



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 69 OF 2017

DOMENIC KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the conviction and sentence of Hon. M.A.O. Opanga (SRM) delivered on 25th January, 2017 in Kithimani Principal Magistrates Court S.O.A. No. 11 of 2014)

JUDGEMENT

1. The appellant has filed this appeal on grounds that:

- i. The trial magistrate erred in law and fact when he conducted the trial in breach of section 214 (1) of the Criminal Procedure Code.
- ii. That the trial magistrate erred in law and fact when he acted on unproven allegation.
- iii. That the trial magistrate erred in law and fact when he conducted trial in violation of Article 50 (2) (c) of the Constitution of Kenya.
- iv. That the trial magistrate erred in law and fact when he dismissed the appellant's defence.

2. He was charged and convicted to serve life imprisonment for the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars thereof were that the appellant on 4th March, 2014 at [particulars withheld] village within Machakos County intentionally and unlawfully did an act which caused penetration with his organs (penis) into the genital organ (vagina) of M.K. a child aged 9 years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. Particulars being that the appellant on 4th March, 2014 at [particulars withheld] village within Machakos County intentionally by use of his genital organ namely penis caused contact into the genital organ namely vagina of M.K. a child aged 9 years.

3. The facts as per the record are as follows. The appellant lured E.M. promising to give her a mango. He took her to a thicket where he unzipped his trouser and removed E.M.'s pant. He then made her lie on the ground and '*did bad manners to her*'. She felt pain in her vagina in the process and cried. On their way to the thicket, R M M *alias* R J (PW2) who was from the river saw the two. She first took her water home. On her way home, she met J M whom she informed of what she had seen. Jecinta then decided to go and find out what the two were up to. When PW2 reached home, she informed another woman with whom she went to the scene. They met Jecinta who informed them that what they were suspecting was true. They ran to the scene screaming. E.M. ran away while the appellant was busy zipping up his trouser. Jecinta caught and examined E.M. and saw mucus like substance on her buttocks. People came but the appellant did not run away. E.M. was escorted home and later taken to hospital. APC Alfred Njue (PW3) arrested the appellant while PC Mwajuma Jinango (PW4) interrogated E.M. together with her witnesses, recorded their statements and escorted them to Donyo Sabuk Health Centre. Her P3 form was filled. She later preferred charges against the appellant. Joseph Mwaniki (PW5) a Clinical Officer at Donyo Sabuk dispensary confirmed that he examined E.M. Laboratory tests were done and pus and blood cells were found in her urine. HIV test came out negative. On examination of her private parts, it was revealed that her hymen was torn and her vagina was inflamed and bleeding. She was also found to have a smelly discharge but no spermatozoa were seen. It emerged from PW5's evidence that E.M. had been treated elsewhere. He produced p3 form (P. Exhibit 1) and treatment notes (P. Exhibit 3). Benjamin Maingi (PW6) a Clinical Officer at Matuu level four hospital assessed E.M.'s age and established that she was aged 9 years. PW6 produced the age assessment report as P. Exhibit 2.

4. Put on his defence, the appellant gave unsworn evidence to which he stated that he was on his way back from work when he felt pressed and stopped to relieve himself. A child passed by and as he was leaving, she told him to give her KShs 5/= to buy cake. Some women asked the child what she had done to ask for the money and she said nothing. The women then raised a false alarm and followed her home. At around 8.00 pm, he was arrested and taken to Katulye AP post. He was interrogated and charged for the offence he faced.

5. It was the appellant's contention on the first ground that the trial court allowed the application for amendment of the charge sheet without explaining to him his right associated to the amendment. That for the aforesaid reason his conviction and sentence was founded in an irregularity. The respondent on the other hand contended that section 214 (1) only calls upon the trial court to compel the Appellant to plead afresh where a charge has been altered and that the trial court did so. It was submitted that the trial was conducted on the basis that even after the amendment of the age of E.M., the offence still fell within the brackets of section 8 (1) as read with (2) of the Sexual Offences Act. That the amendment did not introduce a new matter into the main charge. That the spirit of section 214 of the CPC is to afford an accused person opportunity to recall and cross examine witnesses where amendments would introduce fresh element or ingredient into the offence with which an accused is charged.

6. Section 214 (1) of the Criminal Procedure Code provides:

“(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 that the witnesses or nay 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.”

7. It is clear from the above provision that the only mandatory thing for a trial court to do is to call upon the accused person to plead to the altered charge which the trial court did. Subsection (2) of the said section is to the effect that it is upon the accused to demand that witnesses be recalled for cross-examination. I further note that the appellant did not object to the amendment and the said amendment in the charge sheet did not occasion extreme variance between the charge and the evidence considering that the age was changed from 8 years to 9 years both ages termed in law as 'child'. The amendment did not in any manner affect the charge the appellant was facing. In the circumstances, I find that no prejudice would be suffered by the appellant. In the end, this ground has no merit and fails.

8. The appellant contended that his rights under Article 50 (2) (c) were violated. That the appellant was not provided with statements and documentary exhibits that the prosecution relied upon and that the trial court failed to explain to the appellant that he had the right to be supplied with the same. He further argued that he was not given an explanation as to his right to legal representation. On the other hand, the respondent argued that the case was mentioned severally before the hearing commenced without the appellant raising the issue that he required the said documents. That at no point did he raise the issue and was denied such opportunity. On legal representation, the respondent cited **Karisa Chengo and 2 others v. Republic [2015] eKLR** stating that the provision is not available to the appellant since he is not convicted of a capital offence.

9. On this ground, I wish to associate myself with Justice Mativo's observation in **Joseph Ndungu Kagiri v. Republic [2016] eKLR**. The Judge held:

“The next issue for determination is whether failure by the prosecution to provide the accused persons with witness statements amounted to a violation of their constitutional rights to a fair trial. It is not disputed that the accused persons were not provided with witness statements prior to the trial or during the trial yet all the four prosecution witnesses testified and the trial magistrate never addressed himself to this issue. Counsel for DPP Mr. Njue submitted that no prejudice was occasioned to the accused persons because the record shows that they ably cross-examined all the prosecution witnesses.

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). [13]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.

The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In Thomas Patrick Gilbert Cholmondeley Vs. Republic, [14] (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 V 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.

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. 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.

As pointed out above, the right to a fair trial is not one of those rights that can be limited under Article 24 of the Constitution. The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. In this regard, it is apt to reproduce a passage from a decision by the Supreme Court of India in the case of *Natasha Singh v. CBI* [15] where it was held as follows:-

"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 entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized." (Emphasis added)

In *R v Ward* [16] the Court of Appeal in England was unanimous that:-

"The prosecution's duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. 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. [Emphasis Mine]

As pointed out earlier, although the *Cholmondeley* case was decided under the former Constitution, principles of disclosure are well entrenched in the Constitution of Kenya 2010 as stipulated under Article 50(2)(j) cited above.

The case of *R v Ward* [17] is clear that the duty of disclosure is a continuing one throughout the trial. 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."

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in *R v Stinchcombe* [18] where the Supreme Court of Canada observed, "The obligation to disclose was a continuing one and was to be updated when additional information was received."

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 and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to a violation of their constitutional rights to a fair trial."

10. While I so associate myself, it must be noted that rights go hand in hand with responsibilities. Nowhere in the court record is it revealed that the appellant asked for provisions of the documents and was denied. It is unclear why the appellant did not raise the issue at the earliest instance. Further, and as correctly submitted by the respondent, state funded legal representation is unavailable to the appellant bearing in mind that he was not facing a capital offence punishable by death. In this regard I am guided by the Court of Appeal finding in *Karisa Chengo* (supra) and *Thomas Alugha Ndegwa V. Republic* [2016] eKLR where the court held as follows:

“9. A determination of whether the appellant herein is entitled to legal aid, in view of the fact that Legal Aid Act commencement date was 10th May, 2016, is a novel issue. We will look at authorities from Kenya as well as other jurisdictions for jurisprudential guidance.

10. This Court in the case of DAVID MACHARIA NJOROGE V R, (2011) eKLR analyzed the applicability of Article 50 of the Constitution and held:

“State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where „substantial injustice would otherwise result.” persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided.”

In David Macharia Njoroge V R, (supra), this Court considered the right to free legal counsel at state expense for the first time in Kenya and expounded on the principle of “substantial injustice”.

11. More recently, this Court in the case of KARISA CHENGO & 2 OTHERS V R, CR NOs. 44, 45 & 76 OF 2014, stated:

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result” and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

11. In the circumstances, I find that the appellant’s right as alleged were not in any way violated. That ground too fails.

12. The appellant also argued that he was convicted on unproven evidence and that his defence was not considered. The respondent submitted that defilement, attempted defilement and rape cases can be proved by way of oral evidence without DNA evidence. It was further submitted that the trial magistrate carefully considered the appellant’s defence and formed an opinion that his defence could not exonerate him from the charge. I have carefully considered the evidence on the record, the prosecution case that E.M. was in company of the appellant in the thicket and that the appellant was found zipping his pants and that E.M. was found to have whitish mucus like substance, her hymen broken and was then aged nine years was unshaken by the appellant’s evidence. The Appellant was apprehended at the scene by members of the public and handed over to the police officers who later had him charged with the offence. The Appellant had been placed squarely at the scene of crime and was found in flagrant delicto tying to unzip his trousers. Hence the Appellant’s claim that a false alarm had been raised by the members of public leading to his arrest is not convincing. The complainant’s evidence left no doubt as to the identity of her assailant. I am unable to fault the learned trial magistrate as the Appellant had been properly convicted.

13. In the circumstances, I find that the Respondent established its case beyond reasonable doubt. In the end, I find no merit in this appeal. It is hereby dismissed. The conviction and sentence of the trial court is upheld.

Dated and delivered at Machakos this 7th day of **March, 2018**.

D.K. KEMEI

JUDGE.

In the presence of:-

Domenic Kariuki - the Appellant

Machogu - for the Respondent

Kituva - Court Assistant