



**BRL v Republic (Criminal Appeal E021 of 2024)
[2025] KEHC 5906 (KLR) (12 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E021 OF 2024**

RPV WENDOH, J

MAY 12, 2025

BETWEEN

BRL APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. BRL was convicted on his own plea of guilty by the Hon. S.R.M, Kapenguria for the charge of Incest contrary to Section 20 (1) of the Sexual Offences Act.
2. The particulars of the charge were that on 1/10/2024 in Pokot Central, intentionally caused his penis to penetrate the vagina of IC a child aged 12 years, his own daughter.
3. He also faced an alternative charge of Committing an Indecent Act with a minor contrary to Section 11 (1) of the Sexual Offences Act – in that he touched the buttocks and breasts of IC a child aged 12 years with his penis.
4. At first, the Appellant denied the offence but later, changed the plea, was convicted and sentenced to serve life imprisonment. The Appellant is aggrieved of both conviction and sentence and preferred this appeal.
 1. That he pleaded guilty without knowing the penalty for the offence;
 2. That he was influenced by the police officer to plead to the charge;
 3. That the court violated his Constitutional right under Article 50 (2) of the constitution.
 4. That the plea was equivocal.
 5. That the sentence is manifestly harsh and excessive.



5. The Appellant prays that the conviction be quashed, sentence set aside and that he be given a chance at retrial.

This being a first appeal, this court has the duty to re-examine all the evidence tendered before the Trial Court, evaluate it and arrive at its own findings. This court is guided by the case of *Okeno v Republic* [1972] EA 32.

The Appellant filed submissions in support of the appeal. He submitted that the court failed to inform him of his right to counsel as guaranteed Article 50 (2) (g) of *the Constitution*; that being a serious offence, the court had the duty to inform him of the right to appoint counsel. He also submitted that Article 50 (2) (g) (h) was also violated in that he was not informed of the right to be assigned counsel by the State at state expense. He relied on the case of *JOO v Republic* [2021] eKLR and *K. O. v Republic* CRA E020/2021 where the Judge declared the proceedings a nullity where their rights were violated by the court.

6. The Appellant also submitted that the plea was not unequivocal because the court did not indicate the language that was used and that it did not accord with the decision in *Adan v Republic* [1973] EA 445. Lastly, the Appellant submitted that the sentence was too harsh and the court should move away from retributive justice to restorative justice
7. The appeal was opposed and Mr. Majale, the Assistant Director of Public Prosecutions, submitted that the Appellant was accorded a fair trial; that the plea was properly taken; that the fact that the appellant was not given an option of legal representation is not a matter of a right for he was neither facing a capital offence nor is he a minor to benefit from legal representation appointed by the state; that it took some time before the Appellant changed his plea and he had ample time to engage the services of an advocate. He urged the court to dismiss the appeal.
8. This court has now considered the grounds of appeal, the rival submissions and the evidence tendered in the trial court. Before I consider the question whether the plea was proper or not, I think it necessary, first, consider whether or not the Appellant's rights to fair hearing were violated.
9. Article 50 of *the Constitution* guarantees an accused person's right to fair trial. Article 50 (2) (b) (g) and (h) provide as follows:-

“Every accused person has the right to a fair trial, which includes the right-

- (b) to be informed of the charge, with sufficient detail to answer it.
- (g) to choose, and be represented by, an advocate, and to be informed of his right promptly;
- (h) to have an advocate assigned to the accused person by the State and at the State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

10. The Appellant complained that the court did not explain to him the penalty likely to be meted upon his pleading guilty and conviction. In the case of *Kennedy Ndiwa Boit v Republic* [2002] eKLR the Appellant pleaded guilty and was sentenced to death without the court informing him of the consequences of pleading to the charge and the Court of Appeal set aside the said sentence for failure by the trial Magistrate to warn the appellant of the likely sentence after pleading guilty to the charge.



11. In *Bernard Injendi v Republic* [2017] eKLR Judge Sitati held as follows:-

“Finally, the learned Trial Magistrate failed to warn the Appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the Appellant upon pleading guilty to the charge facing him. In the *Paul Matungu -V- Rep. 2006* case CRA. eKLR the Court of Appeal quoted from *Boit v Republic* [2002] IKLR 815 and stated that a Trial Court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words “as nearly as possible in his own words. I am convinced that if the Appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty.”

12. In this case the Appellant faces a long sentence of life-imprisonment. It is my view that in such a serious case where the sentence may be long, the court must ensure that the accused understands the ingredients of the offence which includes also understands the sentence he may face if he opts to plead guilty. Article 50 (2) (b) states “accused to be informed of the charge, with sufficient detail to answer it.” Without informing an accused of the sentence he may face; he had not been furnished with sufficient detail of the charge as required.

The Appellant also complains that he was not informed of his right to legal representative of his choice. I have set out the provision above. *The Constitution* makes it mandatory for an accused to be promptly informed of their right before the trial commences. Section 43 of the *Legal Aid Act* also places a duty on the court when interacting with an unrepresented accused person. It states:-

“A court before which an unrepresented accused person is presented shall:-

- a. Promptly inform the accused of his or her right to legal representation;
- b. If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her;
- c. Inform the service to provide legal aid to the accused person -.”

13. Justice Nyakundi in *Joseph Kiema Philip v Republic* [2018] eKLR had this to say with regard to the above requirement;

“The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. The fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus, legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under Article 50 of *the Constitution* of Kenya 2010...it is paramount that the record of the Trial Court should demonstrate that the accused was informed of his right to legal representation...In the instance the Appellant had been charged with defilement which attracts a serious sentence once convicted. From the



record of the Trial Court, the Appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice.”

14. In *Karisa Chengo & 2 Others v Republic* [2015] eKLR, the court emphasized that:-

“One of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The Appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years imprisonment. The charge was a very serious one, upon being found guilty the Appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trial should have informed him of his right to legal representation and directed that he be provided with an advocate at state expense.”

15. Courts have held that the accused person should be informed of his right to an advocate of his own choice at the earliest opportunity, preferably at the time of plea and the court should record it to demonstrate that the accused was informed of the right. Failure to inform an accused of the said right amounts to an injustice and a denial of his right to fair hearing. Also see *JOO v Republic* [2021] eKLR,

16. The Appellant also complained that his right to be informed of his right to have an advocate assigned to him by the state at state expense was violated. From a reading of the said provision, the said right is not absolute because it is subject to proof that substantial injustice would otherwise result if no Advocate was assigned. The *Karisa Chengo* case also discussed the said right.

17. In *Karisa Chengo's* case – the court had this to say of the right under Article 50 (2) (h):-

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia* case (supra) seems to have expanded the constitutional requirement that legal representation be provided at the state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

18. In *Mphukwa v S* (CA&R 360/2004) [2012] the Supreme Court of South Africa stated;

“...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.”

Again, in *Elijah Njihia Wakianda v Republic* 437/2010 [2016] eKLR, the Court of Appeal stated:-

“One ought to know the consequences of his virtual waiver of his trial rights that *the constitution* guaranteed him. That did not occur in the instant case and yet the Appellant



was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding was not to be a mere umpire aloofly observing the proceedings. He was the protector, guarantor and educator of the process ensuring that an unrepresented accused person was not lost at sea in the maze of the often-intimidating judicial process.”

19. I find that the trial court violated the appellants fundamental rights under Articles 50(2) (b) and (g) hence, his rights to fair trial were violated. In the result, the trial was rendered a nullity. The question then is whether this court should order a re-trial. In the case of Samuel Wahini Ngugi v Republic [2012] eKLR, the court stated:-

“The law as regards what the court should consider on whether or not to order a retrial is now well settled. In the case of Ahmed Sumar v Republic [1964] EALR 483;

“...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 insufficient of evidence or for the purposes of enabling the prosecution to fill up 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 necessarily follow that a retrial should be ordered.”

20. The Appellant was convicted of a very serious offence of incest and was sentenced to life imprisonment on 24/12/2024. He has only served four months in jail and this court is satisfied that he will not be prejudiced if a retrial is ordered so that justice is served to both parties.
21. Consequently, the conviction is hereby quashed and sentence set aside. The Appellant will be released to Ortum police station to be charged afresh and presented before the Principal Magistrate’s Court Kapenguria for plea and trial before another magistrate other than Hon. Kenei who had handled the matter earlier. This being a retrial the same should be expedited. Mention before Principal Magistrate Kapenguria on 19/5/2025.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 12TH DAY OF MAY, 2025.

R. WENDOH

JUDGE

Judgment delivered in the presence of:-

Mr. Majale for the State

Appellant - Present

Juma/Hellen – Court Assistants

