



**Mbosiro v Republic (Criminal Appeal E097 of 2022)
[2024] KEHC 4221 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E097 OF 2022
RPV WENDOH, J
APRIL 25, 2024**

BETWEEN

DANIEL MBOSIRO APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence by Hon. Ong’ondo – Senior Principal Magistrate in
Kehancha Senior Principal Magistrate’s Court S.O. No. 66 of 2020 delivered on 3/02/2022)*

JUDGMENT

- 1 Daniel Mboiro has filed this appeal against the judgment of the Senior Principal Magistrate in Kehancha, in which he was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. In the alternative, the appellant faced a charge of committing an incident Act with a child contrary Section 11 (1) of the *Sexual Offences Act*.
- 2 The particulars of the charge are that between November 2018 and September 2020 in Kuria West Sub County within Migori County, intentionally caused his penis to penetrate the vagina of H. G. a child aged 15 years or that in the alternative he caused his penis to touch the vagina of H. G. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of four witnesses in support of their case namely PW1 H.G. the complainant; PW2 Masia Moseti, the complainant’s father; PW3 George Obonyo, a clinical officer at Tisinya Health Centre in Kuria East Sub County and lastly PW4, PC Magdalene Kibe the investigating officer attached to Kehancha Police Station.
- 3 When placed on his defence, the appellant gave a sworn statement but did not call any other witness in support of his case.



4 Upon conviction, the appellant was sentenced to serve twenty (20) years imprisonment on the main charge. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 11/10/2022 are as follows: -

1. That the trial court erred in both law and facts by refusing to consider Article 50(2) (g) and (h) of the Constitution of Kenya 2010. His advocate withdrew due to lack of fees and he was not accorded one at the state's expense;
2. That the trial court erred in both law and facts by failing to consider that they had been married for long and even had 2 children born and to date she's staying at his home as a wife and also considering that she was not schooling;

5 The appellant therefore prays that the conviction be quashed, sentence set aside and a retrial be ordered. On 18/8/2023, the Appellant amended his Petition of Appeal and the prayers therein; he urged the court to allow the appeal, conviction be quashed, the sentence be set aside and he be set at liberty. The appellant also filed written submissions in support of the appeal. The prosecution counsel Mr. Kaino opposed the appeal through his submissions dated 23/11/2023.

6 This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it and arrive to its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of M'Riungu v Republic [1983] KLR 455 where the Court expressed itself as follows: -

“Where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.

7 PW1, the complainant told the court that she was born in the year 2003 and that her birth certificate indicated that she was born on 15/3/2003. She confirmed that she knew the appellant who she referred to as her fiancée; that she started having an affair with him in the year 2017 and she went to live with him in December 2018. They have been living as husband and wife. She stated that while living together, they had sexual intercourse and they even had a child together; that they were arrested in September 2020 and taken to Taranganya Police Station and later to Kehancha Police station; she denied being taken to any hospital for any tests other than for DNA. She stated that she married the appellant when she was in standard 8 at Kebonono Primary School.

8 PW2 the complainant's father told the court that her daughter was born on 13.5.2003; that the victim had an affair with the Appellant who was renting a house at Kobinto. He reported the matter at Kehancha Police Station on 19/10/2018 and on 1/12/2018; they thereafter went to Kuria West District Hospital. Sometimes in January, 2019 the victim went to live with the Appellant and she became pregnant and after giving birth he lodged another complaint against the Appellant.

9 PW3 examined the complainant and observed that the hymen was long broken and there was no evidence of discharge from the sexual organs. They conducted several tests urinalysis, HIV, VDRL and pregnancy which all tested negative. PW3 filled the P3 Form and the treatment notes which he produced and were marked as Pexh.3 and 4.

10 The investigating officer (PW4) stated that in September 2020, PW2 went to the station and reported the incident which he informed her that had earlier been reported in the year 2018; she recorded his



statement and upon establishing that the victim was still a minor aged 17 years, issued an arrest order to Taranganya Police Station against the appellant. She recorded the statement of the victim who admitted that she was married to the appellant and they even have a child. This was confirmed by the DNA Report dated 29.10.2020; the appellant and his father were then arrested and were later charged. He produced the Exhibit Memo Form as Pexh.5, the DNA Report as pexh. 6 and the Victim's Birth Certificate as Pexh. 7.

- 11 The appellant's defence was a general denial and emphasised on her relationship with the complainant. He admitted that he had married the complainant but that he was unable to pay dowry as demanded by her father; that at the time they got married the complainant was not going to school and they have lived with her since then. He confirmed to be providing everything for their child and taking care of them. He further admitted that at the time he was marrying the complainant, she was 15 years old and she is now 17 years and that they had been having sex.
- 12 In support of the appeal, the appellant submitted that the trial court did not inform him of his rights as provided under Article 50 (2) (g) and (h) of the *Constitution*. That despite informing the court that he was unable to reach his advocate, he was not given another advocate at the state's expense.
- 13 Mr. Kaino submitted that the ingredients of the offence were established during trial and are not in dispute. The age of the victim was established by the Birth Certificate produced as Pexh. 3, the victim was 15 years at the time the offence was committed. The perpetrator was the Appellant, who lived with the victim as husband and wife. Penetration is not in question too.
- 14 On the allegation that his Constitutional Rights were violated because he was not informed of his right to counsel pursuant to Article 50(2) (g) of the *Constitution*, Mr. Kaino submitted that on 12/1/2021, the matter proceeded for hearing and all the prosecution witnesses testified despite the fact that the appellant indicated that he was not ready to proceed as he was unable to reach his advocate and thus sought an adjournment, the prosecution did not object to the said adjournment but the court proceeded with the hearing nonetheless.
- 15 The Respondent's counsel admitted that the said procedure violated the appellant's constitutional rights to a fair hearing particularly Article 50 (2) (c) and (g) to have adequate time and facilities to prepare a defence and be represented by an advocate respectively. It was his further submission that the DNA Report produced as Pexh. 6 was not produced in accordance with the provisions of section 77 of the *Evidence Act*. The same was produced by the Investigating Officer instead of an Expert given the crucial nature of the evidence and the charge.
- 16 In conclusion, it was his submission that if the court were to find that the appellant's rights were violated, then the court should order a retrial, to serve the interests of justice.
- 17 I have carefully read and understood the proceedings and the judgment of the trial court, the grounds of appeal and the submissions. This being an offence of defilement, the prosecution has the duty to prove beyond any reasonable doubt the following: -
 - 1 Proof that the complainant was a minor;
 - 2 Proof of penetration;
 3. Proof of identification of the perpetrator.
- 18 As seen from the Petition of Appeal and confirmed from the Record of Appeal and the Respondent's submissions, the ingredients of the offence are not in question, the same were all proved beyond reasonable doubt. What is at the core of the instant Appeal is whether the appellant's Constitutional Rights as enshrined in Article 50 (2) (c), (g) and (h) were violated?



- 19 It is the appellant's contention that he was not informed of his right to counsel by the court; that even though he went ahead and instructed an advocate on his own, when he was unable to reach him, the trial court did not accord him an opportunity to have a counsel at the state's expense. The Respondent's counsel has confirmed the said sentiments and admitted that despite the appellant stating his reservations and seeking an adjournment of the hearing, which the prosecution counsel did not object to, the trial court went ahead and heard the prosecution witnesses in the absence of the appellant's counsel.
- 20 I have carefully looked at the Record of Appeal, particularly the proceedings of 12.1.2021 contained at page 14 of the Record of Appeal. The appellant stated that he was unable to proceed with the hearing since he was unable to reach his advocate. The court in its ruling stated that no evidence had been provided by the accused person to show that his counsel was informed and properly instructed to appear in court and represent him in court that day. The trial court then directed that the hearing of the prosecution case proceeds as scheduled. Does this amount to a miscarriage of justice and a violation of the appellant's constitutional rights?
- 21 Article 50 (2) (g) of the Constitution provides as follows: -
- 50(2) Every accused person has the right to a fair trial, which includes the right-
- (c) to have adequate time and facilities to prepare a defence;
 - (g) to choose, and be represented by an advocate, and to be informed of this right promptly.
 - (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;
- 22 The appellant was arraigned before the court on 7.9.2020 wherein the charge and the elements thereof were read to him in a language that he understood and he pleaded guilty. A plea of not guilty was entered and thereafter the prosecution made an application that the appellant and the complainant be taken for a DNA. There is no indication from the record that the appellant was informed of his Constitutional Rights under Article 50 (2) (g) including the right to counsel. Be that as it may, the appellant proceeded and instructed an Advocate Mr. Kisia to come on record and represent him. The counsel was appointed well before the hearing commenced. What appears to be in dispute is the proceedings of 12.1.2021 when the matter proceeded for hearing in the absence of the appellant's advocate. The question that follows is whether that amounted to a violation of the appellant's rights under Article 50 (2) (c) and my answer is in the affirmative.

the Constitution guarantees an accused the right to a fair trial which includes the right to have adequate time and facilities to prepare his defence. The appellant informed the court of his predicament to reach his advocate and the trial court denied to grant an adjournment and proceeded in the absence of the appellant's advocate. As conceded by the Respondent's counsel, the court ought to have taken into account the critical nature of the charge and the evidence to be adduced, for instance the DNA Report that was produced by (PW4) the Investigating Officer contrary to section 77 of the Evidence Act. Not every person has the ability to represent himself and clearly poke holes in the other side's case or even articulate proper cross-examination. Besides, this was the first time the case was coming up for hearing. The appellant had never sought an adjournment before. By insisting that the hearing proceeds in the absence of the appellant's advocate, the trial court violated the appellant's rights to a fair trial. I need not go into the alleged violations. The breach of the appellant's rights renders the trial null and void.



23 I therefore quash the conviction and set aside the sentence. The next question is whether the court should order a retrial.

24 The Court of Appeal in the case of Ahmed Sumar v R (1964) EALR 483, outlined the threshold to govern the court in ordering a retrial and stated as follows: -

25 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 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”

26 Further, the Court of Appeal in Mwangi v Republic [1983] KLR 522 at page 538 while addressing the issue of a retrial held as follows: -

We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.

27 I have carefully considered the evidence on record in support of the charge of defilement. The offence is a serious one. It is therefore my considered opinion that the evidence on record might support the conviction of the appellant. Besides, the appellant was sentenced to 20 years imprisonment on 31/1/2022 and has not served a substantive part of the sentence and will not suffer any prejudice if a retrial is ordered.

28 To this end, this court proceeds to order a retrial. The appellant be released to Kehancha police station to be presented before the Senior Principal Magistrate’s Court for fresh trial. Mention before Kehancha Senior Principal Magistrate court on 30th April, 2024.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 25TH DAY OF APRIL, 2024.

R. WENDOH

JUDGE

In presence of; -

Ms. Ikol for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant

