



REPUBLIC OF KENYA



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**Ngala v Republic (Criminal Appeal E090 of 2022)
[2023] KEHC 19917 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E090 OF 2022
RPV WENDOH, J
JULY 11, 2023**

BETWEEN

PATRICK SIKOI NGALA APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence by Hon. P. N. Areri – Principal Magistrate in Migori Chief Magistrate’s Sexual Offences Case No. E018 OF 2020 delivered on 24/8/2022)

JUDGMENT

1. Patrick Sikoi Ngala, the appellant herein was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8(4) of the *Sexual Offences Act*.
2. In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge are that on diverse dates between the month of March, 2020 and September 19, 2022, in Suna East Sub County in Migori County, intentionally caused his penis to penetrate the vagina of EJ a girl aged sixteen (16) years or that intentionally and unlawfully touched the vagina of EJ a girl aged sixteen (16) years.
3. The prosecution called a total of four witnesses in support of their case while the appellant gave a sworn statement in his defence but did not call any other evidence. Upon conviction, the appellant was sentenced to serve twenty (20) years imprisonment. No finding was made on the alternative charge. He is aggrieved by the trial court’s judgment and preferred this appeal.
4. The grounds of appeal are as follows:-
 1. That the trial court failed to comply with Article 50 (2) (g) and (h) of the *Constitution*;
 2. That the offence of defilement was not proved to the required standard;



3. That the trial court failed to consider the appellant's defence.
The appellant therefore prays that the sentence be set aside and there be a retrial.
5. The Respondent opposed the appeal and the prosecution counsel also filed submissions. Counsel submitted that Article 50 (2) (g) and (h) were not violated because the appellant participated in the proceedings by cross examining witnesses; that the appellant opted to act in person. As regards Article 50 (2) (h) only persons charged with murder or children in conflict with the law have right to counsel at State expenses, otherwise the right under Sub Article 2 (h) is not automatic.
6. Counsel also submitted that the three ingredients required to prove an offence of defilement i.e. age of complainant, penetration and identity of the perpetrator were proved beyond reasonable doubt and therefore, the conviction was sound.
7. This is a first appeal and it behoves this court to examine, evaluate and analyse all the evidence on record and arrive at its own conclusions. The court is guided by the decision in *Okeno vs Republic* (1972) EA32. PW1 IA, a sister in law to the complainant (EJ) told the court that she has lived with the complainant (PW2) since she was twelve (12) years when the mother died; She is PW2's guardian. PW1 also identified the appellant as a neighbour. She recalled that on September 27, 2020, she observed PW2 when coming from taking a bath. She noticed PW2's dress was tight and her belly was big. PW1 questioned PW2 and she admitted to not seeing her period for long and admitted to having been intimate with Sikoi several times over the weekends when PW1 was away; that PW2 told her that the last time PW2 had been intimate with Sikoi was September 19, 2020. PW2 repeated the narration to PW1's husband. The husband summoned Sikoi who denied the allegations. Both the complainant and the said Sikoi were taken to Panyako Police Station where PW2 was taken for examination at Migori Referral Hospital. PW1 testified that the complainant is fifteen (15) years and she had a birth certificate which she had shown the police. She identified the age assessment report and the treatment notes.
8. PW2 EJ identified the appellant as the father of her child, that they are neighbours and that one day the appellant saw her going to fetch firewood and called her to go to his mothers house where they had sex. They met again the next day and they continued to have sex in the bush till PW1, her sister in law noticed her enlarged stomach and reported to her brother who interrogated her and the brother looked for the appellant and escorted both to Panyako police station. She gave birth in February 2021. In cross examination, PW2 stated that she used to take the baby to the appellant's home. PW2 admitted that she never raised alarm when she was defiled because she was willing.
9. PW3 Moindi Julius, a clinician examined the complainant on September 29, 2020 after she was treated at Osingo Dispensary. On examination, PW3 noted that PW2 had an extended abdomen which was about twenty (20) weeks. The hymen was broken but there were lacerations. A lab test for pregnancy was done which was positive.
10. PW4 CPL Linda Juma recalled that on May 26, 2021 when she took over the investigations from PC (W) Purity on May 26, 2021. She produced the age assessment report as exhibit 1.
11. At the close of the prosecution case, the Appellant was placed on his defence and he denied the allegation and claimed to have been framed; that he requested for DNA and complainant was taken away. He admitted that the complainant knew him very well as a neighbour and she has no grudge against him. He requested to call complainant's father as a witness.
12. I have considered the grounds of appeal, the evidence on record and the submissions on record. I will first deal with the issue whether Article 50 (2) (g) and (h) were violated.



13. Article 50 guarantees an accused person's right to fair trial. By dint of Article 25 (c) the said rights cannot be derogated. Articles 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.

14. I will start by considering the right under Article 50 (2) (g) of the Constitution.

15. I will start by looking at the court record to ascertain whether the right was complied with because there has to be a record of it.

16. I have not seen any record where the court informed the appellant of his right to choose counsel of his own choice. The said right should be explained to accused promptly so that he can make an informed decision whether or not to procure services of counsel and apply to the committee under Legal Aid Act to be assigned counsel. 'Promptly' has been defined to mean before plea or before the hearing commences.

17. In the case of *Mphukwa vs. S* (CA & R) 360 OF 2014 2012, the court 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.

18. 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 ...

19. In the above case, the court underscored the need to inform an accused of his rights. The court stated why it is necessary for the court to explain to an accused what his rights are. 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 at the first hearings... (emphasis added).

20. In *Joseph Kiema Philip vs. Republic* (2019) eKLR J Nyakundi reiterated the fact that the accused should be informed of his right promptly and the same has to be recorded in the proceedings. The court said as follows:-

.....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.....

21. In *Chacha Mwita vs. Republic* (2019) eKLR J. Mrima dealt with a similar issue and he concluded that failure to inform an accused of his right to counsel renders the proceedings a nullity, and therefore the judgment must be quashed and sentence set aside.
22. As for the right under Article 50 (2) (h) the said right is not automatic. In the case of *Karisa Chengo & 2 Others vs. Republic* LRA 44, 45, 76 OF 2016 the court held that for one to be availed counsel at State expense, it must have been demonstrated that 'substantial injustice' will result if the said counsel is not availed.
23. In *Sheria Mtaani Na Shadrack Wambui vs. Office of the Chief Justice and Office of the Director of Public Prosecution* (2021)eKLR it was held that it is only people charged with the offence of murder and children in conflict with the law who have an automatic right to legal / representation at State expense. As for others, one has to prove that substantial injustice will result.
24. Having found that the proceedings are a nullity, I find it unnecessary to deal with the other grounds of appeal. The question then is what should the court do, order a retrial? The case of *Abmed Sumar vs Republic* (1964) EALR 483 discussed the de... To consider before ordering a retrial when it 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.

25. In the instant case, the case was concluded on August 24, 2022 and so far the appellant is yet to serve one year out of twenty (20) years imprisonment that he was sentenced to. He has thus not served a substantial part of the sentence. The appellant was charged with a very serious charge where if convicted, he is liable to a minimum sentence of fifteen (15) years. I have considered the evidence on record and I find that the potentially admissible evidence is likely to result in a conviction. The victim who is a minor is entitled to protection of her rights and it is only proper that the case be heard on merits so that if the perpetrator is found guilty, he faces the full force of the law. I have considered the evidence on record and I am satisfied that the potential admissible evidence is likely to result in a conviction. I find that this is a case that is suitable for a retrial and the appellant will not suffer any prejudice.
26. I direct that the appellant be released to the Officer Commanding Station Migori Police Station to be presented to the Senior Principal Magistrate's Court Migori on July 14, 2023 for a fresh trial. Since this is a retrial, the hearing should be given priority.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of July, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino Prosecution Counsel



Appellant Present

Ms. Emma/ Phelix –Court Assistant

