Odari v Republic (Criminal Appeal 102 of 2017)
[2023] KECA 1307 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1307 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 102 OF 2017

PO KIAGE, F TUIYOTT & WK KORIR, JJA

OCTOBER 27, 2023

BETWEEN

OLIVER ODARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (C. Kariuki, J.) dated 18th December, 2016inHCCRA No. 232 of 2013)

JUDGMENT

1. During the hearing of this appeal in which the appellant Oliver Odari is unrepresented by counsel, a number of disturbing irregularities implicating the fairness of his trial emerged. We think they are dispositive of the appeal.

2. The appellant was charged, tried, convicted and sentenced to life imprisonment in the Senior Principal Magistrate's Court at Kakamega. The charge was defilement of a girl child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*.

3. It was alleged that on the 8th day of May 2012 at Galone Sub-location in Vihiga County, he intentionally and unlawfully caused his penis to penetrate the vagina of 'MC' a girl aged 4 years old.

4. The main evidence consisted of the evidence of MC. She was the first witness before the learned trial magistrate and the record of the day starts very abruptly, and records what she told the court thus;

> "I am 4 years old. I go to nursery school. My mother is C. I know accused he is a neighbour at home. The accused took his penis and penetrated my vigine. I was playing with TM at the verandah. Mudaradu told M to go and sleep and he took me to the maize plantation, he removed my pant, he placed me on the floor. He removed his trouser and penetrated

me with his penis. He left me there. I went home and told my mother accused defiled me. Mother took me to hospital. It is during the day. Mother had gone to the river."

5. The first thing that pops out of this part of the record is the lack of a voir dire, a preliminary examination of a child so young so as to determine whether she was possessed of sufficient intelligence to give cogent, comprehensible testimony and, if so, whether she understood the nature of an oath and the obligation to tell the truth. This latter enquiry is to guide the trial court in determining whether the child witness, a child of tender years, should testify on oath or unsworn. It is a glaring and fateful omission that the trial magistrate did not follow these steps. Indeed, there is no telling whether the words attributed to the child were spoken under oath or not. A related issue is that one cannot tell from the record which language the child was speaking. We need not go into the obvious incongruity of attribution of technical or age-inappropriate language to the child of 4 years. Did she actually say, as the record indicates that "the accused (no name given) put his penis" into her 'vagina" and that he 'defiled' her?

6. We think, with respect, that the record is in a most unsatisfactory state. The learned magistrate ought to have recorded the testimony (if it can so be termed in this case) in the very words used, or as closely to the words used, by the child as possible.

7. When we asked Mr. Okang'o, the learned Senior Principal Prosecuting Counsel what he made of the absence of voir dire, he readily admitted that there ought to have been, stating that without it, the trial court did not even reach the point of deciding whether the child should even have testified, and that she might well have been declared a vulnerable witness and testified through an intermediary.

8. This Court has pronounced itself in clear and consistent terms on the necessity of voir dire before reception of the testimony of children of tender years and we need not cite a multiplicity of cases on the subject. The rationale and process of *voir dire* was spelt out thus some 40 years ago in *Johnson Muiruri v Republic*[1983] KLR 445;

> " 1. Where, in any proceedings before any court, a child of tender years is called a s a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
>
> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
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> 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
>
> 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he as persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

9. That case was cited by successive benches of this Court sitting in Nyeri in *Japheth Mwambire Mbitha v Republic*[2019] eKLR and more recently in *Patrick Kathurima v Republic*[2015] eKLR in which it was stated, and bears repeating that;

> " It is best, though not mandatory in our context that the questions put and the answers given by the child during the voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina v Campbell(Times) December 20, 1982, and Republic v Lal Khan[1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

10. The failure to conduct a voir dire on the part of the trial court had the effect of inflicting an infirmity on the testimony, if that it was, of PW1 and constituted a reversible error.

11. Nor was that the end of it.

12. Immediately after the excerpt we reproduced, with the consequences we have stated, the record shows that the learned trial magistrate made this order;

Child aged 4 years old. She cannot be cross-examined."

13. Tellingly, this is then followed by the testimony of Christine Chepchumba, the complaint's mother who is indicated as PW1, which casts further doubt on how exactly the complaint's statements was treated by the learned magistrate. Was it a preliminary statement or was it testimony?

14. The question we must answer is whether the learned trial magistrate was correct to cushion the complaint's statement from cross-examination. The right of an accused person to challenge the evidence adduced against him by the prosecution by way cross- examination of witnesses is a fundamental aspect of the right to a fair trial expressly recognized in Article 50(2)(k) of the *Constitution*. So critical is the right that, where an accused person is unrepresented by counsel, the trial court is under a positive obligation to ensure he understands the right and is able to exercise it. Section 208(3) of the *Criminal Procedure Code* expresses the duty thus;

> " If the accused person does not employ an advocate,the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any question to that witness and shall record his answer."
>
> (Our emphasis)

15. That duty relates to every witness called by the prosecution, without exception. It is thus a matter concern, going to the integrity of the trial, that in the present case the duty was not discharged, and the benefit to the appellant was in fact negated. This Court has on a number of occasions addressed the anomalous instances of denied cross examination which occasionally occur. On its way to finding that the magistrate had in that case misapprehended the law in not having a child witness cross-examined and that the High Court's failure to note the anomaly was a failure of justice, this Court sitting at Busia had this to say in *H.O.W v Republic* [2014]eKLR;

> " In our view, a number of issues are causing us concern in the way the entire case was handled both by the trial court and by the first appellate court.

> The first such matters and which is the main one is on point of procedure which in law, we feel fundamentally prejudiced the entire case and the appellant. This is that the complainant, J.S. who was a minor was taken through voire dire examination and this was proper in law for whatever evidence was given on age, she was not above twelve (12) years in age. The learned trial Magistrate found as a result of voire dire examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross- examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately, the appellant was unrepresented and clearly could not apprehend his right to cross-examine the witness. He clearly relied on the trial court which had a duty to invite him, at the end of the witnesses' evidence in chief to cross- examine the witness, which invitation did not come forth in respect of this witness."

16. The Court sitting at Eldoret was of the same view in *Angechel Lotip v Republic* [2017] eKLR finding as we have herein that the issue was determinative of that appeal.

17. In determining this appeal, we consider it expedient to confine ourselves to the ground that the appellant was not allowed to cross examine the complainant, a matter which was not raised by the appellant in the courts below.

18. The issue of failure to cross examine a complaint by the accused was addressed. In the case of Nicholas Mutula Wambua v Republic, MSA CRA No. 373 of 2006 where this Court cited with approval the decision of the Supreme Court of Uganda in *Sula v Uganda* [2001] 2 EA 556 thus;

> " The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.'

19. And recently, in the case of *Paul Kinyanjui Kimauku v Republic* [2016] eKLR,this Court whilst addressing a similar issue further observed thus;

> " ...the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of *the Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the *Criminal Procedure Code* to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross- examined."

20. As in the afore quoted case, the record of the instant case similarly revealed that, the appellant did not cross examine AA who gave unsworn evidence. The record shows that after AA testified, the court went on to hear the evidence of PW 2, without the appellant cross examining AA. No explanation or reasons were provided for this omission. As such, the appellant was denied the opportunity to cross examine the complainant, resulting in a misstep in the criminal justice process, which has led to a mistrial.'"

21. See also the recent decision of this Court in Nyeri in Justus Muthui Mbathe v Republic Criminal Appeal No. 69 of 2015 (unreported).

22. The two issues we have addressed with regard to the complaint's statement or testimony speak to a failure of justice that vitiated the trial. It is unfortunate that on first appeal, the High Court (C. Kariuki, J.) failed to notice those infirmities and made no mention of them as it dismissed the appellant's first appeal. We are further troubled by another issue, again implicative of the appellant's fair trial rights, which the learned judge handled as follows towards the end of his judgment;

> " Apart from the above issues, the appellant also claims that he was not issued with statements of the prosecution witnesses. This is a right of an accused person as enshrined in Article 50(2)(1) of *the Constitution* of Kenya 2016. It is upon the accused to enforce the said right by requesting for the documents the prosecution intends to use/rely on during the prosecution. All through the proceedings, the accused, now appellant did not request for the statements. It is not for the court to request for him, the court only makes an order upon an application or request by the accused."

23. With great respect, we think that the learned judge's approach was erroneous and constitutes a misapprehension of the law. It has long been settled and is expressly provided in Article 50(2)(3) that, an accused person is entitled, as a matter of fair trial;

> " To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence ..."

24. This right, at the very least, imposes upon the prosecution a clear and peremptory duty to make known and available to an accused person the statements of the witnesses it intends to call. It also imposes a concomitant duty on the trial court, as a custodian of the process and guarantor of fair trial, to ensure that the prosecution discharges that duty so that the accused person is not prejudiced. It cannot be correct to say that it is upon the accused person to enforce that right. It ought to be the duty of the court to ensure there is as level a playing field as possible. It cannot adopt a detached and cavalier posture especially where, as here, the accused person is already labouring under the burden of non-representation. The non-provision of the statements and the learned judge's dismissal of the complaint off-hand constituted yet another failure of justice.

25. The effect of the three procedural substantive errors we have addressed, taken singly and cumulatively, is that the trial of the appellant did not meet the constitutional and statutory minima for a fair trial. The same was a mistrial.

26. The question we must next address is whether we should order a retrial. Faced with that very question, the Court in *Muiruri v Republic* [2003] KLR 552 reasoned as follows;

27. We note from the record that the appellant was charged on 11th May 2012 and was sentenced to life imprisonment on 27th November, 2013. That means he has served nearly 10 years in prison on account of the stricken trial. That is by any standards a long period of time and, seeing that the appellant was himself free of blame for the mistrial, it seems unarguable that to subject him to a new trial would be

patently prejudicial to him and would cause him injustice, notwithstanding our appreciation that the offence charged was a serious one.

28. The end result is that the appeal is allowed. The appellant's conviction is quashed and the sentence set aside. He shall be set at liberty forthwith unless he is held for some other lawful reason.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 2023

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR