therefore affects the evidence of the Survivor, Dr. Warda Hassan, who produced the P3 form and Police Constable Frida Mwari, who was the investigating officer. The admission of the evidence of the three witnesses was for the reasons I have stated above irregular.

63. Obviously, there would not have been sufficient evidence to prove the ingredients of the offence if the evidence of the three witnesses was excluded. It is on the basis then that I find that the ingredients of the offence were not proved beyond reasonable doubt as the evidence of the three was irregularly considered and admitted, prejudicing the Appellant.

64. This court having reached the finding that the appeal has merit on the two grounds addressed above is now required to determine whether a retrial should be ordered or an acquittal.

65. In the case of Nicholas Kipngetich Mutai v Republic [2020] eKLR the Court held that a retrial should be ordered only where the interest of justice so requires and not to facilitate the prosecution to fill gaps or correct contradictions, inconsistencies and shortcomings in its case. In the instant appeal, I take the view that in the circumstances of this case where on more than sixteen occasions spanning over three years the prosecution failed to avail PW4 and PW5, ordering a retrial would be facilitating the prosecution to correct its shortcomings of failing to present the two witnesses without reasonable cause. That would not be in the interest of justice, noting further that the Appellant has been in prison since 20th December, 2023.

66. In the result, for the reasons stated above, I allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully detained.

DELIVERED (VIRTUALLY) DATED AND SIGNED THIS 9TH DAY OF JULY, 2024.

JOE M. OMIDO

JUDGE

Appellant: Present.

For Appellant: Mr. Mwenda Kinyua.

For Respondent: Ms. Jennifer Ndeda.

Court Assistant: Ms. Njuguna.