KO v Republic (Criminal Appeal E026 of 2021)
[2023] KEHC 18310 (KLR) (2 June 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E026 OF 2021

WM MUSYOKA, J

JUNE 2, 2023

BETWEEN

KO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment by Hon. G Ollimo, Resident Magistrate, RM, in Butere PMC Sexual Offence Case No. 33 of 2019, of 21st July 2021)

Failure by a trial court to inform a minor that faced charges that carried a lengthy sentence of their right for legal representation is a violation of the minor's right to fair trial.

The appellant was convicted of gang rape and was sentenced to 30 years' imprisonment. Aggrieved the appellant filed the instant appeal. The main issue was whether failure by a trial court to inform an accused that was a minor that faced charges that carried a lengthy sentence of their right for legal representation was a violation of the minor's right to fair trial. The High Court held that the failure to inform the accused of his right to be represented was non-compliance with the constitutional requirements regarding fair trial. As such the trial was unfair, and was rendered a nullity. There was a mistrial, and the conviction of the appellant could not possibly stand.

Reported by John Ribia

Constitutional Law *– fundamental rights and freedoms – right to fair trial – right to legal representation when facing a charge - where a minor facing a charge carrying a lengthy sentence was not informed of his right to legal representation - whether failure by a trial court to inform an accused that was a minor that faced charges that carried a lengthy sentence of their right for legal representation was a violation of the minor's right to a fair trial - whether the trial court's failure to inform a minor, facing charges carrying severe penalties, about their right to legal representation would automatically lead to a mistrial – Constitution of Kenya, articles 50(2)(g)(h) and 157(10); Legal Aid Act sections 3 and 4; Sexual Offences Act section 8(1)(2).*

Brief facts

The appellant was convicted of gang rape and was sentenced to 30 years' imprisonment. Aggrieved the appellant filed the instant appeal on grounds that there was no proof of penetration, that the evidence of sexual

assault was not corroborated, the trial court misapprehended section 8(1)(2) of the Sexual Offences Act, the sentence was excessive and that the accused were not informed of their right to be legally represented.

Issues

i. Whether failure by a trial court to inform a minor that faced charges that carried a lengthy sentence of their right for legal representation was a violation of the minor's right to fair trial.

ii. Whether the trial court's failure to inform a minor, facing charges carrying severe penalties, about their right to legal representation would automatically lead to a mistrial.

Held

1. The ground that the trial court misapprehended section 8(1)(2) of the Sexual Offences Act was not understandable. The appellant was not charged with the offence defined in section 8(1)(2) of the Sexual Offences Act, but section 10, gang rape or gang defilement. Section 8(1)(2) of the Sexual Offences Act was, therefore, wholly irrelevant to the charges, and the trial court was not required to advert to it.
2. The judgment complied with the requirements of section 169 of the Criminal Procedure Code. Section 169(2) was on what the judgment should contain, where there was conviction. It required that the offence, for which the person was being convicted, should be specified, including citing the particular provisions of the statute creating the offence or providing for the offence, and the sentence. The presiding officer did not do very well, for the judgment was not specific on the offence for which the appellant was convicted, neither were the relevant statutory provisions mentioned. The sentence was not in the judgment, for sentencing was done separately. The omission to specify the offence charged and the provisions was not fatal. The ingredients of the offence that the trial court found to have been committed was the first count, on gang rape/defilement, for the issues framed for determination were those that defined gang rape. Section 169(3) was not relevant, as it related to acquittal, and the appellant was not acquitted.
3. Where the victims of gang rape were minors, section 10 provided for a minimum of 15 years, and a maximum of life in jail. Factors considered would include the impact of the assault on the victim, how long the assault took, the number of perpetrators involved and the potential danger to which she was exposed. The assault was so severe that she lost consciousness. It lasted 3 days, and she was in captivity. It involved 4 individuals. With so many assailants involved, there was always the danger that her life was at real risk of serious assault and even death. Given the circumstances, the sentence imposed was not unreasonable.
4. In any case where the accused faced a charge where his liberty was likely to be taken away for a long time, substantial injustice could arise, if he did not have the benefit of legal representation. The appellant was charged with gang rape, contrary to section 10 of the Sexual Offences Act, where the punishment was pretty stiff, if the victims were minors, for it attracted a minimum of 15 years, and a maximum of life. That penalty pointed to substantial injustice occurring, where the accused could face a long jail term, should he be convicted, and should have attracted the benefit of article 50(2)(g)(h) of the Constitution, particularly where the accused person was indigent. The severity of the charge and the penalty should be the trigger for the trial court to inform the accused of those rights, and to especially consider whether the accused would have capacity to defend himself, in terms of being capable of conducting his own defence, or to instruct an advocate of his own choice.
5. Article 50(2)(g)(h) of the Constitution should be read together with the Legal Aid Act. The Legal Aid Act operationalized article 50(2)(g)(h) of the Constitution. Article 50(2)(g)(h) of the Constitution and the Legal Aid Act dealt with access to justice, by providing legal aid services to indigent persons in Kenya. They provided for inclusion, non-discrimination and protection of marginalized groups. Sections 3 and 4 of the Legal Aid Act were particularly to the point. Section 43 of the Legal Aid Act imposed a duty on the court, before whom an unrepresented person was presented in court, especially for plea-taking, to comply with article 50(2)(g)(h) of the Constitution, by informing that person of his right to legal representation of his own choice, and where substantial injustice was likely to arise,

to inform him of his right to be assigned an advocate by the state, and where the accused was found to require such aid, to inform the National Legal Aid Service to provide legal aid service to the accused person. According to section 43(1A) of the Legal Aid Act, in determining whether substantial injustice was likely to occur, the court should take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend himself.

6. Informing an accused person of his rights, under article 50(2)(g)(h) of the Constitution, and assessing whether the accused required legal aid from the National Legal Aid Service, were prerequisites for a fair trial, and were condition precedents before a trial was mounted. Those rights were constitutional imperatives, commanded by the Constitution, and trial courts had a duty to ensure that they were complied with, and failure to comply ought to automatically render the subsequent trial null and void, for violation of the Constitution.

7. The offences that the appellant faced at the trial court were allegedly committed in 2019. When the offences were allegedly being committed the Constitution and the Legal Aid Act were in force, and applied to the instant case, and the court before whom he was produced was bound by article 50(2)(g)(h) of the Constitution and section 43 of the Legal Aid Act. The said court was obliged to inform the appellant of his right to legal representation by an advocate of his own choice, and the right to legal aid from the State in the event that he was indigent. The court was bound to assess whether the appellant was at risk of being exposed to substantial injustice, and to suffer lack of access to justice, on account of being indigent, or belonging to a marginalized or vulnerable group, and on account of the severity of the charges that he faced and the sentence he was liable to be given in the event of conviction.

8. When plea was taken, article 50(2)(g)(h) of the Constitution and section 43 of the Legal Aid Act were not complied with. The court did not inform the appellant of his right to legal representation and to legal aid services by the State, in case he was indigent. The court did not consider whether there was a likelihood of the appellant suffering substantial injustice, along the lines of section 43(1A) of the Legal Aid Act, on account of severity of the charges and sentence, the complexity of the charge and the capacity of the appellant to defend himself. The failure to comply with the fair trial principles in article 50(2)(g)(h) of the Constitution and section 43 of the Legal Aid Act meant that the appellant was subjected to an unfair trial.

9. The omission or failure to comply with article 50(2)(g)(h) of the Constitution amounted to a contravention of that provision of the Constitution, and rendered the entire trial invalid. The failure to comply with section 43 of the Legal Aid Act meant that the objectives of that Act were not met, in terms of making justice accessible to all, creating a level playing ground for all, ensuring that the indigent in society get to access the same facilities as those available to persons who were not indigent, and that there was no discrimination and marginalization of those who could not afford legal services.

10. Whether the appellant suffered prejudice or not, from the non-compliance, was not even an issue, for the failure or omission to obey constitutional commands by itself renders the prosecution invalid. The Constitution was the supreme law, and what it commanded must override everything else. The constitutional fair trial rights were not upheld and that rendered the trial unfair. The trial did not reach the constitutional threshold for fairness, which rendered the trial unconstitutional, in view of the failure or omission to comply with the constitutional dictates. The trial did not meet the constitutional threshold, which, by dint of article 2(4) of the Constitution, reduced it to a nullity.

11. The configuration, for what should happen at arraignment, changed fundamentally upon the coming into force of the Constitution and courts presiding over a plea taking exercise should come to terms with it. It was no longer enough to just have the charges read to the accused, have him plead to them, consider whether to release him on bond, and thereafter allocate a date for hearing. All the constitutional prerequisites for a fair trial, stated in article 50 of the Constitution, must be adhered to. For some of them, there had to be compliance before the trial kicked off in earnest, and a trial court,

which decided to plough on with the trial, in disregard of article 50, wasted precious judicial time, for the entire exercise would be totally a nullity.

12. As there was non-compliance with the constitutional requirements regarding fair trial, the trial was unfair and was rendered a nullity. There was a mistrial, and the conviction of the appellant could not possibly stand.

13. Whereas the court ordered a mistrial, it did not order a re-trial, in view of article 157(10) of the Constituion which stated that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

Appeal allowed.

Orders

i. *There was a mistrial of the appellant in Butere PMCSO No. 33 of 2019.*

ii. *The Director of Public Prosecutions was to decide whether he should prosecute the appellant afresh or not. In case the Director of Public Prosecutions elected to prosecute the appellant afresh, the Butere Magistrate's court shall conduct a re-trial.*

iii. *The conviction on record was quashed, and the sentence was set aside.*

iv. *The appellant shall be handed over to the police for presentation before the magistrate's court at Butere, at the earliest possible time.*

Citations

Cases

1. *Edwin Wachira & 9 others v Republic* Petition No 97 of 2021 — Followed
2. *Maingi & 5 others v Director of Public Prosecutions & another*(Petition E017 of 2021; [2022] KEHC 13118 (KLR); Petition No E017 of 2021) — Followed

Statutes

1. Constitution of Kenya articles 2(4); 19(2); 48; 50; 50(2)(g); 50(2)(h); 157(10) — Interpreted
2. Criminal Procedure Code (cap 75) sections 168(1); 169; 169(2); 169(3) — Interpreted
3. Legal Aid Act (cap 16A) sections 3, 4, 43; 43(1A) — Interpreted
4. Sexual Offences Act (cap 63A) sections 8(1)(2); 10; 11A; 20 — Interpreted

Advocates

Mr. Anyona, instructed by Anyona & Company, Advocates for for the appellant
Ms. Kagai, instructed by the Director of Public Prosecutions for for the State

JUDGMENT

1. The appellant was convicted by Hon. Ollimo, RM, of gang rape, contrary to section 10 of the Sexual Offences Act, No 3 of 2006, and was accordingly sentenced to 30 years imprisonment. The particulars of the charges against the appellant were that on the night of August 17, 2019, in Kisa West Sub-county, within Kakamega County, he and others gang raped RAO , a child aged 15 years. He also faced an alternative charge of committing an indecent act with a child, contrary to section 11(A) of the *Sexual Offences Act*, founded on the same facts. He pleaded not guilty to the charges, a trial was conducted, where 4 witnesses testified.

2. PW1, RAO , was the complainant. She testified that on 1August 7, 2019, at 6.00 PM, as she was coming from the shops, the appellant and another grabbed her, blindfolded her, and took her to a house, where they confined her for 3 days. On the first night, the appellant and another had sex with her. They had sexual intercourse with her during the day and at night. She was released on the fourth day, when she

was escorted, blindfolded to the main gate of her home. She was thereafter taken to hospital by her mother.

3. PW2, PO, was the mother of PW1. She testified that PW1 disappeared on August 17, 2019, after a visit to the shops. She searched around for her in vain. She was away for 3 days. On the third day, at about 7.00 PM, they found her at their gate. Her clothing was soiled. They took her to a hospital at Namasoli, from where they were referred to Yala. PW1 told her of how she had been kidnapped by the appellant and other boys, she mentioned that she once received an SMS on her phone, that the sender had been sent by the appellant to kidnap PW1. She made a report to the police.

4. PW3, Moses Atete, was a clinician at Namasoli. He testified on how PW1 was brought to the facility on August 20, 2019, by PW2, unconscious. He resuscitated her, and examined her. Her clothes were wet, torn and soiled, but not bloody, and she had a fishy smell. She spoke of how she had been abducted by 4 boys. On speculum examination, her vagina was visibly open, with white discharge, which was foul-smelling, and the cervix was reddish. She was referred to Yala Hospital for high vaginal swab. He said that the fishy smell was indicative of sexual acts. He said that he diagnosed sexual assault. He explained that the fact that she was brought in unconscious meant that she was under torture.

5. PW4, No 112187 Police Constable Issa Abdi, was the arresting officer, and that he later took over as investigating officer. He stated that a report of the incident was made at the police station on August 27, 2019. A P3 form was issued, and the appellant and 3 others were arrested.

6. The appellant was placed on his defence. He gave an unsworn statement, as DW1. He stated that he was arrested on August 17, 2019, but was not informed of the reason for the arrest. He said that he was questioned about the whereabouts of PW1, and explained that he had seen her in the company of 3 persons that he named. Those individuals were arrested, but later released.

7. After taking evidence from both sides, the trial court found that the offence of defilement had been established against the appellant, convicted him and sentenced him to serve 30 years in jail. The appellant was aggrieved, hence the instant appeal. The grounds are that there was no proof of penetration; the evidence was not corroborated; the evidence was at variance with the charge; the trial court misapprehended the provisions of section 8(1)(2) of the *Sexual Offences Act*; the court failed to consider the impact of the family feud on the case; the court wrongly believed the evidence of PW1 solely; burden of proof was shifted to him; the judgment was contrary to section 169 of the *Criminal Procedure Code*, cap 75, Laws of Kenya; the trial conviction and sentence were illegal; and the sentence was excessive.

8. Directions were given on May 4, 2022, for filing of written submissions. The appeal was canvassed by way of written submissions. None of the parties filed written submissions.

9. The first ground is there was no proof of penetration. PW1 was the victim. She testified that she was penetrated, and no better evidence can be gotten anywhere other than from the victim herself. That evidence was amplified by the medical evidence from PW3. He testified that the vagina of PW1 was obviously open, evidence of recent and sustained sexual activity. It had a whitish discharge, foul smell and reddish, all signs of penetration. It had a fishy smell, which he described as associated with sexual acts. He diagnosed sexual assault. There was more than adequate proof of penetration.

10. The other ground is that the evidence of sexual assault was not corroborated. PW1 was the main source of the evidence of penetration and sexual assault. She made a report of the assault, to her mother, PW2. The medical evidence also corroborated the information from PW1. It is not true, therefore, that the evidence on the sexual assault was not corroborated.

11. The other ground is that the trial court misapprehended section 8(1)(2) of the *Sexual Offences Act*. I do not quite understand this ground, for the appellant was not charged with the offence defined in section 8(1)(2) of the *Sexual Offences Act*, but section 10, gang rape or gang defilement. Section 8(1)(2) of the *Sexual Offences Act* is, therefore, wholly irrelevant to the charges, and the trial court was not required to advert to it.

12. The other ground is with regard to section 169 of the *Criminal Procedure Code*, which is on the content of a judgment in a criminal case. Section 168(1) is about the judgment being written by the presiding officer, in the language of the court, and containing the points for determination, decision and the reasons for it, and it ought to be signed and dated in open court. I have scrutinised the impugned judgment, and I am satisfied that it complies with all those requirements. The presiding officer was G Ollimo, RM, the judgment is in English, the court identified the issues for determination or framed the issues, it has a decision, and reasons are given for the decision, and it is signed and bears a date. Was it read in open court? The trial notes for July 21, 2021 say so. Section 169(2) is on what the judgment should contain, where there is conviction. It requires that the offence, for which the person is being convicted, should be specified, including citing the particular provisions of the statute creating the offence or providing for the offence, and the sentence. The presiding officer did not do very well, for the judgment is not specific on the offence for which the appellant was convicted, neither are the relevant statutory provisions mentioned. The sentence is not in the judgment, for sentencing was done separately. Was the omission to specify the offence charged and the provisions fatal. No. It is clear from the body of the judgment that the ingredients of the offence that the trial court found to have been committed was the first count, on gang rape/defilement, for the issues framed for determination are those that define gang rape. Section 169(3) is not relevant, as it relates to acquittal, and the appellant was not acquitted.

13. The other ground is on the matter of the family feud. The appellant did not lead any evidence on the alleged family feud, other than mention it in his unsworn statement. He did not call any witnesses to expound on it, and, in any case, his statement in defence was unsworn, which meant that it carried very little weight. He has also raised issue that burden of proof was shifted to him. I have not seen anything on record, which points to the trial court shifting burden of proof to the appellant.

14. The other ground is on sentence, which he says is excessive. Where the victims of gang rape are minors, section 10 provides for a minimum of 15 years, and a maximum of life in jail. The minimum is, of course, no longer an issue, in view of *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HC Petition No E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No 97 of 2021 (Mativo, J). Factors considered would include the impact of the assault on the victim, how long the assault took, the number of perpetrators involved and the potential danger to which she was exposed. The assault was so severe that she lost consciousness. It lasted 3 days, and she was in captivity. It involved 4 individuals. With so many assailants involved, there was always the danger that her life was at real risk of serious assault and even death. Given those circumstances, I am persuaded that that sentence imposed was not unreasonable.

15. The other ground is on the trial, conviction and sentence being illegal , unconstitutional and null and void. I am not clear about what he has in mind. I have looked through the proceedings, and I note that article 50(2)(g)(h) of the *Constitution* was not complied with. Article 50(2)(g)(h) of the *Constitution* is about the constitutional right to legal representation by an Advocate of one's choice. These provisions are about being entitled to legal representation by an Advocate of one's choice, or at State expense, in case of being indigent, and being informed of those rights, in either case. Article 50(2)(g)(h) makes it a fair trial right for an accused person to be informed of his right to choose an Advocate to represent him in the proceedings; and where he cannot afford one, to have one assigned to him, if substantial injustice

would otherwise occur. The provision places a burden on the trial court, before it commences the trial, to ensure that the accused person is informed of his rights, including that to appoint an Advocate of his own choice, and where he cannot afford one, to have one assigned to him at State expense. Whether or not an accused person can afford to instruct an advocate of his own choice, is a matter to be addressed when he is first arraigned.

16. Regarding whether substantial injustice would otherwise arise, it would appear that in any case where the accused faces a charge where his liberty is likely to be taken away for a long time, substantial injustice could arise, if he does not have the benefit of legal representation. Incest committed on minors attracts a mandatory penalty of life in jail, according to section 20 of the *Sexual Offences Act*, subject, to *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HC Petition No E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No 97 of 2021 (Mativo, J).

17. The appellant was charged with gang rape, contrary to section 10 of the *Sexual Offences Act*, where the punishment is pretty stiff, if the victims are minors, for it attracts a minimum of 15 years, and a maximum of life. That penalty clearly points to substantial injustice occurring, where the accused could face a long jail term, should he be convicted, and should attract the benefit of article 50(2)(g)(h) of the *Constitution*, particularly where the accused person is indigent. The severity of the charge and the penalty should be the trigger for the trial court to inform the accused of those rights, and to especially consider whether the accused would have capacity to defend himself, in terms of being capable of conducting his own defence, or to instruct an Advocate of his own choice.

18. Article 50(2)(g)(h) of the *Constitution* should be read together with the *Legal Aid Act*, No 6 of 2016. The preamble to the *Legal Aid Act* states it to be

> " An Act of Parliament to give effect to articles 19(2), 48, 50(2)(g) and (h) of the *Constitution* to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes."

The *Legal Aid Act* operationalizes article 50(2)(g)(h) of the *Constitution*. Article 50(2)(g)(h) of the *Constitution* and the *Legal Aid Act* deal with access to justice, by providing legal aid services to indigent persons in Kenya. They provide for inclusion, non-discrimination and protection of marginalized groups. Sections 3 and 4 of the *Legal Aid Act* are particularly to the point.

19. Section 43 of the *Legal Aid Act* imposes a duty on the court, before whom an unrepresented person is presented in court, especially for plea-taking, to comply with article 50(2)(g)(h) of the *Constitution*, by informing that person of his right to legal representation of his own choice, and where substantial injustice is likely to arise, to inform him of his right to be assigned an advocate by the state, and where the accused is found to require such aid, to inform the National Legal Aid Service to provide legal aid service to the accused person. According to section 43(1A) of the *Legal Aid Act*, in determining whether substantial injustice is likely to occur, the court should take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend himself.

20. Informing an accused person of his rights, under article 50(2)(g)(h) of the *Constitution*, and assessing whether the accused requires legal aid from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. These rights are constitutional imperatives, commanded by the *Constitution*, and trial courts have a duty to ensure that they are complied with, and failure to comply ought to automatically render the subsequent trial null and void, for violation of the *Constitution*.

21. I need to consider whether these constitutional fair trial prerequisites are applicable in this case. The offences that the appellant faced at the trial court were allegedly committed in 2019. When these offences were allegedly being committed the *Constitution of Kenya, 2010*, which commenced on August 27, 2010, and the *Legal Aid Act*, which commenced on May 10, 2016, were in force, and applied to the instant case, and the court before whom he was produced was bound by article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act*. The said court was obliged to inform the appellant of his right to legal representation by an advocate of his own choice, and the right to legal aid from the State in the event that he was indigent. The court was bound to assess whether the appellant was at risk of being exposed to substantial injustice, and to suffer lack of access to justice, on account of being indigent, or belonging to a marginalized or vulnerable group, and on account of the severity of the charges that he faced and the sentence he was liable to be given in the event of conviction.

22. I have carefully scrutinized the trial court record. When plea was taken on August 30, 2019, article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act* were not complied with. The court did not inform the appellant of his right to legal representation and to legal aid services by the State, in case he was indigent. The court did not consider whether there was a likelihood of the appellant suffering substantial injustice, along the lines of section 43(1A) of the *Legal Aid Act*, on account of severity of the charges and sentence, the complexity of the charge and the capacity of the appellant to defend himself.

23. The failure to comply with the fair trial principles in article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act* meant that the appellant was subjected to an unfair trial. Article 2(4) of the *Constitution* states that

> " ... any act or omission in contravention of this Constitution is invalid."

The omission or failure to comply with article 50(2)(g)(h) of the *Constitution* amounted to a contravention of that provision of the Constitution, and rendered the entire trial invalid. The failure to comply with section 43 of the *Legal Aid Act* meant that the objectives of that *Act* were not met, in terms of making justice accessible to all, creating a level playing ground for all, ensuring that the indigent in society get to access the same facilities as those available to persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.

24. Should I overlook the non-compliance on the basis that the appellant did not suffer prejudice as a result? Whether the appellant suffered prejudice or not, from the non-compliance, is not even an issue, for the failure or omission to obey constitutional commands by itself renders the prosecution invalid. The *Constitution* is the supreme law, and what it commands must override everything else.

25. The constitutional fair trial rights, in this case, were not upheld, which rendered the trial unfair. The trial did not reach the constitutional threshold for fairness, which rendered the trial unconstitutional, in view of the failure or omission to comply with the constitutional dictates. I agree with the appellant, his trial did not meet the constitutional threshold, which, by dint of article 2(4) of the *Constitution*, reduced it to a nullity.

26. The configuration, for what should happen at arraignment, changed fundamentally upon the coming into force of the *Constitution of Kenya, 2010*, and courts presiding over a plea taking exercise should come to terms with it. It is no longer enough to just have the charges read to the accused, have him plead to them, consider whether to release him on bond, and thereafter allocate a date for hearing. All the constitutional prerequisites for a fair trial, stated in article 50 of the *Constitution*, must be adhered to. For some of them, there has to be compliance before the trial kicks off in earnest, and a trial court,

which decides to plough on with the trial, in disregard of article 50, wastes precious judicial time, for the entire exercise would be totally a nullity.

27. As there was non-compliance with the constitutional requirements regarding fair trial, in this case, the trial herein was unfair, and was rendered a nullity thereby. There was a mistrial, and the conviction of the appellant cannot possibly stand. I shall accordingly order a mistrial. However, I shall not order a re-trial, in view of article 157(10), which states that the

> "... Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

28. The final order is that I hereby find and hold that there was a mistrial of the appellant, in Butere PMCSO No 33 of 2019, for the reasons given above. I shall not order a re-trial, in view of article 157(10) of the *Constitution*, and I shall leave it to the Director of Public Prosecutions, to decide whether he should prosecute the appellant afresh or not. In case the Director of Public Prosecutions elects to prosecute the appellant afresh, the Butere Magistrate's court shall conduct a re-trial. Consequently, the conviction on record is quashed, and the sentence is set aside. The appellant shall be handed over to the police for presentation before the magistrate's court at Butere, at the earliest possible time. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances:

Mr. Anyona, instructed by Anyona & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions.