



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 15 OF 2018

BETWEEN

JULIUS ROTICH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R. Oanda, PM

dated 1st December 2017 at the Principal Magistrates Court

in Kilgoris in Criminal Case No. 356 of 2013)

JUDGMENT

1. The appellant, **JULIUS ROTICH**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** (“the Act”). It was alleged that on 27th May 2018 at [particulars withheld] in Transmara District of Narok County, he intentionally and unlawfully caused his penis to penetrate the vagina of CC, a child aged 10 years. He was sentenced to life imprisonment and now appeals against conviction and sentence.

2. Through his counsel, the appellant, contested the conviction and sentence on several grounds. He complained that his fundamental rights to a fair trial under **Article 50** of the Constitution were violated when he was not furnished with witness statements and that the trial was conducted in a language he did not understand. Counsel also pointed out that the court did not comply with **section 200** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** when a new magistrate took over hearing of the matter when the original magistrate was transferred. He also contended that the prosecution failed to prove the case against him beyond reasonable doubt.

3. Counsel for the respondent supported the conviction and sentence on the ground that the prosecution proved its case beyond reasonable doubt. He submitted that the appellant’s rights were not violated as the proceedings showed that he understood the proceedings, was able to cross-examine the witnesses, testified in his defence and called two witnesses.

4. For reasons that will become apparent, I will deal with the constitutional issues raised by the appellant. First, I do not agree that the trial magistrate failed to comply with **section 200(3)** of the **Criminal Procedure Code** which provides as follows:

200 (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

5. The record shows that the matter was originally heard by Hon. Mkoross Ag. SRM. When he was transferred, Hon. Oanda, SRM took over the conduct of the matter. The proceedings of 17th May 2016 were as follows:

State Counsel – Matter is part heard. We can take directions.

Hon. R. Oanda, SRM

Accused – I wish the matter to proceed from where it had reached.

Hon. R. Oanda, SRM

State Counsel – We can take the witness who is present in court.

Hon. R. Oanda, SRM

Accused – I am ready.

Hon. R. Oanda, SRM

6. Although the trial magistrate did not mention **section 200** of the **Criminal Procedure Code**, he did give the appellant the opportunity to recall any witness as required and the appellant did indicate that he was able to proceed from where the matter had reached. I find and hold that the trial court complied with **section 200** aforesaid in substance and no prejudice was occasioned to the appellant in the circumstances.

7. I also dismiss the ground raised by the appellant that the proceedings were conducted in a language he did not understand. At the time the plea was taken, the trial magistrate recorded that the language by the interpreter was Kiswahili/English although the charge was read and answered in Kipsigis. Subsequent proceedings show that the complainant testified in Kipsigis and was cross-examined in Kipsigis. The appellant did not raise any issue about failing to understand or follow the proceedings. He called two witnesses to testify on his behalf. Although I fault the trial magistrate for failing to detail the language of the appellant and the interpreter at every step of the proceedings, it is clear that the testimony and other proceedings were interpreted and that the appellant did not suffer any prejudice as he was able to follow the proceedings. In reaching this conclusion, I am guided by the decision of the Court of Appeal in **George Mbugua Thiong'o v Republic NRB CA Criminal Appeal No. 302 of 2007 [2013]eKLR** where it observed that:

For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice.

8. I now turn to the issue of witness statements. The record shows that the appellant was not furnished with witness statements and documentary evidence. When the accused was first arraigned in court and after denying the charges, the court proceeded to take the testimony of the child. The court did not order the appellant to be furnished with statements. The appellant did not request to be furnished with statements or indicate that he had not been furnished with statements.

9. The question for determination is whether failure by the prosecution to provide witness statements violated the appellant's right to a fair trial. **Article 50 (2) (j)** of the Constitution 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." This right is further buttressed by **Article 50(2) (c)** of the Constitution which provides for the right of the accused, "to have adequate time and facilities to prepare a defence."

10. The right, as a component of a fair trial, was buttressed in **Thomas Patrick Gilbert Cholmondeley v Republic NRB CA Criminal Appeal No. 116 of 2007 [2008]eKLR**, which was decided under the former Constitution, that:

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. In **Simon Githaka Malombe v Republic NYR CA Criminal Appeal No. 314 of 2010 [2015]eKLR**, the Court of Appeal quashed the conviction on the ground that the prosecution had failed to furnish the appellant with witness statements despite the appellant requesting for them. The court held that, "The denial of witness statements in the present case reduced the trial to a farcical sham."

12. As I understand, the respondent's position is that the appellant waived his right to receive witness statements by failing to request for them. He also participated in the trial by cross-examining witnesses and calling his own witnesses and was therefore not prejudiced. This position finds support in the judgment of Ngugi J., in **M E M v Republic NKU HCCRA No. 314 of 2015 [2018] eKLR** where he expressed the view that:

[21] In this case, the Appellant says on appeal that the witness statements were never supplied to him. However, he does not allege that he asked for them and that the Court failed to give them. Indeed, his argument is that the Court record does not reflect that he was given witness statement. This argument verges on the technical: that failure of the Court to record that an Accused Person has been given witness statements is a per se proof violation of his constitutional right to fair trial. I do not think our decisional law has enunciated such a rigid and formalistic rule.

[22] Instead, our case law provides a more functional approach. While it is a salutary practice for a Trial Court to record to indicate that it has given orders for an Accused Person to be provided with the statements or has facilitated their supply, failure to record this is not necessarily fatal.

13. In **Simon Ndichu Kahoro v Republic NRB CA Criminal Appeal No. 69 of 2015 [2016]eKLR**, the Court of Appeal was confronted

with the issue as to whether the failure to give the accused statements was fatal. In that case, although the trial magistrate ordered that the statements be furnished, the trial proceeded without the appellant being furnished with the statements. The court held that accused's right to a fair trial were violated on that account but it made the following observation:

We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case.

14. I therefore reach the conclusion that the failure by the prosecution to provide statements is not, for that reason alone, fatal to the prosecution case. The court must look at the prejudice occasioned. For example, in the ***Simon Githaka Malombe Case (Supra)***, while the court made an order that the accused be furnished with statements, it ordered him to pay for them. Since he was unable to pay the cost, he was not furnished with the statements hence his rights to a fair trial were violated. In ***Simon Ndichu Kahoro Case (Supra)***, the trial magistrate order the appellant to proceed with the hearing despite the fact he was unwell and did not have the statements.

15. In this case, the court did not inform the appellant of his right to receive witness statements by directing that the appellant be given be given witness statements at the time of arraignment. In fact, the complainant, who was the critical witness, testified immediately. Even though the appellant was able to cross-examine the other witnesses and called other witnesses, I cannot say that the appellant was not prejudiced. I therefore conclude that the appellant's right to witness statements under **Article 50(2)(j)** of the Constitution was violated.

16. I accept the principle that where an appellant has not had a satisfactory trial, the fair and proper order to make is an order for a retrial. In ***Muiruri v Republic [2003] KLR 552***, the Court of Appeal held that whether a retrial should be ordered or not must depend on the circumstances of the case. It observed that a retrial will only be ordered when it is in the interests of justice and if it is unlikely to cause injustice to the appellant. Amongst the factors the court ought to consider include the nature of illegalities or defects in the original trial, length of time that has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

17. On this score, I find that the failure to order the provision of witness statements was the court's fault. The offence for which the appellant was charged and convicted is serious and attracts a mandatory sentence of life imprisonment. The appellant had been in custody for less than two years and I do not think it is impossible for him to be retried in light of the substantial evidence against him.

18. I therefore allow appeal, quash the conviction and sentence and direct that the appellant shall be retried on the same charges before a Magistrate of competent jurisdiction other than Hon. R. Oanda, PM. The appellant shall remain in custody and shall be taken to the Magistrates Court at Kilgoris on **11th February 2019** for re-trial.

DATED and DELIVERED at KISII on this 6th day of February 2019.

D.S. MAJANJA

JUDGE

Mr O. M. Otieno, Advocate for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.