



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIIAYA**

**CRIMINAL APPEAL NO. 69 OF 2019[SEXUAL OFFENCE]**

**CORAM: HON. R.E.ABURILI J**

**STEPHEN ODONGO NYABAYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[appeal against judgment, conviction and sentence passed by Hon. Muthoni Mwangi, Resident Magistrate in Siaya Principal magistrate's Court Sexual Offence No26 of 2019 delivered on 1<sup>st</sup> August 2019]*

**JUDGMENT**

**Introduction**

1. The appellant herein **STEPHEN ODONGO NYABAYA** was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No.3 of 2006. Particulars of the charge are that on the 20<sup>th</sup> day of February 2019 at Kaugangi Hawinga Sub-location in Siaya District within Siaya County, he intentionally caused his penis to penetrate into the vagina of GAB [full name withheld for legal reasons], a child aged 10 years. The appellant also faced the alternative charge of Committing an Indecent Act with the child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.
2. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.
3. The trial magistrate, Hon. Muthoni Mwangi heard the testimony of five prosecution witnesses and placed the appellant on his defence. The appellant elected to remain silent and leave the matter to the court to decide based on evidence adduced by the prosecution witnesses.
4. The trial magistrate in her judgment found that the prosecution had proved their case beyond reasonable doubt and proceeded to convict and sentence the appellant to life imprisonment.
5. Aggrieved by the said conviction and sentence, the appellant through his advocates on record Messrs Amuga & Company, filed a petition of appeal based on the following grounds:

***a) THAT the learned trial Magistrate erred in law and fact in failing to accord the Appellant a fair trial/hearing as is required under Article 50 of the Constitution of Kenya, 2010 and the trial and eventual conviction and sentence of the Appellant were vitiated, invalid, null and void.***

***b) THAT the trial Magistrate erred in law and fact in allowing the prosecution to adduce hearsay evidence against the Appellant and further erred by relying on such hearsay evidence to convict the Appellant.***

***c) THAT the learned Magistrate erred in law and fact in convicting the Appellant when the evidence tendered before court was not sufficient to support a conviction for the offence of defilement.***

***d) THAT the learned Magistrate erred in law and fact in failing to hold that corroboration of the evidence of the Complainant was missing from the totality of the evidence tendered before court and there was therefore no sufficient evidence before court which could be the basis of a conviction under the Sexual Offences Act, No. 3 of 2006.***

***e) THAT the learned Magistrate erred in law and fact in imposing upon the Appellant a harsh and oppressive sentence of life imprisonment.***

**f) THAT the learned Magistrate erred in law and fact in basing the life imprisonment she imposed upon the Appellant on an erroneous finding or observation that the Appellant “appears to be a sex pest so to speak who lures young school girls and defiles them” when there was no admissible evidence tendered before court to support such the drastic finding that the Appellant was a sex pest.**

### **Appellant’s Submissions**

6. The appellant through his counsel submitted that the Appellant was not only entitled to be informed, promptly, of his right to legal representation but also to have the state assign him an advocate if he needed one but could not afford to pay for one. It was submitted that the fact that the Appellant was granted cash bail of Kshs. 50,000/= or bond of Kshs. 350,000/= which he was unable to raise, and he had to go through the trial while in remand, confirmed that the Appellant could not afford legal representation on his own and as such his constitutional right to legal representation was contravened and the trial was therefore unfair and void thus necessitating a retrial. Reliance on this proposition was placed on the cases of **Joshua Njiri v Republic [2017] eKLR** and **Jared Onguti Nyantika v Republic [2019] eKLR** where the courts in both instances voided the conviction of the appellants’ therein as they were not informed of their right to be represented by an advocate. The appellant also relied on the Supreme Court case of **Republic v Karisa Chengo & 2 Others [2017] eKLR** where the Supreme Court held that the right to legal representation is a fundamental ingredient of the right to a fair trial.

7. The appellant also submitted that there was a failure by the trial court to properly analyze the evidence, with the result that although the offence of defilement was not proved to the required standard, the trial Magistrate still convicted the Appellant. It was the appellant’s submission that there was no conclusive evidence that the complainant was defiled, neither was there corroboration of the complainant’s evidence and further that there was no medical evidence adduced to corroborate the complainant’s case. The appellant thus submitted that the conclusion by the trial Magistrate that penetration had been proved beyond reasonable doubt was therefore unsafe and erroneous. Reliance was placed in the cases of **David Mwingirwa v Republic [2017] eKLR** and **Albanus Kioko Kinyai v Republic [2019] eKLR**, where the Court of Appeal and the High Court respectively held that absence of or broken hymen is not in itself proof of defilement.

8. It was further submitted on behalf of the appellant that the sentence of life imprisonment was too harsh. Counsel relied on the cases of **Eliud Waweru Wambui v Republic [2019] eKLR** and **Jared Koita Injiri v Republic [2019] eKLR** and submitted that the sentence of life imprisonment should be substituted with a non-custodial sentence

### **Analysis & Determination**

9. This is a first appellate court. As expected, I have to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own independent conclusions, bearing in mind that I neither saw nor heard any of the witnesses as they testified. See **Okeno v Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424.”***

10. Similarly, in **Kiilu & Another v Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

***“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.***

***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.”***

11. The prosecution evidence as laid out in the trial Court was as that PW1 the complainant was on 20.02.2019, returning home from school for lunch, she went to the appellant’s house so that he would help her with money to buy sweets as she had gone there before.

12. The complainant found the appellant alone in his 1 roomed house and asked him for money upon which the appellant told her to go to his bed where he removed her panty, the appellant lowered his trouser, removed his penis and did “tabia mbaya ”to her. The trial court noted that the complainant was firm and composed in her testimony. The complainant went on to testify that the appellant then gave her Kshs. 5 and she left for home where she did not tell anyone on what transpired. The complainant testified further that the appellant had prior to that defiled her twice.

13. It was the complainant’s further testimony that when her mother inquired why she was walking in the manner she was, the complainant stated that she felt pain on her “susu” and further told her mother that the appellant had “done bad manners to her.” Her mother took her to Linda to whom she revealed what the appellant had done.

14. In cross-examination, the complainant stated that she used to go to the appellant for money. She further stated that she went to the appellant after he defiled her with her mother and found him inside the house. The complainant stated that her mother inquired from the appellant as to why he had defiled the minor yet there were many women in the village but the appellant kept quiet. She further stated that her mother then took the issue to Linda and to the police station.

15. PW2 RAJ, the complainant's mother testified and produced a birth certificate showing the complainant's date of birth as 26.01.2008. She testified that on the 27.2.2019, her neighbour Mugene asked her why her child, the complainant was taking children to the appellant's house. That the minor revealed that the appellant gave them Kshs. 5 + or sweets. PW2 testified that she further inquired from the minor as to what the appellant did to them as she had noticed the minor walking funny to which the minor revealed that the appellant did 'tabia mbaya' to her and told her not to tell anyone.

16. PW2 testified that she then went to the assistant chief Consolata who told her to call Mugene as well as the children who used to go to the appellant's house, all who were 10 in number. PW2 testified that the assistant chief questioned the children who revealed that the appellant used to defile them and subsequently give them Kshs. 5 and further that some parents used to send children to the appellant so he could do "budget" i.e. the appellant would give unga and soap to the parents in exchange. PW2 further testified that the teachers asked the complainant and she agreed she was defiled. She stated that she took the complainant to Siaya County Referral hospital.

17. In cross-examination, PW2 stated that by the time she went to the police station she was alone and that she took the minor to hospital a week after the incident. She further restated that the assistant chief said after she interviewing the children that the appellant used to assist them with budget for soap, sugar and flour.

18. PW3 Isaac Imbwaga a clinician at Siaya County Referral hospital testified that the minor was brought to the hospital by her mother at what time she did not have the clothing she wore at the time of the incident. He testified that the victim was calm and oriented during examination and that the approximate age of injury was 5 weeks and was probably caused by a blunt object.

19. PW3 further testified that the minor had a normal external genitalia and also had a reddened and inflamed urethra, inflamed vaginal wall and partially torn hymen. He revealed that on further examination she had a yellowish vaginal discharge and when Lab investigations were done, the minor tested HIV negative and UDRI negative. He further testified that the urinalysis revealed that there were no spermatozoa, no pus cells and no epithelial cells.

20. He further testified that he concluded based on the history that there were features suggesting partial vaginal penetration. PW3 further testified that the minor's birth certificate showed date of birth as 26.01.2008.

21. In cross-examination, the clinician stated that he did not know the appellant personally and neither did he arrest him.

22. PW4 Victor Otieno a teacher at [particulars withheld] primary school testified that the minor had been his pupil from class 1 to 3 and that on the 18/3/2019 the minor's teacher Madam Jackline informed him that the minor was deteriorating in class and further that she had heard allegations in the village that there was someone duping the girls and giving them money and defiling them.

23. PW4 further testified that that week he was on duty he observed the minor and noted she was coming to school very late and upon investigation the complainant told him there was a man who had been giving them Kshs 10/= and that some pupils at Awinga primary told her if she wanted money she could go to his house. He further testified that the complainant later opened up and said the man does "tabia mbaya" to her which he subsequently relayed to the complainant's mother. He testified that the complainant named Odongo Kanyagaya as the person who defiled her. It was PW4's testimony that he subsequently escorted the complainant and her mother to Siaya Referral hospital.

24. In cross-examination PW4 reiterated that what he had stated in his court was what was entailed in his statement.

25. PW5 No. 116919 PC Jephitha Alamau testified that 27.3.2019 one lady RAJ went to the station with her daughter GA and alleged that her daughter was defiled by a man well known to her as Stephen Odongo Nyabaya. He testified that he took the treatment notes which she had been referred to at Siaya Referral hospital and gave her a P3 form and after it was filled, he recorded their statements.

26. PC Alamau further testified that he issued an arrest order and in the course of his investigations noted that the minor was 10 years old from the birth certificate showing the age. He further testified that on the 2.04.2019 the appellant was arrested and escorted to Siaya police station.

27. In cross-examination, PC Alamau testified that the complainant's mother noted that the appellant had defiled the complainant for a couple of days on 20th February 2019 and took her to hospital on 27th March 2019.

28. At the close of the prosecution's case, the appellant chose to remain silent in accordance with his rights as enshrined in section 211 of the Criminal Procedure Code.

### **Analysis and Determination**

29. Having carefully considered the appellant's grounds of appeal, the evidence adduced in the lower court and submissions for and against the appeal, the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant or sustain a conviction for the offence of defilement as charged.

30. As a preliminary point, I will consider the point raised by the appellant that his right to a fair trial was violated as he was not only entitled to be informed, promptly, of his right to legal representation, but also to have the state assign him an advocate if he needed one as he could not afford to pay for one.

31. 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 statutes 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 appeal, the appellant is placed in somewhat advantageous position as he is ably represented by an advocate of his own choice. Legal representation is a fundamental constitutional dictate envisaged under Article 50 of the Constitution of Kenya 2010. Relevant in this case is Article 50(2) (b) (g) (h) which provides as follows:

***“50(2) every accused person has the right to a fair trial, which includes the right –***

***(g) To choose, and be represented by an advocate and to be informed of the 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.”***

32. Generally, Article 50(2) (g) of the Constitution guarantees a fair trial to every accused person which includes the right to be represented by an advocate and to be informed of that right promptly. This right is implemented under the Legal Aid Act, 2016 which came into force on 10th May 2016.

33. The above mentioned Act in its preamble states that, its focus is to:

***“give effect to Article 19(2), 48, 50(2) (g) and (h) of the Constitution to facilitate access to justice and social justice.”***

34. Section 43 of the Act lays down the duties of the court before which an unrepresented accused person is presented. The section provides as follows:

***“A Court before which an unrepresented accused person is presented shall:***

***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.”***

35. The key words under Article 50(2) (g) and (h) of the Constitution and section 43 of the Legal Aid Act, 2016 are: ***“to be informed promptly of the right”***. In order to fully comply with the dictates of Article 50(2)(g) and (h) and section 43(1) of the Legal Aid Act, trial courts as a matter of constitutional duty and the interest of justice, ought to give the information to the accused person and/or make a preliminary inquiry at the earliest opportunity possible on the right in question.

36. A determination must be made as to whether or not the accused person would require legal representation before commencing with the hearing of the case. The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearing. The trial court is under a duty to look at the whole indictment and satisfy itself that substantial injustice will not be occasioned that would inform the court’s decision as regards whether or not to proceed to the hearing with an unrepresented accused person. If through the above scrutiny, the court finds that substantial injustice would be occasioned, it would then move from the provision under Article 50(2) (g) to 50(2) (h) and make a finding and/or orders to the effect that a state funded counsel be provided to the accused person for not only justice to be done but for justice to be seen as having been done.

37. Where the trial court finds that substantial injustice would be occasioned if the accused person proceeds to the hearing of the matter unrepresented, the court must have an advocate assigned to the accused person by the state at its expense, and the court should or must once again inform the accused of this right promptly pursuant to Article 50(2) (h) as read with section 43(1) (b) Of the Legal Aid Act no. 6 of 2016.

38. It is instructive to note that the trial record of proceedings must indicate or communicate that the accused was duly made aware of his rights under article 50(2) of the Constitution and that the process expounded above was conducted where it is relevant. The court is the custodian of law and ought to ensure that these constitutional safeguards are jealously protected and upheld at all times. Therefore, it is incumbent upon the courts to ensure that the trial is judicious, fair, transparent and expeditious as well as ensuring compliance with the basic rule of law.

39. In criminal matters, there is a very big distinction between an unrepresented and a represented accused person. This follows the logic that the adversarial system is so complex that an accused devoid of requisite legal skills may find it difficult to comprehend the trial proceedings.

40. However, the right as regards legal representation is not absolute and there are instances where the same can be limited. This was succinctly dealt with in this case of ***S v Halgryn 2002, (2) SACR 211 ((SCA)*** Paragraph 11, Herms JA stated that:

***“Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations.”***

41. A closer reading of Article 50(2) (h) of the Constitution and section 43(1) (b) of the Legal Aid Act, 2016 on the right to legal representation reveals that an accused person’s entitlement to legal representation at the expense of the state is not automatic but qualified. Thus, this right is not an entitlement to every accused person. It therefore appears from the above provisions of law that legal representation

at the expense of the state is only available where there is likelihood of substantial injustice to occur to the detriment of an unrepresented accused person. It is therefore incumbent upon the accused person to prove that unless he or she is assigned an advocate by the State, substantial injustice would occur.

42. **“Substantial injustice”** is not defined in the Constitution. Thus, there is no legal definition of the same. Neither does the Constitution enumerate circumstances under which an accused person is entitled to a state funded Counsel. In an attempt to define the concept of substantial injustice, both local and foreign jurisprudence provide guidance on the issue.

43. The Court of Appeal in the case of **Macharia v R** after reviewing the past and current law stated that as follows:

**“Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”**

44. In the case of **Karisa Chengo & 2 Others v R, CR NO.s 44, 45 & 76 OF 2014**, it was stated:

**“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result? And to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”**

45. The Supreme Court in the case of **Republic v Karisa Chengo (supra)** quoted by the appellant, also held that the right to legal representation is a fundamental ingredient of the right to a fair trial.

46. In view of the principles expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider in addition to the relevant provisions of the Legal Aid Act, various other factors which include: the serious or nature of the offence in question thus serious offences may attract public interest to the extent that the public may require some form of representation to be accorded to the accused person to conduct his own defence; the severity of the sentence, thus legal representation is to be provided where the offence carries a death sentence and or life imprisonment ;the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the ability of the court to comprehend the court proceedings thus the literacy of the accused and the complexity of the case which is discernible from the issues of fact and law which may not be comprehended by the accused.

47. In the instant appeal, the appellant was convicted of the offence of defilement and sentenced to life imprisonment. I have gone through the trial record and nowhere does it communicate whether or not the accused was informed of his rights under section 43 (1) of the Legal Aid Act and Article 50(2)(h) and (g) of the Constitution regarding the right to legal representation. Furthermore, the appellant was charged with an offence which carries a severe sentence of life imprisonment but he was not informed of or accorded his right to legal representation as required by law. In that regard, there is substantial injustice occasioned to him.

48. The trial court ought to have at least informed the appellant of this right. It is my considered view that the appellant, according to section 41 of the Legal Aid Act, is eligible to make the application to the National Legal Service in person or through any other person authorized by him in writing. The mandatory duties imposed on trial courts by section 43(1) of the said Legal Act and Article 50 of the Constitution were therefore not complied with, and in the circumstances I find that the trial proceedings were conducted in a manner prejudicial to the appellant. Such proceedings ought not to stand.

49. It is paramount that the record of the trial court should demonstrate that the rights enshrined under Article 50 of the Constitution were accorded to the accused person where they are applicable. For instance, the record of the trial court must demonstrate that the accused was informed of his right to legal representation and whether or not in the event that he cannot afford an advocate, one is appointed and assigned to him at the expense of the state. The record of the trial court must also show that the court did take the profile of the accused person before the trial commenced and in doing that the trial court may look into, inter alia, the education level of the accused, it must inquire whether or not he understands or he is knowledgeable in legal matters as well as the trial process. Whether or not he understands the languages of the Court, that is English and Kiswahili and if not, the court must ensure that an interpreter has been appointed to aid the accused person in all matters of such kind. Where the person does not afford an advocate or qualify to having one appointed at state expense, and the court is of the opinion that substantial injustice is likely to be occasioned considering the circumstances of each case, it may allow the accused person to have an intermediary of his choice who may be knowledgeable enough to speak on his behalf.

50. Accordingly, and for the above reasons, I find and hold that the proceedings leading to the trial and conviction of the appellant herein did not take into account the constitutional safeguards on the rights of accused persons. The failure in my humble view prejudiced the appellant. In the end, I hereby quash the conviction of the appellant and set aside the sentence of life imprisonment imposed on him.

51. However, in the circumstances of this case and to ensure fair administration of justice, I hereby order for a retrial of the appellant before any other magistrate other than the convicting and sentencing magistrate.

Orders accordingly.

**Dated, Signed and Delivered at Siaya this 6<sup>th</sup> October, 2020 via Microsoft Teams.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Appellant present virtually at Kisumu Maximum Prison.

Mr Okachi, Senior Principal Prosecution Counsel for the State

CA: Brenda