



**Otieno v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 27510 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 27510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E002 OF 2022**

RPV WENDOH, J

MAY 9, 2023

BETWEEN

VICTOR ODIRA OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence by Hon. M. Obiero Senior Principal Magistrate
in Migori Chief Magistrate's Criminal Case No. E 99 OF 20221 delivered on 17/12/2021)*

JUDGMENT

1. Victor Odira Otieno, the appellant, was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8(2) of the Penal Code.
2. The particulars of the charge are that on 6/3/2020, at West Kanyamkago Location, willfully and unlawful caused his penis to penetrate the vagina of R. A. a child aged ten (10) years.
3. The prosecution called a total of five (5) witnesses, in support of their case. When called upon to defend himself, the Appellant gave unsworn evidence.
4. The appellant was convicted and sentenced to serve life imprisonment. Being aggrieved by the said judgment, the appellant filed this appeal based on the following grounds:-
 1. That the court violated Article 50 (2) (g) and (h) of *the Constitution*;
 2. That the ingredients of the offence of defilement were not established;
 3. That the trial court did not indicate what language was used in court;
 4. That the charge did not disclose an offence;
 5. That the court made its decision in absence of the appellant;



6. That there were contradictions and inconsistencies in the prosecution evidence.
7. That the mandatory nature of the sentence is unconstitutional.
5. The appellant therefore prays that the conviction be quashed, and sentence be set aside. In his submissions, the appellant urged that the trial court never indicated what language the appellants understood and the court record does not show who the interpreter was; that PW2, PW3, PW4 and PW5's testimonies were not translated to Dholuo to enable him understand. The second ground is that the appellant's rights under Article 50(2)(g) & (h) of *the Constitution* were violated and the appellant relied on the decision of Thomas Alugha Ndegwa vs. Republic CA No. 2 of 2004 and Lima & Another vs. Republic (1991) eKLR.
6. It was also submitted that the charge did not disclose an offence. It was also submitted that the prosecution's case was riddled with contradictions and inconsistencies an example being that PW2, PW3 & PW4 claimed that the offence was reported to the mother on 6/3/2020 yet PW1 and PW5 claimed that the report of the incident was made on 21/3/2020; that whereas the charge indicates that the complainant was assaulted once but the witnesses claimed that the applicant had been defiling the complainant; that there were contradictions in the medical evidence.
7. The appellant urged the court to revise the sentence in the event the charge on conviction fails.
8. The prosecution filed submissions. He submitted that the prosecution proved all the elements of the offence of defilement and that the court upheld the appellant's right to fair trial throughout the proceedings. He urged the court to dismiss the appeal.
9. Having considered the grounds of appeal, evidence on record and submissions of both sides, I think it necessary to just consider whether or not the appellants rights under Article 50(2)(g) and (h) of *the Constitution* were violated. Article 50 provides for an accused person's rights to fair trial. Having alleged breach of the said rights, it is necessary that the court looks at the court record.
10. The appellant was arraigned before Hon. Onyango, Chief Magistrate on 1/2/2021 when the charge was read to him and he denied the offence. The matter was later fixed for hearing and the evidence of the first witness was taken on 26/5/2021 and prosecution case closed on 2/8/2021. Upto that date, the court had not explained to the appellant his rights under Article 50. Article 50 (2) (g) and (h) provides 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.
 - (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.

11. Criminal Appeal 33 of 2019 Chacha Mwita vs. Republic J. Mrima dealt with a similar case and observed that for an accused person to exercise that right, he/she must have been informed of that right to legal representation by an advocate of his / her choice. Under Article 25 (c) of *the Constitution*, the



rights under Article 50 of *the Constitution* cannot be derogated. In *Mphukwa vs. S* (CA& R369 / 2014 (2012), the South African Court held that:

12. Sub Article (2) (g) requires that an accused be informed of his right to chose counsel to represent him promptly. In

“... A general duty is on the part of the 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. It is therefore the duty of a magistrate to inform the Accused of the said right and in some cases where necessary, the accused may need to apply to the Legal Aid Board for assistance to get free legal Aid”.

13. J. Nyakundi in *Joseph Kiema Philip vs. Republic* (2019) eKLR held that it is the trial court that has the duty to inform an accused of the right to choose counsel to represent him. The court also observed that the court has a duty to record that it complied with the said requirements. Recording is important in the event the court’s decision was challenged.

14. As to when an accused should be informed of the right under Sub Article 50 (2) (g), it should be done promptly meaning that it should be before plea is taken or soon thereafter so that the accused can be able to prepare for his defence. The same was confirmed in *Joseph Kiema case* (supra) where the court said:

“... 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 the first hearing.”

15. In the instant case, the court record does not show where the Appellant was informed of the said right to choose counsel hence the proceedings were conducted in violation of the right to fair hearing guaranteed under Article 50 (2) (g) which renders the proceedings a nullity. (See *Chacha Mwitwa case supra*).

16. The appellant also complained of breach of Article 50 (2) (h) which requires that an accused be informed that an advocate may be assigned to him/her by the State at State expense if ‘substantial injustice’ would otherwise result. From the wording of the said provision, the said right is not automatic. Presently, in Kenya, only persons charged with murder and child offenders are entitled to legal counsel at State expense. Any other person who needs counsel at the State expense needs to demonstrate that ‘substantial injustice’ will be suffered by them. Factors to be considered include seriousness of the offence; the severity of the sentence, the ability of the accused person to pay for his own legal representation; whether accused is a minor; the literacy of the accused; the complexity of the charge; (See *SC Petition 5 of 2015 Karisa Chengo vs. Republic* paragraph 94.

“In the above context, 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;
17. As held in the above cases, there was no evidence that substantial injustice would result if the appellant was not assigned counsel at State expenses because the appellant did not demonstrate that he was inhibited in any way.
18. However, having found that the proceedings were rendered a nullity for lack of compliance with Article 50 (2) (g), this court needs not consider the other ground of appeal. The conviction is quashed and sentence set aside.
19. The question is whether this court can order a retrial. The court in Ahmed Sumar vs. Republic case gave guidelines on what the court may consider in order to consider a retrial 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.
20. I have considered the evidence on record. PW2 B.A. told the court that the appellant defiled her on that material date and that the incident was witnessed by PW3 her sister. According to PW2, it was not the first time that the appellant had done that her. PW1 who examined PW2 found evidence of penetration. I have also taken into account the appellant’s defence and in my view, the potentially admissible evidence on record is likely to result in a conviction.
21. The appellant was sentenced to serve life imprisonment on 17/12/2021. So far he has only served about one year four months. It is not a substantial part of the sentence and the appellant will therefore not suffer injustice. The appellant was charged with a very serious offence and the victim is a child whose rights must also be protected and it is only proper that the matter be heard and determined on merit so that if the culprit can force the full force of the law.
22. I direct that the appellant be released to the OCS Uriri Police Station and be presented to Migori Chief Magistrate’s Court for afresh trial on 11/5/2023.
23. The case be expedited being a retrial.

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

R. WENDOH

JUDGE

In presence of ;-

Mr. Owuor for State



Appellant present in person
Ms. Nyauke –Court Assistant

