



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CRIMINAL APPEAL NO. 10 OF 2019**

**RODGERS LITEMO WIRUNDA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising from the decision by Hon. C.K. Kamau, Senior Resident Magistrate*

*in Rongo Senior Resident Magistrate's SOA Case No. 35 of 2018 delivered on 07/02/2019)*

**JUDGMENT**

1. The appeal subject of this judgement was based on one ground. It was whether the trial of the Appellant herein, **Rodgers Litemo Wirunda**, was so speedily undertaken to amount to an unfair trial.
2. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
3. To enable this Court discharge its said mandate, I will revisit the facts of the case. The Appellant was arraigned before the Senior Resident Magistrate's Court at Rongo on 21/12/2018 where he was charged with the principal charge of **Defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. He faced an alternative count of **committing an indecent act with a child**.
4. The Appellant denied the charges and he was tried. Five witnesses testified in support of the prosecution's case. All the prosecution witnesses testified on the same day. It was on 18/01/2019.
5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave an unsworn defence without calling any witness. He so testified on 24/01/2019. Thereafter the court rendered its judgment on 07/02/2019 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 20 years' imprisonment.
6. The foregone events led to the appeal.
7. Directions were taken and the appeal was disposed of by way of oral submissions. The Appellant argued that the trial was conducted in such a speedy manner that it amounted to an unfair trial. He cited the persuasive decision in **Joseph Ndungu Kagiri vs. Republic (2016) eKLR**. The Appellant prayed that the appeal be allowed, conviction quashed and sentence be set-aside. He further prayed that he be acquitted or be retried.
8. The appeal was opposed by the State. It was submitted that the Appellant was given adequate time and facilities to prepare and participate in the trial. This Court was instead urged to commend the trial court for a job well done. The State prayed that the appeal be dismissed.
9. As stated above the Appellant was charged on 21/12/2018. He was supplied with copies of witness statements, P3 Form and treatment notes. The case was initially slated for hearing on 03/01/2019 but the hearing did not take off as the trial magistrate was indisposed. The matter was adjourned to 18/01/2019 where all the five prosecution witnesses attended court and testified. The prosecution closed its case and the Appellant was placed on his defence on the same day. He however tendered his defence later.

10. It therefore took one month for the trial to begin from the time the Appellant was charged.

11. **Article 159(2)(b)** of the **Constitution** provides that the dispensation of justice shall not be delayed. Trials are therefore supposed to commence and be concluded without any unreasonable delay. **Article 50** of the **Constitution** provides for the right to a fair hearing. **Sub-Article 2(a) to (m)** provides as follows: -

**2. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

**(a) to be presumed innocent until the contrary is proved;**

**(b) to be informed of the charge, with sufficient detail to answer it;**

**(c) to have adequate time and facilities to prepare a defence;**

**(d) to a public trial before a court established under this Constitution;**

**(e) to have the trial begin and conclude without unreasonable delay;**

**(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;**

**(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) to remain silent, and not to testify during the proceedings;**

**(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**

**(k) to adduce and challenge evidence;**

**(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.**

12. While conducting a trial a Court must always endeavour to ensure that the trial remains within the confines of **Article 50** of the **Constitution**. The court must ensure that every element of the right to a fair hearing is, at all times, observed against the quest that trials must not unreasonably delay. That balance is of utmost importance.

13. Courts spend public resources and enormous time in hearing cases. It is therefore not only a constitutional calling but also in public interest that cases be expeditiously disposed. A party alleging an infringement of the right to a fair trial must hence clearly demonstrate how the right was impugned. (See **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**, **Anarita Karimi Njeri –vs- The Republic [1976-1980] KLR 1272**, **Stephen Nyarangi Onsoma & Another –vs- George Magoha & 7 Others [2014] eKLR** among others).

14. In this case the Appellant contended that the trial was too fast to be fair. To him such a trial infringed **Article 50(2)(e)** of the **Constitution**.

15. I agree that a trial should not be hastily conducted to the detriment of any of the parties. To that end I fully associate myself with the various decisions and writings referred to by the Court in the **Joseph Ndungu Kagiri** case (supra). On the flip side, a trial should also not take too long to cause an injustice to the parties.

16. For one to determine whether a trial was too fast or too slow to be unfair the totality of the facts must be carefully considered. The facts must be juxtaposed against **Article 50** of the **Constitution**. It is therefore not sufficient for a party to just allege that a trial was either too fast or too slow to be unfair. Such a party must demonstrate how the speed of the trial impugned the right to a fair trial. A party must be able to demonstrate that as a result of the speed of the trial it was not able to undertake certain crucial steps in the matter which failure compromised the right to a fair trial. For instance, a party must be able to show that a trial was too fast that the party was not given adequate time to study the prosecution's statements and exhibits so as to properly cross-examine witnesses or to put up a defence.

17. I have on my part carefully considered the issue. I note that the Appellant had a whole month to prepare for the trial. When the matter came up for hearing the Appellant expressed his readiness to proceed on. He heard witnesses testify and he cross-examined them. At the close of the prosecution's case the Appellant was found to have a case to answer. He was given time to prepare for his defence. He tendered his defence. The whole trial took around 2 months. Throughout the trial the Appellant did not raise any issue on how the case was conducted.

18. This Court is hence not persuaded that the manner in which the Appellant was tried amounted to an unfair trial. In so finding I must say that I have also observed that the testimonies of the witnesses were fairly short and the matter involved a minor. The Appellant was also in

remand.

19. I agree with the prosecution that this is a case in which I must, as I hereby do, commend the trial court (**Hon. C. K. Kamau, SRM**) for conducting the trial within the shortest time possible and having kept within the legal lanes.

20. The upshot is that I do not find any merit in the appeal. It is hereby disallowed.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 6<sup>th</sup> day of February, 2020**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Awino** Counsel for the Appellant.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant