



REPUBLIC OF KENYA



**Amimo v Republic (Criminal Appeal E026 of 2021)
[2023] KEHC 1031 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E026 OF 2021
RPV WENDOH, J
FEBRUARY 9, 2023**

BETWEEN

JOHN ONYANGO AMIMO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. H. C. Mariti, Resident Magistrate in Chief Magistrate's Sexual Offence Case No. 74 of 2020 delivered on 21/12/2020)

JUDGMENT

1. John Onyango Amimo was convicted by the Resident Magistrate's Court Migori on 7/5/2021 for the offence of defilement contrary to section 8 (1) as read with Section 8(4) of the *Sexual Offences Act*.
2. The particulars of the charge are that on diverse dates between April 3, 2020 and May 4, 2020, in Suna East, intentionally caused his penis to penetrate the vagina of SAO a girl child aged sixteen (16) years.
3. In the alternative, the appellant faced a charge of committing an indecent Act contrary to section 11 (1) of the *Sexual Offences Act*.
4. Upon conviction the appellant was sentenced to serve fifteen (15) years imprisonment.
5. The appellant is aggrieved by the said judgment and preferred this appeal. The grounds of appeal are as follows:-
 1. That the trial court erred by not complying with article 50(2)(g) and (h) of *the Constitution*;
 2. That the offence of defilement was not proved;
 3. That the sentence was harsh and excessive.



6. The appeal was canvassed by way of written submissions. The appellant merely reiterated the grounds of appeal in his submissions.
7. Mr Omooria, the prosecution counsel also filed his submissions in which he admitted that indeed the court did not comply with Article 50(2)(g) and (h) of the Constitution. Without even dwelling on the other grounds, I will deal with this ground because if proved, it will determine the appeal.
8. Article 50 of the Constitution, guarantees an accused's person's right to fair hearing. It provides as follows: -

Article 50(2)

“ 50

- (2) 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 his right promptly.

9. Article 50(2)(g) requires that an accused person be informed of his right to choose counsel to represent him. The said right should be explained to an accused at the earliest possible time to enable him prepare himself by getting counsel or seek legal aid if he qualifies for one under the Legal Aid Act. The above provisions have been considered in various decisions. J. Mrima considered in the case of NMT alias Aunty vs. republic Criminal Appeal 44 of 2019. The judge observed that for one to exercise the said right, he must be informed of the right to legal representation. In Petition 5 of 2015 Republic vs. Karisa Chengo & 2 others (2017) eKLR, the court said:-

“The right to legal representation under the said Article, is a fundamental ingredient of the right to fair trial and is to be enjoyed pursuant to the Constitutional edict without more”

See also Pett vs. Greybound Racing Association (1968) 2 ALL E. R. 545 where Lord Denning said:-

“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?”

10. To determine whether the court complied with the said sub-Article, one has to look at the court record. I have perused the court record and I confirm that at no stage of the proceedings was the appellant informed of his right to choose a counsel of his choice. It therefore follows that his right to fair trial was violated. In respect to article 50(2)(h), a duty is placed on the State to assign counsel to an accused if substantial injustice will otherwise result. It has to be demonstrated that if counsel is not availed to



an accused then injustice will result for example if the case is very complex, the sentence is severe or the accused cannot be able to understand the language etc. To an extent therefore that right is limited. Though the appellant was not informed of this right under article 50(2)(h) yet the appellant has not demonstrated that injustice will result if he is not assigned counsel at the State expense.

11. However, having found that trial the court failed to comply with article 50(2)(g), the proceedings are rendered a nullity and therefore quashed. The sentence is also set aside.
12. The question is whether this court can order a retrial. The grounds upon which a retrial may be ordered were considered in the case of *Abmed Sumar vs. Republic* (1964) EALR 483. The court said:-

“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.

13. In *Lolimo Ekimat vs. R*, Criminal Appeal No. 151 of 2004 (unreported) when this Court stated as follows:

..... the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.

In the instant case, the appellant faced a very serious charge of defilement which attracts a sentence of life sentence upon conviction. The complainant was a child and it is only proper that the victims' rights are also protected so that the culprit should face the full force of the law.

14. The court has considered the testimonies of PW1, PW2, PW3 and the defence case. I am satisfied that the potentially admissible evidence is likely to result in a conviction.
15. The appellant was sentenced on 7/5/2021. So far, he has only served about 1 ½ years out of the fifteen (15) year term which is not a substantial part of the sentence.
16. The appellant will therefore not suffer prejudice if a retrial is ordered.

For all the above reasons, this court is satisfied that this is a good case for a retrial. I direct that the appellant be released to Migori Police Station to be produced before the Chief Magistrate's Court Migori for fresh plea on 14/2/2023. The case be expedited being a retrial.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 9TH DAY OF FEBRUARY, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Maatwa, for the State.

Appellant present in person.



