



**Namaswa v Republic (Criminal Appeal E015 of 2023)
[2024] KEHC 11199 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E015 OF 2023
HI ONG'UDI, J
SEPTEMBER 25, 2024**

BETWEEN

GEORGE NAMASWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment delivered by Hon M. Kyalo, Resident Magistrate on 19th May, 2023 in Nakuru Chief Magistrate's Court Criminal Case No. E046 of 2022)

JUDGMENT

1. George Namaswa the appellant was charged with the offence of defilement contrary to section 8(1) & (2) of the [Sexual Offences Act](#) No. 3 of 2006. He faced an alternative count of committing an indecent act with a child under the same Act. The appellant denied both counts.
2. The matter proceeded to full hearing with the prosecution calling a total of four (4) witnesses while the appellant gave an unsworn statement of defence. Thereafter he was found guilty and convicted of the main count and sentenced to life imprisonment.
3. Being dissatisfied with the entire Judgment he filed the Petition of Appeal dated 29th May, 2023.
4. He later filed a supplementary Petition of Appeal dated 22nd August, 2023 on the following grounds:
 - i. That the learned Magistrate erred in failing to make a finding as to whether PW1 possessed sufficient intelligence to testify and give coherent evidence as this evidence was the sole basis for finding the accused person culpable.
 - ii. That the court erred to find PW1's evidence on penetration was not supported by the doctor (PW4) who testified that he saw no bruises, anal orifice was normal and no anal discharge, and in failing to appreciate that the only basis for establishing penetration was on internal



hemorrhage which could be caused by a raft of other factors, including and not limited to constipation or difficulty in passing fecal matter.

- iii. That the Magistrate was in error in failing to appreciate that PW4 did not state whether the anus was intact or defiled. The anus in this case was intact in absence of indication of defilement as there were no injuries, tears or bruising. Despite this, the trial court only considered PW4's evidence of internal hemorrhoids and internal damaged vessel's as the only basis for her finding on penetration.
- iv. That the evidence of internal damaged vessel was only voiced by the doctor while testifying but was never noted in the P3 and the PRC relied on in evidence. The court thus relied on extraneous factors not in the P3 and by a witness that did not examine the complainant as the basis of her conclusion, and hence arrived at an erroneous finding. The maker of PRC.
- v. That the evidence of PW2 was also not collaborated by the evidence of the doctor (PW4) as the doctor did not note any scratches or injuries on the complainant, completely discrediting the evidence of PW2.
- vi. That the evidence of the doctor was contradictory in failing to establish how he arrived at a finding of grievous harm. Whereas there were no physical injuries or any external injuries. How then did the doctor conclude grievous harm?
- vii. That the learned Magistrate erred in law and fact in failing to comply with the provision to section 124 of the *Evidence Act*, by failing to record reasons for believing the complainant was a truthful witness.
- viii. That the learned Magistrate erred in law and in fact by failing to find that the first doctor who examined the witness would have been an indispensable witness the child having been examined the very next day after the alleged incident.
- ix. That the learned Magistrate failed to find that the child's brother mentioned as the person who reported the incident to PW2 ought to have been called to collaborate the evidence of the complainant, and the fact that PW2 evidence was all hearsay.
- x. That the court failed to ascertain whether the accused person understood the nature and gravity of the offence, whether he understood the importance of the proceedings, and failing to caution him of his right to counsel, considering that the accused person is illiterate and could not reasonably follow the proceedings.
- xi. That the trial court ought to have noted that the accused person mitigated instead of putting for the his defence, which cements the fact that the accused did not understand the very nature of the proceedings and ought to have been explained to what was expected of him.
- xii. That the court failed to note that the investigating officer failed to accompany the minor for medical examination despite knowing that the complainant was of a vulnerable age and especially given the nature of the alleged offence.
- xiii. That the evidence was largely contradicting with PW4 testifying that the victim was accompanied by police officers for medical examination, whereas PW2 and PW3 confirm that it is the parent that accompanied the minor. The P3 is not stamped to indicate the institution.
- xiv. That the trial court erred in failing to find that no medical report treatment notes from Kapkures Hospital, despite having been the first facility that the victim was taken to by PW2.



- xv. That the learned trial Magistrate erred in failing to seek for age assessment of the accused person to ascertain whether he was an adult for purposes.
5. The appeal was canvassed by way of written submissions. The Appellant’s submissions are dated 24th February, 2024 having been filed by G. N. Githae & Co. advocates. Those of the respondent are dated 17th May, 2024 and were filed by Emma Okok Principal Prosecution Counsel.
 6. Both counsel have in their submissions extensively addressed the court on the grounds of appeal raised by the appellant herein.
 7. This being a first appeal the court has a duty to re-evaluate and re-consider the evidence and arrive at its own conclusion. It must bear in mind that it did not see nor hear the witnesses. This was well stated in the cases of (i) *Okeno v Republic* [1972] E. A 32. (ii) *Kiilu & another v Republic* [2005] 1KLR 174: and *Simiyu & another v Republic* [2005] 1KLR 192.
 8. I have carefully considered the evidence on record, grounds of appeal and the submissions by both parties. In the analysis, I wish to first deal with three (3) of the grounds stated in both petitions of appeal. These are: grounds (i) of the petition dated 29th May, 2023 plus grounds (x) & (xi) of the supplementary petition dated 22nd August, 2023.
 9. From the said grounds the appellant is arguing that he did not have a fair trial, which is a violation of Article 50(2)(g) of the 2010 Constitution. In her submissions, M/s Githae for the appellant submitted that the appellant was denied an opportunity to have legal representation. She cited Article 50(2) (g) of the Constitution section 40, 43(1) & 43 (1A) of the Legal Aid Act No. 6 of 2016 as her reference points.
 10. Stressing the need for legal representation counsel referred to the case of *Foo v Republic* [2020] eKLR where Mrima J held:

“I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of the Constitution then the trial is rendered a nullity. Qualifying the provisions of Article 50(2) (g) of the Constitution will be tantamount to amending the Constitution through a back door, an act which this court must frown. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless courts, as custodians of justice and the Rule of Law, are prepared to enforce the Constitution as it is the intentions of the People of Kenya as expressed in the Constitution will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law”.

Also referred to is the case of *Owour v Republic* (Criminal Appeal No. 16 of 2019) [2022] KECA 18 (KLR).

11. The respondent in its submissions in reference to Article 50(2)(g) of the Constitution submitted that from the record the appellant was not informed of his right to legal representation at the plea taking stage nor at any stage during the trial. Counsel submitted that this was a serious offence and failure to inform the appellant of this right rendered the trial a nullity.
12. Counsel cited the case of *Joseph Kiema Philip v Republic* [2019] eKLR where the court stated as follows:

“I am of the view that the right to a fair trial runs through the whole trial process it is paramount that the record of the trial court should demonstrate that the right enshrined under Article 50 of the Constitution were accorded to the accused person where they are



applicable. For instance, the record of the trial court must demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the State. It must show that the court did take the profile of the accused person before the trial commenced and in doing that the trial court may look into, inter alia, the education level of the accused, it must inquire whether or not he understands or he is knowledgeable in legal matters as well as the trial process..... I observe that the learned magistrate did not comply with the provision of article 50 on the right to a fair trial. As such I find the proceeding were defective and did prejudice the appellant and appropriate steps ought to be taken to ensure a fair hearing at his trial”.

13. In view of the above the respondent conceded the appeal on the ground of the violation of the appellant’s right to a fair trial but urged the court to order for a re-trial based on the evidence.

14. Article 50(2)(g) of the *Constitution* provides

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

(g) to chose to be represented by an advocate and to be informed of this right promptly

15. A perusal of the record shows that the charge the accused faced was a serious offence carrying a mandatory sentence of life imprisonment. It is nowhere indicated that he was informed of his right to legal representation as provided for under the cited provisions of the *Constitution*. Even if this was an oversight what followed ought to have stirred up both the Court and the prosecution to find out whether the appellant understood what was going on.

16. The scenario was that none of the four (4) prosecution witnesses was cross-examined by the appellant. Secondly when placed on his defence, instead of countering the evidence of the prosecution witnesses he was there mitigating. Thirdly he never raised issue whenever the matter was adjourned.

17. It is clear from the record that the appellant did not understand what was going on in the lower court hence the need for legal representation, which was not explained to him. It is well noted that counsel for the respondent has admitted the error.

18. This error was occasioned by the trial court. What would be the next cause of action? This court should determine whether or not an order for a re-trial should issue.

19. This issue has been dealt with in the cases of: *Abmed Sumar v Republic* [1964] EA 481; *Manji v The Republic* [1966] EA 343; *Merah & others v Republic* [1971] 221.

Whether an order for re-trial should be made ultimately depends on the particular facts. Further the court should consider whether or not an injustice would be done to the appellant if the order of re-trial is made.

20. For consideration by this court are the following: Seriousness of the charge The appellant first appeared in court on 17th May, 2022 and the case was determined on 19th May, 2023. He has served roughly one (1) year plus four (4) months of the sentence. He had been in prison remand for one (1) year before the case was determined. The victim was a child aged eight (8) years at the time of the alleged offence. Considering all these factors, I find that it would be in the interest of justice that both parties cases be re-heard and a determination made thereafter. The above being the finding by this court I will not delve into the other grounds of the Appeal as that would prejudice the re-trial.

21. The upshot is that the appeal is allowed and the conviction quashed. The sentence is set aside, and a re-trial ordered.



22. The appellant will be released into police custody at Nakuru for presentation before Nakuru Chief Magistrate for fresh plea taking and re-allocation on 2nd October, 2024. The matter to be heard by any Magistrate with competent jurisdiction besides Hon M. Kyalo.
23. Orders accordingly

**DELIVERED, DATED AND SIGNED THIS 25TH DAY OF SEPTEMBER, 2024 IN OPEN COURT
AT NAKURU**

**H. I. ONG'UDI
JUDGE**

