**Mwakitau v Republic (Criminal Appeal E036 of 2022)**
**[2023] KEHC 19716 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19716 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**CRIMINAL APPEAL E036 OF 2022**

**OA SEWE, J**

**JUNE 30, 2023**

**BETWEEN**

**GIFT MWANYALO MWAKITAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the conviction and sentence by Hon. C.K Kithinji, Principal Magistrate, dated 21st April, 2022 in Voi Sexual Offence Criminal Case No. E030 of 2021)***

## JUDGMENT

[1] This is an appeal from the conviction and sentence imposed on the appellant, Gift Mwanyalo Mwakitau, by the Principal Magistrate's Court at Voi on 21st April 2022. The appellant was arraigned before the lower court in Voi Chief Magistrate's Sexual Offence No. E030 of 2021: Republic v Gift Mwanyalo Mwakitau, charged with one substantive count of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge were that on the 28th November 2021 at around 1700 Hours in Voi Sub-County within Taita Taveta County, he unlawfully caused his genital organ (penis) to penetrate the female genital organ (vagina) of HK, a girl aged 5 years.

[2] In the alternative, the appellant was charged with indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*; and the allegation was that on the 28th November 2021 at around 1700 Hours in Voi Sub-County within Taita Taveta County, he unlawfully touched the vagina of HK, a child aged 5 years.

[3] The appellant denied those allegations and upon trial was found guilty and convicted of the substantive count. The lower court's judgment was delivered on 21st April 2022, whereupon the appellant was sentenced to life imprisonment as provided for in Section 8(2) of the *Sexual Offences Act*.

[4] Being dissatisfied with the decision of the trial court, the appellant filed this appeal on 1st August 2022 on the following grounds:

(a) That the learned trial magistrate when sentencing him erred in law and fact by failing to properly evaluate the whole case;

(b) That the learned trial magistrate erred in law and fact by sentencing him to life imprisonment when penetration was not proved;

(c) That the learned trial magistrate erred in law and fact in convicting him when an essential ingredient of the offence, namely, identification, was not proved;

(d) That the learned trial magistrate erred in law and facts when she failed to put into consideration his mitigation;

[5] Accordingly, the appellant prayed that his appeal be allowed, his conviction quashed and the sentences set aside to the end that he may be set at liberty.

[6] The appeal was admitted to hearing on 7th November 2022 and directions given that it be disposed of by way of written submissions. The appellant filed his written submissions on 7th November 2022 together with his Amended Grounds of Appeal. The same are hereby deemed duly filed pursuant to Section 350(2)(v) of the *Criminal Procedure Code*. He accordingly refined his Grounds of Appeal as hereunder:

(a) That his right to a fair trial under Article 50(2)(h) of the *Constitution* was violated since he was never informed of his right to be provided with legal counsel at State expense.

(b) That the learned trial magistrate erred in law and fact by failing to find that penetration was not established.

(c) That the sentence imposed on him was both harsh and excessive since it was applied in mandatory terms as provided for in the statute.

[7] The appeal was urged by way of written submissions, pursuant to the directions given herein on 7th November 2022. In his written submissions, the appellant urged the Court to find that his right to legal representation at state expense as provided for under Article 50 (2) (h) of the *Constitution* was violated by the trial court. He acknowledged that, whereas he was informed by the trial court of his right to representation by counsel of his choice as is required under Article 50 (2) (g) of the Constitution, the court failed to inquire further whether he had the ability to engage a lawyer and settle the legal fees. He submitted that, without legal counsel, he delved into the turbulent waters of litigation by himself notwithstanding his illiteracy and ignorance. He therefore submitted that the trial court ought to have gone a step further and informed him of his right to an advocate assigned by the state at its expense as provided for under Article 50(2) (h) of the Constitution.

[8] The appellant relied on the *Legal Aid Act*, No. 6 of 2016 and submitted that, under Section 43 thereof, the trial court had a constitutional duty make an inquiry at the earliest opportunity possible as to whether an unrepresented person requires legal representation; and that such inquiry ought to be reflected in the record of the court proceedings. He argued that the court is the custodian of the law and ought to ensure that constitutional safeguards are jealousy protected and upheld at all times. He referred the court to the decision of the Court of Appeal in *Elijah Njihia Wakianda v Republic* [2016] eKLR, where it was held that the officer presiding should ensure that the rights of the accused are protected and that the accused person is not lost in the maze of the often-intimidating judicial process.

He relied on the case of *Pett v Greyhound Racing Association* [1968] 2 All E.R. 545 (p.549), where it was held that:

> "It is not every man who has ability to defend 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."

[9] On penetration, the appellant submitted that this element of defilement was not proved beyond reasonable doubt. According to him, PW1 as the victim only indicated that the appellant hurt him, but did not indicate how so. He further submitted that the evidence of PW1 was not corroborated; since PW2 did not witness any act but only heard that the victim stating she was being hurt. The appellant contended that PW2's testimony that she found the appellant's pants down and that "he had just started his work" is no proof that there was penetration.

[10] The appellant postulated that the circumstantial evidence presented by the Prosecution before the lower court, if anything, only proved that he was framed by his biological mother, PW2 herein. He added that this case was not one of defilement but a deep rooted family feud which the trial court was not privy to; and which he endeavoured to expose during PW2's cross-examination. He therefore urged the Court to find that penetration was not proved to the requisite standard.

[11] As regards his sentence of life imprisonment, the appellant submitted that the sentence is harsh and excessive and should be interfered with for reason that the trial court did not consider the mitigating factors raised by him, including the fact that he was a first offender. He added that the trial court did not apply its discretion in the matter, but rather sentenced him in compliance with the mandatory minimum sentence set in Section 8(2) of the *Sexual Offences Act*.

[12] The appellant made reference to the cases of *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), *Dismas Wafula Kilwake v Republic* [2019] eKLR and *Yawa Nyale v Republic* [2018] eKLR for the proposition that the circumstance of an offence must be considered; and the courts are at liberty to exercise their discretion and mete appropriate sentences taking into account the circumstances of each case.

[13] On his part, Mr. Sirima, learned counsel for the State, relied on his written submissions dated 30th November 2022 and filed herein on 2nd December 2022. He submitted on the constituent elements of the offence of defilement, namely, age of the complainant, proof of penetration and positive identification of the assailant and urged the Court to find that all these elements were proved to the requisite standard before the lower court. He relied on Section 2(1) of the *Sexual Offences Act* for the definition of penetration and the cases of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 and *Mark Oiruri Mose v Republic* [2013] eKLR to underscore his argument that penetration need not be full insertion of the offender's genital organ into the genital organ of the victim.

[14] In response to the appellant's argument that his constitutional right to legal representation at state expense was violated, counsel submitted that it was upon the appellant to inform the court that he was indigent and therefore in need of a state-sponsored legal representation; which the appellant failed to do. He added that the appellant was given ample time to cross-examine witnesses and that while he opted not to cross-examine the complainant, he effectively cross-examined PW2 and PW3. Counsel accordingly urged the Court to find that that the appellant participated in the trial and that

no substantial injustice was accessioned to him as he chose when and when not to participate in cross-examination.

[15] Mr. Sirima relied on case of *Kimanzi Mwanzia v Republic* [2021] eKLR, in which Hon. Nyakundi, J. held that the right under Article 50(2)(h) of the *Constitution* is not absolute but is dependent on the accused showing that substantial injustice would be occasioned if legal representation was not provided for at the States expense. Counsel further added that legal representation is generally unavailable due to financial constraints and is only provided for in exceptional cases.

[16] On the sentence aspect of the appeal, Mr. Sirima relied on *Alex Sayalel Kantai v R* [2021] eKLR in urging the Court to bear in mind the objective of sentencing and the nature and circumstances of the crime in issue herein. In his view, the sentence imposed by the lower court was commensurate with the crime the appellant committed. He pointed out that the minor was only 5 years old and that the appellant is the complainant's uncle. He therefore urged for the dismissal of the appeal in its entirely.

[17] I have given careful consideration to the appellant's Amended Grounds of Appeal as well as the written submissions filed by and on behalf of the appellant as well as the response thereto by the respondent. I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon; this being a first appeal. (see *Okeno v Republic* [1972] EA 32).

[18] Accordingly, a perusal of the record of the lower court shows that the Prosecution called 4 witnesses, including the complainant (PW1). She told the lower court that she was living with her grandmother at the time; and that the appellant is her uncle. She then told the lower court that the appellant hurt her in the area of her genitalia. PW2 on her part testified that the appellant is her son; and that the complainant is her grandchild. She further stated that she returned home on 28th November 2021 at around 4.30 p.m. and found the appellant red-handed defiling the complainant; and that the complainant was crying saying "uncle unaniumiza". She inspected the girl's genitalia and noted that she was bleeding. She accordingly reported the matter to the Police and the appellant was arrested and charged.

[19] Dr. Joto Nyawa (PW3) was then attached to Moi County Referral Hospital and was on duty on 29th November 2021 when the complainant was taken there for examination and treatment. He examined her genitalia and noted that she was in pain, had inflamed and tender vaginal walls and that her hymen was freshly broken. He further stated that the hospital conducted a HVS on the complainant and noted that, although there were no spermatozoa seen, numerous epithelial cells were seen. He formed the opinion that the child had been defiled. He filled and signed the P3 Form which was produced before the lower court as the Prosecutions Exhibit 1 along with other documents.

[20] The last prosecution witness was PC Veronica Makokha (PW4). She was on duty at Voi Police Station on 29th November 2021 when PW2 went there with the complainant and reported a case of defilement. She explained that the suspect, the appellant herein, was presented at the same time by the area village elder. She conducted her investigations and thereafter charged the appellant accordingly.

[21] When placed on his defence, the appellant opted to exercise his legal right of remaining silent.

[22] In the premises, the issues for that arise for determination are: -

(a) Whether the Appellant's right to counsel under Article 50(2)(h) of the *Constitution* was violated by the trial court.

(b) Whether penetration, an element of defilement was established beyond reasonable doubt by the prosecution.

(c) Whether the sentence of life imprisonment imposed was both harsh and excessive.

**A. On the right to Counsel as State Expense:**

[23] I have considered the submissions made herein by both the appellant and counsel for the respondent. Article 50(2) (h) of the Constitution provides the right to have an advocate assigned to the accused by the State and at State expense if substantial injustice would otherwise result, and to be informed of that right promptly of the right. The provision has been fortified in the *Legal Aid Act*, No. 6 of 2016, which establishes a National Legal Aid Service. Section 43 of the *Legal Aid Act*, No. 6 of 2016 provides: -

(1) A court before which an unrepresented accused person is presented shall—

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person.

(1A) In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—

a. the severity of the charge and sentence;

b. the complexity of the case; and

c. the capacity of the accused to defend themselves.

(2) The Service shall provide legal aid to the accused person in accordance with this Act.

(3) Where a child is brought before a court in proceedings under the *Children Act* (No. 8 of 2001) or any other written law, the court may where the child is unrepresented, order the Service to provide legal representation for the child.

(4) Where an accused person is brought before the court and is charged with an offence punishable by death, the court shall, where the accused is unrepresented, order the Service to provide legal representation for the accused.

(5) The provision of legal representation under sub-section (4) shall be subject to the criteria for eligibility for legal aid under this Act.

(6) Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.

[24] It is therefore the duty of the trial court to inform an accused person of his right to legal representation including the right to have an advocate assigned to him or her at state expense, if need be. Further, the *Act* is explicit as to the factors that the court ought to take into consideration when determining whether or not substantial injustice would result, namely, the severity of the charge and sentence; the complexity of the case and the capacity of the accused to defend themselves. The *Act* further adds that lack of legal representation shall not be a bar to the continuation of proceedings against a person.

[25] The Supreme Court had occasion to consider the import of Article 50(2)(h) of the *Constitution* in Petition No. 5 of 2015 *R v Karisa Chengo & 2 Others* [2017] eKLR. Here is what the Court had to say:

...[93] In recognizing the discretion exercisable by any Court in making the determination as to whether the accused person is entitled to legal aid, the Supreme Court of India held as follows:

> "The Court may Judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the Court."

(94) 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;

[26] Clearly therefore, the right under Article 50(2)(h) of the *Constitution* is not absolute. The court must be satisfied as to the substantial injustice that may result before the said right is realized.

[27] In this instance, the record of the proceedings of the trial court indicate that, although the appellant was informed of his right to legal representation by an advocate of his choice, it is not clear whether he was informed of his right to have an advocate assigned to him at the State's expense. In the case of *Vincent Obulemere v Republic* [2022] eKLR the point was made that:

> ...The primary duty of the court in the two provisions is to inform the accused person of his right to legal representation. In one case, the court informs or communicates the right and leaves it to the accused to do whatever he chooses with respect to the communication. In the other, depending on the charge and severity of sentence, there is further obligation to assess whether substantial injustice is likely to occur, and to take the further step of informing the accused of the possibility of an advocate being allocated to him at State expense, subject to him applying for it. The court should also take the further step of getting in touch with the national legal aid service in that behalf. The duty to inform the accused person of his right to legal representation applies with respect to all criminal offences, whether serious or minor, and the right to an advocate being assigned at State expense would apply in limited cases, where the offence is serious and the sentence severe, or the case is complex, or the accused person is indigent, or substantial injustice is likely to occur.

[28] The question that this court must grapple with is whether this omission by the trial court was so serious that it prejudiced and occasioned substantial injustice to the appellant thereby vitiating the entire trial. I have perused the entire record and it is clear that the trial proceeded without any difficulty as it is

clear from the appellant's cross-examination of the respondent's witnesses and his readiness to proceed during the course of the trial. I therefore find and hold that no substantial injustice befell the appellant because of the said omission on the part of the trial court. This ground of appeal must therefore fail and I hereby dismiss it.

**B. On whether penetration was proved to the requisite standard:**

[29] Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. As an important ingredient of the offence, it must be proved beyond reasonable doubt. This is either through the evidence of the victim, corroborated by medical evidence or in other circumstances, through the sole evidence of a victim as provided for under Section 124 of the *Evidence Act*, Cap 80 of the Laws of Kenya.

[30] In the case of *Bassita v Uganda* S.C. Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda had the following to say in respect of proving penetration:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

[31] In the present case, PW 1 testified that, the appellant had hurt her "at the place where she used to urinate". PW2 who happened to return home in the nick of time and found the appellant in the act, indicated that she immediately examined the child's genitalia and noted the presence of blood. This fact was corroborated by PW3 who testified that the child had inflamed tender vaginal walls and that her hymen was freshly broken and that the presence of epithelial cells demonstrated forced penetration. It is plaint therefore that the trial court did not rely only on the evidence of PW1 and PW2 as alleged by the appellant. The court also relied on the medical evidence adduced by PW3. There was therefore sufficient corroboration of the complainant's evidence as to the element of penetration.

[32] It is important to mention that the trial court also considered the appellant's defence, namely that he was framed on account of a family feud. This defence was however found to be baseless in that it was a mere insinuation posed during cross-examination I find no reason to fault the decision of the lower court in that regard. I am therefore satisfied that the element of penetration was therefore proved beyond reasonable doubt.

**C. On whether the sentence of life imprisonment imposed by the lower court was harsh or excessive:**

[33] In the guideline judgment of the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR it was held thus:

> ...It is now settled law, following several authorities by the court and by the High Court, that sentence is a matter that is in the discretion of the trial court.

Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for

interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist..."

[34] In the case before the trial court, the appellant was charged under Section 8(1) as read with section 8(2) of the *Sexual Offences Act*, which provides that:

(1) A person who commits an act which causes penetration with a child is guilty of an offence terms defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

[35] With the foregoing in mind, I have perused the record of the proceedings of the lower court; particularly the proceedings of 21st April 2022 when the appellant was sentenced. The lower court proceeded on the basis that the sentence prescribed for the offence is the mandatory sentence and imposed life imprisonment on that basis. That was an error, coming as it did after the decision of the Court of Appeal in Dismas Wafula Kilwake v Republic [2019] eKLR, in which it was held: -

> ...we hold that the provisions of section 8 of the *sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.
>
> The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful..."

[36] Similarly, I am persuaded by the position taken by Hon. Odunga, J. (as he then was) in *Yawa Nyale v Republic* (*supra*) that:

43. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in *S vs. Malgas* 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:

> " What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed

periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

44. Therefore the provisions of a legislation that was in force before the *Constitution* of Kenya, 2010 such as the *Sexual Offences Act*. No. 3 of 2006 must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences to not take into account the dignity of the individuals as mandated under Article 27 of the *Constitution* as appreciated in the Muruatetu Case."

[37] It is now trite that life imprisonment is lawful and is to be treated as the maxim sentence under Section 8(2) of the *Sexual Offences Act*. It is equally trite now that a trial court has room to exercise discretion on sentencing and that in appropriate cases it can impose the sentence of life imprisonment if warranted. While there may be need for certainty as to what amounts to life sentence, I subscribe to the view that that such certainty can only be furnished by way of legislative intervention and not by this Court. Indeed, in the *Muruatetu Case*, the Supreme Court expressed itself on the matter and had the following observations to make:

(87) In the United Kingdom, the Criminal Justice Act, 2003 provides for guidelines for sentencing those serving different categories of life imprisonment. It is noteworthy that the Act has not scrapped the whole life sentence and it is only handed down to those who have committed heinous crimes.

(88) Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya Judiciary Sentencing Guidelines, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.

(89) In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the *Constitution*, which reads:

(1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

(3) Parliament shall enact legislation that—

(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and

(b) takes into account the relevant international human rights instruments."

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of *Jackson Maina Wangui & Another v. Republic* Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life

sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.

76. .... As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

[38] Thus, in this instance, it is noteworthy that the victim was a child aged 5 (five) years; and that although the appellant was given an opportunity in mitigation, he opted to say nothing. I therefore find no reason to interfere with the sentence imposed on the appellant by the lower court.

[39] In the result, the appeal herein lacks merit and is, therefore, hereby dismissed in its entirety.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH JUNE 2023**

**OLGA SEWE**

**JUDGE**