BKM v Republic (Criminal Appeal E027 of 2024)
[2025] KEHC 4884 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4884 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E027 OF 2024

FN MUCHEMI, J

APRIL 24, 2025

BETWEEN

BKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable D. Milimu (SRM), in Criminal Sexual Offence Case No. 65 of 2020 on 25th July 2024)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Thika where he was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to life imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 8 grounds which is hereby summarised as follows:-

    a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof;

    b. The learned trial magistrate erred both in law and in fact by failing to consider the documents proving the age of the appellant, being the birth certificate and the age assessment report and proceeded with the case in toto disregard of the provisions of the *Children Act* as the appellant was treated and described as an adult throughout his trial and the trial was held in public.

c. The learned trial magistrate erred by failing to consider the appellant was a child in conflict with the law and therefore in need of care and protection at the time of the commission of the offence, the charge and during trial.

d. The learned trial magistrate erred in law and in fact by failing to afford the appellant who was a minor, the services of an advocate at the onset of his trial thus compromising his right to a fair trial.

e. The learned trial magistrate erred in law and in fact by failing to consider that the life sentence imposed upon the accused person was discriminatory in nature and contrary to article 27 & 28 of *the Constitution* of Kenya.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the charge sheet is defective, contradicting and did not tally with the evidence produced in court. The appellant states that he was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* and an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The appellant argues that the trial court did not give its findings on the alternative charge.

5. The appellant argues that PW1 and PW2 testified that the victim was 8 years old and the charge sheet indicated that the victim was 9 years old whereas he was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* clearly indicating that the child who was defiled was between the ages of 12 to 15 years. Thus the appellant argues that he was charged with the wrong section of the law which is a significant legal error because the charge sheet must be clear, unambiguous and provide sufficient details to inform an accused person of the specific nature of the allegations against them. To support his contentions, the appellant relies on the cases of Kasyoka vs Republic [2003] eKLR and SK vs Republic (Criminal Appeal 2 of 2020) [2024] KEHC 1894 (KLR).

6. The appellant argues that no DNA examination was conducted on him to link him to the crime. The appellant submits that DNA evidence is a powerful tool in forensic investigations providing a conclusive link between the perpetrator and the crime. Relying on the cases of Mutunga Stephen Kiema vs Republic [2018] eKLR and Republic vs MMG (Criminal appeal No. 120 of 2018) [2019] KEHC 3452 (KLR), the appellant submits that the failure to conduct a DNA examination means that there is no scientific evidence directly linking him to the alleged offence. The appellant submits that the P3 Form requires that a medical examination be conducted on him so as to provide a clear link between the victim and the accused.

7. The appellant argues that the investigative procedures in the present case were notably deficient which significantly undermined the reliability of the evidence presented against him. Specifically, the failure of the investigating officers to visit the scene if the crime and document it thoroughly. The appellant further argues that the clothes worn by the complainant at the time of the alleged offence were never produced as exhibits in court. The absence of the said items in evidence presented casts serious doubts on the thoroughness and completeness of the investigation. To support his contentions, the appellant relies on the cases of Ali vs Republic (Criminal Appeal 51 of 2021) [2024] KECA 1168 (KLR) and Njuguna vs Republic (Criminal Appeal 193 of 2020) [2024] KECA 329 (KLR). The appellant argues that the investigating officer only relied on hearsay evidence and did not conduct any investigation to confirm the allegations, he never visited the crime scene neither did he take the victims clothing for examination.

8. The appellant argues that the trial court ignored the fact that he was a minor at the time of the alleged commission of the offence and proceeded with the case without due regard of the *Children Act*, 2022. The appellant states that he was 17 years old at the time he was arrested and he proved his age through the age assessment report that was sought by the court and the birth certificate produced in court. The appellant states that he was remanded at Kamiti youth Rehabilitation Centre and throughout the trial he was being referred to as a minor. The appellant submits that the manner in which the trial court dealt with the matter did not conform with the provisions of Part XV of the *Children Act* 2022 as the trial court did not follow up to open a Care and Protection file for him the trial court did not find out whether any preliminary inquiry had been conducted in his case and the trial court failed to allocate him an advocate at the time of plea taking and during the hearing in respect of PW1 and PW2's evidence. The appellant further submits that the pro bono advocate represented him during the hearing of PW3 whereby the witness was stood down midway her evidence. Thereafter the probono advocate never represented him and the trial court never took action to safeguard his legal representation rights despite knowing very well he was a minor.

9. The appellant further submits that the trial court failed to consider diversion as the learned trial magistrate failed to explain to him the meaning and object of diversion for him to understand, neither was he taken through the diversion process. Additionally, the appellant submits that he was never referred to any family group conference pursuant to the *Children Act*. The appellant argues that his rights were not considered and the trial court proceeded with the case as if he was an adult. The manner in which the trial court handled the entire case was prejudicial to him and violated his rights to legal representation, access to justice and a fair hearing and sentenced him to life imprisonment.

10. The appellant argues that the sentence was very harsh noting that he is currently 22 years old. The appellant submits that the sentence shuttered his future. The appellant submits that he was sentenced harshly contravening Article 50(2)(g)(h) of *the constitution* as he was not assigned legal representation despite the fact that the charge attracted a harsh sentence of life imprisonment. To support his contentions, the appellant refers to the case of Jared Inguti Nyantika vs Republic [2019] eKLR and submits that failure to be informed of his right to an advocate was a denial of the right to fair hearing.

11. The appellant submits that Section 43 of the *Legal Aid Act* imposes a duty to the court with respect to unrepresented persons, to inform them of their right to legal representation if substantial injustice is likely to occur. The appellant relies on the case of Evans Nyamai Ayako vs Republic Criminal Appeal 22 of 2018 and submits that the mandatory life sentence was contrary to Articles 27 and 28 of *the Constitution* which guarantee equality before the law and human dignity.

The Respondent's Submissions

12. The respondent in their oral submissions conceded to the appeal and proposed a retrial to be conducted. The respondent submits that the appellant's age was assessed before the plea and he was found to be 15-17 years. The birth certificate number 1681603657 corresponded with the age assessment. The appellant was ordered to be remanded at Kamiti Correction Centre during the trial and the court acknowledged that the appellant was a minor. The respondent submits that the appellant was underage when he committed the offence and he was not accorded legal representation. From the record, a pro bono counsel was appointed when PW3 was giving evidence. It was further submitted that the pro bono advocate thereafter abandoned the case and the appellant proceeded without a counsel. The trial magistrate found the appellant guilty of the offence and sentenced the him to life imprisonment. Being a minor, the sentence imposed was illegal. The respondent submits that currently the appellant has served 7 months in custody. The respondent further submits that although the prosecution has a good case, the proceedings were defective.

13. The appellant's counsel opposed the proposal for a retrial as the appellant will be punished to go through trial twice and she submitted an acquittal would be the bet move to accord justice to the appellant.

Issue for determination

14. The main issue for determination is whether the appeal has merit.

The Law

15. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

16. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the appeal has merit.

17. The appellant was arraigned before Honourable V. Ogutu on 10/8/2020 for taking of the court plea. The plea deferred to 12/8/2020 to enable the appellant to undergo age assessment. The charge indicated that the age of the appellant at the time of commission of the offence was less than eighteen (18) years.

18. The appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* and an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. On 12/8/2020 the charges were read to the appellant and he entered a plea of not guilty. The trial court released the appellant on a surety bond of Kshs. 100,000/- or cash bail of Ksh.50,000 which he failed to raise. He was then remanded at Kamiti Youth Rehabilitation Centre.

19. The matter proceeded for hearing with the complainant's mother and the complainant testifying as PW1 and PW2 respectively on 3rd November 2020. On 25th February 20221, when the matter came up for further hearing, the appellant informed the trial court that he was aged 17. On perusal of the trial record, a copy of the appellant's birth certificate had been filed which indicates that the appellant was born on 17th July 2003 and as such, he was 17 years old at the time of the commission of the offence.

20. On the same day, a pro bono advocate, Mr. Kinyanjui came on record for the appellant and sought more time to prepare for the hearing. The trial court directed that the proceedings be typed and that the pro bono advocate be paid the 1st instalment of his probono fees by the court. The pro bono advocate appeared only once on 7/6/2022 It was noted that the counsel had missed severl court attendances and was not picking phone calls. On 24/8/2022, the trial court directed that another pro bono advocate be appointed and the matter was fixed for hearing on 2/11/2022. On 2that day, Mr. Kinyanjui was present and the trial court heard the testimony of PW3 but the counsel did not show up in court thereafter. The appellant made several complaints in court and the trial court took note of the prevailing problem. On 6/2/2024 the court directed that due to the age of the case, another pro bono advocate appointed to represent the appellant. However on 21/3/2024, the appellant prayed that the matter proceeds without his advocate as he never attended court or picked his calls. The trial court proceeded with the case and after the close of the prosecution case, the trail court found that the appellant had a case to answer and put him on his defence.

21. It is evident that the appellant was a minor and thus the trial court should have applied the provisions of Part XV of the *Children Act* 2022. Section 222(2) of the *Children Act*, provides that pursuant to the provisions of Article 50 of *the Constitution*, every child is entitled to a fair trial which shall include the presumption of innocence, the right to be notified of the charges preferred against him or her, the right to legal representation, the right to the presence of a parent or guardian, the right to present and examine witnesses, the right to remain silent and the right to appeal at all stages of the proceedings.

22. Article 50(2)(g) and (h) provide:-

> Every accused person has the right to a fair trial, which includes the right-
>
> To choose and be represented by an advocate and to be informed of this right promptly.
>
> To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

23. The record shows that the trial court did not inform the appellant of his rights to legal representation under Article 50(2)(g) and (h) of *the Constitution*. Two witnesses, PW1 and PW2 testified whilst the appellant had no legal representation. Even when the trial court noted that the appellant was 17 years old after the appellant stated so, the said witnesses were never recalled to testify or to be cross-examine by the probono counsel.

24. In Otieno vs Republic (Criminal Appeal E002 of 2022) [2023] KEHC 27510 (KLR) (9 May 2023) (Judgment) the court held that:-

> Sub article (2) (g) requires that an accused person be informed of his right to choose counsel to represent him promptly.
>
> A general duty is on the part of the judicial officers to ensure that unrepresented accused persons fully understand their rights and the recognition that in the absence of such understanding, a fair and just trial may not take place. It is therefore the duty of the magistrate to inform the accused of the said right and in some cases where necessary, the accused may need to apply to the legal Aid Board for assistance to get free legal aid.

Section 77 of the Children's Act provides: -

> "Where a child is brought before a court in proceedings under the Actor any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation."

25. As was held in the Otieno Vs R case (supra) the trial magistrate had a duty to inform the appellant of his rights at the earliest opportunity preferably during plea for it had been established that he was a minor. The appellant was a minor and was facing charge of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* which carries a sentence of not less than twenty (20) years. In my considered view, this is a serious offence and the court ought to have considered the issue of appointing a pro bono counsel from the onset of the case. The counsel who came on board later abandoned the case. It was the responsibility of the court to ensure that the appellant was given another counsel to represent him till the disposal of the case. The court failed to comply with the law in this regard.

26. I therefore agree with the appellant that his rights of legal representation were violated by conducting the better part of the case by himself. This is in contravention of Article 50(2) of *the Constitution* and Section 77 of Children's Act. The said proceedings are hereby declared a nullity.

27. Thus the court is called upon to determine whether a retrial ought to be held. The Court of Appeal in Ahmed Sumar vs Republic [1964] EA 481 at page 483 gave guidelines on what the court may consider in order to consider a retrial. The court stated:-

> 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.

28. The court explained in the Ahmed Sumar Case (supra) hat the court in ordering retrial must consider a number of things. Firstly, it noted that in the case before me, it was not the mistake of the prosecution but that of the court that led the defective proceedings. Secondly, I have considered the evidence before the trial court and I am of the view that the admissible evidence has high chances of resulting in a conviction. The impact of the offence on the victim who was a minor aged eight (8) years at the time of the offence, was indeed traumatising. As the court serves justice to the accused, the victim must also be given her share of it. The trial before the court below took four (4) years which is not very long time and that if retrial is ordered, the retrial can be fast tracked. The court also considers that the offence is of grave nature considering its impact on the victim.

29. Having considered the foregoing factors, I am of the considered view that a retrial ought to be ordered in this case.

30. In conclusion, I find this appeal successful and make the following orders:-

    a. That the proceedings of the trial court were a mistake due to non-compliance with the law and are hereby declared a nullity.

    b. That the conviction and sentence imposed on the appellant is hereby set aside.

c. That this court orders that a retrial be conducted within a period of six (6) months by another magistrate other than the trial magistrate herein.

31. That the original file and a copy of this court's judgment to be placed before the Chief Magistrate Thika for the necessary orders.

31. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE