



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 32 OF 2018**

**(Consolidated with Criminal Appeal No. 29 of 2018)**

**JAMES OTIENO KIMUNGE.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. J. O. Alambo, Resident Magistrate in Kehancha Senior Principal Magistrate's Criminal Case No. 77 of 2017 delivered on 31/01/2018)***

**JUDGMENT**

1. The Appellant herein, **James Otieno Kimunge**, was charged, tried and convicted on two counts of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act** No. 3 of 2006. He also faced two alternative charges of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. He was subsequently sentenced to life imprisonment.

2. Dissatisfied with the convictions and sentences, the Appellant timeously lodged Appeal No. 29 of 2018 and thereafter instructed the firm of **Messrs. Kerario Marwa & Co. Advocates** which filed Appeal No. 32 of 2018. The twin appeals were consolidated with Appeal No. 32 of 2018 being the lead appeal. The Appellant through Appeal No. 32 of 2018 raised the following grounds: -

- 1. The trial Magistrate erred in law and fact when he failed to ensure that the appellant was accorded representation once his advocate withdrew from the matter hence the appellant right to representation was negated.***
- 2. The honourable trial Magistrate erred in law and fact when he failed to consider the defence and alibi of the appellant during trial.***
- 3. The trial Magistrate erred in law and in fact when he convicted the appellant solely on the uncorroborated testimony of a minor.***
- 4. The trial Magistrate erred in law and in fact when he failed to hold and find that the medical evidence produced was unreliable as it does not paid out to the appellant as the offender.***
- 5. The trial Magistrate erred in law and fact when he failed to consider the appellant's application for a DNA test to establish culpability.***

3. The appeals were heard by way of oral submissions where Counsel for the Appellant submitted that the Appellant's right to legal representation was contravened when the trial court failed to accord the Appellant an opportunity to seek the services of another Counsel when his then Counsel withdrew his representation. Counsel further submitted that the charges were not proved and that the trial court even after making an order for DNA testing did not ensure that the order was effected. Counsel then urged this Court to allow the appeal. The State opposed the appeal and submitted that there was ample evidence on commission of the offences by the Appellant and prayed that the appeal be dismissed.

4. This is the Appellant's first appeal. The role of this Court is now 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, analyze 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.

5. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or

alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law that is beyond any reasonable doubt. To that end, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and the parties' submissions.

6. I will first deal with the issue of whether the Appellant's right to representation under **Article 50** of the **Constitution (Fair Hearing)** was infringed. **Article 19** of the **Constitution** *inter alia* provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State and that the purpose of recognizing and protecting those rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice. Under **Article 25** of the **Constitution** the right to a fair trial envisaged in **Article 50** of the **Constitution** cannot be limited in any way whatsoever.

7. **Article 50(2)(g)** and **(k)** of the **Constitution** 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 this right promptly;**

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

8. As said, those rights cannot be limited. The role of a Counsel in a criminal trial cannot be gainsaid. A Counsel plays such a crucial role in ensuring that the represented party benefits from protection of the **Constitution** and the law. That is the rationale behind **Article 50(2) (h)** of the **Constitution** that the State must provide an Advocate to an accused person if substantial injustice would otherwise result in a trial. Currently there is the **Legal Aid Act** No. 6 of 2016 in place.

9. In this case the Appellant instructed **Mr. Gembe** Counsel who appeared for him. On 14/06/2018 Mr. Gembe Counsel took part in the hearing where PW1 testified. The matter was then adjourned for further hearing on 03/07/2018. On the said day Mr. Gembe Counsel went to court in the afternoon having first appeared before a Judge in Migori Law Courts. Counsel then applied to be discharged from representing the Appellant. The record is silent on whether the Appellant was accorded an opportunity to respond to the application by Counsel. Be that as it may, Counsel was accordingly discharged and the hearing of the case proceeded right to the close of the defence case. Three witnesses testified and the prosecution's case was closed. A ruling was made where the Appellant was placed on his defence and proceeded to give his sworn defence. He closed his case and the matter was fixed for judgment on 06/07/2018.

10. It is the events of 03/07/2018 which prompted the contention. There is no doubt that the Appellant faced very serious offences with the consequence of mandatory life imprisonment on conviction. To aid him in the trial, the Appellant had engaged the services of an Advocate. Whereas an Advocate has a right to be discharged from a trial, a trial court must be cautious enough to ensure that the accused person's right under **Article 50(2)(g)** and **(k)** of the **Constitution** is not infringed whenever an Advocate who previously appeared for an accused is, for whatever reason, discharged from the case. A court must ascertain from the accused and record those enquiries and their responses as part of the proceedings if the accused needs time to either seek the services of another Advocate or to prepare for the hearing by him/herself. If the hearing of the case must proceed on the day the Advocate is discharged then the record must be clear on the accused person's readiness to so proceed with the hearing of the case and/or a ruling of the court to that end. By so doing, the trial court will be discharging its duty under **Article 3** of the **Constitution** in upholding the **Constitution**.

11. I must therefore find that the Appellant's right to a fair trial under **Article 50(2) (g)** and **(k)** of the **Constitution** were trampled on in the circumstances of this case. The Appellant was not accorded a fair trial and the resultant convictions and sentences cannot stand.

12. Having so found, a consideration of the other grounds of appeal will add no value to this matter. What I must now consider is whether the Appellant ought to be released or be re-tried. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

**'...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where where the conviction is set aside because of insufficient 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;.....'**

13. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi v. R (2012) eKLR**:

**"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 each case but an order for the retrial should only be made where interests of justice require it.’”*

14. Applying these principles to this appeal and by further considering the gravity of the offence, the facts as recorded, the possibility of the availability of the witnesses most of whom are from the complainant’s homestead and the fact that the Appellant was convicted barely six months ago and since that eliminates the risks of faded memory, I am of the considered finding that this is a case for retrial.

15. As I come to the end of this judgment I must apologize to the parties for the late delivery of this judgment which was caused by several challenges beyond my control and my involvement in a Multi-Judge Bench matter at the High Court in Mombasa.

16. Consequently, the appeals are allowed. The convictions are hereby quashed and the sentences set-aside. The Appellant shall be released into police custody and be produced before any court competent to try him within 5 days of this judgment except **Hon. R. K. Langat**, Senior Resident Magistrate.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 14<sup>th</sup> day of February 2019.**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Kerario Marwa** Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for Appellant.

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

**Evelyn Nyauke** – Court Assistant