



**Karakacha v Republic (Criminal Appeal E016 of 2022)  
[2022] KEHC 15548 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15548 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E016 OF 2022  
RE ABURILI, J  
NOVEMBER 21, 2022**

**BETWEEN**

**RODGERS OMETE KARAKACHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal against the Judgment, conviction and sentence by Hon. M.O. Wambani, Chief Magistrate on 20.4.2022 at Siaya CM's Court in Sexual Offence case No. 56 of 2020)*

**JUDGMENT**

1. The appellant herein is Rodgers Omete Karakacha. He was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to serve 20 years imprisonment.
2. Aggrieved by the judgment, conviction the appellant filed this appeal vide Memorandum of Appeal dated 4/5/2022 and filed on May 5, 2022 setting out the following grounds of appeal:
  1. That learned trial magistrate erred in law and in fact in failing to accord the Appellant a fair trial/hearing as is required under article 50 of the [Constitution](#) of Kenya, 2010, and the trial and eventual conviction and sentence of the appellant were vitiated, invalid, null and void.
  2. The learned trial magistrate erred in law by failing to warn and or accord the Appellant an opportunity of legal representation in view of the grave charges that were facing him.
  3. That the offence against the appellant was not proved beyond reasonable doubt.
  4. That there were gaps and inadequacies in the evidence which undermined the conviction.



5. That the child's mother's testimony was unreliable, untrue and could not be relied upon to support the conviction while the Child's testimony was unreliable as her testimony clearly showed she had been coached.
  6. That the Child's testimony was at variance with the medical evidence relied upon.
  7. That the trial and eventual conviction of the accused was an affront to the doctrine of presumption of the innocence of the accused.
  8. That the medical evidence did not support the conviction and or sentence.
  9. That the trial, conviction and subsequent sentence of the appellant amounted to an affront of the appellant's constitutionally guaranteed right to a fair hearing.
3. This appeal was heard by way of oral submissions. Mr. Ooro Ediwn Michael advocate appeared and submitted on behalf of the appellant while the respondent did not appear although the hearing date was fixed by consent on October 17, 2022.
  4. Grounds 1&2 were argued jointly, grounds 3,6, & 7 argued together while grounds 4, 5, 8 & 9 were argued jointly.
  5. Counsel for the appellant submitted that the appellant was not accorded a fair trial as stipulated in article 50(2)(g) and (h) of the Constitution.
  6. He submitted that the right to choose and be represented by an advocate and to be informed of that right promptly and be assigned an advocate if substantial injustice would result and be informed of that right promptly was violated.
  7. It was submitted that the appellant was self-represented from the date of taking plea on 24/8/2020 yet he was not accorded the right. Reliance was placed on Joshua Njiri v Republic [2017] where the court considered the gravity of the offence and age of the accused.
  8. On grounds 3, 6 & 7, it was submitted that the medical evidence did not support the conviction of the appellant. That although the offence allegedly took place at 6.30 pm and the complainant was promptly taken to hospital and examined, under sections B & C of the P3 Form, there was no evidence of defilement. Further, that the treatment summary form also show no injury and that it shows that the patient was in good emotional state.
  9. In addition, that the laboratory results showed no sperm cells seen. It was submitted that the person who filled the P3 form was Catherine Adowa but the said P3 form was produced by a different person and yet no reasons were given for such changes, in a case where the accused was unrepresented.
  10. Further submission was that the evidence on record did not support the charge. That no offence was committed on August 20, 2020 since PW1 gave a different day which is unknown.
  11. It was further submitted that age of the complainant is unclear in that the birth certificate gives a different name of mother of the complainant from PW2 and yet to explanation was given why the mother of the victim was different from the one in the birth certificate.
  12. It was submitted that the defence was plausible hence it should have behaved. Counsel urged the court to allow the appeal on conviction and sentence.

### **Analysis Determination**

13. I have considered the grounds of appeal and the submissions by counsel for the appellant.



14. This being a first appellate court. The role of this court is well set out through judicial pronouncements to analyse and evaluate afresh all the evidence adduced before the trial court and draw my own independent conclusion bearing in mind that I neither heard nor saw the witnesses as they testified hence, give an allowance for that. This principle was espoused in the *Okeno v Republic* [1972]EA 32 case in which the Court of Appeal set out the duties of a first appellate court as follows:
15. A similar position was taken in the earlier case of *Pandtya v Republic* [1957]EA 336 in the following words:
16. Later in *Kiilu & another v Republic* [2005]KLR, 170 the Court of Appeal restated the role of the 1<sup>st</sup> appellate court and held that:
17. Revisiting the evidence adduced before the trial court, PW1 testified on Oath after the voire dire examination was administered on her and stated that her name was MA and a class 3 pupil at S. Primary School. She stated that on August 20, 2022 she had gone to her step mother's house whom she called Mama Puri and was carrying the child of the Mama Puri called (P) so she put the child to sleep in the kitchen and she started going back to her home when on her way, she met the accused Rodgers who is a nephew to Mama Puri and he called her by name saying he wanted to tell her something then he asked her to give him something small but she declined and insisted that she was going so she went away and met her brother a class 4 pupil as their mother had left for the market.
18. The complainant stated that later on another day, she went back to the home of accused and after she had put the child to sleep, the accused grabbed her at the door and he had sex with her. Nobody was at home. That she ran to the market to inform her mother who reported to the police and the accused was arrested. She was taken to Yala Hospital by the police and her P3 form was filled and she was treated. She identified the accused in the dock her assailant.
19. In cross examination, PW1 stated that it was her mother who stated her age and could explain her differences in the ages stated in her P3 form and in her statement. She reiterated her evidence in chief and stated that the second time he grabbed her when she was at the kitchen and that is when she went to the market and informed her mother who went and reported to the police.
20. PW2 J.A. testified that PW1 was her daughter who was aged 10 years but she could not remember the date of birth which she confirmed that it was in the Birth certificate and showed 4.7.2009. She recalled that on 20.8.2020. She was at Sirembe Market selling peanuts when at about 7pm, the complainant went and informed her that Rodgers had defiled her. PW2 accompanied the complainant to the Police Station and to hospital after reporting the matter to Sirembe Police Post and that thereafter, the accused was arrested. The complainant was escorted to Yala Hospital the following morning. She stated that the accused was a nephew to her co-wife and she identified him in court.
21. PW3 Kennedy Shadrack a Clinical Officer from Nyadu produced a P3 form filled for the complaint, who was alleged to have been defiled. The witness stated that there was no bruises on labia majora/minora, hymen broken but not fresh, she had keytons infection, epithelial cells were seen on high vaginal swab, the girl had not attained menstrual age, she had no physical injuries. He produced P3 form, Treatment notes, lab and PCR forms and Birth certificate for the complainant. He concluded that from lab results and physical examination, there was physical assault.
22. In cross examination, PW3 stated that if there is penetration and ejaculation, sperm is indicative of sexual assault. He stated that friction on walls leading to injuries and infection is common. He also stated that clothes were soiled and untidy. He reiterated that there were epithelial cells and the hymen had been broken.



23. He further stated that it was normal vaginal discharge. He maintained that the minor was defiled. He stated that there was no blood and that if she had taken a shower then no blood could be seen although it was not indicated if the parent said that the child had taken a shower.
24. PW4 Police Constable Mary Njoki from Sirembe Police Post recalled that on 20/8/2020 while she was at the report office, a minor with her mother went and reported that at 6.30pm, while the minor was on her way home from her Aunt's house, she was pushed into a house and defiled. PW4 stated that she saw sperms on the minor's private parts so she booked the report and issued her with a P3. The accused was identified by the victim the said day and a birth certificate was availed showing that the minor was aged 11 years. She maintained her testimony in cross examination.
25. Placed on his defence, the accused testified on Oath and stated that he was Rodgers Omete Karakacha from Mumias and an electrical engineering student. That the incident took place while he was at his aunt's place. He stated that there was a problem between his aunt, her children and the complainant's family and that he was just implicated in the case without any evidence. He stated that the case was a fabrication and that he was not there when the incident happened. Cross examined, he stated that he did not commit the offence and that PW1 & PW2 gave false evidence in court.
26. The accused then closed his case.
27. The trial magistrate after assessing the evidence adduced by the prosecution witnesses and after warning herself of the dangers of relying on evidence of one eye witness the minor, and after satisfying herself that the minor was consistent in her testimony that she was defiled by the appellant herein, found that the prosecution had proved all the elements of defilement against the appellant beyond reasonable doubt and dismissed the alibi defence as a mere denial and an afterthought considering the circumstances under which the offence.
28. The appellant was convicted as charged and after hearing mitigation, sentenced the accused to serve 20 years imprisonment. It is that conviction and sentence that has given rise to this appeal.

### **Analysis And Determination**

29. Upon considering the grounds of appeal, the oral submissions by counsel for the appellant and the state Prosecution, the main issue for determination is whether the prosecution proved all the elements of defilement against the appellant beyond reasonable doubt. However, as the appellant has raised a serious constitutional issue of the alleged violation of his right to a fair trial, I will deal with that issue first before delving into the merits of the appeal herein.
30. The appellant asserted that he was denied the right to a fair trial as he was unrepresented and that he was not promptly informed of his right to legal representation by an advocate of his own choice or where substantial injustice would result, to be assigned an advocate at the state expense. This ground raises the constitutional right to a fair hearing under article 50 (2) (g) of the Constitution.
31. This is not the first time this court has rendered a judgment on a similar question of whether failure to promptly notify an accused person charged with a criminal offence that carries long term sentence, of his right to legal representation of own choice renders the criminal proceedings void and a nullity, amenable to being quashed and setting aside on appeal.
32. I will however rely substantively on the decision by R. Weldon J rendered at Migori High Court on June 16, 2021 in AMR v Republic [2021] eKLR to buttress my findings. That case was similar to this case. The learned judge extensively cited other decisions and arrived at a determination that rendered the trial of the appellant before the lower court a nullity on the basis that his rights to fair trial under



article 50(2)(g) of the Constitution were violated. That case is *in parimateria* with this case. The Article provides that:

“50(2). Every 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.”

33. The learned Judge stated as follows, quite elaborately:

“J. Mrima dealt with a similar issue in Chacha Mwita (supra) where he referred to his earlier decision in Migori Criminal Appeal 44 of 2019 N M T alias Aunty v Republic. I will quote from the said judgment where the judge exhaustively dealt with the matter on what it means to be informed of the right to choose an advocate, at what stage the accused should be informed of the right and when supposed to inform the accused of that right. The Judge stated as follows:

14. That being the record the question which now begs an answer is what entails the right as provided in article 50(2)(g) of the Constitution. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. Since the Constitution does not define the word ‘choose’ I will make reference to the Tenth Edition of the *Black’s Law Dictionary* on how the said word is defined. The said Dictionary does not expressly define the word ‘choose or choice’ but refers one to ‘Freedom of Choice’ (See page 294 thereof). At page 779 the Dictionary defines ‘freedom’ as follows: -

i. The quality, state or condition of being free or liberated esp. the right to do what one wants without being controlled or restricted by anyone.

15. The Dictionary further defines ‘Freedom of Choice’ as ‘the liberty embodied in the exercise of one’s right’. The Second Edition of the *Law Dictionary* has the following to say about the ‘Freedom of Choice’: -

Unfettered right to do what one wants, when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one’s self or another.

16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one’s choice as embodied in article 50(2)(g) of the Constitution therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one’s choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.

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 v 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.

19. In South Africa in *Fraser v ABSA Bank Limited* (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -

Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation....

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.

21. Apart from the Constitution and the foregone judicial decisions there is The International Convention on Civil and Political Rights (ICCPR) which Kenya



is a party after adopting it on December 16, 1966. Article 14(3)(d) thereof entitles an accused person of the following rights: -

To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

22. Having settled the need to inform an accused person of the right to legal representation under article 50(2)(g) of the *Constitution*, the next limb of consideration must be who is under such a duty to inform the accused person of the right. The answer seems to be in one of our legislations. The Legal Aid Act No 6 of 2016 (hereinafter referred to as 'the Act') is an Act of Parliament to give effect to articles 19(2), 48, 50(2)(g) and (h) of the *Constitution*. Section 43(1)(a) of the Act which provides one of the duties of the court as follows: -

43. A court before which an unrepresented accused person is  
(1) presented shall-  
(a) promptly inform the accused of his or her right to legal representation;

23. Still on the said subject, a South African Court in *S v Daniels & another* 1983(3) 275(A) at 299 G-H, while emphasizing that the duty to inform the accused person squarely lies on the court stated that: -

... the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation

24. Further, another South African Court in *Mphukwa v S* (CA&R 360/2004) [2012] ZAECGHC 6 (16 February 2012), made reference to the comments of Goldstone J. in *S v Radebe; S v Mbonani* 1988(1) SA 191 (TPD), a decision which was quoted with approval by the Supreme Court of Appeal of South Africa in *Ramaite v The State* (958/13) [2014] (26 September 2014). My Lordship Goldstone, J stated as follows: -

...a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.

If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and



the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice ...

25. In Kenya, Nyakundi, J. in *Joseph Kiema Philip v Republic* (2019) eKLR added his voice on the subject in the following manner: -

.....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.....

26. From the foregone I believe I have said enough regarding the duty of a court to inform an accused person of the right under article 50(2)(g) of the [Constitution](#).

27. That now leads to the other question as to what point in time should the right be explained to the accused person.

28. Article 50(2)(g) of the [Constitution](#) dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in *Joseph Kiema Philip (supra)* 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).

29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with article 50(2)(g) of the [Constitution](#) among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.

30. In this case the trial court explained the right to representation to the Appellant at defence stage. That was too far late in the day.

31. Having dealt with the various limbs of the right under article 50(2)(g) of the [Constitution](#) and in view of the status of the record as espoused hereinabove I must return the verdict that the trial court failed to comply with the dictates of article 50(2)(g) of the [Constitution](#). The appellant was hence not accorded a fair trial in line with article 50(2)(g) of the [Constitution](#).



32. ....
33. ....
34. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under article 50(2)(g) of the Constitution in the circumstances of this case”
35. There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.
36. In answering the question, I will consider the wording of the article 50(2)(g) and (h) of the Constitution. From the wording of Article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under article 50(2)(g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in the Constitution then it remains the unwavering duty of this court to enforce the provisions of the Constitution.
37. 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 at. 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.

I totally agree with the J. Mrima. In the end, I find that the appellants right to be promptly informed of the right to choose an advocate was infringed and that renders the whole proceedings a nullity. The question then is how should this court proceed” Should the court dismiss this case or order a retrial. There are numerous decisions which give guidance on when a court can order a retrial. In *Ahmed Sumar v R* (1964)EALR 483, the Court of Appeal said

“.....in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiently of evidence or for the purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not



necessary 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 depends 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.”

This decision was echoed in *Lolimo Ekimat v Republic* Criminal Appeal No 151 of 2004 KLR 552. In *Fatebali Manji v Republic* (1966)EA 343, the courts expressed itself thus:-

Although some factors may be considered such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial at the end of the day, such a case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”

In the instant case, the offence was committed on 23/1/2018 and the appellant was convicted on 9/1/2019. So far, he has served about 2 ½ years. The complainant was the appellants grandmother and will not be hard to trace. The other witnesses were relatives and neighbours of both the complainant and appellant and are easily traceable. The offence committed is a very serious one and carries a sentence of life imprisonment. The circumstances under which it was committed greatly affected the complainant. I find that this is a case that is suitable for a retrial and I hereby order that a retrial be undertaken.

In the end, I allow the appeal, quash the conviction, set aside the sentence on the grounds that the appellant’s right to fair trial under article 50(2)(g) of the *constitution* were infringed. I direct that this matter be referred back to Kehancha Court for a retrial. The Principal Magistrate Kehancha Law Courts to take plea and to ensure the fastrack of the case. The appellant is released to police custody to be produced before Principal Magistrate Kehancha on June 21, 2021 for taking plea.”

34. I find no reason to differ with the above holdings and or delve into the merits of this appeal as the right to a fair trial cannot be limited. I find that as the offence committed was a serious offence attracting up to life imprisonment upon conviction, the trial court was under a duty to promptly inform the appellant of his right and the appellant would have indicated whether he could afford an advocate or be advised to apply to the National Legal Aid Service Board for a pro bono advocate. That duty was not undertaken by the trial court right from the time of taking the plea until the end of the trial. The charge that the accused faced was serious. He faced up to life sentence upon conviction. In my view, substantial injustice occurred considering the age of the appellant who was only 20 years old and therefore the need to promptly inform of his right to legal representation.



35. Accordingly, as there is no evidence that witnesses cannot be traced as this is a 2020 case where the accused was convicted and sentenced on 20/4/2022 while on bond, and as the offence charged was serious in nature, I hereby quash the appellant's conviction, set aside the sentence of twenty years imprisonment and order that the appellant shall be retried before Siaya Chief Magistrate's Court for the same offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offence Act](#). The Appellant shall be released only to the police custody to be produced before Siaya Chief Magistrate's court on November 28, 2022 for Plea taking.

1. This file is closed.
2. I so order.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2022**

**R.E. ABURILI**

**JUDGE**

