Nyambeta v Republic (Criminal Appeal E005 of 2022)
[2023] KEHC 20266 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20266 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E005 OF 2022

WA OKWANY, J

JULY 13, 2023

BETWEEN

PATRICK KENNEDY NYAMBETA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of Hon. W. C. Waswa – RM Nyamira dated and delivered on the 20th day of July 2021 in the original Nyamira CMC Sexual Offence Case No. E004 of 2021)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 10th April 2021, in Nyamira South sub-county within Nyamira County, intentionally and unlawfully caused his genital organ, penis to penetrate the vagina of SM (particulars withheld) a child aged 3 years.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars were that on 10th April 2021, in Nyamira south sub-county within Nyamira County, intentionally and unlawfully touched the genital organ, vagina of SM a child aged 3 years with his genital organ, penis.

3. The Appellant denied both charges after which the matter proceeded for hearing. The Prosecution presented the evidence of a total of 4 witnesses.

The Prosecution's Case

4. PW1 PA (particulars withheld), the victim's father, testified that the victim was three years old having been born on 27th July 2019. He produced her Birth Certificate as P. Exh1. He stated that he knew the Appellant as his neighbour and that he on the material date 10th April 2021, received a phone call

from his wife J who informed him that their daughter had returned home crying and saying that the Accused had defiled her. PW1 testified that he rushed back home and that upon examining the victim, he noticed that her vagina was wet after which he took her to hospital for treatment. He later reported the incident to the police station where he recorded a statement.

5. PW2, Mr. Rodgers Ongaga, was the Clinical Officer who examined the victim on the same day 10th April 2021 and noted that she had bruises on the right labia minora and a freshly broken hymen. He also conducted laboratory tests on the complainant and noted that she had deep pus cells, yeast cells and lucosites although no spermatozoa was present. He concluded that the victim had been defiled and that the presence of lucosites was indicative of an infection in the vagina. He produced P3 Form (P.Exh2) and the Treatment Outpatient Card (P.Exh3).

6. PW3 was No. 118045 P.C. Rukia Shaaban. She testified that PW1, his wife and daughter reported to the station that their daughter had been defiled. She testified that she interrogated the victim who informed her that she was on the material day at home playing with her friend one A when the Appellant asked her to accompany him to [particulars Withheld]. She stated that the victim informed her that the Appellant led her into a classroom that was used as a church where he defiled her. PW3 testified that she re-arrested the Appellant from Mabundu Police Post and charged him in court.

7. PW4 was SM. the victim herein. She testified that she knew the Appellant as Kennedy and that on the material day, she was playing with her friend A when the Appellant came to her and slept on her stomach and poured saliva on her causing her pain on her vagina. She testified that she told her father what had happened to her and that the incident happened at [Particulars Withheld] church before lunch time. She also testified that it was not her first time to see the Appellant as she would often see him at [Particulars Withheld] church.

8. At the close of the Prosecution's case, the trial court found that the prosecution had made out a prima facie case against the Appellant and held that he had a case to answer. The Appellant however opted to remain silent and did not tender any evidence in his defence. In a judgment rendered on 20th July 2021 the trial court convicted the Appellant on the main charge of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and sentenced him to life imprisonment.

9. Aggrieved by the said judgment of the trial court, the Appellant instituted the present Appeal through his Counsel M/S C.O. Nyamwange & Co. Advocates on 30th May 2022 where he raised 6 grounds of Appeal as follows: -

    1. That the learned trial magistrate erred in law in failing to appreciate the fact that the evidence of PW1 P A was hearsay in that he testified to have been given information about the defilement of the minor child by his wife J who did not testify before the lower court despite her having said that she was the one who observed the child and thought that she was defiled.

    2. That the learned trial magistrate erred in law and in fact in failing to appreciate the fact that the information on the P3 Form was exaggerated by the use of the technical terms such as deep puss cells, yeast cells and lucosites at the time when the accused person was acting in person which also remains at variance with the evidence of PW3 PC Rukia Shabaan who testified that the Appellant ejaculated outside the girl's genitalia hence making the issue of defilement and various kind of cells alluded to by the Clinical Officer highly suspect.

    3. That the learned trial magistrate erred in law and in fact in convicting the Appellant against the weight of the evidence adduced by the Appellant (sic).

4. That the learned trial magistrate erred in law and in fact in considering that the Appellant was a first offender hence ought to have meted out a reasonably minimal sentence.

5. That the learned trial magistrate erred in law and in fact in totally disregarding the mitigating factors of the Appellant and in particular that the Appellant had a chronic wound since the year 2011 and went out to mete an excessive sentence.

6. That the learned trial magistrate erred in law and in fact in considering that the crucial issue of failing to call the mother of the minor complainant having been a material witness (sic).

10. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions

11. The Appellant faulted the Prosecution for failing to present the evidence of crucial witnesses and for tendering questionable cooked up medical evidence. According to the Appellant, the alleged laboratory tests on the victim could not have yielded the results within a span of 2 hours from the time the incident occurred. The Appellant maintained that there were material contradictions in the evidence of the victim and that of the Investigating Officer on the issue of whether the victim had any panties on the material date.

12. It was submitted that his conviction was founded on trumped up charges and shoddy investigations. The Appellant faulted the trial court for failing to consider his mitigation before sentencing him. He urged this Court to set aside the sentence and substitute it with the option of a fine or reduce the life sentence and mete out any other sentence that may be reasonable in the circumstances.

The Prosecution/Respondent's Submissions

13. The Prosecution conceded to the appeal and submitted on 4 main issues namely; the right of an accused person to a fair trial, inconclusive medical report, failure to call crucial witnesses and partial consideration of the Probation Officer's report. It was submitted that failure, by the trial court, to inform the Appellant of his right to legal representation under Article 50 (2) (h) resulted in substantial injustice, particularly considering the gravity of the offence that he was facing and the fact that he is a class 7 drop-out and therefore incapable of understanding court proceedings going by the fact that he did not cross-examine PW1 and PW2 who were crucial witnesses.

14. The Respondent cited the provisions of Section 43 of the *Legal Aid Act* No. 6 of 2016 and the case of *Republic vs. Karisa Chengo and 2 Others* (2017) eKLR where the court held that the right to legal representation was fundamental ingredient of the right to a fair trial and more so where substantial injustice would occur.

15. It was submitted that the medical report may have been doctored because there was no possibility of detecting an infection the same day that the offence was allegedly committed unless the victim had been defiled prior to the material date. The Prosecution also submitted that the Appellant ought to have been subjected to the same test to establish whether he was the one who had defiled the victim.

16. Regarding the failure to call crucial witnesses, the Prosecution Counsel submitted that the victim's mother ought to have been called to corroborate the evidence of PW1 since she was was the first person to learn of the incident from the victim. It was further submitted that Angel, the other child who was playing with the victim, ought to have been called to shed light on the identification of the Appellant. It was submitted that the Prosecution had a duty to make available all witnesses to enable the court to establish the truth even if those witnesses were unfavourable to their case and that failure to do so

ought to have led the court to conclude that the witnesses would have presented evidence that does not favour the Prosecution's case.

17. Lastly, it was submitted that the trial court only partially considered the Probation Officer's Report by taking the victim's side of the story and not considering the parts that were favourable to the Appellant which could have led to an alternative sentence as opposed to life imprisonment. It was the Respondent's case that the Appellant did not commit the offence and was likely to have been framed up. The Respondent urged this court to allow the appeal in its entirety.

Analysis and Determination

18. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion. This duty was succinctly espoused in the case of *Ramkrishna Pandya vs. Republic* (1957) EA 336 as follows:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence."
>
> (See also *Okeno vs. Republic* [1972] EA, 32)

19. I have considered the record of appeal and the parties' respective submissions. I find that the main issue for determination is whether the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) was proved to the required legal standard. The following issues arise from the main issue: -

    i. The import of the Respondent's concession to the Appeal.

    ii. Whether the lack of legal representation amounted to a violation the Appellant's right to a fair trial.

    iii. Whether the Prosecution's failure to call material witnesses was fatal to their case.

    iv. Whether the conviction was safe.

    v. Whether the sentence was appropriate.

Legal Representation

20. The right to a fair trial is enshrined in the *Constitution* under Article 50 (2) of the *Constitution* which provides thus: -

    50. Fair hearing

        (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 this right promptly;

21. Lord Denning explained the need for legal assistance to persons facing criminal charge in *Pett vs. Greyhound Racing Association*, (1968) 2 All E.R 545, at page 549 as follows: -

> " 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?"

22. The importance of legal assistance was also explained by the *African Commission in Advocates Sans Frontiers (On Behalf of Bwampanye) vs. Burundi, African Commission on Human Rights*, Comm. No. 213/99 (2000) when it observed that: -

> " ...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case... The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to „argue their cases ...on an equal footing."

23. Similarly, in *Republic vs Karisa Chengo & 2 Others* Petition No. 5 of 2015 [2017] eKLR while addressing the various aspects of the right to a fair hearing under Article 50 of the *Constitution*, the Supreme Court 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."

24. Legal representation is critical in ensuring that an accused person is afforded a fair trial. Article 50 of the *Constitution* dictates that it is the duty of the trial court to inform the Accused person of this right and the same must be done promptly. In *Joseph Kiema Philip vs. Republic* (2019) eKLR Nyakundi J stated as follows in this regard: -

> " .....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 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..... .... 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...."

25. In *S vs. Radebe*; *S vs. Mbonani* 1988(1) SA 191 (TPD) Goldstone J. also held thus:

> " ...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 ..."

26. A perusal of the Lower Court record reveals that the Appellant was arraigned in court on 13th April 2021 when he took plea after which he was granted bond. I note that the trial thereafter proceeded without any mention, by the trial magistrate, of the Appellant's right to legal representation. It is my finding that the trial court skipped a very key plank of the right to a fair trial, an omission that this court cannot ignore. It cannot be gainsaid that the Appellant faced a serious charge of defilement that attracts a mandatory life sentence that is materially prejudicial to him. I find that it was incumbent upon the trial magistrate to inform the Appellant of his right to legal representation so as to ensure that he fully understood his right to a fair trial. It is my take that, in the circumstances of this case, the failure to inform the Appellant of his right resulted in a trial that cannot be said to have been fair. I find that the trial court did not comply with the dictates of Article 50(2) (g) of the *Constitution* and that the Appellant was hence not accorded a fair trial in line with Article 50(2) (g) of the *Constitution*.

27. The question which inevitably arises is the effect of derogation of the Appellant's right under Article 50(2)(g) of the *Constitution* in the circumstances of this case? The answer to this question was extensively and aptly discussed by Mrima J. in Migori High Court Criminal Appeal No. 44 of 2019 *N.M.T. alias Aunty vs. R* (unreported) as follows: -

> "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.
>
> 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*.
>
> 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.

> 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 vs. 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 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."

28. Taking a cue from the decision in the above cited case, I find that the error on the record was occasioned by the trial court when it failed to inform the Appellant of his right to legal representation. I have carefully considered and reviewed the evidence on record and without going into the merits thereof, I am of the view that a conviction is a likely outcome if the case is properly prosecuted. The offence allegedly committed against an innocent toddler is of a heinous kind. It is not in doubt that such an offence affects the victim for the rest of her life.

29. The Appellant was charged on 13th April 2021. Judgment was rendered on 20th July 2021 and has therefore been incarcerated for slightly over two years from the time he took plea. I find that the period of two years is not inordinately long taking into account the gravity of the offence in question. I also note that the witnesses in this case will not be difficult to trace case as they are members of the complainant's family including the Clinical Officer and the Police. Justice demands that the culprit faces appropriate sanctions. This is a proper case for a retrial and I so find.

30. I will therefore allow the appeal, quash the conviction and set-aside the sentence on the sole ground of non-compliance with Article 50(2)(g) of the *Constitution*.

31. I find that the justice of this case will require that an order for retrial be made instead of discharging the Appellant. Having regard to the findings and observations that I have made in this judgment, I find that it will not be necessary to consider the merits of the appeal or the other issues that I had isolated for determination.

32. 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, within the next 7 days, for fresh trial before any court competent to try him other than Honourable C.W. Waswa.

33. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE