



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 17 OF 2018

BETWEEN

BENARD MUTHINI MBONDO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kangundo Senior Principal Magistrate's Court Criminal (SO) Case No. 6 of 2017, Hon. D. Orimba, SPM on 4th December, 2017)

REPUBLIC.....PROSECUTOR

VERSUS

BENARD MUTHINI MBONDO.....ACCUSED

JUDGEMENT

1. The appellant, **Benard Muthini Mbondo**, was charged before the Senior Principal Magistrate's Court at Kangundo in Criminal Case (SO) No. 6 of 2017 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**. The particulars were that the appellant, on diverse months between the month of November, 2016 and 25th February, 2017 in Kangundo sub-county within Machakos County, unlawfully and intentionally caused his penis to penetrate the vagina of **EWM**, a child aged 7 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he unlawfully and intentionally touched the vagina of **EWM**, a girl aged 7 years.

2. Upon being found guilty, the appellant was convicted of the offence of defilement and was sentenced life imprisonment, the court stating that its hands were tied.

3. Not being satisfied with the sentence the appellant has lodged the instant appeal in which he sets out the following grounds:

- 1) **That the learned trial magistrate erred in law and fact by relying on the evidence which was contradictory.**
- 2) **That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution had failed to prove its case to the standard required in law, that is proof beyond reasonable doubt.**
- 3) **That the learned trial magistrate erred in law and fact for failure to summon essential witnesses for the determination of the case.**
- 4) **That the learned trial magistrate erred in law and fact by shifting the burden of proof on the appellant.**
- 5) **That the learned trial magistrate erred in law and fact by failing to find that the investigating officer did not conduct any investigations and that if he did, the same was shoddy.**
- 6) **That the learned trial magistrate erred in law and fact by failing to give his defence adequate consideration.**

4. In support of its case the prosecution called 6 witnesses. According to the complaint, **EWM**, a standard two pupil who testified as PW1, after the court conducted a *voir dire* examination, sometimes in 2017 in the morning hours while she was playing with her younger sister with a cushion, the appellant, who used to visit the complainant's home, went to their home when their mother was away. The appellant then bought a *mandazi* from a nearby kiosk and offered to both the complainant and her sister. He then got hold of the complainant left with her, laid her on the cushion, told her to remove her pants, laid on her, unzipped and inserted his penis into her organ. According to the complainant she felt pain as it was the first time it was happening to her. While all these were happening her younger sister was just nearby. One **FN** (PW2) found the appellant lying on her top and when the appellant saw her he ran away. It was PW2 who relayed information to the complainant's mother when her mother returned. She was then taken to the hospital by her mother where she was treated.

5. According to PW2, **FN**, on 25th February, 2017 she was at home at 12.40 pm and was on her way to attend a merry-go-round in the neighbourhood, when she decided to pass through the complainant's home as her mother was also supposed to attend the function. Upon reaching the home, she found the appellant, a neighbour, lying on top of the complainant with a cushion placed on the path. Upon seeing PW2, the appellant pleaded with her to forgive him, stood up and went to his home. PW2 proceeded to when she was going and informed the complainant's mother (PW3) what she had witnessed. They then returned and followed the appellant who was arrested and taken to the police while the complainant was taken to the hospital. According to her, the appellant had removed the inner pant of the complainant. It was her evidence that the appellant admitted that fact to the police and disclosed that that was the 6th time he was sleeping with the complainant. In cross-examination she stated that the complainant stated that the appellant normally gave her *mandazi* after the act.

6. On 25th February, 2017, PW3, **ASM**, the complainant's mother had gone for a function. While there, PW2 informed her that the latter was at her home when she found the appellant lying on her daughter, the complainant, aged 8 years. She produced the complainant's immunization card, notification of birth and birth certificate showing that the complainant was born on 23rd July, 2009. She immediately rushed home and accosted the appellant, a neighbour and a close relative, who informed her that he wanted to commit the offence but did not do so. She then called her husband and the matter was reported to the police and the appellant arrested and he admitted having tried to defile the complainant. PW3 took the complainant to the hospital where she was treated and issued with a P3 form. According to her evidence, the complainant's pants were blood stained. In cross-examination she denied that she left the appellant at her home while going for the function.

7. PW4, **Vincent Muthini**, recalled that on 25th February, 2017 at about 12.40pm he was from a wedding ceremony with one Victoria who received a call and informed him of the incident. They then proceeded to the scene where they found that the appellant had fled the scene. He then followed him and arrested him and handed him over to the police. At the scene, were two pillows which according to him the appellant had laid the complainant on. Upon his arrest, the appellant, a neighbour, pleaded for mercy. He stated that the complainant's cloth was torn.

8. PW5, **Corazon Cheron**, a clinical officer at Kangundo Level 4 Hospital, examined the appellant, aged 65 years, who was taken to the Hospital in the company of a police officer, on 25th February, 2017 at 10.30 am, on allegation of commission of defilement. According to him, the appellant was in fair condition but was unkempt and had bruises on his face. Upon examination, he found that he had blood from his private part and they carried out HIV, Hypertory and Urine tests. While the urine test was positive the other tests were negative. He then filed in a P3 form which he produced.

9. He also examined the complainant aged 8 years who was accompanied by her mother with the history of sexual assault. According to him, she was in general condition but upon examination, she found her hymen broken, though not fresh, with visible laceration on the labia minora though there was no active bleeding and no visible discharge. According to him the examination was 4 and ½ hours.

10. PW6, **Cpl Susan Kwach**, attached to Kangundo Police Station was, together with **PC Msyaya** on patrol at Ngonda on 25th February, 2017 at about 2.50pm when they received a call from the OCS, Kangundo requesting them to proceed to Kikambua Police Post where a suspect of defilement had been arrested. Upon proceeding there, they found the victim of the victim, the appellant together with eye witnesses who narrated to them the history of the matter. They arrested the appellant and took him to the police station and were later instructed to carry out investigations. They issued the complainant with a p3 form and recorded the statements from the witnesses. According to her, upon interrogating the appellant, who was also medically examined, he admitted having defiled the complainant 6 times. The appellant was therefore charged with the offence.

11. Upon being placed on his defence, the appellant opted to make unsworn statement. According to him, he did not defile the complainant as alleged and sought that he be acquitted of the offence as he could not do such a thing to a young child and that he was framed by the members of the family of the complainant.

12. In his judgement, the learned trial magistrate found, based on the notification of birth that the complainant was 8 years old having been born on 23rd July, 2009. He further found, based on the evidence of PW1, PW2, PW4 and PW5 that the complainant was defiled. As to whether the appellant was the culprit, the court found that the appellant did not deny being at the scene of crime and indeed told the court that he normally visits the home and on the material date was present. The appellant was also examined and the indication showed that he had sex as he had blood in the private parts and he was well known to the complainant. Accordingly, the court found the evidence was overwhelmingly against the appellant and that the prosecution proved its case beyond reasonable doubt. He proceeded to convict the appellant accordingly.

13. In this case the prosecution submits that the evidence adduced did not prove penetration. However, the offence of indecent act was proved. The Court was therefore urged to find so and convict the appellant accordingly. I have also considered the submissions made by the appellant.

14. The appellant complains that the language used by the court was not indicated. According to the proceedings of 27th February, 2017, proceedings which seems to have been by way of a standard stamp. With due respect such a procedure which applies a standard mode of indicating an accused's presence is highly inappropriate in criminal proceedings. The interpretation in the space left for the purpose in the stamp is indicated as Eng/Kiswahili presumably that the interpretation was from English to Kiswahili. The certified copies of the proceedings themselves do not show which language was being used by the court and its interpretation if, any and by who.

15. The Court of Appeal has had occasion to deal with what I would call “standard form recordings” in Elijah Njihia Wakianda vs. Republic [2016] eKLR in which it held that:

“Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms.”

16. The manner in which the plea was recorded in that matter had somewhat similarities to the instant case. The court noted that whereas there was only one charge, the record of the proceedings stated thus:

“Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili:- “It is true.”

17. Commenting on this mode of recording pleas, the Court stated as follows:

“With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of “charge(s)” when there was a single charge and the rather odd “in a language he understands”, when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process.”

18. It is not surprising that the appellant initially pleaded guilty to the offence and only later on did he change his plea.

19. Nothing would have turned on those earlier proceedings despite their impropriety since the plea was changed. However, after that there is no indication at all regarding the language that was in use by the court and whether the appellant had the benefit of an interpreter. Article 50(2)(m) of the Constitution provides that an accused person is entitled to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. I agree with **Mativo, J** in Wilson Kipchirchir Koskei vs. Republic [2019] eKLR where he expressed himself as hereunder:

“3. Counsel for the DPP, Mr. Chingiti, in the course of his submissions made a candid observation, that it is possible that the appellant did not understand the proceedings in the lower court since they were conducted in English which was translated to Kiswahili. On this ground, he urged the court to find that the proceedings in the lower court were mis-trial.

4. The appellant in his grounds of appeal stated that he did not understand the language of the court. Article 50(m) of the Constitution guarantees a fair trial to include the right "to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."

5. The record shows that the proceedings were conducted in English language which was translated to Kiswahili. Curiously, after the appellant was put on his defence, while tendering his defence, for the first time in the proceedings a Tugen Interpreter was availed. Curiously, this was the first time the court recognized the need for an interpreter.

6. The starting point is that this court hoists high the constitutional requirement for a fair trial which includes the right of the accused to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. This court has a duty to study the entire record and satisfy itself that indeed the trial court did not comply with this constitutional requirement. The appeal court must consider whether the misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal bearing in mind that what the Constitution demands is that the accused be given a fair trial.

7. In Joseph Ndungu Kagiri vs Republic, addressing the question of a fair trial, I rendered myself as follows:-

"In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society."

8. In the above case I cited the Supreme Court of India where it stated:-

"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism."

And again:- "Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused....."

9. The right to a fair trial is among the fundamental rights and freedoms that may not be limited. Article 50(2)(m) correctly interpreted means that an accused person should be able at all stages of the trial to understand the case against him or have the case explained to him in a language that he understands. The sole purpose of doing so is so as to ensure that an accused at all stages of the trial understands the case against him and avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence.

10. The constitutional dictate to a fair trial cannot be met if the accused cannot understand the language of the court. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

11. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial includes the grant of fair and proper opportunities to the person concerned, and understanding the nature of the case against him and understanding the language of the court. This must be ensured and observed as it is a constitutional, as well as a human right. Under no circumstances can a person's right to fair trial be jeopardized.^[5] On this ground alone, I find and hold that the trial at the lower court was not conducted in a manner that can be said to be consistent with the Constitution. The conviction cannot be allowed to stand.

.....

41. In conclusion it is my finding that the proceedings in the lower court were not conducted in a manner that can be read to be consistent with the fair trial requirements under Article 50(2) (m) of the Constitution. The appellant cannot be said to have been accorded a fair trial when it is evident that the entire proceedings except his defence were conducted in a language he did not understand. I find that it would be an affront to the letter and spirit of the Constitution to allow the conviction and imprisonment imposed upon the appellant to stand."

[Emphasis mine].

20. In this case it is clear that the manner in which the proceedings were conducted fell short of the constitutional dictates.

21. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial or not? 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 insufficiency 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;....."

22. The Court of Appeal likewise had the following to say in the case of Samuel Wahini Ngugi vs. 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.’”

23. In Muiruri –vs- Republic (2003), KLR, 552 and Mwangi –Vs- Republic (1983) KLR 522 and Fatehali Maji vs. Republic (1966) EA, 343 the view expressed was that: -

“Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it.”

24. **Makhandia J.** (as he then was) in the case of Issa Abdi Mohammed vs. Republic [2006] eKLR opined that: -

“An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant.”

25. In this case the appellant was convicted on 4th December, 2017. He has served slightly more than 1½ years. However, the offence facing him was a serious offence and this Court cannot lose sight of the fact that the alleged culprit here was a young girl aged only 7 years. Just like the Court of Appeal in Elijah Njihia Wakianda vs. Republic [2016] eKLR I quash the conviction and set aside the sentence. I set the clock back so the process is restarted on proper footing. In consequence, I direct that the appellant shall be presented before any Magistrate with jurisdiction other than, **Hon. Orimba, SPM** to hear and determine the matter *de novo*.

26. However, any resulting sentence, if at all, will where appropriate, take into account the period the appellant spent in custody.

27. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 3rd day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey