



DNN v Director of Public Prosecutions & another (Criminal Petition E002 of 2024) [2025] KEHC 4276 (KLR) (19 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL PETITION E002 OF 2024
LN MUTENDE, J
MARCH 19, 2025**

IN THE MATTER OF PETITION FOR A NEW TRIAL

AND

IN THE MATTER OF ARTICLE 50(6) OF THE CONSTITUTION

AND

**IN THE MATTER OF VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS
UNDER ARTICLES 10, 22, 25, 28, 29, 48, 50 AND 53 OF THE CONSTITUTION**

AND

IN THE MATTER OF SECTION 43(3) OF THE LEGAL AID ACT

AND

IN THE MATTER OF SECTION 18 AND 77 OF THE CHILDREN'S ACT

BETWEEN

DNN PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

JUDGMENT

1. The Petitioner herein is a male adult serving a life imprisonment sentence at Naivasha Main Prison following conviction on a charge of Defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#), in Criminal Case No. 2208 of 2011 where he was sentenced to life imprisonment.



2. At the outset the Petitioner pleaded guilty, and was convicted on his own plea. That at the time he was 16 years old and unrepresented. That during mitigation he was sick and had pains in the ribs. The court on considering mitigation sentenced him to life imprisonment.

Petitioners Case

3. The Petitioner contends that his rights were violated. That he was not informed of the right to legal representation as provided by Article 50(g) and (h) of *the Constitution* at the first appearance.
4. That at the time of arraignment, the Petitioner was a minor, and as a child he should have been granted legal representation. In this respect he relies on Section 77 of the *Children Act*, 2001 which was applicable then; Section 43(3) of the *Legal Aid Act*; Republic v Karisa Chengo & 2 Others [2017] eKLR where the Supreme Court delivered itself thus;

“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.”

5. That he has suffered substantial injustice by being in prison for now a period of 13 years. That in the course of incarceration he has been held with adults, where he has been subjected to bullying and child abuse.
6. That according to Section 18(2) of the *Children Act*, 2001, a child shall not be subjected to capital punishment or to life imprisonment.
7. That the trial court erred in law and fact in sentencing him a child to life imprisonment and failed to consider different types of punishment for children.
8. That the Petitioner did not appreciate the language of the court and the nature of the information given to him by the court. That during mitigation on the sentence after conviction on his own plea, the Petitioner went ahead to state his grievances unrelated to the question in issue. That he was not made aware of the severe sentence which would be imposed upon him admitting the charge.
9. That he was held in three (3) days from 04/11/2011 up to 7/11/2011 before being arraigned in court which was physical torture and was coerced to plead guilty.



10. That in *Ndete v Republic*, it was held that;

“There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute.... 3. Where, as has happened in this case, at the time of the taking of plea there appears to be an unusual circumstance as injury to the accused.....then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the court.”

11. The Petitioner hence seeks;

- i. A declaration that his right to fair trial was denied.
- ii. A declaration that the right to fair trial was infringed when the court did not accord him counsel at the expense of the State.
- iii. That his right was infringed when the trial was conducted on a language he did not understand.
- iv. That his right to fair trial was violated when he was tortured in police custody to coerce him to plead guilty to the charge.

12. He calls upon the court to quash the conviction in Criminal No. 2208 of 2011 and set aside the sentence.

13. The 1st Respondent filed an affidavit through Ms. Gladys Kariuki, learned prosecution counsel, in reply who deposes that following the conviction, the Petitioner has been serving sentence for thirteen (13) years. That although the Petitioner claims to have been a child at the time of his arrest the charge sheet registered in court for Police File No. 245/194/2011 on 7th November, 2011, clearly identified the accused person as an adult.

14. That the charges were read in a language that he understood and he admitted hence a plea of guilty was entered.

15. That now the Petitioner has a baptismal card from New Divine Christian Church indicating the date of birth as 20/10/1995 which is both absurdly and suspect for the same being availed 13 years after.

16. That the right of appeal was explained to the Petitioner but he did not even attempt to file a review or appeal which is absurd given to the legal information accorded to the inmates by Criminal Justice Sectors and Paralegal Program. The Petition is hence dismissed as having been brought in bad faith to defeat justice.

17. The 2nd Respondent through learned counsel Pauline Waithaka for the Attorney General, relying on grounds of opposition filed, urged that the petition falls short of the threshold set out in *Anarita Karimi Njeru v the Republic* (1976 – 1980) KLR 1272 in which the court stated that;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

18. That the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenya Section of the International Commission of Jurists & Kenya Human Rights Commission* [2013] KECA 445



(KLR) reaffirmed the principle in Anarita Njeru. That the case referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided with or no particulars as to the allegations and the manner of the alleged infringements.

19. That the 2nd Respondent arrested the Petitioner on 4th November, 2011, a Friday and arraigned him in court on 7th November, 2011, the following Monday hence there was no delay in producing him in court.
20. That although Section 43(3) of the *Legal Aid Act* requires a child to be provided for legal aid, Section 43(6) of the Act provide that lack of legal representation shall not be a bar to proceedings against a person. That it was not within the mandate of the 2nd Respondent to inform the Petitioner on his right of arrest under Article 49 of *the Constitution*.
21. That the Petitioner was given a fair hearing as per the Nyahururu Criminal Case No. 2208 of 2011. That the charges were read in a language that he understood and was sentenced to his own plea of guilty.
22. That the petition is an afterthought mischievously disguised as a constitutional petition in which the Petitioner seeks to appeal the judgment. Reliance is placed on *KKB v SCM & 5 Others (Constitutional Petition 014 of 2020) [2022]* where the court stated that;

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain.”
23. That the Petitioner has not sufficiently proved the fact of having been a minor then. And the charge sheet indicated he was an adult.
24. This court has considered the petition, affidavit in support and opposition by the 1st Respondent; and submissions filed by the 1st and 2nd Respondents.
25. The Petitioner herein is a convict who may allege human rights infringement through conviction pursuant to provisions of the law. This is because he retains fundamental rights. Each case therefore depends on its circumstances and careful consideration must be given to the arguments.
26. The allegations put forth by the Petitioner of purported violation of his rights by the Respondents allegedly arose before conviction. There is an alleged violation of the Petitioner’s right to legal representation; The right to benefit from a language he understood; and the right to freedom and security of person.
27. Although the Petitioner did not disclose, upon being tried by the Lower Court he was aggrieved and did appeal in *Daniel Njoroge Njenga v Republic [2013] KEHC 3262 (KLR) (Criminal Appeal No. 272 of 2011)*. The grounds upon which the appeal was preferred were;
 - “1. He was lured into pleading to the charge;
 2. That he was tortured before being taken to court;
 3. That the plea was read in a language that he did not understand.”



He prayed for a re-trial or acquittal by the court. Wendoh J. stated that;

“The appellant alleges that he was lured into pleading guilty to the charge by the police. The appellant did not state the nature of the luring nor did he name the person who lured him. He never complained of such luring at the time of plea or mitigation. There is no evidence that the trial court was party to any such act.

The appellant appeared before the Senior Resident Magistrate, Mongare, on 7/11/2011. The record shows that the language of the court was English and Kiswahili. After the charge was read to the appellant, he agreed that it was true. The facts were read to him. The record shows that he accepted that they were true. The court convicted him and after the prosecutor addressed the court, the appellant was invited to give his mitigation. He said that he was sick, had rib pain and had not seen a doctor and that he was sorry. The response of the appellant clearly demonstrates that he understood the language of the court, the charge and facts. Even if the court did not specifically record the language of the court then, he understood the charge and the facts.

The appellant also claims to have been tortured and injured by the police. If there had been any visible injuries on the appellant when he first appeared before the court, the court would have noted them. It is only in mitigation that he claimed to have been sick. He never complained that he was tortured and beaten up. This court is satisfied that the plea was unequivocal, the appellant understood the language of the court, understood the facts and only pleaded with the court that he was not well. The circumstances under which the plea was taken do not warrant any interference by the court.

Having considered the grounds of appeal, I find that the conviction was proper and I hereby confirm it. The sentence prescribed under Section 8(2) of the *Sexual Offences Act* is life imprisonment. The sentence is legal and this court has no reason to interfere with it. In the end, I find that the appeal lacks merit, it is hereby dismissed.”

28. As stated in the Anarita Karimi case (supra) the Petitioner was supposed to identify clearly and definitely what his complaint was all about and how supposedly the rights were infringed.
29. The court did address the question of fair trial. The question of being a minor at the time did not arise. The question of a purported baptismal card from Christ Divine Christian Church having mushroomed some thirteen (13) years later is of course suspect.
30. There is also an allegation of having been held with adults while he was a minor. Other than coming up with the allegation at the outset as a fore found; there are mechanisms of lodging complaints while in prison and also in court. No such a complaint was made during pendency of the trial or appeal to persuade this court to believe the Petitioner.
31. In the Anarita Karimi case(supra), it was stated hat per the doctrine of constitutional avoidance, where a dispute should be determined without necessarily raising constitutional issues, the alternative form ought to be pursued. The Petitioner herein did appeal. The matter was determined by a court of concurrent jurisdiction which determined issues raised that were framed as grounds of appeal.
32. From the foregoing, I find the petition seeks to overturn the decision of the High Court, powers that this court does not have. In the premises, the petition lacks merit. Accordingly, it is dismissed.
33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH, 2025.



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L.N. MUTENDE
JUDGE

