



**Bramwel v Republic (Criminal Appeal E044 of 2021)
[2022] KEHC 11852 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E044 OF 2021**

RPV WENDOH, J

MAY 19, 2022

BETWEEN

JULIUS CHACHA BRAMWEL APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Julius Chacha Bramwel, the appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) by the Principal Magistrate's Court Kehancha.
2. The particulars of the charge are that on September 17, 2020 in Suna West County, Migori County, he intentionally caused his penis to penetrate the vagina of ABM, a girl aged eleven (11) 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](#). It was alleged that on the above named date and place, he intentionally and unlawfully touched the vagina of ABM a girl aged eleven (11) years.
4. The appellant was sentenced to serve life imprisonment. The appellant is dissatisfied with the judgment of the trial court. He filed this appeal on August 16, 2021 based on the following grounds: -
 - 1) That the trial violated the appellant's constitutional rights to fair trial by failing to comply with article 50 (2) (g) of the [Constitution](#);
 - 2) That the offence of defilement was not proved to the required standard;
 - 3) That the sentence was harsh and excessive.

He prays that the conviction be quashed and sentence set aside.



5. The court directed that the appeal be canvassed by way of written submissions and both parties complied. The appellant was represented by Mr Mwita Kerario and the prosecution counsel was led by Mr Omooria.
6. In his submissions filed in court on March 10, 2022, the appellant relied on the decision of *Bwam Panye v Burundi, African Commission on Human Rights* 213/99/2000 where the court considered the right to fair trial and held that due to the gravity of the offence, the appellant had to have the assistance of the lawyer; the case of *Pett v Grey Hound Racing Association and David Njoroge Macharia* (2001) eKLR where the court reiterated the need of defence counsel for an accused especially in a case with complex issues. He also relied on J Nyakundi decision in *Philip Kiema v Republic* (2019) eKLR where the court held that the accused must be informed of the right to counsel.
7. Relying on the decision of *Chacha Mwita v Republic* (2020)eKLR where the court held that failure to inform an accused of his right to counsel renders a trial a nullity, it was urged that the proceedings before the trial court was a nullity.
8. Mr Omooria, the prosecution counsel filed the respondents' submissions on March 10, 2022. It was counsel's submission that the offence of defilement was proved by the evidence of the complainant, who was proved to be about eleven (11 years old; that there was overwhelming evidence that there was penetration of the vagina that the complainant sustained injuries to her genitalia; she bled, fell unconscious after the incident and regained her consciousness in hospital; that PW3 the medical officer who saw PW2 about 4:30 pm on March 18, 2020 confirmed to finding the complainant with blood stains on her, thighs, broken hymen, a tear to the wall of the vagina which was stitched and the tear had caused trauma vagina ovix and that was evidence of defilement. On identity, it was submitted that the complainant knew the appellant who used to get sand from her brother and that he is a best friend to her brother and that evidence was never controverted
9. As regards sentence, it was urged that under section 8(2) of the *Sexual Offences Act*, upon conviction one is liable to be sentenced to life imprisonment and that the sentence is therefore lawful. As regards article 50(2) (g) of the *Constitution*, counsel urged that failure to comply with that section would only where injustice would result. He relied on the decisions of *Karisa Chengo & Others v Republic* (2015) eKLR where the court held that legal representation should be provided an injustice would result. He urged that the appellant understood the charge he faced and participated in the trial by cross examining witnesses and that the sentence does not take away his life and he was therefore not prejudiced. He urged the court to dismiss the appeal.
10. This is a first appeal and this court is called upon to exhaustively re-examine all the evidence tendered before the trial court, analyse it and draw its own conclusions but bearing in mind that this court neither saw nor heard the witnesses testify in order to assess the witness demeanour. See *Okeno v Republic* (1972 EA 32).
11. Briefly, the evidence tendered before the trial court is that PW4, AB M, a minor aged twelve (12) years at the time she testified. On September 17, 2020at about 4:00pm, PW4 was at her grandmother's house when she was called by the grandmother and ongoing to the grandmother, she told her that her brother was on the road and wanted to talk to her. She went on the road and found Chacha and he said that he wanted to buy her soda, and asked her to board a motor cycle which was there and they proceeded to Kehancha then to Migori; that the appellant covered her eyes with a clothe and, he then took over riding the motor cycle while the rider became a passenger. She was taken to a hotel, food was ordered for her but she only took soda. The rider left them to go and fuel but did not return despite the appellant promising that he was returning. They started walking and the appellant took her to a small hotel where they ate and that the appellant asked the hotel attendant for a room for them to sleep. He took her to a



- room, asked her to remove her clothes but she refused and he started touching her on the buttocks and she hit him with a chair and fell asleep. However, she felt pain in the lower abdomen and she realized that the appellant had undressed her and was lying on her and he laughed. she covered herself in a blanket and he told her to remove the blood soaked sheets; that she realized she was bleeding from her vagina and when she tried to open the door to leave, he caught her. She said she wanted to go to the toilet, she went bathed, but continued bleeding and felt dizzy; that somebody knocked on the door of the toilet and she opened and she fell down. She was carried back to the room and does not know what happened till she found herself in hospital where she was admitted for a week. She knew the appellant as he used to harvest sand with her brother.
12. PW5 RMR, the complainant's mother recalled that on September 18, 2020 while in hospital, a police officer called to inform her that her daughter (PW4 ABM) was admitted at Akidiva Hospital. She called her husband, left him with the sick child and went to Akidiva hospital where She found the complainant unconscious and bleeding. PW4 informed PW5 that Chacha defiled her. PW5 knew Chacha as a person who used to harvest sand with her son. PW5 saw the complainant's blood-stained clothes.
 13. PW1 Seth Mudenyio Obura, a clinical officer at Nyatike Hospital, recalled that on September 22, 2020 when working at Migori Hospital, a young girl ABM went to the facility and looked weak and pale. On examining her genitalia, there was a whitish discharge, the labia had lacerations on both sides; the vagina had been stitched, hymen was broken; that she had lost a lot of blood.
 14. PW2 Joseph Okinyi who works in a guest house called Amadura recalled that on September 17 2020 about 8:00pm, the appellant went there and asked for a vacant room and he found for him a room . The appellant went to the room and about 2:00am he called PW2 to assist him. PW2 found a girl in the room and she seemed to be sleeping but she was unresponsive. The appellant denied doing anything to her. He assisted to take the girl to hospital on a wheelbarrow. The doctor asked what had happened to the girl and he called the police. The police came and picked the appellant.
 15. PW3 Dr Nicholas Lukugo of Akidiva Hospital testified that A B M was taken to the hospital on September 18, 2020 at 4:30 am He examined her at 8:00am, and she was bleeding a lot, her pressure was low, skirt was blood stained, thighs were blood stained, pubic hair and hymen was broken; a tear in the right wall of the vagina and it was stitched; blood clot in the vagina and she was treated; that bleeding was due to the tear on the vagina wall. He was of the view that injury was due to sexual assault.
 16. PW6 PC Ignatius Wanyonyi Situma of Oruba Police Post the investigating officer, recalled that on September 18, 2020, one Joseph Okunga an employee of Amuduce Guest house reported that Julius Chacha had gone to the guest house with a young girl and the girl had been defiled and was bleeding; that he had assisted in taking the girl to hospital at Akidiva where the minor was admitted; that the police had picked the said suspect at the hospital. He produced the certificate of birth of the complainant as PEX 7.
 17. The appellant was placed on his defence. He gave sworn testimony, that on September 17, 2020 he was at home in Sirare when a person asked for sand which he promised to come and collect; that the driver called to inform him that he was at Sirare about 6:00pm; that the person arrived about 7:00pm and they needed to take sand and he accompanied the person to Kakrao at 7:00pm They went back for more sand. On the way home, he alighted at Migori, and could not get means home and he looked for a place to sleep. He booked a room in a guest house at 10:00pm and slept. About 4:00am he heard people talking outside, he peeped through the window, opened the door and saw people standing at the door. When he enquired what the problem was, they denied knowing. He went to the toilet and when returning, was told there was a sick person and they asked for assistance to take the person to



hospital. They took the patient to Akidiva and after a short while police came and he was arrested. He denied knowing the complainant or her brother.

18. Having considered the grounds of appeal, I think it is necessary to begin with addressing the issue of whether article 50(2)(g) of the Constitution was violated. Section 50(2)(g) provides as follows: -

“50(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 this right promptly.

19. The said section mandatorily requires the court to inform the accused of his right to counsel. Being a right to fair trial, it cannot be limited, by dint of article 25 of the Constitution. I have had a look at the record of appeal and nowhere did the court ever inform the appellant of his right to counsel. This court has had occasion to deal with this issue of derogation of the right to counsel. In Chacha Mwita v Republic (2019) eKLR, J Mrima had this to say. J Nyakundi was on the same in Philip Kiema v Republic (2019)eKLR where he said :-

“.....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced.”

20. This court has agreed with the above position, that the court has the duty to inform an accused, especially one facing such a serious offence like the appellant, of his right to counsel. The above article provides that the accused should be informed of this right promptly, which has been held to be before plea or soon thereafter. This is to enable an accused person to prepare for his case and if he needs counsel, to hire one or apply to the committee on legal aid to avail him one if he qualified for one. In the Kiema case J, Nyakundi stated as follows:-

“.... The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings... (emphasis added).”

21. Failure to inform the appellant of his right to counsel rendered the trial a nullity. The question is whether the court should order a retrial.

22. The law on when a retrial may be ordered is settled. In the case of Abmed Sumar v Republic (1964) EALR 483, the court said:-

“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

23. In the instant case, the appellant was charged with a very serious offence of defilement of a minor aged about eleven (11) years. This court is of the firm view that the potentially admissible evidence is likely to result in a conviction. The appellant was sentenced to serve life imprisonment on August 11, 2021, about seven (7) months ago. He has not served a substantial part of the sentences. The gravity of the offences are such that the culprit, if found guilty, should face the full force of the law for the heinous crime committed on a vulnerable member of society, a child. This is a suitable case for a retrial. I direct that the appellant be tried by any other court at Migori Chief Magistrate's court other than Hon Obiero, Senior Principal Magistrate.
24. Meanwhile, the appellant be released to the Migori Police Station to be produced before the Chief Magistrate's Court Migori on May 23, 2022 for fresh plea and the case be heard by any other magistrate other than Hon Obiero Senior Principal Magistrate.
25. It is so ordered.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 19TH DAY OF MAY, 2022.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Omooria for the Respondent.

Mr. Mwita for the appellant

Appellant present.

Nyauke Court Assistant.

