



**JM v Republic (Criminal Appeal E040 of 2021)  
[2023] KEHC 3490 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3490 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E040 OF 2021  
WM MUSYOKA, J  
APRIL 28, 2023**

**BETWEEN**

**JM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from judgment by Hon. JR Ndururi, Principal Magistrate, PM, in  
Kakamega CMC Sexual Offence Case No. 20 of 2019, of 19th October 2021)*

**JUDGMENT**

1. The appellant, JM, had been charged before the trial court of the offence of incest, contrary to section 20(1) of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya. The particulars were that on diverse dates between March 7, 2019 and March 15, 2019, both dates inclusive, in Kakamega South Sub-County of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of MN, a child of 13 years. There was an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. He pleaded not guilty, a trial was conducted, and 4 witnesses testified.
2. PW1, MN, was the complainant, and a daughter of the appellant. She testified that for the period between March 7, 2019 and March 15, 2019, she was staying with her father, the appellant, at [Particulars Withheld] village, during which he defiled her on most of the nights. She said that he also brought other men to the home to defile her. She was later rescued, on a day when a man called D was defiling her. She was taken to the police and to hospital.
3. PW2, Jacklyne Kwamboka, was a social worker, under whose custody the other children of the appellant, and siblings of PW1, were. On March 14, 2019 went to the home of the appellant, to get documents from him to process certificates of birth for some of the children. She met PW1 at the home, who informed her of her ordeal in the hands of the appellant. She found a man in the house,



- who had been defiling PW1. The appellant and the man were arrested and taken to the police. PW1 was taken to the hospital.
4. PW3, No xxxx Police Sergeant Eva Cherop, was the investigating officer. She was on duty on March 15, 2019, when the appellant, PW1, and D were brought to the police station, escorted by an assistant chief, who was accompanied by PW2. It was reported that PW1 had been rescued from the home of the appellant, who had been defiling her. It was also reported that D had been found in the act of defiling her. She booked the report, re-arrested the appellant and D, locked them up in the cells and charged them with separate offences.
  5. PW4, Wilson Odhiambo, was the clinician who attended to PW1, and filled the P3 Form. He testified that PW1 was escorted to the hospital by a police officer. She complained of having been defiled by 3 people on different occasions. He found that her hymen was missing, and there was evidence that she had been defiled. He found epithelial cells, which were indicative of sexual penetration.
  6. The appellant was placed on his defence. He gave a sworn statement, as DW1. He described about how he was arrested on March 6, 2019. He said that when he went home with PW1 and the assistant chief, he found PW1 with D. He said that PW1 had set him up.
  7. After taking evidence from both sides, the trial court found that the offence of defilement had been established against the appellant, convicted him and sentenced him to serve life in jail. The appellant was aggrieved, hence the instant appeal. The grounds are that he was convicted on the evidence of a single witness, which was malicious, farfetched, inconsistent and uncorroborated; the actual perpetrator of the offence was D; the time he spent in custody was not considered at sentencing; the offence was not proved beyond reasonable doubt; the age of PW1 was not proven; and the defence was dismissed by error.
  8. Directions were given on March 15, 2022, for filing of written submissions. Only the appellant filed written submissions, dated March 18, 2022. In the written submissions, the appellant argues around 4 areas or grounds, being the charge being duplex, failure to be informed of his rights to representation, the sentence, and the age of PW1.
  9. I shall limit my analysis to the issues raised in the written submissions, for I shall presume that the appellant has chosen to argue his case only around the issues raised therein. I shall not consider anything besides what is raised in the written submissions.
  10. I will start with the alleged violation of the Constitution, through failure to be informed of his constitutional right to legal representation. I will do so as disposal of the issue could determine the appeal finally, without having to consider the other issues or grounds submitted on.
  11. The constitutional right to legal representation by an Advocate of one's choice is stated in Article 50(2)(g)(h) of the Constitution. The provisions in there are about being entitled to legal representation by an Advocate of one's choice, or at State expense, in case of being indigent, and being informed of those rights, in either case. Article 50(2)(g)(h) makes it a fair trial right for an accused person to be informed of his right to choose an Advocate to represent him in the proceedings; and where he cannot afford one, to have one assigned to him, if substantial injustice would otherwise occur. The provision places a burden on the trial court, before it commences the trial, to ensure that the accused person is informed of his rights, including that to appoint an Advocate of his own choice, and where he cannot afford one, to have one assigned to him at State expense.
  12. Whether or not an accused person can afford to instruct an Advocate of his own choice, is a matter to be addressed when he is first arraigned. Regarding whether substantial injustice would otherwise arise, it would appear that in any case where the accused faces a charge where his liberty is likely to



be taken away for a long time, substantial injustice could arise, if he does not have the benefit of legal representation. Incest committed on minors attracts a mandatory penalty of life years in jail, according to section 20 of the *Sexual Offences Act*, subject, to *Philip Mueke Mainigi & others vs Director of Public Prosecutions & another Machakos HC Petition No E017 of 2021* (Odunga, J) and *Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No 97 of 2021* (Mativo, J).

13. Section 20 of the *Sexual Offences Act* states as follows:

20. Incest by male persons

1. Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

2. .

14. The penalty for incest with a minor clearly points to substantial injustice occurring, where the accused could face a long jail term, should he be convicted, and should attract the benefit of Article 50(2)(g) (h) of the *Constitution*, particularly where the accused person is indigent. The severity of the charge and the penalty should be the trigger, for the trial court to inform the accused of those rights, and to especially consider whether the accused would have capacity to defend himself, in terms of being capable of conducting his own defence, or to instruct an Advocate of his own choice.

15. Article 50(2)(g)(h) of the *Constitution* should be read together with the *Legal Aid Act*, No 6 of 2016. The preamble to the *Legal Aid Act* states it to be 'An Act of Parliament to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the *Constitution* to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes.' The *Legal Aid Act* operationalizes Article 50(2)(g)(h) of the *Constitution*. Article 50(2)(g)(h) of the *Constitution* and the *Legal Aid Act* deal with access to justice, by providing legal aid services to indigent persons in Kenya. They provide for inclusion, non-discrimination and protection of marginalized groups. Sections 3 and 4 of the *Legal Aid Act* are particularly to the point.

16. Section 43 of the *Legal Aid Act* imposes duties on the court, before whom an unrepresented person is presented, especially for plea-taking, to comply with Article 50(2)(g)(h) of the *Constitution*, by informing that person of his right to legal representation of his own choice, and where substantial injustice is likely to arise, to inform him of his right to be assigned an Advocate by the State, and where the accused is found to require such aid, to inform the National Legal Aid Service to provide legal aid service to the accused person. According to section 43(1A) of the *Legal Aid Act*, in determining whether substantial injustice is likely to occur, the court should take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend himself.

17. Informing an accused person of his rights, under Article 50(2)(g)(h) of the *Constitution*, and assessing whether the accused requires legal aid services from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. These rights are constitutional



imperatives, commanded by the Constitution, and trial courts have a duty to ensure that they are complied with, and failure to comply ought to automatically render the subsequent trial null and void, for violation of the Constitution.

18. I need to consider whether these constitutional fair trial prerequisites are applicable in this case. The offences that the appellant faced at the trial court were allegedly committed in 2019. When these offences were allegedly being committed the Constitution of Kenya, 2010, which commenced on August 27, 2010, and the Legal Aid Act, which commenced on May 10, 2016, were in force, and applied to the instant case, and the court before whom he was produced was bound by Article 50(2)(g)(h) of the Constitution and section 43 of the Legal Aid Act. The said court was obliged to inform the appellant of his right to legal representation by an Advocate of his own choice, and the right to legal aid from the State in the event that he was indigent. The court was bound to assess whether the appellant was at risk of being exposed to substantial injustice, and to suffer lack of access to justice, on account of being indigent, or belonging to a marginalized or vulnerable group, and on account of the severity of the charges that he faced and the sentence he was liable to be given in the event of conviction.
19. I have carefully scrutinized the trial court record. When plea was taken on March 18, 2019, Article 50(2)(g)(h) of the Constitution and section 43 of the Legal Aid Act were not complied with. The court did not inform the appellant of his right to legal representation and to legal aid services by the State, in case he was indigent. The court did not consider whether there was a likelihood of the appellant suffering substantial injustice, along the lines of section 43(1A) of the Legal Aid Act, on account of severity of the charges and sentence, the complexity of the charge and the capacity of the appellant to defend himself.
20. The failure to comply with the fair trial principles in Article 50(2)(g)(h) of the Constitution and section 43 of the Legal Aid Act meant that the appellant was subjected to an unfair trial. Article 2(4) of the Constitution states that 'any act or omission in contravention of this Constitution is invalid.' The omission or failure to comply with Article 50(2)(g)(h) of the Constitution amounted to a contravention of that provision of the Constitution, and rendered the entire trial invalid. The failure to comply with section 43 of the Legal Aid Act meant that the objectives of that Act were not met, in terms of making justice accessible to all, creating a level playing ground for all, ensuring that the indigent in society get to access the same facilities as those available to persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.
21. Should I overlook the non-compliance on the basis that the appellant did not suffer prejudice as a result? Whether the appellant suffered prejudice or not, from the non-compliance, is not even an issue, for the failure or omission to obey constitutional commands by itself renders the prosecution invalid. The Constitution is the supreme law, and what it commands must override everything else.
22. The constitutional fair trial rights, in this case, were not honoured and complied with, which rendered the trial unfair. The trial did not reach the constitutional threshold for fairness, which rendered the trial unconstitutional, in view of the failure or omission to comply with the constitutional dictates.
23. The paradigm has shifted so far as plea-taking is concerned. The configuration, for what should happen at arraignment, changed fundamentally upon the coming into force of the Constitution of Kenya, 2010, and courts presiding over a plea taking exercise should come to terms with it. It is no longer enough to just have the charges read to the accused, have him plead to them, consider whether to release him on bond, and thereafter allocate a date for hearing. All the constitutional prerequisites for a fair trial, stated in Article 50 of the Constitution, must be adhered to. For some of them, there has to be compliance before the trial kicks off in earnest, and a trial court, which decides to plough on with the trial, in disregard of Article 50, wastes precious judicial time, for the entire exercise would be totally a nullity.



24. As there was non-compliance with the constitutional requirements regarding fair trial, in this case, the trial herein was unfair, and was rendered a nullity thereby. There was a mistrial, and the conviction of the appellant cannot possibly stand. I shall accordingly order a mistrial. However, I shall not order a re-trial, in view of Article 157(10), which states that the 'Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.'
25. The final order is that I hereby find and hold that there was a mistrial of the appellant, in Kakamega CMCSO No 20 of 2019, for the reasons given above. I order a re-trial. In case the Director of Public Prosecutions elects to prosecute the appellant afresh, the Kakamega Chief Magistrate's court shall be at liberty to conduct a re-trial. Consequently, the conviction on record is quashed, and the sentence is set aside. The appellant shall be presented at Kakamega Chief Magistrate's Court at the earliest possible time. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF APRIL 2023**

**W MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

**Appearances**

JM, the appellant in person..

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

