



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 9 OF 2019

-consolidated with-

CRIMINAL APPEAL NO. 2 OF 2018

JOSEPH OUMA OWINO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. R. Odenyo Senior Principal Magistrate

in Migori Senior Principal Magistrate's Court Criminal Case No. 454 of 2015 delivered on 21 /12/2017)

JUDGMENT

1. **Joseph Ouma Owino**, the Appellant herein, was initially charged with one **Div Ochieng Thomas**. The two were charged on 25/06/2015 with a joint charge of Gang Rape. The particulars of the joint charge were that '*Joseph Ouma Owino on the 23rd day of June 2015 at [particulars withheld] jointly, intentionally and in association with Div Ochieng Thomas caused, their penis to penetrate the vagina of LAO a child aged 19 years without her consent*'.
2. The two accused persons denied the charge and a trial was ordered.
3. On 17/11/2015 the hearing began. Two witnesses testified. They were the complainant, LAO who testified as PW1 and PW2 was the mother of the complainant. That evidence was taken before **Hon. Sindani, RM**.
4. The trial hit a snag thereafter. The said Div Ochieng Thomas jumped bail. Appropriate proceedings were undertaken, but he was not re-arrested even after the police were given ample time.
5. On 31/01/2017 the matter came before **Hon. R. Odenyo, SPM** for hearing. The prosecution had 3 witnesses. The court on its own motion ordered that the case was to *start de novo*. The matter proceeded with the Appellant as the sole accused person.
6. PW1 re-testified on that day. Later a neighbour one EOG. testified as PW2 and a Clinical Officer from Karungu Sub-District Hospital testified as PW3.
7. On 13/06/2017 the prosecution applied to amend the charge sheet so as to take care of the other co-accused person who had absconded. According to the court record the application was allowed even without giving an opportunity to the Appellant to respond thereto.
8. A new charge sheet was presented. The Appellant was called upon to plead and he denied the offence. The court then ordered that the trial was to proceed. The mother of PW1 then testified as PW4. The Assistant Chief of Lower Karapolo Sub-Location in Nyatike Sub-County testified as PW5 and The investigation officer testified as PW6.
9. The amended charge sheet had only the Appellant as the sole accused person. The particulars were that '*on the 23rd day of June 2015 at*

[particulars withheld] jointly, intentionally and in association with another not before court you caused your penis to penetrate the vagina of LAO a child aged 19 years without her consent’.

10. At the close of the prosecution’s case the Appellant was placed on his defence. He gave an unsworn statement without calling any witnesses. The Appellant was subsequently found guilty as charged and convicted. On receipt of mitigations the court sentenced the Appellant to 15 years in jail.

11. The Appellant, with the leave of this Court, lodged *Criminal No. 9 of 2019*. He had earlier however filed *Criminal Appeal No. 2 of 2018*.

12. Directions were taken and the Appellants filed written submissions. The appeal was opposed. At the hearing of the appeal it was brought to the attention of the Court that the Appellant had filed *Criminal Appeal No. 2 of 2018*. The appeals were consolidated with *Criminal No. 9 of 2019* being the lead appeal.

13. The Appellant challenged the conviction and sentence in great length. He raised several grounds including the manner in which the trial court dealt with the change of the trial Magistrate and the amended charge.

14. 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.

15. 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 offence are proved.

16. I will first deal with the issue on how the trial court handled the amendment to the charge on 13/06/2017.

17. The starting point is the law. **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 if it is 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 (1) 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 misled or deceived, adjourn the trial for such period as may be reasonably necessary.

18. **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.

19. 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 Appellant was entitled, as of right, to be informed of the amendment with such details as to be able to 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.

20. In this case the Appellants pleaded afresh to the charges after PW1, PW2 and PW3 had testified. The record is silent that the Appellant

was accorded an opportunity to recall any of the witnesses who had testified.

21. 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**.

22. 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.

23. The amendment in this case brought in a complete different set of particulars. The amendment was therefore not meant to cure a technical compliance of the charge, but it went to the root of the charge. The trial court was hence under an obligation to comply with the law by *inter alia* explaining the right to recall the witnesses to the Appellant. The failure on the part of the trial court to so comply therefore infringed on the Appellant's right to a fair trial. That rendered the trial substantially defective and the conviction and sentence cannot stand.

24. 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 Appellant is to be set at liberty or be re-tried.

25. 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;

26. 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.

27. Applying the above principles to this appeal and considering the nature of the evidence on record, the amended 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 two years ago, whether the witnesses may run the risks of faded memory and given that the Appellant were convicted around 2 years ago, I am of the considered finding that this is a suitable case for retrial.

28. Consequently, the appeal is hereby allowed, the conviction quashed and the sentences set aside. The Appellant shall be released into police custody and be produced before any other Court competent to try him. That will be within 7 days of this judgment.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 16TH DAY OF DECEMBER, 2019.

A. C. MRIMA

JUDGE

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

Joseph Ouma Owino, the Appellant 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