



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 31 OF 2019

(From Original Conviction and Sentence by Hon. CN Njalale, Senior Resident Magistrate (SRM), in Butali SRMC Sexual Offences Act Case No. 38 of 2017, of 19th March 2019)

BWW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. CN Njalale, Senior Resident Magistrate, of defilement contrary to section 8(1), as read with section 8(2), of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya. The particulars of the charge against the appellant were that on divers dates between 3rd November 2017, and 13th November 2017 in Kakamega North Sub-County, within Kakamega County, he intentionally caused his penis to penetrate the anus of BB, a child aged one and half (1½) years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. There was also a second count, of failing to provide necessities of life contrary to section 239 of the Penal Code, Cap 63, Laws of Kenya.

2. He pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called four (4) witnesses.

3. DM was the first to take the witness stand, as PW1. She was the spouse of the appellant and the mother of the victim of the alleged offence. She testified that between 3rd November 2017 and 13th November 2017, she and the appellant had differences, and on 3rd November 2017, she asked him to let him have the child so that she could go back to her parents. He refused. Whereupon, she reported the matter at the Malava Police Station, and thereafter to the local Children’s Officer, who gave her custody of the child. She went back to the home or house, where she found the child very dirty but with no injuries. She reported to the local village elder, but the appellant still refused to let her have the child. She slept at a neighbour’s house that night. The next morning, she and the village elder and a member of *nyumba kumi*, went to the home to pick the child. They did not find the appellant there, and when they called him, he came to the compound with the child. At that time the child was bleeding from the anus. After that they took the child and the appellant to the Malava County Hospital. At the hospital they were referred to the Moi Teaching and Referral Hospital, Eldoret. Her uncle reported the incident at the police station, while she took the child to the referral hospital. She stated that the child was injured at the anus. She indicated that he was born on 30th June 2016. She explained that after that he chased her away, he was left with the minor, and that he lived with his sisters.

4. PW2, Selfa Sikolia, testified as PW2. She said that she was the village elder to whom PW1, reported, on 14th November 2017, her dispute with her husband, the appellant, who had taken their one-year-old child. She, PW1 and others went to the home of the appellant. They did not find the appellant, but she saw the child inside the house, through a window. She telephoned the appellant, who came and opened the house, and brought out the child. The child was not looking well, as he had swellings on the face, and generally he was not in good condition. When PW1 noted the condition of the child, she fainted. The child also had bloodstains in his buttocks. When they enquired from the appellant about the buttocks, he said that he had fallen on maize stocks, which hurt the child in the anus. Thereafter PW1 was escorted to hospital by members of the community policing team.

5. PW3, Josephine Barasa, was a member of the local community policing team to whom PW1 reported about the appellant preventing her taking away her child with her to her parents’ home. She was in the team that went to the appellant’s home on 14th November 2017. She stated that they did not find the appellant at home, but he came later and removed the child from the house. She noted that the child had a scratch in the anus. She went with PW1 to take the child to hospital, where the child was admitted. The explanation the appellant gave was that a maize stalk had damaged the child’s anus. PW4, Number 56659 Police Sergeant Consolata Lugonzo, testified on behalf of the officer who investigated the matter. She stated that the matter was reported while the child was admitted at the Moi Referral and Teaching Hospital. PW5, Pauline Manango, was the clinical officer, who attended to the child at Malava County Hospital on 14th November 2017. The child had a swollen stomach, a viable laceration on the anus, and there was tenderness on the digital metal examination. The child was subsequently admitted at Moi Referral and Teaching Hospital. The doctors at Moi Referral and Teaching Hospital confirmed sexual assault. The child was in hospital from 15th November 2017 to 23rd November 2017. She stated, during cross-examination, that the child had a laceration around the anus region, and a lot of tenderness around the anus, which she described as unusual, especially for a minor. She explained that that was

why they concluded that there was defilement. She stated that the clinical findings were that there was penetration of the child's anus. She further stated that the injury could not have been inflicted accidentally. She also explained that the injuries were internal.

6. The appellant was put on his defence. He gave a sworn statement, and called two witnesses.

7. He testified, as DW1, that he had left three children in the house, and he had not locked it. When he came back he opened the door. He stated that the child had a swollen nose as if he had an asthmatic attack. He said that there were no blood stains on the nose, nor on the anus. He said the injury at the anus was not that big. He said the child was injured at 2.00 PM, of a day whose date he could not remember. He explained that the child was cut by maize stalks while walking in the farm. He said the injury was two or so days old before the 14th November 2017. He stated that after the child suffered the injury, he and his mother took him to hospital at Namanja. DW2 was the father of the appellant, and his name was WW. He stated that on 14th November 2017, when PW1 was given the child, she said that he had a scratch in the buttocks. He looked at the child and confirmed that he had a scratch beside the buttocks. PW1 then claimed the child had been raped. He was shocked, and he decided to send them to hospital. The child was admitted for three days for an operation on the throat. DW3 was RW, the mother of the appellant. She testified that the child used to scratch himself, and had a crack on the buttock, and it looked, to her, like a stick had pricked him on the right buttock.

8. After reviewing the evidence, the trial court convicted the appellant of the two main charges, and sentenced him to serve life imprisonment for defilement and two years for failing to provide the child with the necessaries of life. Both sentences were to run concurrently.

9. Being dissatisfied with the sentence, the appellant filed the appeal herein, and raised several grounds of appeal. He avers that the trial court convicted him on the basis of a defective charge, the trial court presided over a trial that did not meet the threshold of Article 50(2)(g)(h)(j) and (k) of the Constitution, the evidence was fabricated with a view to frame him up, the court arrived at a conclusion even in the absence of unsummoned witnesses, the court convicted on the basis of discredited, doubtful inconsistent and malicious evidence which was not tight enough to justify and uphold a conviction, the finding on penetration was founded on weak belated inconclusive and unreliable medical evidence, he was not subjected to proper corresponding medical investigations as required by section 36 of the Sexual Offences Act, his defence was not considered and burden of proof was shifted to him, and the sentence was harsh and excessive.

10. The appeal was canvassed on 4th March 2020. The appellant relied on written submissions that he had placed on record, while Ms. Omondi, Prosecution Counsel, relied on the trial court record.

11. On the charge sheet being defective, it is submitted that the charge refers to section 8(1)(2) of the Sexual Offences Act, as opposed to section 20 of the Sexual Offences Act, since he was related to the victim of the alleged offence. In short he submits that he should have been charged with incest rather than with defilement. He next submits that his fair trial rights were not observed or protected by the trial court. He also submits that the case was a frame-up, and points to the testimony of PW1, that there were domestic disputes between them fueled by gossip from neighbours. He asserts that those differences were confirmed by his witnesses. He submits that the evidence was also doubtful discredited and inconsistent to the extent that the complainant did not testify, and PW1 could not testify on her behalf. He also submits that penetration was not proved, arguing that since the complainant did not testify, it was doubtful whether there was any penetration. On section 36 of the Sexual Offences Act, he submits that equal treatment would require that his samples should also have been subject to testing. He submits that his defence was dismissed, yet it was cogent and plausible. Finally, he submitted that the sentence imposed on him was harsh and excessive, and the trial court ought to have applied *Francis Karioko Muruatetu & another vs. Republic and William Okungu Kitinya vs. Republic*.

12. I am sitting as a first appellate court; I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

“An appellant 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. 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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.”

13. The appellant has raised the issue of violation of his fair trial rights. Whether the trial was fair or not is a preliminary issue for determination, for once I find that the trial was not fair, then I will have no option but to set aside the conviction and sentence, and order a retrial, without having to consider the rest of the grounds. Should I, however, find that the trial was fair, on account of the trial court having observed the fair hearing principles, I shall go on to consider the rest of the grounds on their merits.

14. Article 50(2)(g)(h)(j)(k) states as follows:

50. (1) ...

(2) Every accused person has the right to a fair trial, which includes the right—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

f) ...

(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;

(l) ...”

15. The appellant has taken issue with the failure by the trial court to inform him of his right to legal representation. Article 50(2) (g) of the Constitution requires that an accused person has a right to choose an advocate of his own choice to represent him in the matter, and it imposes a duty on the trial court to inform the accused person of that right. In *Jared Onguti Nyantika vs. Republic* [2019] eKLR, it was stated that that 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. The court linked Article 50(2) (g) with Article 25(c) of the Constitution, which states that the right to fair trial shall not be limited. Similarly, in *Daniel Mpayo Ngiyaya vs. Republic* [2018] eKLR, with regard to Article 50(2) (g), it was stated that where an accused person faced a serious charge or sentence, the court is bound to inform him of the right to legal representation, and that it would amount to miscarriage of justice to fail to do so. The importance of legal representation, in general, cannot, therefore, be gainsaid.

16. Parliament passed the Legal Aid Act, No. 6 of 2016, to give effect to among other Articles of the Constitution, Article 50(2) (g) and (h), so as to facilitate access to justice and social justice. These objectives are stated in the preamble to the Act, as well as in section 3 of the Act. Section 3 in particular states that some of the objects of the Act is to provide affordable and accessible legal aid to indigent persons in Kenya in accordance with the Constitution, and to provide legal awareness. The same theme is pursued in section 4, which sets out the guiding principles, and lists the principles of inclusiveness non-discrimination, and protection of marginalized groups. For the purpose of implementation, certain duties have been cast on the court. section 43 states as follows in that regard:

“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 representative;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her;
and

(c) inform the Service to provide legal aid to the accused person.”

17. The court has had occasion, in *Joseph Kiema Philip vs. Republic* [2019] eKLR, to examine the Legal Aid Act, with respect to its application. In that case, the court highlighted the link between the Legal Aid Act, 2016 and the constitutional requirement that trial courts inform accused person of their right to be represented by advocates of their own choice. It was pointed out that the objective of the Legal Aid Act, is to give effect to Article 50(2) (g) of the Constitution so as to facilitate access to justice and social justice. It was stated that section 48, should actually be read as section 43, of the Legal Aid Act, imposes duties on the court with respect to unrepresented persons, which include a duty to promptly inform them of their rights to legal representation, and if substantial injustice is likely to arise, then they should be informed of their right to an advocate to be assigned to him by the state, and to inform the state to provide legal aid to them. It was emphasized that trial courts, as a matter of constitutional duty, and the interest of justice, must give the information to the accused person and make a preliminary enquiry at the earliest possible time to determine whether the accused person would require legal representation. The court stated that the trial record ought to indicate that the rights under Article 50(2) (g) (h) were communicated to the accused person.

18. The Legal Aid Act commenced on 10th May 2016. Its design was to breathe life to the constitutional provisions on the right legal representation, and, in particular access to legal representation by the indigent. I would like to underline the fact that the statute talks about social justice, inclusiveness, non-discrimination and marginalized groups. It is no doubt intended to focus on the needs of the poor and their inability to access justice. The poor are invariably ill-educated and lack access to information on legal and constitutional rights, hence the need for them to be informed of these rights before the trial kicks off. It on the basis of that the court in *Joseph Kiema Philip vs. Republic* stated that trial court must place it on record that the rights under Article 50(2) (g) (h) were communicated to the accused person. Both the Constitution and the Legal Aid Act state this duty on the part on the trial court in mandatory terms. That, to my mind, would mean that a trial where these mandatory provisions are not observed should be vitiated, for the poor will not get to enjoy the rights in the Constitution unless the courts carry out their constitutional duty to inform them of those rights as commanded by the Constitution and statute.

19. In *David Njoroge Macharia vs. Republic* [2011] eKLR and *Karisa Chengo & 2 others vs. Republic* [2015] eKLR, it was emphasized that

one of the factors that make it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of defilement of a minor of 1 ½ years, which attracted a penalty of life imprisonment. The charge was a very serious one, for upon being found guilty the appellant faced life in jail, and he was indeed sentenced to that exact period. That being the case, the trial court should have informed him of his right to legal representation and directed that he be provided with an advocate at state expense. Ultimately, the cost of keeping a convict in jail for life is, no doubt, higher than that of allocating him an advocate to defend him at the trial.

20. The constitutional provisions on the right to legal representation, as stated in Article 50(2) (g) (h) of the Constitution, and the provisions of the Legal Aid Act, in general, clearly put a damper on the mantra that every citizen is expected to know the law, and that ignorance of the law is no defence. These provisions clearly are alive to notoriety of the general ignorance of the law and lack of awareness with regard to legal processes and rights amongst the general populace. It is against that reality that the law has placed a burden on the courts to enlighten accused persons of their rights in law, so that they can benefit from the law, and, socially, the rights that accrue to them under Article 50(2) (h) and the Legal Aid Act. That reality was highlighted by the Court of Appeal in *Elijah Njihia Wakianda vs. Republic* [2016] eKLR, where it was stated that the trial court should play the role of an educator of the accused person, so far as these matters are concerned.

21. From the record of the trial court, it is clear that the appellant was not represented by an advocate. The record is silent as to whether he was ever informed of his right to be represented by an advocate in the proceedings, so that he could make a decision as to whether or not to appoint one of his own choice. The duty to inform an accused person of his rights is a constitutional and statutory imperative, stated in Article 50(2) (g) of the Constitution and section 43 of the Legal Aid Act. Failure to inform the appellant of that right violated his fair trial rights and amounted to an injustice. A trial where fair hearing rights have been violated in this manner cannot possibly stand.

22. Article 50(2)(h) of the Constitution states that every accused person is entitled to be assigned to him an advocate by the state at state expense, if substantial injustice would otherwise result, and to be informed of that right promptly. The importance of this right was addressed in *Joseph Ndungu Kagiri vs. Republic* (supra), *Macharia vs. R* [2014] eKLR, among others. However, it has been held that the same is qualified and subject to the substantial injustice test. Not everyone, therefore, is entitled to an advocate at the state's expense, with each case being considered on its merit. In *Charles Maina Gitonga vs. Republic* [2018] eKLR, it was stated that legal representation at state expense is not an inherent right available to an accused person under Article 50 of the Constitution, adding that under section 36(3) of the Legal Aid Act, an accused person has to first establish that he was unable to meet the expenses of trial. Even then, under section 43, the trial court is obliged to consider the circumstances of each accused person. Much as the accused person is required to make his case for such assistance, the court does have a duty to assess the situation and advise the accused appropriately. The law is meant to assist the indigent, the marginalized, the excluded and the discriminated, largely the poor. It would be defeatist to again require them to make a justification. The trial court has to be proactive.

23. In the instant case, the issue of legal representation did not arise at all at the trial, and, therefore, the appellant did not have the opportunity to attempt to establish that he stood to suffer substantial injustice by not being provided with legal representation at state expense. He did not attempt to do the same at the hearing of the appeal. It has 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. However, the sentence imposed by the statute, which defines the offence charged, is very stiff, life in jail. Secondly, he was never informed of his right to legal representation, and that he was entitled to an advocate paid for by the state in case he faced a complex case. It should only be after that that he should be expected to make a case or justification for provision of an advocate at state expense. I believe the appellant's case was deserving of provision of an advocate at state expense.

24. Article 50(2) (g) (h) of the Constitution and section 43 of the Legal Aid Act are in mandatory terms. I believe failure to observe constitutional and statutory commands should vitiate any trial. These provisions were not observed. The appellant, therefore, received an unfair trial and the conviction should be vitiated.

25. Article 50(2)(j) of the Constitution is about the pre-trial disclosure of the state case. I note from the trial record that on 5th December 2017, the day plea was taken, that the state informed the court that it had provided the appellant with witness statements, and the appellant confirmed to the court that he had received the statements. There is nothing on record to suggest that he had requested for any other material, during the course of the trial, and the same was not availed. That being the case, it would be improper for anyone to argue that that constitutional fair trial right had not been granted to the appellant.

26. Article 50(2)(k) of the Constitution is about the right to adduce and challenge evidence. With regard to adducing evidence, I have noted from the trial court record that the appellant, after he was put on his defence, gave a sworn statement, and called two witnesses. He was, therefore, accorded the right to adduce evidence, after his rights under section 211 of the Criminal Procedure Code, were read to him. He took advantage of that opportunity. He cannot be heard to complain in that regard. On the right to challenge evidence, the record is clear, he confronted all the six witnesses presented by the prosecution, and cross-examined them extensively. He cannot, similarly, be heard to say that he was denied an opportunity to challenge his accusers.

27. Having found that there was violation of the appellant's fair trial rights, as set out in Article 50(2)(g) and (h) of the Constitution and section 43 of the Legal Aid Act, and concluded that the trial was unfair to that extent, there is no need for me to consider the rest of the grounds of appeal listed in the petition, and argued in the written submissions. I shall declare that there was mistrial and direct that the appellant be subjected to a fresh trial, where the trial court shall comply fully with the provisions in Article 50(2)(g) and (h) of the Constitution and section 43 of the Legal Aid Act.

28. In view of everything that I have said above, these are the final orders:

(a) That I do hereby find that the trial of the appellant in Butali SRMC Sexual Offences Act Case No. 38 of 2017 was unfair and I hereby declare the same a mistrial;

(b) That the appellant shall be tried afresh before a magistrate other than Hon. CN Njalale, SRM, in a trial where Article

50(2)(g) and (h) of the Constitution and section 43 of the Legal Aid Act shall be fully observed;

(c) That to facilitate (b), above, the conviction of the appellant in Butali SRMC Sexual Offences Act Case No. 38 of 2017 is hereby quashed and the sentence imposed on him, of life imprisonment, is hereby set aside;

(d) That the file in Butali SRMC Sexual Offences Act Case No. 38 of 2017 shall forthwith be shall be returned to the Principal Magistrate's Court at Butali for fresh hearing in terms of (b), above; and

(e) That the trial court shall deal with any other issues concomitant with such trial.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF MAY, 2020

W. MUSYOKA

JUDGE