



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. E009 OF 2020

JOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. M. Obiero

Principal Magistrate in Chief Magistrate's Court Criminal Case No. 29 of 2019

delivered on 11/3/2020)

JUDGMENT

The appellant **JOO** was convicted by Hon. M. Obiero Principal Magistrate for the offence of defilement contrary to Section 8 (1) (4) of the Sexual Offence Act.

The particulars of the charge are that on diverse dates between 17/5/2019 and 23/5/2019 at **[Particulars Withheld]** Village in Migori County, intentionally used his male genital organ namely, penis, to penetrate the female genital organ (vagina) of FA, a child aged sixteen (16) years.

In the alternative, the appellant faced a charge of committing an indecent act with a child contrary Section 11(1) of the Sexual Offence Act. No finding was made on the alternative charge.

Upon conviction, the appellant was sentenced to serve seven years imprisonment.

Being aggrieved by the whole judgment of the lower court, the appellant preferred this appeal. Appellant raised the following grounds:-

- 1) That the trial court violated his right to find heavy as guaranteed by Article 50(2)(g) and (h);**
- 2) That the trial court erred by shifting the burden of proof to him;**
- 3) That the offence of defilement was not proved to the required standard.**

The Court gave directions that the appeal be canvassed through written submissions and each party filed their respective submissions. The appellant who appeared in person reiterated the grounds of appeal in his submission.

Mr. Kimanthi Counsel for the prosecution supported the appeal for reason that the trial court violated the appellant's rights under Article 50(2)(g) his right to choose and be represented by an advocate and to be inferred of his right promptly. Counsel was of the view that the right to choose an advocate should have been explained to the appellant at the time of plea taking which the appellant may have, if he was able, to choose an advocate to represent him; that this being a serious offence, the court had the duty to explain to the appellant so that he would choose to appoint an advocate; that the right cannot be limited and that the court as well acknowledged that fact.

This is a first appeal and this court has the duty to revisit all the evidence tendered in the trial court, analyse it and arrive at its own conclusions but bear in mind that the lower court had the opportunity to see or hear the witnesses testify in court and this has to make allowance for that. The court is guided by the decision of **Okeno vs Republic (1972) EA 32**.

Briefly in the case before the trial court the prosecution called a total of five witnesses.

PW1 F. A. who was aged sixteen (16) years testified that the appellant had been her friend for one and half (1 ½) years and that from 17/5/2019 to 23/5/2019 she did not go home but visited accused at his home, they slept in the same bed and engaged in sex for three days and went to school from his house. PW1's mother went to school on 22/6/2019 she was asked to go get her shoes which were left at the appellant's house but she did not go back to school. The appellant informed PW1 that they were required at the school with their parents. Next day when they went to school, they were taken to police station, then hospital and upon examination she was found to be three months pregnant. She said they had had sex with the appellant several times from May 2019.

PW2 EO, the complainant's mother recalled that on 22/5/2019 the complainant was sent to call her by the principal of her school. She found the appellants' father after which both the appellant and complainant were picked up by the police and upon being taken to hospital, PW1 was found to be pregnant. She confirmed that PW1 was away from home from 17/5/2019 to 23/5/2019 and she reported to the Chief.

PW3 MW, the principal of **[Particulars Withheld]** Secondary School where both the appellant and complainant were students, summoned the parents of the two on 21/5/2019 because she had received a report from complainant's mother that the complainant had been missing from home from 17/5/2019; that earlier on 5/2/2019 the complainant's grandmother had reported that the complainant was staying with the appellant and the two were warned. When she discovered that the complainant was still staying at the appellant's home, She called the OCS Migori Police Station who arrested both the culprit and appellant. At the time she knew the appellant to be twenty-three (23) old years while the complainant was sixteen years old.

PW4 Immaculate Awuor Ogutu, a Clinical Officer at Migori Hospital examined the complainant on 24/05/2019, the laboratory tests revealed that she was pregnant which was fourteen (14) weeks at the time. She also examined the appellant who was found to be normal.

PW5 PC Peter Makaba of Migori Police Station investigated the case whereby he found that the complainant and appellant were living together. He confirmed that PW1 was sixteen (16) years and found PW1 and appellant to have been in a love relationship and preferred charges against the appellant.

When called upon to defend himself, the appellant made an unsworn statement, denied being a boyfriend to PW1 or having had any sexual relationship with her. PW2, the appellant's father recalled that he was summoned by the principal of the school and informed that the appellant had been defiling the complainant but he denied being aware. He denied ever seeing the complainant at his home.

Having considered the evidence on record and submissions of the parties. One of the key issues to determine is whether the appellant's rights to a fair trial under Article 50(2)(g) and (h) were violated and if so, what should the court do.

Article 50(2)(g) and (h) provides as follows:

“50(2). Every 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.”

I have perused the court record from the time the appellant took plea on 27/5/2019 till the hearing commenced on 10/7/2019 and the prosecution closed its case on 25/9/2019. The court never informed the appellant of his right to choose an advocate of his choice to defend him nor was he informed that he had a right to be represented by an advocate. I also note that he was never informed of the right to being assigned counsel by the State at the State expenses if injustice would result, (Article 50 (2)(g) and (h).

In **Chacha Mwita =vs= Republic CRA 33 of 2019** and Migori CR Appeal 44 of 2019, Mrima J exhaustively dealt with allegations of breach of the right to fair hearing guaranteed under Article 50 (2)(g), as respects what that right entails, when the accused should be informed of the right, by who and the effect of such breach on the proceedings. The judge stated as follows :-

14. That being the record the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of the Constitution. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. Since the Constitution does not define the word ‘choose’ I will make reference to the Tenth Edition of the Black’s Law Dictionary on how the said word is defined. The said Dictionary does not expressly define the word ‘choose or choice’ but refers one to ‘Freedom of Choice’ (See page 294 thereof). At page 779 the Dictionary defines ‘freedom’ as follows: -

i. The quality, state or condition of being free or liberated esp. the right to do what one wants without being controlled or restricted by anyone.

15. The Dictionary further defines ‘Freedom of Choice’ as ‘the liberty embodied in the exercise of one’s right’. The Second Edition of the Law Dictionary has the following to say about the ‘Freedom of Choice’:-

Unfettered right to do what one wants when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one’s self or another.

16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one's choice as embodied in Article 50(2)(g) of the Constitution therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one's choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.

The right to fair hearing cannot be limited and one must be allowed the opportunity to make a choice, and to choose his own advocate.

The Judge formed the view that under Article 50 (2) (g) it is the court which has to inform an accused person of his right. The judge or magistrate being the one in charge of the court, is the person charged with that duty to inform accused of his right. At paragraph 22, 24, 28 – 29 the court said:-

22. Having settled the need to inform an accused person of the right to legal representation under Article 50(2)(g) of the Constitution, the next limb of consideration must be who is under such a duty to inform the accused person of the right. The answer seems to be in one of our legislations. The Legal Aid Act No. 6 of 2016 (hereinafter referred to as 'the Act') is an Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the Constitution. Section 43(1)(a) of the Act which provides one of the duties of the court as follows: -

43.(1) A court before which an unrepresented accused person is presented shall-

a. promptly inform the accused of his or her right to legal representation;

24. Further, another South African Court in Mphukwa v S (CA&R 360/2004) [2012] ZAECGHC 6 (16 February 2012), made reference to the comments of Goldstone J. in S v Radebe; S v Mbonani 1988(1) SA 191 (TPD), a decision which was quoted with approval by the Supreme Court of Appeal of South Africa in Ramaite –vs- The State (958/13) [2014] (26 September 2014). My Lordship Goldstone, J. 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.

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 ...

As to when the court should inform the accused person of the right, the Constitution provides that it must be prompt. In this respect, promptly must be when the accused appears before the court for plea. The court said as follows:

28. Article 50(2)(g) of the Constitution dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in Joseph Kiema Philip (supra) stated as follows: -

... 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).

29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of the Constitution among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.

The court also cited the decision of J. Nyakundi in Joseph Kiema Philip vs= Republic (2019) eKLR where the court observed that the record of the court should indicate that an accused was informed of his right to representation. That must be the position because in the event that the accused later alleges non compliance, the record would speak for itself.

In the end, I find that violation of Article 50 (2) (g) rendered the proceedings before the trial court at nullity.

Coming to alleged violation of Article 50(2)(h) of the Constitution unlike the right under Sub Article 2 (g) the said right to legal representation at the State's expenses is not absolute because there are instances where the same can be limited.

In S vs Halguju (2002) (2) SACR 211 (SCA) the South African Court confirmed the above statement when it held:-

“Although the right to choose a legal representative is a fundamental one, and one to be zealously protected by the courts it

is not an absolute right and is subject to reasonable limitations.”

In Kenya. Legal Aid as provided for under the legal Aid Act 2016. Section 40 of that Act requires a person who wishes to receive legal aid to may apply to the service in writing so long as such application is made before the final determination by the matter by a court.

Section 43 (1) of the Legal Article Act sets out the duties of the court before which an unrepresented accused person is presented. The court is required to promptly inform the person of his right to have an advocate assigned to him if substantial injustice is likely to result and to inform the National Legal Article Service to provide legal aid to the accused person. The courts have had an opportunity to pronounce themselves on the applicability of Article 50(2)(h) in the case of **Karisa Chengo & 2 others =vs= Republic No. 44, 56, 76 of 2014** where it stated:-

“ It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result” and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

In **Thomas Alugha Ndegwa =vs= Republic CRA 2 of 2014** case the Court of Appeal found that because the applicant faced a life sentence, substantial injustice would result unless he was represented and found that the applicant was eligible to making an application to the National Legal Aid Board in accordance with Section 41 of the Legal Aid Act.

In the instant case, I have perused the court record and it is clear that the trial court did not inform the applicant of his right to legal representation at the State expense. The appellant was charged with the offence of defilement which is a very serious offence and carries a maximum sentence of life imprisonment upon conviction. Substantial injustice would arise without legal representation. I find that the violation of the said right also rendered the trial a nullity.

What should this court do?, should it order a retrial. There is now a host of decisions which give guidance on when a court can order a retrial. In **Ahmed Sumar =vs= Republic 1964 EALR 483**, the court of Appeal said

“in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiently of evidence or for the purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessary 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 depends 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.”

Again In **Fatehali Manji =vs= Republic (1966)EA 343**, the court said:-

Although some factors may be considered such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial at the end of the day, such a case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”

In this case, the offence was allegedly committed in mid 2019. The appellant was sentenced on 11/3/2020 about one year three months ago. I believe being so recent, the witnesses who hailed from the same home area will not be hard to trace.

In such a case, the court considers whether on a consideration of the potentially, admissible evidence a conviction may result. PW1 admitted to have been in a romantic relationship with the appellant. PW1 had stayed with the appellant at his house for several days and engaged in sexual relations and as a result the complainant was pregnant. By now the child must have been born. The complainant was by then sixteen (16) years old while the appellant was twenty three (23) years. I am satisfied that there is sufficient evidence on record that might result in a conviction. I think that the justice of the case requires that the court do order a retrial. There is no evidence that the appellant will suffer any prejudice if a retrial is ordered.

I therefore quash the conviction, set aside the sentence. I Order that the accused be released to the police at Migori Police Station to be charged afresh and presented to the Chief Magistrate’s Court Migori for taking plea on 21/6/2021. The case be allocated to any other magistrate other than Mr. Obiero Principal Magistrate who dealt with the case.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 17TH DAY OF JUNE, 2021.

R. WENDOH

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Kimanthi State Counsel

Ms. Nyauke court assistance

Appellant in person