



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 28 of 2015

MICHAEL PAMBA OUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court

at Kibera Sexual Offence Case No. 7 of 2014 delivered by Hon. Juma,

Ag. SPM on 24th November, 2014).

JUDGMENT.

Background

1. The Appellant herein was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 26th January, 2014 at Kibera Lindi in Langata District within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of SO, a child aged 12 years. He was charged in the alternative with an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act** in that on 26th January, 2014 at Kibera Lindi in Langata District within Nairobi County, unlawfully and intentionally touched the vagina of SO, a child aged 12 years.

2. The Appellant was convicted in the main count and sentenced to serve twenty years imprisonment. He was dissatisfied with the conviction and sentence against which he preferred the instant appeal. He relied on the amended grounds of appeal filed contemporaneously with written submissions filed on 16th October, 2018. In summary, they are that his rights under **Article 49(1)(f)(i) & (ii)** and **Article 50(2)(g),(h) & (j)** of the Constitution were violated, that **Sections 150 and 200(3) and 211(1) of the Criminal Procedure Code** were not complied with, that the prosecution evidence was tainted with contradictions and that his defence in accordance with **Section 169(1) of the Criminal Procedure Code** was not considered.

Determination.

3. Amongst the submissions that the Appellant made was that his right to a fair trial under Article 50 of the Constitution was violated. He submitted that he was not accorded legal representation at State expense, yet the offence he faced prejudiced him as it was a serious offence. I find this a noble question to determine even before I delve into other issues because if determined in favour of the Appellant, the appeal shall have to succeed.

4. He also contended that his right to be produced in court within 24 hours as set out under **Article 49(1)(f) of the Constitution** was infringed. He pointed to the fact that he was arrested on 26th January, 2014 but arraigned on 28th January, 2014. Miss Akunja for the Respondent on the other argued that even if the Appellant's constitutional rights were violated, his redress lies with a civil suit for compensation for damages.

5. The Appellant was arrested on 26th January, 2014. He was arrested at night at around 10:00 p.m. The 24 hours elapsed sometime in the evening of 27th January, 2014. He was arraigned in court on the following day. That being the case this court finds that there was no inordinate delay that would warrant a conclusion that the Appellant's rights under Article 50 were violated. In so holding I have regard to the Court of Appeal decision in **Paul Mwangi Murunga v. Republic[2008] eKLR**, where it was held that;

“...the court might well countenance a delay ... as not being inordinate and leave the matter at that.”

6. Although the cited authority related to a case decided way before the enactment of the current Constitution, I find it applicable to the situation at hand as the police ensured that the Appellant was taken to court within a reasonable time after the expiry of the twenty four hours.

7. The other argument was that his right to legal representation as set out under **Article 50(2) (g) & (h)** was violated as he was never informed of his right to legal representation at State expense. The Supreme Court in **Republic v. Karisa Chengo & 2 others[2017] eKLR** when discussing this issue held that:

“... , that the right to legal representation at state expense, ... , is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available “if substantial injustice would otherwise result.”

8. Over time courts have held that **Article 50(2)(g) and (h)** would be violated only if the Legal Aid Act had come into effect. That is to say that the right was to be applied progressively premised on certain legislative steps. However, in the same decision the apex court has overturned this line of thought as at paragraph 88, it delivered itself as follows;

“In addition to the above, we do not agree with the Court of Appeal’s holding in the instant case to the effect that the right guaranteed in Article 50 (2)(h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50(2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available “if substantial injustice would otherwise result”

9. In same spirit therefore, the failure to accord the Appellant a right to legal representation negates the spirit underpinned under the Constitution. He must enjoy that right without attaching any prerequisite to legislative enactments. The same, as was held in **Karisa case** (supra) is subject to meeting certain criteria. Most paramount being that if the right is not upheld, substantial injustice would be occasioned to the Appellant. The Court made the following observation;

“... , 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;”

10. My view is that the Appellant likely suffered substantial injustice by the failure to accord him legal representation as the offence was serious and carried a severe minimum sentence. Further, his failure to instruct legal counsel throughout the trial is a clear sign that he likely lacked the means to instruct one. He should therefore have been accorded legal representation at State expense and the failure to do so occasioned a violation of his right to a fair trial.

11. I am alive to the fact that the Appellant additionally raised other grounds of appeal which relate to his violation of his constitutional rights, for example a non-compliance with **Section 200(3) of the Criminal Procedure Code**. It makes no sense to delve into them having found one fundamental of the constitutional rights was violated, as the effect on an affirmative finding in respect of other arguments would yield the same results.

12. This is an error though that can be remedied by ordering a retrial subject to satisfying certain conditions. **Opicho v. Republic[2009] KLR 369**, where the Court of Appeal held that;

“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 insufficiency of evidence or for the purpose 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. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”

13. My reevaluation of the evidence drives me to conclude that the Appellant was ably identified by way of recognition as he was a longtime friend of PW1, the complainant. With regards to penetration, the complainant's evidence was that the Appellant was found by PW1 in the act and the medical evidence all proved this element. With regards to age there was no documentary evidence adduced to establish the child's age but the fact that a *voire dire* examination was conducted was indicative of the complainant being a child of tender years which was conclusive proof that she was a child when the offence occurred.

14. The Appellant did submit that there were some material contradictions in the evidence. However, the contradictions were not material as some were merely typographical errors and others miniscule differences in the evidence that could not call into question the credibility of the witnesses. That said, I find that there was sufficient evidence on record to found a conviction.

15. With regards to whether it is in the interest of justice to order a retrial, the offence carries a minimum sentence of 20 years imprisonment and given that the Appellant has been in remand custody since 2014, a four year period is not prejudicial to order a retrial as a substantial part of the possible sentence is yet to be served.

16. Consequently, the appeal partially succeeds. The Appellant shall be escorted to Kilimani Police Station by latest 27.11.2018 for purposes of preparing him to take a plea within the prescribed period under the Constitution. The trial court file shall forthwith be remitted back to the court for purposes of the retrial. It is so ordered.

DATED and DELIVERED this 20th day of November, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person.

2. Miss Atina for the Respondent.