REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 65 OF 2019

JOHN AMUGUNE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged, in Hamisi PMCC No. 889 of 2019, with the offence of rape, contrary to Section 3(1) (a) (b), as read with section 3(3) of the Sexual Offences Act. He was also charged with the offence of committing an indecent act with an adult, contrary to Section 11 A of the said Act. Being dissatisfied with the conviction and sentence, the appellant lodged the appeal herein vide a petition of appeal, dated 12th January 2020.

2. The grounds of the appeal, as set out in the petition, are that the trial court erred in law in denying the appellant the right to legal representation, erred in failing to consider that the prosecution did not comply with the provisions of Article 50 (2) (j) of the Constitution, erred in relying on samples that had not be subjected to forensic investigation, and erred in relying of circumstantial evidence that was doubtful, and that there was no sufficient evidence to warrant the conviction.

3. Before I embark on considering the appeal on its merits, I take the opportunity to remind myself of my responsibility as a first appellate court. A first appellate court has a duty to re-analyse and re-consider the evidence tendered before the trial court, with a view to arriving at its own independent conclusions. See *Okeno vs. Republic* [1972] EA 32. (*Sir William Duffus P. Law & Lutta JJA*)In *Kiilu & Another vs. Republic* [2005]1 KLR 174, (*Tunoi, Waki & Onyango Otieno JJA)* stated that:

> *"1. 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. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.*
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> *2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."*

4. The same was reiterated in *David Njuguna Wairimu vs. Republic* [2010] eKLR,(*Bosire, Waki & Aganyanya JJA)* where stated:

> *"The evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."*

5. Let me start by first addressing the ground on the right to legal representation. The same is set out in Article 50(2) (g) (h) of the Constitution of Kenya 2010, under rights to a fair hearing. The constitutional provision states that:

> *"(2) Every accused person has the right to a fair trial, which includes the right--*
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> *(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;*
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> *(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 ..."*

6. The Constitution makes it mandatory for an accused person to be promptly informed of this right before the trial commences. The Legal Aid Act, 2016, at section 43, sets out the duties of the court when interacting with an unrepresented person, and states:

> *"A Court before which an unrepresented accused person is presented shall:*
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> *a) Promptly inform the accused of his or her right to legal representation;*
>
> *b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and*
>
> *c) Inform the service to provide legal aid to the accused person"*

7. In *Joseph Kiema Philip vs. Republic* [2019] eKLR , (*Nyakundi J*) the court stated as follows, with regard to the same:

> *"The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under Article 50 of the Constitution of Kenya 2010… it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation … In this instance the appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the trial court, the appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice."*

8. In *Jared Onguti Nyantika vs. Republic* [2019] eKLR,(*Ngenye- Macharia* J) it was stated that:

> *"It is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing*."

9. The Court of Appeal in *Selestine Mureithi Mugo vs. Republic* [2020] eKLR ,(*Ongo, Kiage & Murgor JJA*) stated:

> *"Nor is the current appeal the occasion for us to make a pronouncement on the alleged violation of the appellant's right to legal representation at state expense. It is safe to state that the Constitution does not provide for such legal representation in absolute terms: Article 50(2) (h) provides that an accused person has a right to be assigned an advocate by the State and at State expense "if substantial injustice would otherwise result," which right he should be informed of promptly. We are aware that the Supreme Court has rendered itself authoritatively on the applicable principles and the factors a court should consider in determining whether an accused person is entitled to State-funded legal representation. See Republic vs. Karisa Chengo [2017] eKLR."*

10. In the instant case, at no time did the appellant raise the issue of legal representation or address his difficulties during the trial. The appellant carried out a proper cross-examination of the witnesses. It has also not been demonstrated that that his case involved complex issues of fact or law which made him unable to effectively conduct his own defence, owing to some disability or language difficulties or the nature of the offence. It is, therefore, my finding that the appellant has not demonstrated the violation alleged, and, therefore, this ground cannot stand.

11. Regarding Article 50(2) (j), the appellant submits that he was not availed with the witness statements before trial, and thus he was not offered a fair trial. The court, in *Anthony Mutuku Mutua vs. Republic* [2020] eKLR, (*Odunga J*)with respect to the same, said:

> *"21. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront."*

12. In *Joseph Ndungu Kagiri vs. Republic* (2016) eKLR,*(Mativo J)* where the appellants were not provided with witness statements before or during the trial, the court stated:

> *"I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50 (2) (j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused person with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to violation of their constitutional rights to a fair trial."*

13. From the trial court record it is clear that at no time was the appellant furnished with witness statements before or during trial. This was a gross violation of the provisions of Article 50(2) (j) of the Constitution, and the trial was, therefore, a nullity. In this case, it is clear that the manner in which the proceedings were conducted fell short of the constitutional dictates. Being a nullity it is no longer necessary for the

court to deal with the other grounds of appeal.

14. What is the course available to the court in such circumstances? In other words, should the court order a retrial or not? The general principle regarding re-trials is that the same should only be ordered where it is unlikely to cause injustice to the accused. In *Obedi Kilonzo Kevevo vs. Republic* (2015) eKLR (Koome, GBM Kariuki & Sichale JJA) the Court of Appeal said:

> *"Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of Muiruri vs. Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:-*
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> *"Generally whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."*

15. In the *In the case of Ahmed Sumar vs. R (1964) EALR 483,* (*Sir Daniel Grawshaw, Sir Clement De Lestang & Duffus JJA*)said court 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.'"*

16. The appellant was arraigned in July, 2018, and convicted in May, 2019. It is most likely that witnesses are available. The evidence indicates that the prosecution has a strong case against the appellant. The appellant will not suffer any prejudice if he is re-tried for the offence. In the premises, I hereby declare a mistrial in Hamisi PMCC RE No. 889 of 2019. Consequently, I quash the conviction of the appellant, and set aside the sentence imposed upon him. I direct that the trial file in Hamisi PMCCRC No. 889 of 2019 to be returned to the trial court, for a retrial of the appellant on the same charge. The appeal is disposed of in those terms.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS ……..10TH ……..……. DAY OF ……DECEMBER…….……., 2021

W MUSYOKA

JUDGE