



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU

HCCRA NO. 11 OF 2019

**ROLLINCE OTIENO NYAORO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

[Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at Maseno (Hon. C.O.Oruo SRM) dated the 7<sup>th</sup> March 2019 in Maseno SRMCCRC SEXUAL OFFENCE No. 2 of 2018]

**JUDGMENT**

The Appellant, **ROLLINCE OTIENO NYAORO** was convicted for the offence of **Defilement** contrary to **Section 8 (1) (i)** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.

1. In his appeal to the High Court he has raised the following 3 issues;

**“1. THAT the trial magistrate failed to observe that there was no medical evidence, including a DNA linking me with the alleged offence.**

**2. THAT the trial court failed to appreciate that the prosecution case was full of contradictions and inconsistencies.**

**3. THAT the trial court failed to give my defence statement due consideration, despite the fact that the same was strong enough to displace the prosecution evidence.”**

2. When canvassing the appeal, the Appellant made submissions covering the following four (4) issues;

**a. Defective Charge-sheet;**

**b. Inconsistent Evidence;**

**c. Medical Evidence; and**

**d. Unsound Judgement and Sentence.**

3. On the issue concerning the alleged *“Unsound Judgement and Sentence”*, the Appellant submitted that he had not been accorded a fair trial by the trial court.

4.. It was his case that the trial court failed to give him sufficient time and opportunity;

**“..... to enable the appellant prepare for his defence. Sample the following violation of rights of the accused person.**

**‘I will not be ready to proceed. I was not given the proceedings as ordered by the court’”**

5. The foregoing is an excerpt from the proceedings on 30<sup>th</sup> January 2019.

6. Following the said statement by the Appellant, the learned trial magistrate directed that the accused be furnished with copies of the proceedings.
7. The court also directed that the Defence would put forward its case on 14<sup>th</sup> February 2019.
8. However, the accused was not presented to court on 14<sup>th</sup> February 2019. Consequently, the trial court adjourned the Defence case to 20<sup>th</sup> February 2019.
9. When the matter was next in court, (on 20<sup>th</sup> February 2019), the prosecution informed the court that it was ready to proceed.
10. The record of the proceedings shows that on that particular day, the accused was present in court. However, there is no record of what the accused said.
11. The record of proceedings reads as follows;

**“Court;**

**I note that the Accused person is being stubborn and interfering with the court. He was given several occasions to prepare for his defence, in which he asked for proceedings and the prosecution furnished him. I will therefore proceed for defence in the absence of the accused person and *proceed to close the defence. Judgement on 7/03/2019.*”**

12. A perusal of the record of the proceedings failed to find anything to show when the prosecution furnished the accused with the proceedings.
13. The Respondent has submitted that the trial court was right to close the defence case as the Appellant was not keen in defending himself. As far as the Respondent was concerned, the Appellant;

**“..... decided to buy time thereby wasting a lot of judicial time. Even if he had opted to remain silent, in his defence, as noted in Article 50 (2) (i) of the Constitution, we submit that the prosecution evidence was water-tight and proved the charges against him *beyond any reasonable doubt.*”**

14. It would appear that the Respondent perceived the Appellant’s persistent request for a copy of the record of the proceedings, as constituting an unwarranted “*further delay in the dispensation of justice.*”
15. First, the record shows that the accused had made it clear to the trial court that he would not be ready to proceed with the Defence Hearing before he was provided with a copy of the proceedings.
16. In response, the trial court ordered that the accused be provided with the proceedings. I therefore find that the learned trial magistrate must have been persuaded that the request for a copy of the proceeding was reasonable in the circumstances.
17. In effect, the trial court must have deemed the provision of the proceedings to the accused as an integral part of the process of a fair trial.
18. In the case of **JOHN NJENGA KAMAU Vs REPUBLIC, CRIMINAL APPEAL NO. 203 OF 2016**, the Court of Appeal quoted the following words of the Supreme Court of India, on the centrality of fair trial;

**“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional as well as a human right. Thus, under no circumstances can a person’s right to fair trial be jeopardized.”**

(See **Natasha Singh Vs CBI (20130 5 SCC 741)**).

19. As the trial court had already ordered that the accused be provided with a copy of the proceedings, the fair trial could only have been attained through a verifiable process, which demonstrated that the order was complied with.
20. **Article 50 (2) (c)** stipulates that every accused person has the right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence.
21. Therefore, the record of the proceedings ought to have shown the date when the accused was provided with a copy of the proceedings, so that any reasonable person could discern the adequacy of the time which was available to him, to prepare his defence.
22. In **JOSEPH NDUNGU KAGIRI Vs REPUBLIC (2016) eKLR** Mativo J. held as follows;

**“In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal.”**

23. The learned Judge went on to hold thus;

**“The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious, but must ensure compliance with the basic rule of law.”**

24. For the purpose of this case, I put a premium on the need for transparency.

25. In effect, if there is something which happened in court, which then informed the decision made by the trial court, the same ought to have been captured in the record of the proceedings.

26. Instead; we have a situation in which the day’s proceedings commenced in the presence of the accused, but ended in his absence! However, there is no record of an order for the removal of the accused from the court.

27. There is also no record of what exactly transpired, which led the court to conclude that the accused was simply being stubborn, and was interfering with the court.

28. In the circumstances, any appellate court or any other person who was called upon to re-evaluate the proceedings, would be unable to identify what had transpired, and if the same could have justified the removal of the accused from the court.

29. It must always be borne in mind that Justice should not only be done, but it must also be seen to have been done.

30. If justice cannot be demonstrably visible, the appeal court would be entitled to presume that there had been an arbitrary curtailment or deprivation of the right to a fair trial.

31. I find that the decision by the trial court to bar the accused from participating in the hearing of his own defence was a violation of his fundamental right to a fair trial, in the circumstances of this case, as the reasons for that decision are not stated.

32. I also note that as far back as 1<sup>st</sup> October 2018, when the accused said he was not ready to proceed with the hearing, he complained that the court was not being fair to him.

33. The fact that the learned trial magistrate actually recorded the complaint made by the accused against the court, portrays the trial magistrate in positive light.

34. The court then made a note about the demeanour of the accused, but did not specify exactly what was happening.

35. On the basis of the demeanour, the trial court gave an order that the case would proceed in the absence of the accused.

36. Following the exclusion of the accused from the day’s proceedings, **PW3** testified. And although **PW3** gave sworn evidence, she was not cross-examined.

37. After **PW3** testified, the prosecution closed its case.

38. When the accused was put to his defence, he informed the court that he would give sworn evidence, but he would call no other witnesses.

39. I find that the decision to exclude the accused from the hearing of his own Defence, when he had earlier intimated a desire to give sworn evidence was, in all probability, prejudicial to him.

40. I therefore declare the trial of the Appellant, a mistrial. The whole trial is vitiated.

41. In my considered opinion, the interests of justice demand that a retrial be conducted.

42. The incident giving rise to the case was fairly recent, as it took place on 7<sup>th</sup> January 2018.

43. The mistakes which occurred at the trial were made solely by the court, and the prosecution had no hand in them.

44. The offence with which the Appellant was charged is of a very serious nature. I say so because Defilement is, by its very nature a serious offence.

45. But in this instance, the offender was allegedly the step-father of the victim; and the said victim was still less than 2 years old.

46. Without delving into an indepth evaluation of the evidence on record, I hold the considered view that the evidence may lead to the conviction of the Appellant, if he is retried.

47. As I am ordering for the retrial of the Appellant, I must refrain from analyzing the evidence in great detail, because it is important that this court should not do or say anything which might point at either some strong evidence or some gaps in the prosecution case, because

otherwise the views in that respect might influence how the retrial was conducted.

48. In conclusion, I allow the appeal, quash the conviction and set aside the sentence which was passed by the trial court.

49. However, the Appellant shall not be set free. Instead, he shall be tried afresh, by a court of competent jurisdiction, excluding Hon. C.O. Oruo.

50. I further direct that both the prosecuting Counsel and the trial court shall give priority to the retrial of the Appellant.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF APRIL 2021**

**FRED A. OCHIENG**

**JUDGE**