**Gitari v Republic (Criminal Appeal E049 of 2023)**
**[2024] KEHC 17199 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 17199 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MAKUENI**

**CRIMINAL APPEAL E049 OF 2023**

**TM MATHEKA, J**

**OCTOBER 23, 2024**

**BETWEEN**

**PETER GITARI ..... APPELLANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. The appellant 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 offence were that on the 9th day of April 2022 between diverse hours of 8pm and 10am of 10th April 2022 in [Particulars Withheld], Riteta Location in Mbooni East Sub-County within Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of A.M, a child aged 12 years.

2. In the alternative, the appellant was charged with the offence of Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the same days, time and at the same place, the appellant intentionally and unlawfully did an indecent act to A.M, a child aged 12 years, by touching her breasts and vagina.

3. The appellant pleaded not guilty and after a full trial, the learned trial magistrate convicted him on the main charge and sentenced him to 10 years imprisonment.

4. Aggrieved by that decision, the appellant filed this appeal on the following grounds;

    a. That the trial court convicted and sentenced the applicant of the offence charged notwithstanding that he was not supplied with witness statements and any other documentary evidence from the prosecution despite applying for the same pursuant to Article 50(2)(j) of the *Constitution of Kenya, 2010*.

b. That the trial court convicted and sentenced him notwithstanding that the prosecution failed to prove the primary ingredients of the offence charged.

c. That the trial court convicted and sentenced the applicant notwithstanding that there existed material contradictions and inconsistencies in the prosecution evidence.

d. That the trial court convicted and sentenced the applicant notwithstanding that he was not subjected to medical examination to prove he committed the act.

e. That the learned trial magistrate erred in law and facts by failing to note that his plea was unequivocal.

f. That the learned trial magistrate erred in law and facts by convicting him while failing to observe and find that he was unrepresented.

5. The prosecution's case was that; on the night of 09/04/2023, the complainant went missing and was found in the appellant's house the next day by her parents and a member of nyumba kumi. The appellant was employed by the complainant's uncle as a worker and he resided in his employer's compound. The complainant was taken for medical examination and found to have been defiled. Consequently, the appellant was prosecuted, convicted and sentenced.

6. The prosecution called 6 witnesses to wit; The complainant (PW1) the village elder (PW2), the complainant's mother (PW3), the Clinical Officer (PW4), the Assistant Chief (PW5) and the investigating officer (PW6).

7. The exhibits produced were; immunization card (P. Ex 1), P3 form (P. Ex 2), PRC form (P. Ex 3), treatment notes (P. Ex 4), Lab request & Report form, a-f (P. Ex 5).

8. The appellant elected to give sworn evidence and not to call any witness. He stated that he was a farmer and a resident of Mwea. That the incident occurred while he was at home and his employer had told him that he (employer) had issues with his relatives. That the family accused him of being a thief and abused him but his employer told him to persevere. That the complainant went to his house in the morning and he cooked tea for her. The complainant's mother arrived and the complainant tried to hide. That the area chief was called and he directed that the appellant be taken to the police station. That there was no evidence that he was with the girl and no person found him with the girl. That he was charged because of a grudge between the employer and employer's relatives. That he had attended court faithfully from Mwea and would have escaped if he had committed a crime. That his employer did not pay him as he said that he had paid bond. He later discharged himself and took the bond.

9. The appeal was canvassed through written submissions. Though the appellant told the court that his submissions were already filed, I did not find the appellant's submissions in the court file or the e-filing system.

10. The State, through Prosecution Counsel, Lucas Tanui, making reference to *Okeno v R* (1973) EA 322 reminded this court of its duty as a first appellate court to review the evidence afresh and arrive at its independent finding.

11. He submitted that penetration was proved by the complainant's evidence which was corroborated by the clinical officer. That upon examination of the complainant, it was found that her genitalia was swollen and hymen was missing hence indicative of recent penetration.

12. He submitted that the complainant testified that she was born on 26/6/2009 hence 13 years at the time of the offence. That an immunization card was also produced to prove the age.

13. He submitted that the appellant was properly identified as the perpetrator as he was well known to the complainant. That he worked at the farm of the complainant's uncle for more than one year hence the mode of identification was recognition. That he was found with the victim in his house by PW2 and PW3.

14. Referring to section 8(3) of the *sexual offences act*, he submitted that the sentence of 10 years is illegal and should be enhanced to 20 years.

**Duty of Court**

15. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

16. I have considered the grounds of appeal, the respondent's submissions and the entire record. The appellant raises issues of unfair trial for not being supplied with the prosecutions' s evidence, the court not taking cognizant of his lack of legal representation. The following issues present themselves for determination;

    a. Whether the appellant's trial was fair.

    b. whether the offence of defilement was proved to the required standard. Whether the appellant's trial was fair

17. The appellant complained that he was not furnished with witness statements and other documentary evidence by the prosecution. Article 50(2) (j) of the *Constitution* provides that an accused person has the right to be informed, in advance, of the evidence the prosecution intends to rely on and to have reasonable access to it. Our courts have held that the right includes the right to receive a copy of the charge sheet and witness statements. In the case of *Republic v Francis Muniu Kariuki* [2017] eKLR) the court stated that:

> "Our case law has now established without a doubt that it is the Prosecution's duty to provide the witness statements to an Accused Person and the Trial Court's duty to ensure compliance with the constitutional requirement. Article 50(2) (c) and (j) are quite clear and the Courts have said as much: the right to adequate time and facilities for the preparation of one's defence includes the right to receive beforehand the evidence that the Prosecution intends to adduce against the Accused. At a minimum, this right includes the right to receive a copy of the charge sheet, witness' statements and copies of any documents which will be relied on at the trial."

18. In our case, the record of 14/06/2022 shows that the appellant requested for witness statements and the court ordered the prosecution to supply them. The matter was mentioned again on 28/06/2022 but the issue of statements did not come up. The prosecution case started on 5/7/2022 and concluded on 30/05/2023 and the issue of witness statements did not feature anywhere.

19. The record does not show whether the order to furnish witness statements was ever complied with. On most occasions when the matter came up for hearing, the appellant indicated that he was ready. In *Hussein Khalid & 16 Others v Attorney General & 2 Others* [2019] eKLR, the Supreme Court of Kenya stated that;

> "... Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents

before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial."

20. The appellant also complained that the trial court convicted him without observing that he was unrepresented. Indeed, the record shows that he was unrepresented and the question which begs is whether the trial court had a duty towards the appellant on the issue of legal representation. Article 50(2) of the *Constitution* provides that; 'Every accused person has the right to a fair trial, which includes the right-

g. to choose, and be represented by an advocate, and to be informed of this right promptly.

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."

21. The two constitutional provisions were extensively discussed in Migori High Court Criminal Appeal No. 44 of 2019; *N.M.T. alias Aunty v R* as follows;

17. The right under Article 50(2)(g) of the *Constitution* must be distinguished from the right under Article 50(2)(h) of the *Constitution* given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the *Constitution* on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the *Constitution* on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the *Constitution* deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the *Constitution* is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the *Constitution*.

22. Having settled the need to inform an accused person of the right to legal representation under Article 50(2)(g) of the *Constitution*, the next limb of consideration must be who is under such a duty to inform the accused person of the right. The answer seems to be in one of our legislations. The *Legal Aid Act* No. 6 of 2016 (hereinafter referred to as 'the Act') is an Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the *Constitution*. Section 43(1)(a) of the Act which provides one of the duties of the court as follows: -

43.

(1) A court before which an unrepresented accused person is presented shall-

(a ) promptly inform the accused of his or her right to legal representation;

24... If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction.

26. From the foregone I believe I have said enough regarding the duty of a court to inform an accused person of the right under Article 50(2)(g) of the *Constitution*.

27. That now leads to the other question as to what point in time should the right be explained to the accused person.

29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of the *Constitution* among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.

37. I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of the *Constitution* then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of the *Constitution* will be tantamount to amending the Constitution through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce the *Constitution* as it is the intentions of the People of Kenya as expressed in the Constitution will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law.

22. I fully associate myself with the above holding and since the record herein does not indicate whether the appellant was informed of this right, his trial cannot be said to have been fair.

23. The record shows that on the 14th June 2022 the appellant made the application to be supplied with the witness statements and the trial court made an order directing the prosecution to supply the appellant with witness statements. There is nothing in the same record to show that the court did indeed confirm the same had been supplied.

24. Further, the record shows that the matter came up for hearing for the first time on 05/07/2022 and the appellant indicated that he was not ready to proceed as he was unwell. That notwithstanding, the matter proceeded and the record does not show how the appellant's concern was addressed.

25. It appears inhumane for a court to insist of proceeding when one of the parties is unwell and especially considering that no adjournment had been sought previously. Further, the appellant was unrepresented and it would be imperative for him to be in good shape mentally and physically during the hearing of his case.

26. While the decision to grant of refuse and application for adjournment is discretionary, this court has been put in a position to determine whether discretion was exercised judiciously, and that requires a scrutiny of the reasons as captured in the record. In this case, the record is silent hence, and there is nothing to stop the conclusion that the appellant was treated unfairly.

27. In *Peter M. Kariuki v Attorney General* [2014] eKLR, the Court of Appeal stated as follows:

> " "What constitutes adequate time and facilities or proper opportunity for preparation of a defence will certainly depend on the circumstances of each case, so that what may suffice as adequate time for an accused person who is out on bail or bond may not amount to

much for an accused person who has been in solitary confinement, without access to an advocate or visitors for a long period before trial. In *Savannah Development Company Ltd v Merchantile Company Ltd*, CA NO. 120 of 1992, this Court stated that there may be reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an adjournment, the Court always has unfettered discretion to grant the adjournment. The Court further stated that elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application for adjournment; how far, if at all, the other party is likely to be prejudiced by the adjournment; and whether the other party can be suitably compensated by award of costs."

28. In the circumstances it is my view that the appellant was not granted fair trial.

29. What then?

30. When I look at the evidence on record the state established the age of the complainant, there is evidence of penetration and the appellant was known to the complainant. The ingredients of the offence are there.

31. Having drawn the conclusion that the appellant's trial was unfair what next?

32. I take guidance from *Samuel Wahini Ngugi v R* (2012) eKLR the Court of Appeal stated as follows:

> The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Ahmed Sumar v R* (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases 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"

34. I have found from the record that the trial court was in error. The court failed to comply with Article 50 of the *Constitution*, and the *Legal Aid Act*. The appellant ought to have been informed of his right to legal representation.

35. From the evidence available a conviction is likely to be the outcome should a retrial be ordered. Further, there will be no likelihood of delay as judgment was delivered on 01/08/2023 hence the likelihood of tracing all the witnesses is high. The appellant will also not suffer prejudice.

36. In the end, the conviction is quashed and sentence set aside and the appellant be subjected to a new trial before a magistrate other than Hon M.K Mutegi PM.

37. The matter be mentioned before the magistrate in charge Tawa Law Courts within 14 days hereof for fresh plea, consideration of bond, trial and determination.

38. In the meantime the appellant be held at Machakos Remand Prison.

39. Orders accordingly

**DATED, SIGNED AND DELIVERED ON 23RD OCTOBER 2024**

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

**JUDGE**

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

**DATE: 2024-10-24 07:04:26**

Ms Nelima/Ms Elizabeth Court Assistants Ms Nyakibia for State

Appellant present