



REPUBLIC OF KENYA



**Masubo v Republic (Criminal Appeal E69 of 2022)
[2022] KEHC 16362 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E69 OF 2022
RPV WENDOH, J
DECEMBER 15, 2022**

BETWEEN

JOSEPH BHOKE MASUBO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This is an appeal by Joseph Bhoke Masubo from the decision of the Hon. Senior Principal Magistrate Migori. The appellant was charged with the offence of defilement of a child contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*.
2. The particulars of the charge are that on 6/6/2020 at [Particulars Withheld] East Sub County, intentionally caused his penis to penetrate the vagina of JWN a girl aged fourteen (14) years.
3. In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
4. The appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.
5. No finding was made on the alternative charge.
6. Aggrieved by the said judgment, the appellant filed this appeal citing the following grounds:-
 1. That the appellants right to fair trial under Article 50(2)(g) & (h) of the *Constitution 2010* were violated;
 2. That he was not supplied with witness statements;
 3. That the offences of defilement as not proved to the required standard;



4. That the sentence is harsh and excessive.
7. On the first ground, the appellant submitted that the court only told him to get his own advocate and did not explain that he could apply to the legal Aid Committee for counsel and he relied on this court's decision in *Emmanuel Rioba John vs Republic* Migori Criminal Appeal E062 of 2021 . The appellant also submitted that he was never supplied with witness statements and even after the prosecution acknowledged not giving him statements, the court decided to proceed to full trial on December 3, 2020. He relied on the decision of *Pett vs Greyhound Racing Association* (1968) 2 ALL ER 545.
8. On failure to prove the charge it was the appellant's case that the complainant was not truthful and her narration differs from her father's as to what happened; that the complainant was allegedly defiled on June 6, 2020 and it was not until June 17, 2022 that she was examined; that the court did not establish whether the hymen was freshly broken or not.
9. As regards the age of the complainant, the appellant submitted that the findings of the court on age i.e. sixteen (16) years was contradictory to the birth certificate that was produced in evidence indicating that the complainant was born on July 20, 2005. He urged the court to quash the conviction and set aside the sentence.
10. The prosecution counsel Mr Mulama opposed the appeal and filed written submissions. Counsel submitted that from the testimony of PW1 and PW2 on the age of the complainant, the complainant was about fourteen (14) years ten months seven (7) days at the time of the commission of the offence and the age falls within Section 8(3) of the *Sexual Offences Act* as charged.
11. On penetration counsel urged that the complainant narrated how the appellant had carnal knowledge of the her and proceeded to abduct her and that upon examination by PW3, he was of the view that there was penetration.
12. As to whether the defence was considered, counsel submitted that the appellant placed himself at the scene of crime and went on to make a mere denial and the alleged friendship was an afterthought. As to the rights under Article 50(2)(g) and (h) of the *Constitution*. Counsel submitted that the appellant was informed of his right to counsel under Sub Article 2(g). As regards his right under Article 50(2), (h) counsel relied on the decision of *David Njoroge Macharia vs. Republic* (2011)eKLR and *Republic vs Karisa Chengo & 2 others* (2017)eKLR where the court held that an accused will only be entitled to legal representation at State expense where substantial injustice may result and that entails the complexity of the case, the severity and nature of the offence; and the ability of the accused person to conduct his defence e.g. language difficulties. Counsel argued that the appellant has not demonstrated that substance injustice was occasioned to him by failure to have counsel appointed by the State.
13. As to sentence, counsel urged that the sentence meted on the appellant is not excessive considering the circumstances and the minimum sentence under the said Section being twenty years imprisonment. Counsel urged this court to dismiss the appeal.
14. This is a first appeal and this court is enjoined to re-examine all the evidence tendered before the trial court, evaluate and analyse it and arrive at its own findings. This court off course makes allowance for the fact that it neither saw nor heard the witnesses testify. This court is guided by the decision in *Okeno vs Republic* (1972) EA 32.
15. The prosecution called a total of three witnesses in support of their case. PW1, JWN, a student in Form II aged about fourteen (14) years, testified that on March 6, 2020, she left to go to her aunts' home at [Particulars withheld] at 7:00a.m when she boarded the appellant's motor cycle, PW1 knew the appellant before, having been in school with his sister Mercy; that accused took her to her aunts'



home and remained with her change of KShs 250/= which he promised to give to her later. He came to her aunt's place to take her back home and instead decided to take her to visit his sister; She was leaving at 6:00p.m when they met the appellant who offered to take her home and he used unfamiliar route; that the appellant took her to [Particulars withheld]village to a house where he locked her up and came back at 1:00p.m; that he forced her to have sex with her, after removing her clothes; that he left and locked her inside the house. Next day, she saw a woman pass and sent her to inform the mother where she was; that on June 10, 2020, the appellant took her to Kakrao to a lodging and that in the evening, two of appellant's friends took her to the appellant's home and that the appellant's parents took her home, that she recorded her statement after the appellant was arrested. She was taken to Ombo Hospital for examination.

16. The complainant's father TNB recalled that PW1 left home to visit her aunt on June 5, 2020 but did not return home. After two days, a neighbour told him that the daughter was married and he started to look for the complainant and reported to police. He started looking for Mandela who was said to have married PW1. He visited the appellant's home where it was confirmed that PW1 had been seen with the appellant. He was given a photo of the appellant; that he went to Kawa, saw the complainant come from a house to buy charcoal and went to call police but on return, found she had been moved from the said house, but PW1 and the appellant's clothes were recovered there; that later when the appellant returned to the house to carry the mattress, he was arrested and other. PW1 admitted to have married the appellant.
17. PW3 Moindi Justus Magati, a clinical officer at Migori Referral Hospital examined the complainant on June 17, 2020. He found no injuries to the genitalia but the hymen was broken and she admitted to have taken part in sexual activity before. He also examined the appellant a the same date. His view was that there was possibility of penetration.
18. When called upon to defend himself, the appellant admitted to taking PW1 to her aunt's place and she asked him to pick her and on the way home, she asked to see his sister; that he took her to his home and left her there; that PW1 again called her and he took her to Mabera and then to his sister; that he was arrested at Kakrao while alone. He stated that he was framed over differences between him and PW2.
19. I have now considered the grounds of appeal, the evidence tendered before the court and the rival submissions. I think it is necessary to consider the alleged breach of the appellants fundamental rights first.
20. The appellant complained that his rights under Article 50 (2)(g) and (h) were violated. Article 50 of the Constitution guarantees an accused persons' right to fair trial. Under Article 25 of the Constitution, the said rights cannot be abrogated. Article 50 (2) (g) and (h) provides as follows:-
 - (2) Every accused person has the right to a fair trial, which includes the right-
 - (g) to choose, and be represented by, an advocate, and to be informed of his 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."
21. As regards Sub Article 2 (g), it is required of the trial court to inform an accused person of his right to counsel promptly. I have seen the record of the court. On June 18, 2020, before the appellant took plea, the court informed him of his right to Legal representation. As to what exactly the accused was told, it is not indicated. But the accused answered that he would proceed without counsel. All that the court needed to do was to inform the accused of his right to counsel and do so promptly which I



believe was done. In the case of Emmanuel Rioba John (supra), the court found that the accused had not been informed of that right at all, unlike the instant case, in the case of *Chacha Mwita v Republic* (2010) eKLR Mrima J stated as follows:-

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17. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one’s choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.

18. Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In *Pett vs Greyhound Racing Association* (1968) 2 All ER 545 Lord Denning presented himself thus:

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It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.

20. In Kenya, the Supreme Court in Petition No. 5 of 2015 *Republic v Karisa Chengo & 2 Others* [2017] eKLR while dealing with various aspects of the right to a fair hearing under Article 50 of the Constitution stated as follows: -

the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

22. Article 50 (2) (g) was not violated by the court.

As to Article 50 (2) (h) the court is required to inform an accused of his right to be assigned to him counsel by the State at State expense if substantial injustice would result. In David Njoroge Macharia supra the court said

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 state 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.”

23. In *Karisa Chengo* case, the supreme court said:

In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

- (i) the seriousness of the offence;
- (ii) the severity of the sentence;
- (iii) the ability of the accused person to pay for his own legal representation;
- (iv) whether the accused is a minor;
- (v) the literacy of the accused;
- (vi) the complexity of the charge against the accused;

24. Although the offence is serious and sentence is severe the appellant did not demonstrate that he could not pay for representation or that he did not understand the charge he faced or that he was incapacitated in terms of communication. The appellant failed to demonstrate that the said right was violated.

25. The appellant also complained that he was not supplied with the witnesses statements during the trial. Article 50 (2) (J) provides as follows:-

“Every accused person has the right to a fair trial which includes the right to

- (j) to be informed in advance of the evidence the prosecution intends to rely on, and I have reasonable access to that evidence.”

26. The above right is one of the rights that cannot be limited by dint of Article 25. A perusal of the court record shows that after plea was taken, the court recorded that the accused was yet to be supplied with statements and the court declined to give an early date but retained July 14, 2020 for hearing. On July 14, 2020, when the matter came up for hearing, the prosecutor stated that the complainant was sick and that the appellant was yet to be supplied with witness statements. The case was adjourned to September 17, 2020. On September 17, 2020, the accused claimed to be unwell and the case was adjourned to December 6, 2020. Nothing was said of whether or not witness statements had been given to the appellant. When PW1 testified, the appellant asked her about three questions only. He did not cross examine PW2 and PW3.

27. An accused’s rights under Article 50 (2) (j) cannot be abrogated. The court is the protector of an accused’s rights to fair trial and has to ensure that the rights are upheld at all times. From the record,



the court never indicated if at all the appellant was issued with statements. Failure by the accused to cross examine witnesses in my view, is an indicator that he may not have been issued with the witness statements. The court had the duty to ensure that the said right was protected and the court record should reflect that there was compliance. There was no way for this court to know whether the appellant was given witness statements for purposes of preparing his case. For that reason, I find that the appellant was not accorded a fair trial and as a result, the court declares the proceedings a nullity. I hereby quash the conviction and set sentence set aside.

Can this court order a retrial?

28. The criteria upon which a court may order a retrial were set down in the case of *Abmed Sumar v Republic*

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.

29. One of the criteria to be considered in ordering a retrial is whether the potentially admissible evidence is likely to result in a conviction. PW1 knew the appellant very well. In fact, the appellant admits to have been with her on June 6, 2020. According to PW1 and PW2 the appellant and PW1 stayed together from 6th upto 16th when PW2 traced the appellant and the complainant as a result of which the appellant was arrested. PW1 claimed to have been married to the appellant. This court is satisfied that the admissible and available evidence is likely to result in a conviction.
30. The appellant was sentenced on July 15, 2021 just over a year ago. The offence with which the appellant was charged is a very serious one that attracts a sentence of not less than twenty (20) years imprisonment. The appellant has so far not served a substantial part of the sentence. The victim was a minor and her rights have to be protected too. The appellant cannot be prejudiced by an order of retrial. I therefore order that the appellant be released to Migori Police Station to be produced before Chief Magistrate's Court Migori for a fresh trial before any other magistrate other than Hon Munguti, Senior Principal Magistrate. Being a retrial, the trial should be given priority. Further, in the event of a conviction the trial court must take into account the period served by the appellant in this case. Mention before Chief Magistrate's Court on December 19, 2022 .

DATED, SIGNED AND DELIVERED AT MIGORI THIS 15TH DAY OF DECEMBER, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Maatwa for the Respondent.

Appellant present.

Nyauke Court Assistant

