Tanui v Republic (Criminal Appeal 12 of 2012) [2014] KEHC 7536 (KLR) (13 February 2014) (Judgment)

Dominic Kimaru Tanui v Republic [2014] eKLR

Neutral citation: [2014] KEHC 7536 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 12 OF 2012

M SILA, J

FEBRUARY 13, 2014

BETWEEN

DOMINIC KIMARU TANUI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the decision of Hon. G. Mutiso, Resident Magistrate, Kapsabet delivered on 26 September 2011 in Kapsabet Criminal Case No.90 of 2008)

Scope of the right of an accused person to legal regal representation

Reported by Njeri Githang'a

Constitutional Law *- fundamental rights and freedoms - right to legal representation - scope of the right - whether a case in which one faces a life sentence is such a serious case that legal representation ought to be provided at State expense if the Accused cannot afford counsel - whether the right to legal representation was to be accorded immediately after the promulgation of the Constitution - whether the petition had merit - Constitution of Kenya, 2010, article, 50(2)(h).*

Brief facts

The Appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, Act No 3 of 2006. Among his grounds of appeal was that he needed to be provided with counsel because the offence attracted a life sentence. It was also argued that the trial magistrate erred in not recalling witnesses despite there being an application for recall.

Issues

i. Whether a case in which one faced a life sentence was such a serious case that legal representation ought to be provided at State expense if the Accused cannot afford counsel.

ii. Whether the failure by the state to provide the Appellant with legal representation denied the Appellant a fair trial.

iii. What was the time frame accorded to the state by the Constitution of Kenya, 2010 to enforce the right to be provided with legal representation at State expense?

iv. Whether the offence of defilement against the Accused person had been proved beyond reasonable doubt.

v. Whether a birth certificate was a mandatory requirement to prove someone's age.

Relevant provisions of the Law

Constitution of Kenya, 2010 Article 50 (2) (h)

50 (2) Every accused person has the right to a fair trial, which includes the right—

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

Criminal Procedure Code -Section 150

S.150 A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

Held

1. Where the Accused faced a capital offence, the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there were complex issues of law or fact, where the accused was unable to conduct his own defence, or where public interest required that representation be provided.

2. A case in which one faced a life sentence was a serious case, and would be at the same level as a case in which the penalty was loss of life, so that ideally, legal representation ought to be provided at State expense if the Accused could not afford counsel.

3. The Constitution of Kenya, 2010 under article 261 and Schedule 5, provided for a time frame of 4 years, to implement the provisions of article 50 of the Constitution. The Constitution was promulgated on August 27, 2010, and four years would lapse on August 27, 2014. Thus it was arguable that article 50, part of which related to the right to be provided with legal representation at State expense, was yet to be fully enforceable as the State had been accorded time to put the mechanism in place. Therefore there was no violation of the constitutional rights of the Appellant in not having been accorded legal representation at state expense given the justification.

4. Although, as worded, section 150 of the Criminal Procedure Code which seemed to suggest that only the Court had the right to recall a witness, a Court had inherent power to do justice to all, and if justice was going to be done by recalling a witness, the Court would be within the law, if it allowed the Application for recall even if made by a party. However, good reason had to be provided, and in the absence of compelling material, the sole ground, that an accused was hitherto unrepresented, was not good enough to allow a recall of a witness. The Appellant was hence accorded a fair hearing.

5. The Court having evaluated the evidence before court found that there was overwhelming evidence that the act of defilement had been done by the Complainant.

6. It was not a mandatory requirement that a birth certificate be provided in order to prove age. However, such documentation needed to be availed where available, especially where the age is almost at the borderline of an enhanced sentence. Therefore, there was no reason to doubt the age of the Complainant as being 9 years at the time of the trial.

Appeal dismissed.

Citations

East Africa

1. *Macharia v Republic* [2009] KLR 214: [2003] 2 EA 559 - (Explained)
2. *Owino, Elijah Omondi v Republic* Criminal Appeal No 464 of 2009 - (Followed)
3. *Swaka, John v Director of Public Prosecution & 2 others* Constitutional Petition No 318 of 2011 - (Mentioned)

Statutes

East Africa

1. Constitution of Kenya (Repealed) section 72 - (Interpreted)
2. Constitution of Kenya, 2010 articles 28, 50,50(2)(h); 261 - (Interpreted)
3. Criminal Procedure Code (cap 75) section 150 - (Interpreted)
4. Sexual Offences Act, 2006 (Act No 3 of 2006) sections 8(1); 8(2) - (Interpreted)

JUDGMENT

1. The Appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, Act No 3 of 2006. He has now appealed against the conviction. In his Petition of Appeal, the Appellant has raised nine grounds. It is his contention that he was denied a fair trial by being denied the witness statements; that he was never warned of the consequences and dangers of the case; that the trial magistrate displayed manifest bias against him and failed to give him ample time to express himself being his first time to appear in court; that the investigations were not conclusive inter alia because no DNA was done, vital exhibits were not produced, no medical report on age assessment or birth documents were produced, and that his arrest was without warrant; that the prosecution case was based on mere suspicion; that his defence that there existed a grudge was not considered; and that his fundamental rights granted under section 72 of the *Constitution* (now repealed) were violated.

2. This being a first appellate court, it is my duty to re-evaluate the evidence and determine whether the trial magistrate arrived at a correct finding.

3. The prosecution called a total of six witnesses. PW-1 was the mother of the Complainant. She testified that the complainant was aged 10 years at the time of trial. The Complainant (N) and one C1 were sent by one FK to collect FK's clothes from the house of the Appellant. They went to the house, but shortly, only C1 returned. PW-1 asked C1 to go back for N. They later came back together but N locked herself in the toilet and started screaming and crying that the Appellant had done bad things to her. When she came out of the toilet, PW-1 checked her underpants and noticed that it was wet with semen. She also checked her private parts and noticed some blood. N was experiencing some pain. The father of the Appellant came and told her not to report the Appellant to the police. He also told her to have N take a bath and wash the underpant and NC did exactly that. The following day, PW-1 took N to the dispensary and later reported the matter at Kapsabet Police Station. A P-3 was then filled which PW-1 identified.

4. PW-2 was the Complainant herself. She testified that she was aged 10 years and a Standard 4 pupil. She identified the Appellant as a neighbor. They found him alone crushing maize and asked him for FK's clothes. This was around 11 am. The Appellant sent C1 away and took PW-2 to his bed. He had a knife in his hand and warned PW-2 that he would kill her if she screamed. He then defiled her for about an hour. She did not scream because she was afraid that the Appellant would kill her. C1 and

another girl called C2, later came back, and it is then that the Appellant released her. She washed her underpants and also took a bath after the incident.

5. PW-3 was C2, a girl aged 13 years. She had gone to the house of PW-1 to borrow a pair of scissors. PW-1 asked her and C1 to fetch the Complainant from the house of the Appellant. They went there. She testified that she saw the Appellant peeping at them from a window. He later opened the door. She saw him putting on his trouser. The complainant came out of the house and later informed them that the Appellant had done bad things to her. In cross-examination, PW-3 stated that it was C1 who saw the Appellant peeping from the window.

6. PW-4 was FK. He testified that on the material day, he sent the Complainant and C1 to the house of the Appellant to fetch his clothes. The Complainant is a cousin to FK. They went but only C1 returned. C1 informed them that the Appellant had locked the Complainant in his house. He testified that PW-1 asked them to go back and get the Complainant. The Complainant on emerging, informed them that the Appellant had defiled her.

7. PW-5 was C1. She was aged 11 years when she testified. She stated that on the material day, she alongside the Complainant were sent to fetch clothes from the house of the Appellant. They went to the house and the Appellant chased her away and closed the door after N had entered. She went back but was instructed to go back to the Appellant's house. They went with C2 and found the door locked. C1 testified that C2 peeped through the window and that she saw the Appellant sleeping on top of PW-2. After a short time, the Appellant opened the door and PW-2 came out. In cross-examination, PW-5 stated that N was screaming in pain in the house when the Appellant was sleeping on her.

9. PW-6 was the investigating officer. She received the complainant on 29 October 2007 and issued her with a P3 form. The Appellant was later arrested in February of the following year.

10. After PW-6 had testified, the Appellant appointed counsel, Mr Sagasi, to represent him. Mr Sagasi made an application to have PW-1, PW-4, PW5 and PW-6 recalled for further cross-examination. This request was denied by the trial magistrate, who inter alia ruled that the relevant provision for recall, was section 150 of the Criminal Procedure Code, but in his view, this section only allowed the court to recall a witness and the provision was not available to the parties, such that a party could not apply to recall a witness. After the application to recall was denied, PW-7 testified and was cross-examined by Mr Sagasi. PW-7 was a clinical officer who testified that he examined N and filled in the P3. He never examined the Appellant. He testified that N was aged nine years at the time of the offence. He observed that her hymen was torn and her labia minora was bruised. In cross-examination, PW-7 stated that the age was given by the parents of N, and that he also approximated N, on observation, to be of that age.

11. After the prosecution closed its case, Mr Sagasi withdrew from acting for the Appellant. The trial magistrate put the Appellant to his defence and the Appellant gave sworn evidence. He testified that he was framed of the charges because of a boundary dispute. He stated that on the material day, N came to his house and asked for gumboots. He told her that he would come and speak personally to FK. N and the other children then went away. He was then shocked to hear N say that he had defiled her. He also denied that there was a window in his house.

12. In his judgement, the trial court found that the case was proved beyond reasonable doubt and sentenced the Appellant to life imprisonment.

13. Mr AM Ngigi for the Appellant, submitted inter alia that there was no evidence of penetration to prove the offence of defilement. He also pointed out that the complainant took a bath and exchanged her clothes before going to hospital. He also argued that it was never proved that the Complainant was aged 9 years at the time of the offence through a birth certificate. He submitted that the complainant testified

to have been in Class 5, and it is probable that she was much older than 9 years. He further submitted that the Appellant was not accorded a fair trial as he was not supplied with witness statements and was denied legal representation. He averred that even when the Appellant appointed counsel, his counsel was denied the opportunity to recall witnesses. Mr Ngigi also submitted that the defence of the Appellant was never considered and that the conviction of the Appellant was an affront to his right to dignity as granted by article 28 of the *Constitution*.

14. Mr Omwega for the State supported the conviction and sentence. He submitted that the trial magistrate properly evaluated the evidence and the defence of the Appellant. He did not think that there was any affront to the Appellant's right to dignity. As to age, Mr Omwega submitted that age is not only proved by documentary evidence but that even oral evidence can suffice. He further argued that there was no error made by the trial magistrate in refusing the application to recall witnesses and that the Appellant had cross-examined the witnesses in detail. He averred that there was no indication on the record that the Appellant had been denied witness statements. On the argument that penetration was not proved, Mr Omwega submitted that there was ample evidence from the Complainant, PW-1, PW-3 and the clinical officer, PW-7. He was also of the opinion that the sentence was the proper sentence.

15. It is with the above proceedings and arguments that I need to determine this Appeal.

16. I will condense the arguments of the Appellant into three and deal with them. The first issue is whether the Appellant was denied a fair trial. Two points in my view were raised. First, it was contended that the Appellant was denied access to witness statements and secondly, was denied counsel, yet the offence is serious. It was also argued that the trial magistrate erred in not recalling the witnesses despite counsel making an application for recall.

17. The second issue is whether there was ample evidence to support the conviction. On this score, two points were raised. The first, is that there was no proof of penetration. The second is that there was no proof of age.

18. The third issue is that the trial magistrate erred in not considering the Appellant's defence.

19. On the first issue, if I understood Mr Ngigi correctly, it was his argument that the Appellant needed to be provided with counsel because the offence was serious. Although Mr Ngigi did not cite any provision of the law, I believe that his arguments were founded on the provisions of article 50(2)(h) of the *Constitution*. The same provides as follows :-

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    (2) Every accused person has the right to a fair trial, which includes the right—

    (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

20. The Appellant represented himself for a considerable part of the proceedings. He was of course never availed counsel by the State. At some point, he appointed a counsel of his own for a short duration. Article 50(2)(h) provides that an advocate ought to be assigned at State expense if substantial injustice would otherwise result. This issue first came up for interpretation before the Court of Appeal in the case of *Macharia v R*. The Court after reviewing the past and current law stated that as follows:-

> " Article 50 of the *Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with

the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a Court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...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."

21. It will be seen that the Court of Appeal was of the opinion that where the accused faced a capital offence, then the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. In my view, a case in which one faces a life sentence is a serious case, and I would indeed place it at the same level as a case in which the penalty is loss of life, so that ideally, legal representation ought to be provided at State expense if the accused cannot afford counsel.

22. However, the *Constitution* itself under article 261 and schedule 5, provides for a time frame of 4 years, to implement the provisions of article 50 of the *Constitution*. The present Constitution was promulgated on 27 August 2010, and four years will lapse on 27 August 2014. Thus it is arguable that the provisions of article 50, part of which relate to the right to be provided with legal representation at State expense, are yet to be fully enforceable as the State has been accorded time to put the mechanism in place. This was indeed the basis of the decision in the case of *John Swaka v DPP & 2 others*, Nairobi High Court, Constitutional Petition No 318 of 2011, [2013] eKLR.

23. I therefore cannot see any violation of the Constitutional rights of the Appellant in not having been accorded legal representation at State expense given the above reasons.

24. The Appellant was certainly aware of his right to appoint counsel and he indeed appointed one at some stage. Was he denied a fair hearing when the trial magistrate denied him the right to recall witnesses ? The relevant provision I believe is section 150 of the *Criminal Procedure Code* which provides as follows :-

> "Section 150 A Court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the Court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

25. This provision came up for interpretation in the case of *Elijah Omondi Owino v R* (Nairobi High Court, Criminal Appeal No 464 of 2009). The Court, Warsame J, as he then was, stated as follows:-

> "It was incumbent upon the Advocate for the Applicant to state the reasons why it was necessary to recall the two witnesses who had given evidence and who were crossexamined by the applicant. The Court is guided by reasons and without stating the reasons for

recalling the two witnesses it is not open to the applicant to expect the court to merely recall the two witnesses simply because there was a request or an application made for their recalling. I think the magistrate was right in refusing to recall the witnesses without being given sufficient explanation for the said cause. It is clear that the applicant was given an opportunity to cross examine the two witnesses and in the absence of any basis to say that the Applicant may have been prejudiced or is likely to suffer by reason of further cross-examination by his advocate, then the Court had no option but to refuse the Application for recalling the two witnesses."

26. I think the trial magistrate in principal was correct in not allowing the Application for recall as no reasons were given to support the request. I do not however agree with his reasoning that there can never be an instance in which a party can request for a witness to be recalled. Although, as worded, section 150 seems to suggest that only the court has the right to recall, I am of the view that a court has inherent power to do justice to all, and if justice is going to be done by recalling a witness, I think the Court will be within the law, if it allows the Application for recall even if made by a party. However, good reason must be provided, and in the absence of compelling material, I am of the opinion that the sole ground, that an accused was hitherto unrepresented, is not good enough to allow a recall of a witness. I cannot therefore fault the trial magistrate for failing to allow the Application for recall. In summary therefore, I am of the opinion that the Appellant was accorded a fair hearing.

27. On the argument that no witness statements were provided, I have perused the record, and I have not seen any complaint by either the Appellant or his Counsel during trial, that he was never availed with the witness statements. I think this argument is an afterthought and I am inclined to disregard it.

28. The second issue is whether the offence was proved, and as I stated earlier, the Appellant contended that there was no proof of penetration and that age was not proved. I do not agree with the Appellant. The evidence of the Complainant was that the Appellant inserted his erect penis into her body and at the trial the Complainant pointed at her groin. PW-1 also stated that she saw blood and semen oozing out of the vagina of the Complainant. The clinical officer, PW-7 also testified that the hymen of the Complainant was broken. The Complainant may have taken a bath and washed her clothes, but these acts do not in any way take away or negate the act of penetration nor affect proof of it. I think there was ample evidence of penetration and ample evidence that it was the Appellant who defiled the Complainant. I have seen some discrepancies in the evidence of PW-3 and PW-5, especially on whether they saw the act of defilement, or whether they heard the Complainant scream. The Complainant herself testified that she could not scream because she had been threatened with death and as to witnessing the actual act, PW-3 and PW-5 seemed to shift that to each other. But I think there is no doubt that the Appellant locked himself with the Complainant in the house, and when the house was opened and the Complainant set free, she had been defiled. There is therefore overwhelming evidence that the act of defilement was done by the Complainant.

29. As to age, the evidence tabled was the oral evidence of the Complainant, her mother and that of PW-7. Both the Complainant and her mother stated that the Complainant was aged 10 years at the time of trial, which was about one year after the incident. PW-7 stated that he was given the age of 9 years by the parents of the Complainant, but also in his own observation, the minor was about that age. I agree with Mr Omwega that it is not a must that a birth certificate be provided to prove age. But I must also say that such documentation needs to be availed where available, especially where the age is almost at the borderline of an enhanced sentence. On my part, I see no reason to doubt the age of the Complainant as being 9 years at the time of trial.

30. Finally, the Appellant complained that his defence was not given due regard. But this is not supported by a reading of the judgement. The trial magistrate actually considered the defence but was of the

opinion that it did not dispel the overwhelming evidence tendered by the prosecution. I am also of the same view and I see no fault on the part of the magistrate.

31. I do not therefore see any basis for disturbing the conviction.

32. The sentence meted out was that of life imprisonment. Section 8(2) of the *Sexual Offences Act*, prescribes that where the victim of defilement is aged 11 years and less, the accused on conviction shall be sentenced to life imprisonment. No error was made by the trial magistrate as the victim herein was aged 9 years at the time of the offence. I am therefore unable to disturb the sentence.

33. I believe I have dealt exhaustively with the Appeal. I have not seen any reason to disturb the conviction nor the sentence. This Appeal is therefore dismissed.

34. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

HIGH COURT AT ELDORET

Delivered in the presence of:

Appellant - present

Mr. A.M. Ngigi present for the appellant

Mr. Munene present for the state