Barasa v Republic (Criminal Appeal 57 of 2018)
[2023] KEHC 2864 (KLR) (4 April 2023) (Judgment)

Neutral citation: [2023] KEHC 2864 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 57 OF 2018

AC MRIMA, J

APRIL 4, 2023

BETWEEN

AMOS BARASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. P. K. Mtai (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 3 of 2017 delivered on 20th July 2018)

JUDGMENT

1. The Appellant herein, Amos Barasa, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 19th December 2016 and 5th January 2017 at [Particulars Withheld] Farm within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of SC a child aged 15 years old.

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 19th December 2016 and 5th January 2017 at [Particulars Withheld] farm within Trans Nzoia County, the Appellant intentionally caused his penis to touch the vagina of SC a child aged 15 years old.

3. When the Appellant was arraigned before the trial Court, he pleaded not guilty to the offence. After full trial, the trial Court convicted him on the main charge of Defilement and sentenced him to serve 15 years in prison.

4. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal. He raised several issues including the infringement of his right to a fair trial in non-compliance with Article 50(2)(g) of *the Constitution*.

5. Directions were taken and the appeal was to be disposed of by way of written submissions. The Appellant duly complied as well as the prosecution.

6. The Appellant expounded on the grounds. In the end, the Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

7. This being the appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of *Okemo vs. R* (1977) EALR 32 and further in the Court of Appeal case of *Mark Oiruri Mose vs. R* (2013) eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

8. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences of Defilement or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial Court as well as the record before this Court and also the submissions.

9. This Court will, in the first instance, address the ground of infringement of Article 50(2)(g) of *the Constitution*.

10. The Court has previously rendered itself the Article 50(2)(g) of *the Constitution*. I am still of that position.

11. This is what I stated in Migori High Court Criminal Appeal No. 44 of 2019 *N.M.T. alias Aunty v R* (unreported): -

> 11. I will start with a consideration as to whether Article 50(2)(g) of *the Constitution* was infringed during the trial. The said provision states as follows: -
>
> 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.
>
> 12. In light of the foregone provision a consideration of the record is necessary. The Appellant was arraigned before the trial Court at Rongo on April 4, 2019 where she was accordingly charged. The charges were presented to the Appellant in Kiswahili language where she denied them and appropriate orders were made. The prosecution informed the plea court that it had supplied the Appellant with copies of the witness statements and a copy of the charge sheet. The court further fixed the matter for hearing on 12/04/2019. Come the hearing date the matter proceeded on where the complainant, PW1, PW2 and PW4 testified. PW5 testified later.
>
> 13. When the Appellant was placed on her defence, the court duly complied with Section 211(1) of the *Criminal Procedure Code*. The court also explained to the Appellant that she had the right to be represented by Counsel, to proceed alone, to give sworn evidence or unsworn evidence and to call witnesses. The

court also informed the Appellant of the right to remain silent. The Appellant elected to give sworn defence without calling any witnesses.

14. That being the record the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of *the Constitution*. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. Since *the Constitution* does not define the word 'choose' I will make reference to the Tenth Edition of the *Black's Law Dictionary* on how the said word is defined. The said Dictionary does not expressly define the word 'choose or choice' but refers one to 'Freedom of Choice' (See page 294 thereof). At page 779 the Dictionary defines 'freedom' as follows: -

    i. The quality, state or condition of being free or liberated esp. the right to do what one wants without being controlled or restricted by anyone.

15. The Dictionary further defines 'Freedom of Choice' as 'the liberty embodied in the exercise of one's right'. The Second Edition of the Law Dictionary has the following to say about the 'Freedom of Choice': -

> Unfettered right to do what one wants when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one's self or another.

16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one's choice as embodied in Article 50(2)(g) of *the Constitution* therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one's choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.

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*.

18. Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In *Pett v Greyhound Racing Association* [1968] 2 All ER 545 Lord Denning presented himself thus: -

> It is not every man who has the ability to represent 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.

19. In *South Africa in Fraser v ABSA Bank Limited* (66/05) [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -

> Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of *the Constitution* does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation....

20. In Kenya, the Supreme Court in Petition No. 5 of 2015 *Republic v 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 as follows: -

> the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

21. Apart from *the Constitution* and the foregone judicial decisions there is The *International Convention on Civil and Political Rights* (ICCPR) which Kenya is a party after adopting it on 16th December 1966. Article 14(3)(d) thereof entitles an accused person of the following rights: -

> To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

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;

23. Still on the said subject, a South African Court in *S v Daniels & Another* 1983(3) 275(A) at 299 G-H, while emphasizing that the duty to inform the accused person squarely lies on the court stated that: -

> .... the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation

24. Further, another South African Court in *Mphukwa v S* (CA&R 360/2004) [2012] ZAECGHC 6 (16 February 2012), made reference to the comments of Goldstone J. in *S v Radebe*; *S v Mbonani* 1988(1) SA 191 (TPD), a decision which was quoted with approval by the Supreme Court of Appeal of South Africa in *Ramaite v The State* (958/13) [2014] (26 September 2014). My Lordship Goldstone, J. stated as follows: -

> ...a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.
>
> 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. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice ...

25. In Kenya, Nyakundi, J. in *Joseph Kiema Philip v Republic* [2019] eKLR added his voice on the subject in the following manner: -

> .....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced.....

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.

28. Article 50(2)(g) of *the Constitution* dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in Joseph Kiema Philip (*supra*) stated as follows: -

> .... The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings... (emphasis added).

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.

30. In this case the trial court explained the right to representation to the Appellant at defence stage. That was too far late in the day.

31. Having dealt with the various limbs of the right under Article 50(2)(g) of *the Constitution* and in view of the status of the record as espoused hereinabove I must return the verdict that the trial court failed to comply with the dictates of Article 50(2)(g) of *the Constitution*. The Appellant was hence not accorded a fair trial in line with Article 50(2)(g) of *the Constitution*.

32. .....

33. .....

34. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of *the Constitution* in the circumstances of this case?

35. There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void *ab initio*. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.

36. In answering the question, I will consider the wording of the Article 50(2)(g) and (h) of *the Constitution*. From the wording of Article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under Article 50(2)(g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in *the Constitution* then it remains the unwavering duty of this Court to enforce the provisions of *the Constitution*.

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.

38. The above finding now leads me to a consideration of whether the Appellant be released or be retried. My attention is drawn to several decisions of the Court of Appeal including *Samuel Wahini Ngugi v R* [2012] eKLR where the Court 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
>
> That decision was echoed in the case of *Lolimo Ekimat v 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.

39. The error on the record was occasioned by the trial court. I have carefully considered and reviewed the evidence on record and without going into the merits thereof, a conviction is likely if the case is properly prosecuted. The offences allegedly committed are not only very serious but also beastly and the innocent, helpless and vulnerable victim will no doubt be affected for the rest of his life.

40. The Appellant was charged in April 2019. Judgment was rendered on June 17, 2019. The Appellant has by now been incarcerated for less than a year from taking plea. That period is not inordinately long. The witnesses in the case are within the complainant's family and neighborhood and as such it will not be difficult to trace them including the Clinical Officer and the Police.

41. This Court is therefore of the considered view that the ends of justice will be served by an order of retrial instead of discharging the Appellant. In view of the above unfolding events, dealing with the other grounds of appeal will not add any value. I therefore choose to end this discussion here.

42. Consequently, the appeal is allowed and the conviction quashed. The sentence is hereby set-aside and the Appellant will be released into police custody and be produced before any court competent to try him except Honourable R.K. Langat, SRM. This should be in the next 7 days of this judgment.

12. The record does not indicate any compliance with Article 50(2)(g) of *the Constitution* as well as the provision of Section 43(1)(a) of the *Legal Aid Act*. No. 6 of 2016. The trial was, therefore, a nullity.

13. The upshot is that the conviction and sentence cannot stand. The conviction is hereby quashed and the sentence set-aside accordingly.

14. The Court will now consider whether to release the Appellant or he be re-tried.

15. The offences were allegedly committed in December, 2016. The Appellant has been in prison since arrest in early 2017. That is a period of around 6 years. He was 18 years old when he was charged.

16. Given that the Appellant was aged 18 years old and the complainant was aged 15 years old, the matter ought to have been diverted with a view of, otherwise, according the young persons' appropriate guidance in life. It can only be the hope of this Court that the period of 6 years the Appellant has been in prison has served as a correctional measure. This is a matter which a retrial will not be appropriate.

17. In sum, this Court hereby allows the appeal, quashes the conviction and sets-aside the sentence on the sole ground of non-conformity with Article 50(2)(g) of *the Constitution* and Section 43(1)(a) of the *Legal Aid Act*. No. 6 of 2016.

18. Consequently, the following final orders are hereby issued: -

(a) The appeal is wholly successful. The conviction is hereby quashed and the sentence of 15 years is hereby set-aside.

(b) The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 4TH DAY OF APRIL, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Amos Barasa, the Appellant in person.

Mr. Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Regina/Chemutai – Court Assistants