



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 56 OF 2019

JOHN MWANGANGI NDILIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from Original Conviction and Sentence in Criminal Case No. (S.O) 60 of 2018 at Kilungu SRM delivered on 04/12/2018 before Hon. E. Muiru SRM)

JUDGMENT

1. **John Mwangangi Ndili** the Appellant was as per the charge sheet charged with defilement contrary to section 8(1) (3) of Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 5th day of September 2018 at 7:00pm at Kithukuli village, Kee location in Makueni county intentionally caused his penis to penetrate the vagina of **M.N** a child aged 15 years.
2. He faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 5th day of September 2018 at 7:00 pm at Kithukuli village, Kee location in Makueni county, intentionally touched the vagina of **M.N** a child aged 15 years with his penis.
3. After a full hearing the Appellant was found guilty, convicted and sentenced to twenty years' imprisonment on the main count.
4. Being aggrieved, he filed this appeal against the judgment raising the following grounds: -
 - 1) **That**, the learned trial Magistrate erred in law and fact when she convicted and sentenced him without regard to his basic right for disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50(2)(j) of the Constitution.
 - 2) **That**, the pundit Magistrate erred in both points of law and fact by failing to observe that one of the ingredient establishing the offence of incest i.e. penetration was not proven by the prosecution beyond reasonable doubt as required in law.
 - 3) **That**, the trial Magistrate erred in both points of law and fact when she failed to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent, and full of lies hence not capable to pass the test of credibility.
 - 4) **That**, his conviction based on the evidence on record was manifestly unsafe.
 - 5) **That**, he prays that this court implements the Supreme Court's decision and reviews his sentence accordingly following the factors laid out in **Francis Karioko Muruatetu –vs- Republic (2015)**.
5. The prosecution called (6) six witnesses while the defence called two witnesses. Pw1 (**M.N**) the complainant who claimed to be 13 years but was later found to be 15 years, gave unsworn testimony. She stated that on 5th September, 2018 at 7:00pm, she left K primary school where she learnt heading for home. While near the church, the Appellant called her and she went. He warned her that if she talked he would kill her.
6. He held her hand and they went into the bushes. He told her to lie down and remove her pant. He in turn removed his trouser and had sex with her twice. She felt pain and told him but he could not hear any of that. She went home and told no one. While at home, she removed her uniform to prepare vegetables for supper. After a while she heard the Appellant telling her mum (Pw2) to tell her to return his phone. Pw1 and Pw2 went where the Appellant was.
7. She informed Pw2 that the Appellant's phone was taken as he had sex with her. They went to the bushes at the scene and using a torch,

they found the phone which was given back to the Appellant. She went to school the next day, but her mother called her to the shop at 3:00 pm and asked her to remove her pant and she examined her. She was in pain.

8. On 7th September, 2018 the matter was reported to the assistant chief (Pw3) and she was taken to Mutungu hospital by a police officer, Pw2 and her brother Musyimi. The Appellant is their neighbor. In cross examination, she said the Appellant had given her Kshs.100/= to buy her silence but she returned it to him. Pw2 gave similar evidence to that of Pw1 on the role she played.

9. In cross examination, she said she did not report the matter immediately because she wanted to ascertain the truth first. She also informed the Appellant's wife (Dw1).

10. **Pw3 Maureen Makau** the assistant chief, confirmed receiving a report of defilement from Pw1 and her brother. After Pw1 had explained the report to her, she called the chief with whom she went to the Appellant's home and arrested him and took him to Kola police station after visiting the scene. Both Pw1 and the Appellant were taken to hospital. **Pw4 Lawrence Mwau** confirmed the evidence of Pw3.

11. **Pw5 No.54462 PC Joseph Masinde** investigated the case after receiving a report from Pw1 – Pw4, and he re-arrested the Appellant. He issued Pw1 with a P3 form and escorted them to Matungu hospital. The doctor established that Pw1 was aged 15 years.

12. **Pw6 Erick Kasiamani** is the clinical officer who examined both Pw1 and the Appellant.

Findings on Pw1: -

- Pain while urinating
- Hymen was perforated
- Yeast infection
- Pus cells

Findings on Appellant

- Urine test revealed pus cells and syphilis.

He produced the P3 form for Pw1 as EXB 5 whose section D is for the Appellant. Also produced were:

- O.P card for Appellant (EXB3) and PRC form (EXB4)

13. In cross examination, he explained that the Appellant infected Pw1 with a fungal infection which is the yeast infection. He said syphilis takes 10-90 days to manifest itself in the event it has been transmitted. He could not recall asking the Appellant to avail his wife for testing.

14. The Appellant gave an unsworn statement in his defence. He claimed that the injections he was given had made him unable to walk with hard things forming in his joints. He said he had shown Pw2 bhang planted by her son who is in jail. The next day she came to his home and warned him that she would leave his home as a shadow. He said she waters the bhang plants. That he has been charged with the child of **LN**.

15. **Dw1 Monica Ndunge Mwangangi** is the Appellant's wife. She testified that on 5th October, 2018 evening while in her house she heard noises. On checking, she found the Appellant exchanging with Pw1. She was there with her children and the Appellant told her that Pw2's child had stolen his phone. Pw2 had a phone which she refused to give to the Appellant as she was demanding for money claiming he had slept with her daughter. That Pw1 had found her holding a phone, snatched it and ran with it to her home.

16. She further stated that Pw2 told them she would revenge against the Appellant for causing her son to be in jail. They went to hospital with Pw2 and had to wait until the Appellant was examined and was told he was sick. She was not asked to be examined and she was there. She stated that the Appellant was heavily drunk and did not know himself.

17. In cross examination, she said that the Appellant was heavily drunk and that she had confirmed this when she got to where they were. That Pw1, grabbed the phone from the Appellant though she did not see her take it. She did not know what had happened before she heard the noises.

18. During the hearing of the appeal, the Appellant relied on his written submissions. On ground one **(1)** he argues that he was not issued with witness statements hence a violation of his right under Article 50(2)(j) of the constitution. He did not therefore have time to prepare for his defence contrary to Article 50(2)(c). He referred the court to the case of **Thomas Patrick Gilbert Cholmondeley –vs- Republic (2008) eKLR**.

19. It is his submission that the trial was not fair since he was ordered to pay for the witness statements. He cited the case of **Natasha Singh –vs- C B(2013)5 SCC 741 & R –vs-Ward (1993) 2 all ER 557** to support this argument. He claims not to have known the case he was facing.

20. He argued grounds 2, 3 and 4 together. He says penetration was not proved as Pw1 never mentioned what organ was inserted and where.

Relying on the case of **John Mutua Munyoki –vs- R (2017) eKLR** by the Court of Appeal he submits that not all ingredients in a case of rape were produced. That there was a blood stained pant which was produced. He contends that under section 36(1) of the Sexual Offences Act he was entitled to a DNA test to prove whether he committed the offence or not.

21. In ground 5 he challenges the mandatory sentence imposed on him in light of the **Francis Muruatetu case of the Supreme Court** and many others from the Court of Appeal. He asked for review of his sentence. All in all, he asked for the Appeal to be allowed, conviction quashed and sentence set aside. He added that he is fifty-nine (59) years old, married with eight (8) children and that his wife is epileptic.

22. Learned prosecuting counsel for the State Mrs.Owenga opposed the appeal and relied on the evidence on record.

Analysis and determination

23. This is a first appeal and this the court is guided by the principles set out in the case of **Okeno –vs Republic 1972 E.A 32**. In the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** the Court of Appeal stated thus:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

24. From the evidence on record, grounds of appeal and the submissions the issues for determination are as follows: -

- i. Whether the Appellant’s rights are envisaged under Article 50(2) (c) (j) of the Constitution were violated.
- ii. Whether the ingredients for proof of the offence of defilement were established i.e. age, penetration and identification of the defiler.
- iii. If (ii) is confirmed whether the sentence should be reviewed.

Issue (i) whether the Appellant’s rights as envisaged under Article 50(2) (c)(j) of the Constitution were violated.

25. The Appellant submitted that he was ambushed by the Respondent’s evidence hence he was unable to respond or answer adequately or challenge the evidence. He said he was never supplied with witness statements. The Respondent did not specifically address this issue as Mrs. Owenga for State stated that she entirely relied on the evidence on record.

26. Article 50 of the constitution provides as hereunder-

(2) Every accused person has the right to a fair trial, which includes the right –

(c) To have adequate time and facilities to prepare a defence;

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

27. In the case of **Joseph Ndungu Kagiri vs- Republic (2016) eKLR, Mativo J.** exhaustively dealt with this issue and stated thus

“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 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 Article 50 of the Constitution of Kenya 2010. The right to a fair trial is one of the cornerstones of a just society.

The Supreme Court of India in **Rattiram vs- State of M.P. (12)**, a three-judge bench ruled thus: -

“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

“The Constitution of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to Article 50 which provides for the fundamental right to a fair hearing. Article 50(2) (j) 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 while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is

guaranteed under Article 14 of the International covenant on Civil and Political Rights (ICCPR). The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under Article 25(c) of our Constitution, it is among the fundamental rights and freedoms that may not be limited.”

.....

*“In **Thomas Patrick Gilbert Cholmondeley –vs- Republic**, (decided before the promulgation of the 2010 Constitution) the Court of Appeal stated categorically 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.”** In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively **R.V. Ward (1993)2 ALL ER 557; R.V. Stinchcombe (1992) LRC (Cri)68; Olum & Another –vs- Attorney General (2002) 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others –vs- The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001).”

Article 50(2) (j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is to 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. This provision must then be read together with sub Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.

.....

“Furthermore, the words of Article 50(2)(j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. this right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, “to have adequate facilities to prepare a defense.”

.....

“I find that failure to provide the Appellant and his co-accused with the prosecution witness statements in advance as provided for under Article (50)(2)(j) violated their constitutional right to a fair trial and vitiated the entire trial”

28. The record shows that the Appellant first appeared in court on 10th September, 2018 when plea was taken. The court ordered that:

“To be supplied with statements at his own cost.”

The matter was fixed for hearing on 2nd October, 2018 with a mention on 25th September, 2018. On 25th September 2018, the Appellant was not produced.

29. On 2nd October, 2018 the Appellant was present and the prosecutor indicated she had five (5) witnesses present. The Appellant stated “*I am ready.*” The court took the evidence of all these witnesses. The Appellant participated through cross examination but the issue is whether he was adequately prepared for the case.

30. The record shows that there was only one mention date between the date of plea taking and the hearing date. On the mention date of 25th September, 2018 the Appellant who was in prison custody was not produced in court. One of the things which had to be confirmed by the court on the mention date was the party’s preparedness for the hearing.

31. In the absence of the Appellant his position could not have been confirmed. The court did not issue a production order for him to be availed on the next day or on a date before the hearing date. i.e. 2nd October 2018 for the purpose of that confirmation.

32. My view is that following the Appellant’s incarceration in prison custody, the fact that the court had ordered that the Appellant be supplied with the witness statements at his own cost, the short period between the plea date and hearing and the failure to produce him on the mention date the trial court had a duty to confirm if he had been supplied with the witness statements before embarking on the hearing. This I believe is part of pre-trial conferencing.

33. In the case of **Joseph Ndungu Kagiri –vs- Republic 2016 eKLR Mativo J** cited the English case of R vs- Ward (supra) where the Court of Appeal held that:

“..... Furthermore, the prosecution were under a duty which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.”

34. Further in **Joshua Njiiri –vs- R Criminal Revision No. 11 of 2017 (2017) eKLR Nyakundi J.** held that the right to supply of information and witness statements ought to be fulfilled before a court takes any step in the case. Failure to provide the Appellant with the witness statement in advance as provided for under Article 50(2) (j) violated his constitutional right to a fair trial. Failure by the trial court to satisfy itself of the compliance of its orders of 10th September, 2018 and the appellates adequate preparation of the case against him amounted to a violation of his right under Article 50(2)(c) of the Constitution.

35. My finding is that the entire trial was vitiated. I will therefore not proceed to determine the rest of the issues.

36. Having established that the conviction is unsafe, should the Appellant be set at liberty or should the court order for a retrial? On whether or not to order a retrial depends on the circumstances of each case. See **Obendi Kilonzo Kevevo –vs- R (2015) eKLR; Jackson Githinji Karani –vs- Republic (2019) eKLR.**

37. In the case of **John Njenga Kamau –vs- Republic Criminal Appeal No. 203 of 2016 (2018) eKLR** the Court of Appeal further held:

“The unmistakable thread in all the authorities is that “each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the Appellant Explaining what the interest of justice entail, and in its own summary, the court in the English case of Reid –vs- Republic (1978) 27 WIR 25 held: -

“The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Among the factors to be considered in determining whether or not to order a new trial are:-

- a) The seriousness and prevalence of the offence;**
- b) The expense and length of time involved in a fresh hearing;**
- c) The ordeal suffered by an accused person on trial;**
- d) The length of time that will have elapsed between the offence and the new trial;**
- e) The fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial;**
- f) The strength of the case presented by the prosecution but this list is not exhaustive”**

38. The offence herein is serious and prevalent in the area of the jurisdiction of this court. The Appellant was charged in September, 2018 and sentenced on the 4th December, 2018. Weighing the interests of both the Appellant and the complainant who is a minor, I find the interests of justice to favour a retrial.

39. I therefore allow the appeal, set aside both the conviction and sentence and order for a retrial before any Magistrate at Kilungu Law Courts besides Hon. E. Muiru – Senior Resident Magistrate. The trial should be concluded within 12 months.

40. The Appellant to be arraigned before the Senior Principal Magistrate – Kilungu on 21st November, 2019 for a fresh plea to be taken.

Orders accordingly.

Delivered, signed & dated this 14th day of November, 2019 in open court at Makueni.

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Hon. H. I. Ong'udi

Judge