



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CRIMINAL APPEAL NO. 79 OF 2019

STEVE LUMUMBA OMONDI.....APPELLANT

-versus-

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. M. Obiero Principal Magistrate in Migori Magistrate's Court Criminal Case No. 5 of 2019 delivered on 5/7/2019)

JUDGMENT

1. The State rightly conceded to the appeal both on conviction and sentence. It however prayed for a retrial. On the other hand, the Appellant herein, *Steve Lumumba Omondi*, instead prayed for an acquittal.
2. Among the various grounds of appeal preferred by the Appellant was the contention that the trial was not fair as it infringed **Article 50(2)(g)** of the **Constitution**.
3. The appellant herein was charged with the offence of *Defilement* contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. He faced an alternative offence of *committing an indecent act with a child*. The Appellant denied both counts.
4. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced to 20 years' imprisonment.
5. Being dissatisfied with the conviction and sentence, the appellant timeously preferred an appeal through *Messrs. Okong'o Wandago & Company Advocates*.
6. I have severally rendered myself on **Article 50(2)(g)** of the **Constitution**. I still hold the position that failure by a trial court to comply with the requirement of informing an accused person his/her right to representation by a Counsel of his/her choice renders the conviction a nullity (See **Migori High Court Criminal Appeal No. 44 of 2019 N.M.T. alias Aunty vs. R (2020) eKLR**, **Calvince Otieno Juma vs. Republic (2020) eKLR** among others).
7. It is the foregone basis that I stated that the State rightly conceded to the appeal.
8. With the said finding the next issue for consideration is whether the Appellant be retried or be released forthwith. In **N.M.T. alias Aunty vs. R** case (supra) I discussed the subject of retrial as under: -

38. The above finding now leads me to a consideration of whether the Appellant be released or be retried. My attention is drawn to several decisions of the Court of Appeal including Samuel Wahini Nguigi v. R (2012) eKLR where the Court stated as follows:

The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

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

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported) when this Court stated as follows:

...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where interests of justice require it.

39. The error on the record was occasioned by the trial court. I have carefully considered and reviewed the evidence on record and without going into the merits thereof, a conviction is likely if the case is properly prosecuted. The offences allegedly committed are not only very serious but also beastly and the innocent, helpless and vulnerable victim will no doubt be affected for the rest of his life.

40. The Appellant was charged in April 2019. Judgment was rendered on 17/06/2019. The Appellant has by now been incarcerated for less than a year from taking plea. That period is not inordinately long. The witnesses in the case are within the complainant's family and neighborhood and as such it will not be difficult to trace them including the Clinical Officer and the Police.

41. This Court is therefore of the considered view that the ends of justice will be served by an order of retrial instead of discharging the Appellant. In view of the above unfolding events, dealing with the other grounds of appeal will not add any value. I therefore choose to end this discussion here.

42. Consequently, the appeal is allowed and the conviction quashed. The sentence is hereby set-aside and the Appellant will be released into police custody and be produced before any court competent to try him except Honourable R.K. Langat, SRM. This should be in the next 7 days of this judgment.

9. I have considered the evidence on record. There was evidence of commission of an offence. Further, the Appellant seemed to raise the defence under **Section 8(5)** of the **Sexual Offences Act** at the hearing of the appeal. However, the Appellant was not clear on the defence during the trial.

10. The offence was allegedly committed in January 2019. The victim hailed from Nyatike Sub-County. She is likely to be still in school. The other witnesses are neighbours, health officials and other Government officers. I do not see the difficulty the prosecution is likely to undergo in availing the witnesses. This is a case fit for a retrial. I so find.

11. Consequently, the appeal is allowed and the conviction quashed. The sentence is hereby set-aside. The Appellant will be retried by any court competent to try him except *Honourable M. Obiero, PM*.

12. In view of the restrictions on Court appearances in force due to the COVID-19 pandemic, I hereby direct that the plea be taken at the Migori G.K. Prisons.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 2nd day of July 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Marvin Odera, Counsel instructed by Messrs. Okong'o Wandago & Company Advocates 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