REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 34 OF 2018

1. **DAVID OLUOCH ADONGO**

2. **DUNCAN OTIENO OMONDI.....APPELLANTS**

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. R. K. Langat,

Senior Resident Magistrate in Rongo Magistrate's Court Criminal Case No. 1 of 2018 delivered on 14/03/2018)

JUDGMENT

1. There are two Appellants in this appeal namely **David Oluoch Adongo** and **Duncan Otieno Omondi.** The Appellants were initially charged on 04/01/2018 in separate counts with the offences of gang defilement and in the alternative committing an indecent act with a child. They denied committing the offences and the case was set for hearing on 26/01/2018. The particulars of the offences of gang defilement were that *'on the 2nd day of January 2018 in association with [**the other Appellant**] intentionally caused his penis to penetrate the vagina of **SAO** a child aged 15 years'.*

2. On the hearing day the prosecution applied to substitute the charges and the Appellants did not oppose. The trial court allowed the application and the prosecution substituted the charges with separate counts of gang defilement and in the alternative committing an indecent act with a child for each Appellant. In this instance the gang defilement charge for the First Appellant introduced the words '**in turns**' whereas the charge of gang defilement for the Second Appellant herein remained as before. The Appellants denied the charges and the hearing proceeded as scheduled where the complainant and her father testified as PW1 and PW2 respectively. The hearing was then adjourned to 13/02/2015.

3. At the next hearing date, the prosecution again applied to amend and substitute the charges and the Appellants did not object. The application was hence allowed. The prosecution then introduced another charge sheet where the Appellants were, unlike before, charged jointly with the particulars being that *'on the 2nd day of January 2018 in turns, intentionally caused your penises to penetrate the vagina of **SAO** a child aged 15 years'*. The Appellants denied the charges and the hearing proceeded as scheduled where the rest of the witnesses testified. The Appellants were later placed on their defences and they elected to remain silent.

4. The trial court rendered its decision on 14/03/2018 where the Appellants were found guilty of gang defilement and were convicted. Each of the Appellants was sentenced to 15 years' imprisonment. The Appellants, with the leave of this Court, lodged this appeal by filing a Petition of Appeal on 26/07/2018 where they variously challenged the conviction and sentences.

5. Directions were taken and the Appellants filed written submissions. The appeal was opposed.

6. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (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.

7. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences are proved. It is on that footing that I perused the record and came across an issue which although it was not canvassed by the parties, it is so fundamental in the justice system as it forms part of a fair trial. The issue is how the trial court handled the amendment to the charge on 13/02/2018.

8. **Section 214** of the **Criminal Procedure Code**, **Chapter 75** of the Laws of Kenya provides for instances where a charge can be amended and what ought to follow once the amendment is allowed. The said section states that:

> ***214(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that -***
>
> ***(i)Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
>
> ***(ii)Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***
>
> ***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended f or the variance if it proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.***
>
> ***(3) Where an alteration of a charge is made under subsection (I) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is so the opinion that the accused has been thereby mislead or deceived, adjourn the trial for such period as may be reasonably necessary.***

9. **Article 50** of the **Constitution of Kenya** provides for the right of an accused person to a fair trial. Relevant to this matter is **sub-article (2)(b)** and **(k)** which provides that:

> ***(2) Every accused person has the right to a fair trial, which includes the right-***
>
> ***(b) to be informed of the charge, with sufficient detail to answer it;***
>
> ***(k) to adduce and challenge evidence.***

10. The right to a fair trial extends throughout the entire trial and is among those rights under **Article 25** of the **Constitution** that cannot be limited in any manner whatsoever. It therefore means that any time the trial court allowed an amendment to the charge(s), the Appellants were entitled, as of right, to be informed of the amendment with such details as to be able them answer the amended charge(s) and to be accorded a fresh opportunity to plead to the amended charge(s). Further, the Appellants were to be accorded an opportunity to recall any of the witnesses who had testified before the amendment. That is a constitutional guarantee.

11. In this case the Appellants pleaded afresh to the charges after PW1 and PW2 had testified, but were not accorded an opportunity to recall PW1 and PW2. The Court of Appeal in the case of **Harrison Mirungu Njunguna v. Republic Criminal Appeal No. 90 of 2004** (unreported) held that ***".....the right to hear the witness give evidence afresh on the amended charge or to cross examine the witnesses further is a basic right going to a root of a fair trial".*** The appellate Court then found the proceedings before the trial court substantially defective and further explained that the failure of the trial court to inform the accused of his rights given to him by law was not a procedural technicality which could be cured under the provisions of **Section 382** of the **Criminal Procedure Code**.

12. The foregone case of **Harrison Mirungu Njunguna** (supra) was further discussed by a differently constituted bench in the case of **Joseph Kamau Gichuki v. Republic (2013) eKLR** where Hon. Justices ***Mwera, JBM Kariuki*** and ***M' Inoti, JJA***. on 26th day of July 2013 had the following to say: -

> ***The effect of amending the charge was to alter the case that the accused person had to meet. Hence, he had to plead to the amended charge afresh and had to be informed of the right to re-call witnesses to testify on the charge as amended and to be cross-examined.***

13. The amendment which introduced the joint charge was hence a fundamental departure from the previous charges where the Appellants had been charged in separate counts. The amendment was therefore not meant to cure a technical compliance of the charge, but it introduced a complete set of particulars and went to the root of the charge. The trial court was hence under an obligation to explain the right to recall the witnesses to the Appellants. The failure on the part of the trial court to so comply therefore infringed on the Appellants' right to a fair trial. That rendered the trial substantially defective and the conviction and sentences cannot stand.

14. Having so found, consideration of the other grounds of appeal will not add any value to this matter. I will however consider the possible way forward; that is if the Appellants are to be set at liberty or be re-tried.

15. 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 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; .....

16. 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.

17. Applying these principles to this appeal and considering the nature of the evidence on record, the joint charge, the possibilities of the availability of the witnesses mostly of whom were from PW1's family, village and the administrative neighborhood who testified barely one year ago hence cannot be said to run the risks of faded memory and given that the Appellants were convicted barely one year ago, I am of the considered finding that this is a suitable case for retrial.

18. Consequently, the appeal is hereby allowed, the conviction quashed and the sentences set aside. The Appellants shall be released into police custody and be produced before any other Court competent to try them except **Honourable R. K. Langat** Senior Resident Magistrate within 5 days of this judgment.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 09th day of May 2019.

A. C. MRIMA

JUDGE

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

David Oluoch Adongo and **Duncan Otieno Omondi** the Appellants in person.

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

Miss Nyauke – Court Assistant