REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 98 OF 2016

PHILIP KIPKOECH SAMOEI .....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence by Hon. C. Obulutsa. Chief Magistrate in Eldoret Chief Magistrate's Criminal Case No. 5781 of 2015 delivered on 19/08/2016)

JUDGMENT

1. At the hearing of the appeal the Appellant herein **Philip Kipkoech Samoei,** strenuously contended *inter alia* that he was not supplied with the witness statements and that he was ordered to proceed on with the case in such a state of unpreparedness hence he was prejudiced. The Appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** No. 3 of 2006. He was also charged with 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. He denied all the charges and a trial was held.

2. The Appellant was found guilty, convicted and sentenced to life imprisonment. Being dissatisfied with the conviction and sentence, the Appellant timeously preferred an appeal.

3. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse 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.

4. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the written submissions.

5. I will first deal with the issue of the witness statements. The genesis thereof is in **Articles 50(1)** and **50(2)(c)** and **(j)** of the **Constitution** which states as follows: -

> ***'(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right-***
>
> ***(c) to have adequate time and facilities to prepare defence;***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence;***

6. The said right has been subject of interpretation in several judicial decisions both at the High Court and the Court of Appeal and it can now be said with particularity that it is well settled. In a nutshell, a trial conducted where an accused person is not supplied with copies of the witness statements and/or any other relevant documents cannot stand the test in **Articles 50(1)** and **50(2)(c)** and **(j)** of the **Constitution.** That trial is vitiated and cannot be a basis of a conviction. However, where a trial court makes an order for the accused person to be supplied with such documents and the accused person does not raise the matter again during the trial a conviction arising therefrom cannot be vitiated on account of failure to supply the said documents. The constitutional principle of **equity** under **Article 10(2)(b)** shall come into play to the

extent that equity aids the vigilant and not the indolent. (See: **Joseph Ndungu Kagiri vs. Republic (2016) eKLR**, **Thomas Patrick Gilbert Cholmondeley vs. Republic (2008) eKLR**, **Domenic Kariuki vs. Republic (2018) eKLR** among others).

7. It is the duty of a trial court to ensure that an accused person is duly supplied with all materials necessary to enable him/her to prepare for his/her defence. A trial court cannot take a back seat in instances where such compliance is lacking as the trial will be in vain. It must take an active role in ensuring that the **Constitution** is complied with by enforcing compliance and that is the only way the rights envisaged in the Bill of Rights can be fully realized.

8. In this case therefore the trial did not meet the expectations of **Articles 50(1)** and **50(2)(c)** and **(j)** of the **Constitution.** The resultant conviction cannot stand and is hereby quashed and the sentence set-aside.

9. I will now consider whether the Appellant should be released or retried. My attention is drawn to the Court of Appeal decision in **Samuel Wahini Ngugi v. R (2012) eKLR** where the Court stated as follows:

> ***"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'*
>
> ***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."*

21. The lapse that occasioned the injustice in this case was occasioned by the failure of the trial court to ensure that the **Constitution** was complied with. Had the court made an order for the supply of the documents and the prosecution failed to so comply the Appellant would be entitled to an outright acquittal. That being so and coupled with the fact that the alleged offences are not only very serious but also beastly and the innocent, helpless and vulnerable boy will no doubt be affected for the rest of his life. The Appellant has now been incarcerated for only two years post sentence. The witnesses in the case are the complainant's family members and as such it will not be difficult to trace them including the Clinical Officer and the Police who are public servants. Further a look at the evidence or potentially admissible evidence, upon complying with the law in this case, and without going into the merits of it, is likely to lead to a conviction more so in light of the provisions of **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya.

22. This Court is therefore of the considered view that the ends of justice will be served by an order of retrial instead of discharging the Appellant. In view of the above unfolding events, dealing with the other issues in the appeal will not add any value.

24. Consequently, the Appellant will therefore be released into police custody and be produced before any court competent to try him except **Hon. C. Obulutsa**, Chief Magistrate. This should be in the next 5 days of this judgment.

Orders accordingly.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at ELDORET this 1st day of November, 2018.

H. A. OMONDI

JUDGE