REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 102 OF 2017

BERNARD ROP KIPYEGON.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable R. Amwayi – Senior Resident Magistrate,

delivered on 18h day of January, 2018 at Molo Chief Magistrate's Criminal Case No. 68 of 2017)

JUDGMENT

1. The Appellant, Bernard Rop Kipyegon, was arraigned before the Chief Magistrate's Court in Molo in ***Criminal Case No. 68 of 2017*** facing a charge of defilement contrary to section 8(1) as read together with section 8(4) of the Sexual Offences Act. The particulars in the charge sheet were that it was alleged that the Appellant intentionally caused his penis to penetrate the vagina of BC, a child of 16 years on 03/05/207 at [particulars withheld] in Kuresoi North Sub-county in Nakuru County.

2. An alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act also faced the Appellant. The particulars of the victim, date, time, and place of the alternative count were the same as that of the main charge.

3. The Appellant pleaded not guilty and the case proceeded to full hearing. The Prosecution called eight (8) witnesses before closing its case. The Appellant was put on his defence. He gave sworn testimony. At the conclusion of the case, the Learned Trial Magistrate convicted the Appellant and sentenced him to fifteen (15) years imprisonment.

4. The Appellant was dissatisfied by that decision and has appealed to this Court. In his amended grounds of appeal, the Appellant listed six grounds of appeal.

5. The Appeal was argued by way of Written Submissions by the Appellant and oral reply by the Prosecutor. I have read the submissions, considered the submissions by the Prosecutor, and read the record of the Trial Court with the keen evaluative eye demanded of a first Appellate Court. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190.***

6. The Appellant has raised two grounds which go to his fair trial rights. First, he complained that the trial was conducted without him being given witness statement and contrary to his constitutional rights. Second, the Appellant has complained that he was not accorded a translator yet he is neither fluent in English or Kiswahili but only in Kipsigis.

7. On perusal of the Trial Court record, I noted that there was no indication that the Appellant was given copies of the witness statements to help him prepare for this trial. However, I noted that he indicated to the Court that he was ready to proceed; and did not request for the statements. It is important to note, however, that the Trial Court has the obligation to ensure a fair trial by among other things ensuring that an unrepresented Accused Person has all the facilities and information needed for his defence.

8. It is possible that the Appellant was given statements but that this was not recorded in the Trial record. However, the abbreviated participation of the Appellant during the trial gives pause to that presumption.

9. There is no need to belabor the point: the trial, as conducted, fell afoul of the constitutional standards, and, in particular Article **50(2)(j)** of the Constitution. Article **50(2)(j)** of the Constitution of Kenya provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. Article 50(2)(c), on the other hand, provides for the right of the accused to have adequate time and facilities to prepare his defence.

10. Long before the promulgation of the Constitution in 2010, the Court of Appeal had explained the imperative nature of the duty of the Prosecution to supply witness statements in obeying this norm of fair trial in ***Thomas Patrick Gilbert Cholmondeley vs Republic [2008] eKLR.*** In that case, the Court held as follows:

> *We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.*

11. Our Courts have uniformly interpreted the constitutional provisions on fair trial to include the duty of the Prosecution to furnish the Accused Person with witness statements and exhibits which the Prosecution intends to rely on in their defence in advance of the criminal trial.

12. Looking at the Trial Court record, there is also reason to doubt that the trial was conducted in a language that the Appellant understood. The Applicant claims on appeal that he is only fluent in Kipsigis and that he had asked the Court to supply him with a Kipsigis interpreter. That request is not borne out by the Trial Court record. However, I have noted that only witness testified in Kipsigis – that is PW2. For that witness, the record indicates that the Appellant cross-examined her at length. For all the other witnesses, including the Complainant, the cross-examination was quite brief; almost perfunctory. Indeed, for two witnesses there was no cross examination whatsoever. I also noted that the Appellant testified in Kipsigin in his defence.

13. Looking at all these circumstances and context, the conclusion seems inescapable that the Appellant might be right that the bulk of the trial was conducted in a language he did not understand. That would obviously be in violation of the fair trial rights of the Appellant.

14. The cumulation of these two issues, in my view, amount to a substantial breach of fair trial rights of an Accused Person and fatally vitiates the guilty verdict from the trial. I, therefore, conclude that the trial was unfair and the conviction unsafe. Consequently, the conviction and sentence are both set aside.

15. I have looked at the other grounds of appeal proffered by the Appellant. Due to the orders I have given in the appeal, I will not delve into the other grounds of appeal.

16. Having set aside the conviction and sentence, I must now consider whether this is a fit case for re-trial. The principles governing whether or not a retrial should be ordered are now well settled. The East Africa Court of Appeal captured the principles succinctly in ***Fatehali Manji v Republic [1966] EA 343*** as follows:

> *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 insufficiency of evidence or for the purposes of enabling the prosecution to fill up 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 necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person*.

17. The Court of Appeal added an important consideration in ***Mwangi v Republic [1983] KLR 522***:

> *We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.*

18. The main question here, then, is whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial. Given the nature of the offence; the interests of the victims of the crime; the availability of witnesses; and the reason for setting aside the conviction and sentence, after perusing the Trial Court record as part of this appeal, I have come to the conclusion that this is a fit case for re-trial.

19. Consequently, the orders and directions of the Court are as follows:

> **a) The conviction entered in *Molo Chief Magistrate's Criminal Case No. 68 of 2017* is hereby set aside.**
>
> **b) The sentenced imposed on the Appellant is hereby consequently set aside.**
>
> **c) The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial.**
>
> **d) The Appellant shall be presented before the Chief Magistrate's Court, Molo on Wednesday, 27th May, 2020 to take plea.**

20. The Deputy Registrar is directed to send back the Trial Court file in ***Molo Chief Magistrate's Criminal Case No. 68 of 2017*** and a copy of this ruling to the Chief Magistrate's Court, Nakuru for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned R. Amwayi.

21. Orders accordingly.

Dated and delivered at Nakuru this 14th day of May, 2020.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.