Ogombe v Republic (Criminal Appeal E042 of 2021)
[2023] KEHC 21011 (KLR) (1 August 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E042 OF 2021

WM MUSYOKA, J

AUGUST 1, 2023

BETWEEN

JOHN OYANGE OGOMBE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. F Makoyo, Principal Magistrate, PM, in Butere PMCSO No. 36 of 2019, of 25th October 2021)

JUDGMENT

1. The appellant, John Oyange Ogombe, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(3) of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 31st August 2019, in Khwisero Sub-County, within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of FO, a child aged 16 years. The appellant denied the charges, and a trial ensued, where 6 witnesses testified.

2. PW1, FO, was the complainant. She stated that on the material day, the appellant came to her home, and defiled her. She informed her parents, and she was taken to a medical facility for check-up. She said she was born on November 11, 2003. She knew the appellant, as he was a neighbour. She said that she was a virgin, before the defilement, and she bled from her vagina. PW2, NA, was a sister of PW1, and was at home of the material day, when the appellant came calling, and she was sent with other children, to pick vegetables. The appellant and PW1 closed the door behind them. She peeped through an opening on the door, and saw them having sex. She told their mother about the incident. She described the sexual contact as consensual. PW3, Theophilus Mumbo, was a nephew of PW1. He saw the appellant come to their home, then they watched a movie, and had sex. He and other younger children watched them. She peeped through a crack on the wall. He, PW3, entered the house, and

asked the 2 what they were doing, whereupon the appellant pulled up his trousers, and left. PW4, RE, was the mother of PW1. It was reported to him the previous day, that the appellant had visited, showed PW1 pornographic pictures, and then had sex with her. She reported the matter to the authorities, and took PW1 to hospital. She said that PW1 was 16 years old, at the time, having been born on November 11, 2003. PW5, No 711127 Police Constable Mercy Mathusi, investigated the matter. PW6, Ordelia Muduka, was the clinician who attended to PW1. She was 16 years old. She had a smelly pair of panties, whitish discharge, no hymen and her vagina had pain. A high vaginal swab revealed epithelial and pus cells. She said PW1 said that the defilement was her first sexual encounter. Her tests did not reveal an abortion. She concluded that there was defilement.

3. The appellant was put on his defence, vide a ruling that was delivered on June 9, 2021. He opted to give an unsworn statement, and to call 4 witnesses

4. In his unsworn statement, as DW1, the appellant denied the charges. He stated that the charges were driven by family animosity. DW2, Peter Darwin, was a son of the appellant. He testified that PW1 was promiscuous. DW3, Martin Bukhoya, was the wife of the appellant. She said that she would not whether the allegations were true. She stated that there was a family feud. DW4, Janet Adhiambo Omondi, was a colleague of the appellant at work. She testified that the appellant was on duty at the material time. She said that she did not know why the appellant had a personal duty register, as what she knew was at the duty register was maintained at their place of work. She said that on the material day she was at home, since it was holiday time. DW5, Philip Abonji, was a church elder, at the church which the appellant attended. He testified that the appellant was at work on that day.

5. In its judgment, the trial court found the appellant guilty.

6. The appellant was aggrieved, and brought the instant appeal, revolving around Article 50(2)(c)(g)(h)(j) of the *Constitution* not being complied with; the evidence being contradictory; key witnesses and evidence were not called and adduced; age, penetration and identification were not proved; he was not subjected to medical examination, under section 36 of the *Sexual Offences Act*; and the verdict was against the weight of the evidence. Additional grounds were filed on February 22, 2022, and they turn around the evidence being insufficient; the court not properly analyzing the evidence; wrong principles being applied at conviction; and the medical evidence was shambolic.

7. The appeal was canvassed by way of written submissions. Both sides filed written submissions, which I have read through, and taken note of the arguments made.

8. Let me start with the fair trial principles set out in Article 50(2) of the *the Constitution*. They are fair trial prerequisites that any trial court should observe. They are constitutional commands, and omission to comply with them, would render any trial deficient, unfair and unconstitutional. The appellant has issue with 50(2)(c)(g)(h)(j).

9. Article 50(2)(c) is about being granted adequate time and facilities to prepare the defence. Plea was taken on September 6, 2019, and the trial began in earnest on August 26, 2020, when PW1 took to the witness stand. On September 6, 2019, the prosecution supplied the appellant with copies of the charge sheet, the investigation diary, the P3 Form, treatment notes and 4 witness statements. 4 civilian witnesses testified, the other 2 were public officers, the clinician and the investigating officer, who do not usually record statements. From the above, it would be plain that the appellant had adequate time to prepare his defence, and having been provided with the prosecution evidence in good time, he had been afforded sufficient facilities to prepare for the hearing..

10. Article 50(2)(g) is about the right to choose and to be represented by an Advocate, and to be informed of the right promptly. Ideally, the proper time to be informed of the right to choose an Advocate of

one's choice, to conduct the defence, should be before plea is taken, for his advice would be critical, on how the accused person is to plead. The *Constitution* places a duty on the trial court to inform the accused person of this right to legal representation of his choice at the trial, and to do so promptly. Failure to comply with this prerequisite, would render the trial unfair. It is a constitutional command, and the trial court is bound to comply. The record before me indicates that the right of the appellant, to be represented in the proceedings, by an Advocate of his own choice, was not raised at any stage of the proceedings. It did not come up at arraignment on September 6, 2019, and it did not arise thereafter. The trial court did not comply with Article 50(2)(g) of the *Constitution*, and his trial was unfair to that extent.

11. Article 50(h) is about the right to have an Advocate assigned to the accused person, by the State and at State expense, if substantial injustice would otherwise result. This right, like that under Article 50(2)(g), should be communicated promptly to the accused. With regard to when the right ought to be communicated, ideally, it ought to be at the time of arraignment, and particularly before plea is taken, so that the accused can benefit from legal advice on how to plead to the charge. In this case, the trial court did not inform the appellant of this right at arraignment, neither was it adverted to thereafter. The duty is imposed by the *Constitution*, on trial courts, and the omission to inform the appellant of this right rendered the trial unfair.

12. Would substantial injustice have occurred in this case, to require an Advocate being allocated to the appellant by the State and at State expense? At the time the appellant herein was being arraigned in court, the principles, stated in *Francis Karioko Muruatetu & another vs. Republic^* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), had not been pronounced. The statutory minimum sentences under the *Sexual Offences Act* had not been declared unconstitutional. That then meant that the appellant herein was exposed to being sentenced, upon conviction, to a minimum of 15 years in jail, as indeed happened. That is a very lengthy time to spend in prison. Exposure to such sentence would require that an accused person be subjected to a trial where there is a vigorous scrutiny of the evidence being adduced, and strict observance of the rules of procedure. The appellant here was working as support staff at a rural third-tier secondary school. He, no doubt, needed support from an Advocate, to ensure that he got a fair trial, given the exposure.

13. Article 50(2)(g)(h) of the *Constitution* should be read together with the provisions of the *Legal Aid Act*, No 6 of 2016. The object of the *Legal Aid Act* is stated in the preamble, 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."

So, the *Legal Aid Act* is meant to operationalize Article 50(2)(g)(h) of the *Constitution*. Article 50(2)(g)(h) of the *Constitution* and the *Legal Aid Act* are about access to justice, by providing legal aid services to indigent persons in Kenya. It is about inclusion, non-discrimination and protection of marginalized groups. See sections 3 and 4 of the *Legal Aid Act*. Section 43 of the *Legal Aid Act* imposes duties on the court, before whom an unrepresented person is presented, 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 requires legal aid, or is found to require such aid, 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*, that in determining whether substantial injustice is likely to occur, the court ought to take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend themselves.

14. Informing an accused person of their rights, under Article 50(2)(g)(h) of the *Constitution*, and assessing whether the accused require legal aid services from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. It should be noted that the rights under the *Legal Aid Act* should even be invoked right after the arrest of the suspects, and before their presentation in court, because the *Legal Aid Act* also operationalizes Article 49 of the *Constitution*, on the rights of an arrested person, as section 42 of the Act provides for a person in lawful custody, and casts a duty on the officer in charge of the custodial facility where the person is held, to inform the person of availability of legal aid, and to facilitate applications by a person who may wish to access such legal aid. These rights are constitutional imperatives, commanded by the *Constitution*. 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*.

15. Were these constitutional fair trial prerequisites applicable in this case? The offence, the subject of these proceedings, was allegedly committed in 2019. The *Constitution* of Kenya, 2010, commenced on August 27, 2010; while the *Legal Aid Act* commenced on May 10, 2016. It would mean that, as at 2019, when the appellant was being arraigned in court, both the *Constitution* and the *Legal Aid Act* were in application, 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 comply with Article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act*, to inform the appellants of his right to legal representation of his own choice, and the right to legal aid from the State, in the event that he was indigent. The duty on the court was 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 charge that he faced, and the sentence he was liable to be given, in the event of conviction.

16. Article 50(2)(j) is about disclosure of prosecution evidence ahead of the trial. It requires the prosecution to share the evidence, it intends to present in court, with the defence in advance, to facilitate the defence prepare for the case, to avoid ambush. At arraignment, on 6th September 2019, the prosecution indicated that it had supplied the appellant with copies of the charge sheet, P3 Form, 4 witness statements, investigation diary, and treatment notes. I am persuaded that the prosecution did not contravene Article 50(2)(j) of the *Constitution*, for there was compliance.

17. As the fair trial principles in Article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act* were not complied with, the appellants were subjected to an unfair trial. Article 2(4) of the *Constitution* provides for what happens whenever an act violates *the Constitution*. It 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, and 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 persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.

18. The discussion above clearly demonstrates that some of the constitutional fair trial rights were not honoured and upheld, which rendered the trial unfair. That would mean that the trial did not reach the constitutional threshold for fairness. The omission to comply with the *Constitution* sounds a death knell for any trial, given that the *Constitution* is the supreme law in Kenya. Whatever it commands must be honoured and complied with. Article 2(4) of the *Constitution* renders invalid any act or omission which amounts to a violation or disobedience of provisions of the *Constitution*. The violations that I have discussed above, rendered invalid and a nullity the criminal proceedings, that were conducted

against the appellant in Butere PMCSO No. 36 of 2019. That would mean the outcome of those proceedings was invalid and a nullity.

19. The promulgation of the *Constitution* of Kenya, 2010, completely changed the configuration for plea taking. The paradigm shifted, which is something that courts, presiding over a plea taking exercise, should come to terms with. Previously, it was 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. Article 50 has added a host of other things that the court taking plea must do or observe. These are constitutional commands, and failure to comply with them would render the trial unconstitutional or non-compliant with the *Constitution*. Bond is now available for all offences, to be denied only for compelling reasons. Advance disclosure of the case by the prosecution is now a constitutional requirement. The *Constitution* has done away with certain aspects of the presumption that everyone knows the law, and imposes a duty, on the court, presiding over plea-taking, to inform the accused of their legal rights, with respect to the right to be represented by an Advocate of their own choice, and, where the accused is indigent, to inform them of their right to an Advocate paid for by the State, where their case meets certain conditions. The plea taking exercise is now more loaded than before. The court has to go the extra mile, particularly in the more complex and serious offences, and assess whether the accused person, before it, is indigent or not, whether he or she has capacity to defend himself or not, or whether he needs an Advocate paid for by the State or not, and, if he does, set in motion the process for him getting such an Advocate.

20. The appellant has raised other issues, as set out in paragraph 6, hereabove, but it would be academic to discuss the same, in view of the failure or omissions to comply with the constitutional dictates. More importantly, discussion of those other grounds could prejudice what the prosecution may choose to do with the matter after pronouncement of this judgment.

21. So, what should I do in the circumstances? The usual practice is to declare a mistrial, and order a retrial. There are considerations that the court has to have for ordering a retrial. The offences committed herein were grave. I shall, accordingly, declare that there was a mistrial of the appellant, in Butere PMCSO No 36 of 2019, for the reasons given above, and order a re-trial. Consequently, the conviction of the appellant is hereby quashed, and the sentence set aside. I direct that the appellant shall be handed over to the police, by the prisons' authorities, for presentation before the magistrate's court at Butere, at the earliest possible time. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1ST DAY OF AUGUST 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

John Oyange Ogombe, the appellant, in person.

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