IKT v Republic (Criminal Appeal E049 of 2023)
[2024] KEHC 1784 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1784 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E049 OF 2023

AC MRIMA, J

FEBRUARY 27, 2024

BETWEEN

IKT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. S. K. Mutai (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Sexual Offence Case No. E156 of 2021 delivered on 28th April, 2022)

JUDGMENT

1. IKT, the Appellant herein, was charged in Kitale Chief Magistrate's Court Sexual Offence Case No. E156 of 2021 with the offence of Defilement contrary to Section 8(1)(3) of the *Sexual Offences Act*.

2. He denied the offence and was tried. The Appellant was subsequently found guilty as charged, convicted and sentenced to a prison term of 10 years. That was on 28th April, 2021.

3. Aggrieved by the conviction and sentence, the Appellant preferred the instant appeal.

4. The Appellant was not represented by Counsel both at trial and on appeal.

5. Among the grounds proffered by the Appellant in this appeal were that he was not accorded an opportunity to cross-examine the complainant and that he was a minor when the alleged offence was committed.

6. This being a first appeal, the duty of this Court is to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono v. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that

it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

7. This appeal was conceded to by the State as it concurred that the failure to accord an opportunity to the Appellant to cross-examine the complainant derogated the Appellant's fair hearing rights and that the Court ought to have considered the age of the Appellant in sentencing.

8. This Court cannot agree more with the Appellant and the State that the appeal herein must succeed.

9. The complainant was a minor young girl allegedly aged 12 years when the offence was committed. At the time she testified before the trial Court, she stated that she was 15 years old. The trial Court conducted a voir dire examination to determine whether the complainant shall give sworn or unsworn evidence. The Court found that she should give unsworn evidence. The evidence was received by the Court, but the Appellant was not accorded any opportunity to cross-examine the victim. Further, no reasons were given for such state of affairs.

10. Superior Courts have dealt with similar instances as above, many a times. There is an unperturbed consensus that such state of affairs run a foul the law. The Court of Appeal in *H O W v Republic* [2014] eKLR discussed the above scenario in great detail, and as follows: -

> ..... We can find no reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross-examined so would any witness who gives unsworn evidence not be cross-examined. Of course, that was a misapprehension of the law. An accused person who chooses to give unsworn statement in his defence does so as a result of the provisions of the *Criminal Procedure Code* which protect him from being cross-examined if he chooses to give unsworn statement in his defence. It must be appreciated that the accused person cannot in law be charged with the offence of perjury in respect of a statement he gives in defence of himself in a criminal case brought against him. That protection is not available to a witness in a criminal case. Section 208 of the *Criminal Procedure Code* is clear on this aspect. It states:
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> 208
>
> (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).
>
> (2) The accused person or his advocate may put questions to each witness produced against him.
>
> (3) If the accused person does not employ an advocate, the court shall, at the dose of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer." (underlining supplied).

11. In explaining the essence of Section 208 of the *Criminal Procedure Code*, the Appellate Court in the above case had the following to say: -

> This provision is clear on the duty of the court to ensure that at the end of any evidence in chief, the accused is not only afforded opportunity to cross-examine that witness but if he is unrepresented, he is asked by the court to do so if he wishes and his answer to that question shall be recorded. The learned trial Magistrate did not do this, perhaps because he thought

> as we have stated that as J.S. gave unsworn evidence she would not be subjected to cross-examination. With respect he was wrong and the learned Judge of the High Court failed to note and to act on this serious failure in law.

12. In *Nicholas Mutula Wambua v Republic*, Criminal Appeal No. 373 of 2006 heard at Mombasa, the Court of Appeal 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.

13. This above is the law.

14. This Court would only wish to add that the proviso to Section 19 of the *Oaths and Statutory Declarations Act*, the section that gives guidance on the evidence of children of tender years, directs what happens when a minor witness gives false evidence. The proviso states as follows: -

> > If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of adult with imprisonment.

15. On the basis of the foregoing, this Court takes the view that unless a child's evidence is subjected to cross-examination, it would be impossible to know whether the evidence is false or not. Section 208 of the *Criminal Procedure Code* applies to all witnesses who give evidence and is not confined to only those witnesses who give sworn evidence. It covers children giving evidence not on oath as well.

16. The upshot is that the Learned trial Court, with tremendous respect, erred in law in failing to ask the Appellant to cross-examine the complainant if he wished to do so.

17. The conviction cannot, therefore, legally stand.

18. Having found as such, the Court now has to ascertain whether the Appellant be released or be retried.

19. The Court of Appeal in *Samuel Wahini Ngugi v. R* (2012) eKLR rendered itself on the applicable legal principles on retrials 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 v. R* (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
> >
> > > 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 L*olimo Ekimat v. 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.

20. Returning to the matter at hand, the error captured above was precipitated by the Court. Ordinarily in such instances a retrial is allowed. However, in this case there is the issue of the Appellant's age. He stated to be 19 years old at the hearing of his appeal on 14th February 2024. If that is correct, then the Appellant was around 16 years old at the alleged commission of the offence. By then the complainant was aged 12 years old.

21. Whereas this Court is alive to the guidance by the Court of Appeal in *Duncan Okello Ojwang v. Republic* (2019) eKLR in sentencing persons who were minors at the commission of the offences and had turned into adulthood on conviction, given the age difference between the victim and the Appellant, this Court holds that even if the Appellant is retried and convicted, the best way out is to accord the Appellant, who is obviously a very young adult, an opportunity and guidance on how best he may deal with life issues. That would mostly lead to a non-custodial sentence.

22. The Appellant has been in prison since 2021. He must by now have learnt his lessons and it is the hope of this Court that he would be a law-abiding citizen good forward. It is on that basis that this Court finds that an order of retrial will be prejudicial to the life of the Appellant. This Court opts to release the Appellant.

Disposition:

23. Deriving from the above discussion, the following final orders do hereby issue: -

    a. The appeals on conviction and sentence are hereby allowed.

    b. The conviction is hereby quashed and the sentence of 10 years imprisonment set-aside forthwith.

    c. The Appellant shall be set at liberty unless otherwise lawfully held.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF FEBRUARY, 2024.

A. C. MRIMA

JUDGE

JUDGMENT DELIVERED VIRTUALLY AND IN THE PRESENCE OF: -

IKT, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.