**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 178 OF 2015**

**DENNIS WANYONYI WAFULA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(*Being an appeal from the original conviction and sentence in Criminal Case No. 1004 of 2014 in the Principal Magistrate's Court at Sirisia by Hon. Kimani Mukabi – Resident Magistrate*)

**JUDGMENT**

**1. Dennis Wanyonyi Wafula**, the Appellant herein was charged with attempted rape contrary to **section 4** of the **Sexual Offences Act No. 3 of 2006** in count I. In the alternative, he was charged with indecent act with an adult contrary to **section 11** of the same Act. In count II, the Appellant was charged with assault causing actual bodily harm contrary to **section 251** of the **Penal Code**.

**2.** The brief particulars were that on the 23rd of September, 2014 in Bumula district within Bungoma county, the Appellant did intentionally and unlawfully attempt to cause his penis to penetrate the vagina of M.M.N without her consent. (Initials subsitituted to hide the identity of the victim.)

**3. PW1**, who is the Complainant in this case, told the court that on the material day, at about 6.00 p.m. she was on her way home from the posho mill while in the company of her sister-in-law, C N, **PW2**, when they encountered the Appellant. The Appellant threatened to have sexual intercourse with her and kill her which prompted the two of them to flee. The Appellant chased them and eventually caught up with them.

**4.** Upon catching up with them, the Appellant tripped the Complainant to the ground, turned her over and attempted to forcefully have his way sexually. A struggle ensued during which the Appellant punched her on the neck and she sustained mouth injuries. Her pants were torn in the process. In a bid to rescue the Complainant, **PW2** picked up a stick and hit the Appellant causing him to stop the attack and flee. They reported the incident at Malakisi Police Station the following day, and the torn pant was preserved. The Complainant was treated at Malakisi Health Centre.

**5.** The Appellant gave unsworn testimony in his defence without calling any witnesses. He vehemently denied committing the offences and alleged that he was framed. At the conclusion of the trial, the Appellant was convicted on both Counts. He was consequently sentenced to fifteen (15) years imprisonment on count I and five (5) years imprisonment on count II.

**6.** Aggrieved by both the conviction and sentence, the Appellant filed the present appeal. He advanced several grounds in which he stated that he did not plead guilty to the charge yet the trial court failed to consider his defense; his right to a fair hearing under Article 50 of the Constitution was violated; the OB number in the P3 form varies from that on the charge sheet; the evidence of the medical officer was contradictory and that the court shifted the burden of proof from the prosecution to him.

**7.** Learned state counsel Ms. Njeru opposed the appeal on behalf of the Respondent and urged the court to dismiss it for lack of merit. She urged the court to uphold the conviction and sentence which in her view were made in accordance with the law.

**8.** I have analyzed and re-evaluated the evidence on record afresh to make my own findings and draw my own conclusions in line with **Boru & Anor. Vs. Republic Criminal Appeal No. 19 of 2001 [2005] 1 KLR**. In the foregoing case the learned judges of the Court of Appeal held *inter alia* that:

> **"A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any question of law raised on the appeal."**

**9.** On the issue of the medical evidence presented before the trial court, Ms. Njeru contended that the record demonstrated that the evidence in the medical report agrees with the evidence of the Complainant. She urged that the doctor agreed that the injuries were caused by a blunt object. She referred the court to the P3 form and the treatment notes produced at the trial which classified the Complainant's injuries as harm.

**10.** The Appellant argued that there was a discrepancy between the OB number contained in the charge sheet and that in the P3 form. From the record, the OB number in the P3 form is noted as OB 12 whereas that in the charge sheet is OB. NO. 20/23/11/2014. It is therefore clear that there is a discrepancy in the OB number.

**11.** Upon receipt of a complaint, a Police officer at the station records the complaint in the Occurrence Book and issues an Occurrence book (OB) number. The OB number contains the date on which the alleged crime reported was committed. A P3 form is then issued which should contain the OB number for purposes of tracing the file.

**12.** What is material in this case however are the particulars contained in the charge sheet. From the record, it is clear that the particulars in this case are in harmony with the charge and the evidence presented before the trial court. As such, the discrepancy is inconsequential. Even if the charge sheet carried the wrong number, the court will go further to consider whether it is curable by **section 382** of the **Criminal Procedure Code**.

**13.** In the case of **Joseph Maina Mwangi vs. Republic Criminal Appeal 73 of 1992 [2000] eKLR**, the Court of Appeal (Tunoi, Lakha & Bosire JJA) while deliberating on the issue of discrepancies opined thus:

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC *viz* whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence…In view of the long passage of time it would not be expected that witnesses would testify without discrepancies. Besides, the discrepancies are only matters of minute detail and do not affect the tenor and substance of the prosecution case. In our view, therefore, they are inconsequential."**

**14.** Further, **section 382** of the **Criminal Procedure Code** provides thus:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in an inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

**15.** In the present case, the Appellant had the option of raising the objection of the discrepancy at the trial court. In any case, I find that it does not in any way affect the substance of the prosecution case.

**16.** On the question of the Appellant's rights under **Article 50(2)(e)**, **50(2)(g)**, **50(2)(h)** and **50(2)(p)** being violated, Ms. Njeru submitted that the Appellant's rights were not violated in any manner. She stated that when the Appellant complained that he could not read or see due to eye complications, the court made an order for him to be taken to hospital, after which he did not raise further concerns. She urged that when the trial commenced, the Appellant was able to follow the proceedings and to cross-examine the prosecution witnesses. She pointed to the record which showed that the Appellant's defence was considered and found to lack merit.

**17.** Ms. Njeru further stated that the trial commenced and concluded without unreasonable delay. That the times the case did not proceed when it was set down for hearing were when the Appellant was not produced before the court. The record shows that the matter was adjourned a few times either because the Appellant was not produced in court, or because the prosecution witnesses were not bonded.

**18.** It is important to determine then whether this occasioned unreasonable delay which infringed upon the Appellant's right to a fair hearing. From the record, it is clear that the Accused was afforded medical care upon his request and that he never raised further concerns before the trial court.

**19.** It is noteworthy that the maxim *justice delayed is justice denied* which is the cornerstone of **Article 50(2)(e)** of the **Constitution** has its flip side. In the case of **Joseph Ndungu Kagiri vs. Republic Criminal Appeal 69 of 2012 [2016] eKLR**, a defence hearing was fixed within seven (7) days from the date the prosecution concluded its case in what appeared to be a perfect observance of the provisions of **Article 50(2)(e)**. Mativo J while deliberating on this maxim posed the question as to whether this occasioned the "The Two Sided Speedy Trial Problem" and stated thus:

> **"The two sided problem caused by speedy trials was ably discussed by Shon Hopwood who while invoking the maxim *"justice delayed is justice denied"* considered the fuller picture of criminal justice. He postulates what he calls the flip side of the said maxim and argues that it poses an equal danger. This danger was ably brought out by *Martin Luther King, Jr.'s Letter from Birmingham Jail* where he wrote:- '*justice too long delayed is justice denied. Not because delays contrary to justice should be tolerated for any time. Rather, because the flip side of justice delayed can be an equal danger: a rushed, unconsidered justice*'.**
>
> **In my considered opinion, the speedy trial provided for in our constitution is not "*a rushed and unconsidered justice.*" No. it cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must of necessity exhibit the best antidote to both sides. It must**

**demonstrate a criminal justice system that is not too fast, and not too slow, but just right.[11] To me that is the proper meaning of the phrase '*to have the trial begin and conclude without unreasonable delay*'."**

**20.** In the present appeal, the record shows that the trial was concluded without unreasonable delay and the Appellant's claim that his right under **Article 50(2)(e)** was violated cannot therefore stand. In any event, hurried trials are not necessarily efficient since they may prevent accused persons from properly exercising their constitutional rights in presenting their case. Adjournments were allowed to accommodate both sides.

**21.** The Appellant contended that he was not afforded legal representation in line with **Article 50(2)(h)** of the **Constitution**. This right is however only available once the court determines that substantial injustice would otherwise occur. In **Republic vs. Karisa Chengo & 2 others Petition 5 of 2015 [2017] eKLR,** the Supreme Court of Kenya opined thus:

**"…It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:**

**i. the seriousness of the offence;**

**ii. the severity of the sentence;**

**iii. the ability of the accused person to pay for his own legal representation;**

**iv. whether the accused is a minor;**

**v. the literacy of the accused;**

**vi. the complexity of the charge against the accused"**

**22.** The upshot of the above is that the right to legal representation under **Article 50(2)(h)** of the **Constitution** is not open ended. It is only available once the court determines that substantial injustice would otherwise occur. Courts have previously granted legal representation at the state's expense to accused persons, more so those charged with capital offences and facing the death penalty. The court of appeal also granted legal representation at the state's expense to a person charged with defilement and facing life imprisonment in **Thomas Alugha Ndegwa vs. Republic [2016] eKLR.**

**23.** From the record of the trial court there is nothing to indicate that the Appellant sought to have the court avail him legal representation. The Appellant did not also demonstrate that he did not have the means to pay for legal representation. He cites **Article 50(2)(g)** of the **Constitution** yet there is nothing on the record to show that the court denied him representation by a lawyer of his choice. It is important to point out that **Article 50(2)(g)** and **Article 50(2)(h)** of the **Constitution** are distinct. The Appellant cannot therefore claim that he was denied representation by a lawyer of choice then again state that he was never afforded legal representation at the state's expense. **Article 50(2)(h)** only applies where an accused person is unable to bear the cost of representation from their own resources.

**24.** On whether the court shifted the burden of proof to the Appellant, Ms. Njeru submitted for the prosecution that this was false since the prosecution had proved all the ingredients of the charges leveled against the Appellant. That at the close of the prosecution's case, the court found that they had established a *prima facie* case and placed the Appellant on his defence. She contended that the Appellant did not produce any evidence in support of the prosecution's case to warrant the claim that the burden of proof shifted to him. She urged that all the Appellant did was state that he was being framed, a defence the trial court found to be an afterthought.

**25.** In criminal trials, the burden of proof lies with the prosecution to prove its case beyond reasonable doubt. This court has stated times without number that at no point should the burden of proof shift to the accused person. In the case of **Republic vs. Gachanja Criminal Case 37 of 1997 [2001] eKLR 425**, Etyang J held thus:

**"It is a cardinal principle of law that the burden to prove the guilt of an accused person lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probability."**

**26.** The court of appeal (Nambuye, G.B.M Kariuki, J. Mohammed, JJA) in **David Muturi Kamau vs. Republic Criminal Appeal 99 of 2014 [2015] eKLR** reemphasized that the burden of proof lies with the prosecution in criminal cases. They cited the *locus classicus* on this, **DPP vs. Woolmington (1935) UKHL 1** where the court stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case.

**27.** Once the prosecution discharged its duty and established a *prima facie* case, the Appellant in the present case was put on his defence as

required by law. The trial court then assessed the evidence and found that the Appellant had not cast doubt on the prosecution's case or in any way rebutted the evidence tendered by the prosecution. This does not amount to shifting the burden of proof because the law affords an accused person a right to put up a defence which must then be evaluated by the court.

**28.** The record is clear that in his defence, the Appellant gave unsworn testimony during which he admitted that he and the Complainant were well acquainted since they are neighbors. He however denied that he attempted to rape the Complainant. He did not testify with regard to Count II. Upon evaluating his defence, the trial court found it unmeritorious and dismissed it.

**29.** The Appellant also urged that he is deserving of a least severe sentence in line with **Article 50(2)(p)** of the **Constitution**. The record demonstrates that the trial court issued a harsh sentence upon examining the Victim Impact Statement prepared by the Probation Officer. The Statement was accompanied by a letter from the Appellant's area chief. Both were adverse in reference to the conduct and behavior of the Appellant. The trial court consequently imposed the harsh sentence in line with the criminal justice's concept of deterrence.

**30.** The learned trial magistrate was however in error in sentencing the Appellant in count II. The actions of the Appellant, which led to the injuries in count II were part of the same transaction and in furtherance of the Appellant's intentions in count I. A sentence in count II is therefore tantamount to subjecting the Appellant to double punishment for the same offence. No-one may be prosecuted or sentenced twice for substantially the same offence.

**31.** I have considered the Appellant's defence that he was framed in the context of all the other evidence on record and find it totally unconvincing. In my considered view, it is an afterthought intended only to exculpate the Appellant and did not dislodge the prosecution's evidence.

**32.** Having scrutinized and re-evaluated the evidence on record, keeping in mind that I did not see nor hear the witnesses as they testified, I find no reason to depart from the findings of the learned trial magistrate. In sum, I find that the appeal is lacking in merit. Accordingly, I dismiss the appeal and uphold the conviction in respect of count I. The Appellant shall therefore serve fifteen (15) years imprisonment with regard to only count I. The Appellant shall serve no sentence in count II.

It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 20TH DAY OF NOVEMBER 2018.**

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**S. N. RIECHI**

**HIGH COURT JUDGE**