REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 14 OF 2017

KELVIN OCHIENG TOM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Court Criminal Case (Sexual Offence) No. 2 of 2016 delivered on 17/05/2017)

JUDGMENT

1. I have but to allow this appeal on one ground. It is on how the trial court handled an amendment to the charge.

2. The Appellant herein, **Kelvin Ochieng Tom,** was initially charged before the Chief Magistrates Court at Migori in **Criminal Case (Sexual Offences) No. 2 of 2016** (hereinafter referred to as '**the Criminal Case**') with the offence of **defilement** contrary to **Section 8(1)(4)** of the **Sexual Offences Act** No. 3 of 2006 and in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. That was on 08/07/2016. The appellant denied both counts.

3. The particulars of the offence of defilement were that on the 5th day of July 2016 at **[Particulars Withheld]** village within Migori County in the Republic of Kenya, the appellant intentionally caused his penis to penetrate the vagina of **G. M.R**. a child aged 16 years. When the criminal case came up for hearing on 24/10/2016 before Hon. M. M. Wachira, Resident Magistrate (as he then was) the prosecution applied to amend the charge sheet with a view of inserting the correct name of the complainant. The trial court allowed the application and proceeded with the hearing of the case accordingly where five witnesses testified on various dates until the determination of the criminal case.

4. The trial court rendered its decision on 17/05/2017 where it found the appellant guilty of the offence of defilement, convicted him and he was sentenced to 15 years imprisonment. The appellant then timeously lodged this appeal on 31/05/2017.

5. The appellant hotly contested the conviction and sentence in his Petition of appeal and 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. As said, the issue is how the trial court handled an amendment to the charge on 24/10/2016.

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:***
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> ***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 appellant was entitled, as of right, to be informed of the amendment with such details as to be able to answer the amended charge and to be accorded a fresh opportunity to plead to the amended charge. Further the appellant also remained at liberty to adduce their own evidence against the amended charge and to also challenge the evidence of the prosecution in support of the amended charge. That is a constitutional guarantee.

11. In this case three issues stand out. **One**, when the prosecution applied to amend the charge the trial court did not accord an opportunity to the appellant to respond to that application. The court unilaterally allowed the application in the following words '*No prejudice to accused. Application allowed name of complainant amended to read J. M.'* The appellant was therefore outrightly discriminated against and his right under **Article 27** of the **Constitution** infringed. **Two**, when the trial court allowed the amendment the appellant did not plead to the amended charge. The nature of the amendment changed the entire matter before court. The complainant became a complete different one and the appellant was to be accorded a chance to take a fresh plea to that amended charge. That did not happen. **Three**, once a charge is amended and a fresh plea taken an accused person must be accorded an opportunity to re-examine the witnesses who had already testified. In this case however there was no such witness as the amendment was made at the start of the trial.

12. The foregone issue has also been considered on several instances by the Court of Appeal. In the case of **Harrison Mirungu Njunguna v. Republic Criminal Appeal No. 90 of 2004** (unreported) the Court of Appeal held that ***".....the right to hear the witness give evidence afresh on the amended charge or to cross examine the witnesses further is a 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**.

13. 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: -

'Before we leave this point, we would like to observe that the case of HARRISON MIRUNGU NJUGUNA V R (supra) relied upon by the appellant is not a relevant authority in the present appeal. That case involved amendment of a charge under Section 214 of the Criminal Procedure Code. The Code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge and further entitles him to demand the recall of witnesses who have already testified to give their evidence afresh or to be further cross examined. In that case the charge was amended but the accused person was not called upon to plead to the amended charge. This Court held, correctly in our view, that the trial was substantially defective. 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 a mended and to be cross-examined. '

14. The Court of Appeal further considered the same issue in **Samwel Kilonzo Musau v. Republic (2014**) eKLR where a trial court had allowed a charge of defilement to be amended to include the words ***"intentional and unlawfully"*** in the particulars of the offence. The accused person in that case did not object to the application and the amendment was allowed. The appellant was called to plead to the amended charge after which he pleaded not guilty and a plea of not guilty was duly entered. The applicant did not indicate that he wished to have any of the witnesses who had already testified in court to be recalled and the trial proceeded. When he was convicted and sentenced, the accused person then took up the issue on appeal. The Court held that the trial court did not err in not giving the appellant an opportunity to recall any of the witnesses since the appellant did not apply to do so in the first instance. The Court also noted that the amendment was only meant to ensure technical compliance of the charge and that it did not impinge on the appellant's defence.

15. Turning back to the matter at hand and looking at the amendment in issue, I pose this question: **'What was the effect of the amendment to the appellant?'.**

16. It is clear that the effect of the amendment was to alter the case the appellant faced. I say so because the amendment changed the name of the complainant. The complainant became a completely different person. The amendment was therefore not meant to cure a technical compliance of the charge, but it went to the root of the charge and no doubt impeached on the appellant's defence. The first appellant was therefore perfectly within his right to be heard in response to the application and to take a fresh plea. The failure on the part of the court to so comply infringed on the appellant's right to a fair trial. That rendered the trial substantially defective.

17. In view of the above finding the 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.

18. 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 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;.....'***

19. 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:***
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> > *'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'*
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> ***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:***
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> > *'…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.'"*

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

21. Consequently, the appeal is hereby allowed, the conviction quashed, and the sentence set aside. The appellant shall be released into police custody and be produced before any other Court competent to try him except Honourable M. M. Wachira now Senior Resident Magistrate within 5 days of this judgment.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 7th day of June 2018.**

A. C. MRIMA

JUDGE

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

Kelvin Ochieng Tom the Appellant in person.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant