



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 333 OF 2013

WILSON KIPCHIRCHIR KOSKEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgement, conviction and sentence in CMC Criminal Case Number 153 of 2012 Nakuru,

Republic vs Wilson Kipchirchir Koskei, delivered by Hon. R. Angano, RM on 27.11.2013).

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section **8(1)** of the Sexual Offences Act^[1] in Nakuru CMCC No. **153** of 2012. On **27th** November 2013 and sentenced to serve life imprisonment.
2. His first appearance before me was on **3rd** October 2018 when I noted that he had difficulties understanding the language of the court, (English and Kiswahili) and I asked for a Kipsigis interpreter. When his appeal came up for hearing on **28th** January 2018, I again asked for an interpreter to translate the proceedings into dialect. He evidently looked frail, confused and was totally incoherent and gave irrelevant answers. He could hardly comprehend the proceedings. He informed the court that he is aged over **85** years.
3. Counsel for the **DPP, Mr. Chingiti**, in the course of his submissions made a candid observation, that it is possible that the appellant did not understand the proceedings in the lower court since they were conducted in English which was translated to Kiswahili. On this ground, he urged the court to find that the proceedings in the lower court were mis-trial.
4. The appellant in his grounds of appeal stated that he did not understand the language of the court. Article **50(2) (m)** of the Constitution guarantees a fair trial to include the right "to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."
5. The record shows that the proceedings were conducted in English language which was translated to Kiswahili. Curiously, after the appellant was put on his defence, while tendering his defence, for the first time in the proceedings a Tugen Interpreter was availed. Curiously, this was the first time the court recognized the need for an interpreter.
6. The starting point is that this court hoists high the constitutional requirement for a fair trial which includes the right of the accused to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. This court has a duty to study the entire record and satisfy itself that indeed the trial court did not comply with this constitutional requirement. The appeal court must consider whether the misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal bearing in mind that what the Constitution demands is that the accused be given a fair trial.
7. In *Joseph Ndungu Kagiri vs Republic*,^[2] addressing the question of a fair trial, I rendered myself as follows:-

"In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles **50** of the Constitution of Kenya 2010. The Right to a Fair Trial is

one of the cornerstones of a just society."

8. In the above case I cited the Supreme Court of India^[3] where it stated:-

"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism."

And again:- "Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused....."

9. The right to a fair trial is among the fundamental rights and freedoms that may not be limited.^[4] Article 50(2)(m) correctly interpreted means that an accused person should be able at all stages of the trial to understand the case against him or have the case explained to him in a language that he understands. The sole purpose of doing so is to ensure that an accused at all stages of the trial understands the case against him and avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence.

10. The constitutional dictate to a fair trial cannot be met if the accused cannot understand the language of the court. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

11. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial includes the grant of fair and proper opportunities to the person concerned, and understanding the nature of the case against him and understanding the language of the court. This must be ensured and observed as it is a constitutional, as well as a human right. Under no circumstances can a person's right to fair trial be jeopardized.^[5] On this ground alone, I find and hold that the trial at the lower court was not conducted in a manner that can be said to be consistent with the Constitution. The conviction cannot be allowed to stand.

12. Notwithstanding my above finding, I find it appropriate to mention that even though this is a court of law, it has a conscience. The appellant is aged over 85 years. At the time of the conviction, he was over 80 years or thereabouts. He exhibited serious difficulties answering simple questions. He was evidently disoriented and incoherent. He was evidently confused. Above all, he looks frail. He manifests old age related complications.

13. The jurisdiction of the High Court to review or revise orders of a Magistrate's Court or Tribunal is underpinned by the Constitution at Article 165(5) which comports with section 362 as read together with section 364 of the Criminal Procedure Code.^[6] Even though this came to the High Court by way of an appeal, the peculiar circumstances discussed below make this an appropriate case for this court to invoke its vast jurisdiction under Article 165 of the Constitution.

14. The supervisory powers of a High Court are intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior criminal court and even as to the regularity of any proceeding of any inferior court. The object of conferring such powers on the High Court is to clothe the high court with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders or where justice and circumstances of the case so demand.

15. **Mr. Chingiti** acknowledged the appellant's advanced age, frailness and inability to concentrate or answer simple questions and urged the court to invoke its discretion and make appropriate orders. I must register my admiration for **Mr. Chingiti's** candidness and understanding. It reminds me of the often quoted statement by D.A. Bellemare, M.S.M, Q.C who put best the often difficult course for the prosecutor when he said:-

"It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense."^[7]

16. The appellant's advanced age and condition brings to mind the question, under what circumstances should a discharge whether conditional or absolute be granted. The issue here is not so much that of when will a discharge be granted, but rather when it will not be granted. I have in mind the provisions of section 35 of the Penal Code^[8] which provides for absolute or conditional discharge in the following words:-

(1). "Where a court by or before which a person is convicted of an offence is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offenders Act (Cap. 64) is not appropriate, the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein."

17. The obvious purpose of the above provision was to provide the trial courts with an alternative to convicting an accused when the consequences of such a conviction would outweigh the benefit normally obtained through securing a conviction after a finding or admission of guilt. It is clear that it is the function of the trial court to decide the appropriateness of a discharge. The granting of a discharge is discretionary. The trial court may by order direct a discharge "if it considers it to be in the best interests of the accused and not contrary to the public interest."

18. An absolute discharge or a discharge upon conditions prescribed in the above section may be ordered where an accused pleads guilty to or is found guilty of an offence. The court must consider a discharge to be "in the best interests of the accused and not contrary to the public interest". *Absolute discharges* are only available where an accused is not a significant threat to the safety of the public." The appellant is aged over **85** years. He was over **80** years as at the time of the conviction. He cannot be said to be a significant threat to the safety of the public.
19. There are two conditions precedent to the exercise of the jurisdiction to grant a discharge, either conditionally or absolutely. The *first* is that the court may consider that it is in the best interests of the accused. The *second* condition precedent is that the court must consider that a grant of discharge is not contrary to the public interest. In the consideration of this aspect, I think that it should be said that a discharge, conditional or absolute, should not be granted routinely. I am of the view further that the jurisdiction should be used sparingly.
20. In consideration of the exercise of the discretion to grant an absolute or conditional discharge, I emphasize that it is quite impossible to lay down rules which would cover the myriad of situations which may appear before a trial court confronted with the task of appropriate sentence in any given case. I am of the opinion, however, that the following are some of the relevant factors which must be considered in every case.
21. *First*, there is the nature of the offence. While it is to be borne in mind that the section may be used in respect of any offence, one must nevertheless be concerned with the seriousness of the offence, and it would seem appropriate that the more serious the offence, the less frequent would be the use of a discharge in sentencing. It would, for instance, be a most exceptional case where a crime involving violence or sexual assault would be dealt with by an order of discharge.
22. *Second*, one has to consider the prevalence of the particular offence as it may exist in the community from time to time.
23. *Third*, where the offence is relating to property, the value of the property destroyed or stolen must be relevant.
24. *Forth*, where the offence involves sexual assault as in this case, the court should consider the rights of the victim and whether there are aggravating circumstances including violence.
25. *Fifth*, I think that it is relevant to consider whether the crime was committed as a matter of impulse, and in the face of unexpected opportunity, or whether it was calculated and the propensity of the accused to commit such offences.
26. It is necessary that the courts express the moral condemnation of the community for deliberate infractions of the criminal law. The discharge should never be applied routinely to any criminal offence, in effect labelling the enactment violable. It should be used frugally, selectively and judiciously as Parliament obviously intended. The courts should not compromise or circumvent the law.
27. While rejecting a blanket application of the above provision to criminal cases, of course, there will be cases under this section and for other infractions of the criminal law, where a discharge is appropriate, depending upon the nature of the offence, the age and antecedents of the accused and the circumstances of the case.
28. Deterrence to others will be a factor to be assessed when considering the "contrary to public interest" limb. The more serious the offence, the less likely it will appear that a discharge is 'not contrary to the public interest. To attempt more specific delineation would be unwise, and might serve to fetter what I conceive to be a wide, albeit judicial, discretion vested in the court. The court must consider all of the circumstances of the accused, and the nature and circumstances of the offence, against the background of proper law enforcement in the community, and the general criteria mentioned above.
29. The appellant is **85** years old. He looks frail. Life in prison has evidently taken a toll on his health. **Mr. Chingiti** noted his condition and "urged the court to make appropriate orders."
30. It is my opinion that that the public interest in respect of the offence in question must be fully and carefully canvassed and given due weight before a disposition can be made. Much of the public interest in this area is exemplified by the well-known considerations which a court takes into account in determining sentence. Section 35 of the Penal Code^[9] provides conditions to be taken into consideration by the court. The court is required to be of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate. Having had the advantage of examining the appellant, I do not think that one requires a probation officers report to confirm his age and age related complications.
31. Life in prison can challenge anyone, but it can be particularly hard for people whose bodies and minds are being whittled away by age. Older prisoners are more likely than younger ones to develop mobility impairments, hearing and vision loss, and cognitive limitations including dementia. Older prisoners are also more likely to have chronic, disabling, and terminal illnesses. Prisoners who continue to age behind bars will eventually require assisted living and nursing home levels of care while incarcerated.
32. For an old and frail person, the right to safe conditions of confinement means not having to live in a cell with younger persons prone to violence and extortion; the right to decent conditions of confinement means receiving extra blankets and clothing because it is harder to stay warm; and the right to rehabilitation means receiving age-appropriate educational, recreational, and vocational opportunities.
33. I am also concerned that some elderly inmates are being unnecessarily held in prison despite the fact that their continued incarceration does little to serve the principal purposes of punishment: retribution, incapacitation, deterrence, and rehabilitation. For prisoners who no longer pose a public safety risk because of age and infirmity, and who have already served some portion of their prison sentence, continued incarceration may constitute a violation of their right to a just and proportionate punishment. Alternative forms of punishment should be imposed—for example, conditional release to home confinement under parole supervision—that would serve the legitimate goals of punishment.

34. Time has come for our criminal justice system to review sentencing, penal laws and policies and guidelines to determine which can be adjusted to reduce the elderly prisoner population without risking public safety. Meanwhile, correctional facilities should review the conditions of confinement for their elderly prisoners, including the services and programs available to them, and make changes as needed to ensure their human rights are respected.

35. In my view, this case presents exceptional circumstances to compel a court to order an unconditional and absolute discharge as contemplated under section 35 of the Penal Code.^[10] The appellant was 80 years as at the time he tendered his defence in the lower court. He was jailed on 27th November 2013. He is now aged over 85 years. Keeping a person aged over 85 years in prison under the harsh prison conditions when he is not a danger even to himself is something that should prick the conscience of humanity and our entire criminal justice system. It is tantamount to sentencing such a person to a slow death. Differently stated, the trial court properly directing its mind to the provisions of section 35 of the Penal Code^[11] would have in my own view been perfectly entitled to invoke the said section of account of the appellant's age who was over 80 at the time of sentencing.

36. Much has been said about the mandatory sentences under the Sexual Offences Act,^[12] but in my view, the drafters of section 35 of the Penal Code^[13] contemplated circumstances such as presented in this case. To reason otherwise would amount to a blind and mechanical application of the law. Legislatures simply cannot write laws to address all situations which find their way into court or that develop as a case makes its way through the legal system. Judges are present during proceedings and hear the evidence firsthand. From this vantage point a judge must have some discretion to apply the law to the facts and procedure of the pending dispute.

37. Mandatory minimum sentences are the product of good intentions, but good intentions do not always make good policy; good results are also necessary. Parliament needs to ask itself, with respect to each crime, is justice best served by having legislators assign fixed penalties to that crime? Or should Parliament leave judges more or less free to tailor sentences to the aggravating and mitigating facts of each criminal case within a defined range?

38. Crime and its punishment is a public policy concern in which Parliament has a key role in defining. It is a judicial function to ensure the criminal laws are implemented fairly and in accordance with the law. If an arrested person is found guilty, it is a judicial function to set out the punishment of the individual on a case-by-case basis guided by the statutory parameters set out by the legislature.

39. Judicial discretion is necessary for the proper discharge of court's constitutional obligations. Time has come for Parliament to reconsider the provisions of the Sexual Offences Act^[14] particularly on the question of taking away or limiting judicial discretion on sentencing. Chief Justice John Marshall expressed himself as follows:-

"Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."^[15]

40. What the law requires and allows is a function not just of legal rules, but also of considerations without which decisions cannot soundly be made. These considerations are relevant to a judicial decision, so that a court must take them into account and weigh them in the balance in a judicially appropriate way. Neglecting relevant considerations would be a judicial error and can cause injustice. Differently stated, a law that takes away judicial discretion is an open invitation to injustice and can open the law to violation of fundamental rights. It is assumed that the established rules of law sometimes run out, and that when they do judges have "discretion" and must exercise "choice" between legally open alternative decisions.

Final orders.

41. In conclusion it is my finding that the proceedings in the lower court were not conducted in a manner that can be read to be consistent with the fair trial requirements under Article 50(2) (m) of the Constitution. The appellant cannot be said to have been accorded a fair trial when it is evident that the entire proceedings except his defence were conducted in a language he did not understand. I find that it would be an affront to the letter and spirit of the Constitution to allow the conviction and imprisonment imposed upon the appellant to stand. Accordingly, I quash the conviction and set aside the sentence imposed upon the appellant in *CMC Criminal Case Number 153 of 2012 Nakuru, Republic vs Wilson Kipchirchir Koskei*, delivered by Hon. R. Angano, RM on 27.11.2013).

42. Consequently, I order that the appellant **Wilson Kipchirchir Koskei**, be released from prison forthwith unless otherwise lawfully held.

Right of appeal 14 days

Signed and Dated at Nakuru this 30th day of January, 2019

John M. Mativo

Judge

^[1] Act No. 3 of 2006.

^[2] High Court Criminal Appeal No. 69 of 2012, Nyeri.

[3] In *Rattiram vs. State of M.P* {2012} 4 SCC 516.

[4] Article 25 (c) of the Constitution. See High Court Criminal Appeal No. 69 of 2012, Nyeri.

[5] See the Supreme Court of India in the case of *Natasha Singh v. CBI* {2013} 5 SCC 741.

[6] See *Paulo Malimi Mbusi v Republic*, High Court of Kenya at Kiambu, Criminal Appeal No. 8 of 2016.

[7] *Infra*

[8] Cap 63, Laws of Kenya.

[9] Cap 63, Laws of Kenya.

[10] *Ibid.*

[11] *Ibid.*

[12] Act No. 3 of 2006.

[13] Cap 63, Laws of Kenya.

[14] *Ibid.*

[15] *Osborn v. Bank of the United States*, 22 U. S. 738 (1824).