Omojong v Republic (Criminal Appeal E011 of 2024)
[2025] KEHC 6431 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6431 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E011 OF 2024

WM MUSYOKA, J

MAY 23, 2025

BETWEEN

JAMES OMOJONG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief Magistrate, CM, in Busia CMCSOC No. E042 of 2020, of 5th April 2023)

JUDGMENT

1. The appellant, James Omojong, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 15th November 2020, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of LA, a girl aged twelve years.

2. The appellant pleaded not guilty to the charge, on 17th November 2020. No trial was conducted, but the matter was mentioned and came up for hearing a record 42 times. Then on either 13th March 2023 or 5th April 2023 or 12th April 2023, or both those dates, the appellant pleaded a second time, this time guilty to the charges. The facts were read to him; he conceded to them. He was convicted and sentenced forty years imprisonment.

3. He was aggrieved, and brought the instant appeal, on a petition of appeal, filed on an unknown date, and which is undated, against sentence, with the grounds of appeal revolving around the mandatory minimum sentence being imposed without considering other relevant factors; and the trial court not exercising discretion.

4. He later filed amended grounds of appeal, together with his written submissions, on an unknown date. The amended petition of appeal is also undated. This time he has brought his appeal against both conviction and sentence. The grounds revolve around not being informed about his constitutional rights to a fair trial, contrary to Article 50(2)(g) of *the Constitution*; the rights to fair trial hearing enshrined in Article 50(2)(h)(c)(j)(k)(3) of *the Constitution*, being violated; being convicted and sentenced on a plea of not guilty without hearing both parties; there being a strategy to implicate him with a crime to escape paying his salary; not considering medical evidence which had indicated no injury; and period spent in remand not accounted for in sentencing.

5. Directions were given on 27th November 2024, for canvassing of the appeal by written submissions. Both sides have filed written submissions.

6. In his written submissions, the appellant argues around five issues: unfair hearing, equivocal plea, failure by the trial court to interrogate the appellant, non-consideration of medical evidence, and the sentence being harsh and excessive.

7. On unfair hearing, he argues around violation of the constitutional fair trial principles, in Articles 50(2)(c)(e)(g)(h)(j) of *the Constitution*, with respect to being informed of his rights of legal representation, the language used in court, adequate time and facilities to prepare for trial and the case not being disposed of expeditiously. He cites Njuguna v Republic [2007] 2 EA 370 (OK Mutungi, J), Thomas Patrick Cholmondeley v Republic [2008] (Omolo, O'Kubasu & Onyango Otieno, JJA) and Reward v Republic [1993] 2 All ER.

8. On the plea of guilty not being equivocal, he submits that the record reflects that he pleaded guilty on an unknown date, arguing that on 13th March 2023 the matter came up for mention, ostensibly for the giving of a hearing date, and a date for mention was given, 5th April 2023, and another was given for hearing, 24th April 2023, and, according to him, the record is not clear as to when he pleaded guilty and when he requested to have the charges read to him. He asserts that a conviction on a plea of guilty must be founded on a clear and an unambiguous or unequivocal plea of guilty. He protests that his sentence to jail for forty years imprisonment could not possibly be founded on such faulty proceedings.

9. On the failure to be interrogated by the court, he submits that there was a systematic strategy or plan to deny him his wages, and the charges were trumped up as part of it. He implies that had the trial court interrogated him, it would have been established that the charges were false. On the medical evidence, he submits that the same indicated that the complainant had suffered no injury. He argues that the trial court should have considered that evidence before convicting him and should have called for a full trial. On the sentence, he cites Ayako v Republic [2023] KECA 1563 (KLR)(Okwengu, Omondi & J. Ngugi, JJA), to submit that he should not have been sentenced to more than thirty years, and that the period that he spent in custody should have been considered, by virtue of section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya.

10. The respondent supports the decision of the trial court and cites Okeno v Republic [1972] EA 32 (Sir William Duffus P, Law & Lutta, JJA), George Opondo Olunga v Republic [2016] eKLR and Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ).

11. I have read and re-read the trial record, and I get the impression that the appellant did not get a fair trial or fair treatment. The record was kept in a very sketchy manner, too sketchy for a case where an accused person is sent to prison for forty years. It would suggest that not much regard was given to his rights to a fair trial.

12. The first issue would be why it took so long for the trial to commence. The appellant was arraigned on 17th November 2020. He pleaded not guilty, and a full trial should have been conducted. He was in remand custody throughout. The matter came up a record forty times, before it was recorded that he had pleaded guilty, on either 13th March 2023 or 5th April 2023 or 12th May 2023. It is not clear, from the record, why no witnesses were presented between 17th November 2020 and 13th March 2023. Busia law courts do not have a heavy caseload, and cases of this nature are usually heard and determined within a year of arraignment. The appellant herein should have been tried in the course of 2021 and gotten a judgement by the end of 2021 or in early 2022. Just what happened to prevent the mounting of a trial within that period?

13. Of course, judicial notice could be taken of the fact that the appellant was charged just at about the onset of Covid-19, the containment measures that followed, which included extended curfews and limited social contact, which had an impact on physical hearings. However, the Judiciary took measures to facilitate remote hearings, and by mid-2021 the court seized of that matter ought to have gotten its act together. I have read and re-read the trial record, and no reason appears, on the face of it, as to why there was such an extended delay. Was it a challenge that the court was having? If so, what was it? Was it a challenge that the prosecution was having? And if so, what was it? Maybe it was Covid-19. However, if that was the case, then it should be very clear from the record, that the proceedings stalled because of that. It should not be left to third parties, reading the record, to have to read between the lines, to explain or assign a reason for the delay. Reasons for any delay in criminal proceedings must be very clear from the trial record itself.

14. The recording of court proceedings is for accountability purposes. It is an account by the court, for its own sake, to the people of the Republic of Kenya, that the court is working. That is in terms of doing what it was established by *the Constitution* for, and it is doing what it is mandated by *the Constitution* and statute to do. Secondly, that the court is ensuring that an accused person, who is presented before it, is being treated as is required by *the Constitution*, in terms of the application of fair and natural justice principles. That the court itself is treating them fairly, by hearing them, and looking into their welfare. More crucially, that the court is protecting their rights, as against their accusers, the Executive, which is the main driver of prosecutions. Whether the right thing is done by the court itself, or by the other agencies, is to be established from the record kept by the court. If a sketchy or shoddy record is kept, then concerns would arise, as to whether the accused got a fair deal in court, from the court and the other agencies or actors in the criminal justice chain. The keeping of proper court or trial records is very critical for that purpose.

15. Plea was taken from the appellant twice. The record is silent on whether he was changing plea, when he pleaded to the charges for the second time. Why was it necessary to have the charges read a second time to him? Why was that necessity not documented or recorded? Plea was taken on 17th November 2020, and a trial should have been conducted, founded on the plea recorded then. That plea of 17th November 2020 was not changed. The proceedings relating to it were not closed, to enable a second plea to be taken, which would have paved way for the conviction of the appellant.

16. I say this because plea-taking is a very critical part of the trial process. The trial is based on the plea, and without it there can be no trial. It precedes the trial. So, there is something untidy and improper about what happened here. A plea of not guilty was recorded on 17th November 2020. A trial should have then followed based on it. It did not. Why? Because another plea was taken on some date, as between 13th March 2023, 5th April 2023 and 12th May 2023, where the appellant pleaded guilty, was convicted and sentenced. Yet, the plea of not guilty of 17th November 2020 was still outstanding, for the appellant

had not indicated that he was changing it, and the trial court did not address its mind as to what was to become of it.

17. Before a second plea is taken, the first must be dealt with, and the proceedings founded on it closed. There are two instances on how a second plea may legitimately be taken. The first is where the charges are amended. Amendment of charges, whether to add or remove something from the pleading, would require that the plea be taken afresh. That brings or could bring closure to the proceedings founded on that initial plea, so that the trial is not thereafter conducted as per the initial plea, but as per the plea taken after the change in the charges or pleadings. If some witnesses had been heard prior to the amendments and fresh plea, directions must be taken on whether the witnesses are to be heard afresh or recalled, depending on whether the changes effected would have a fundamental effect on the subsequent proceedings.

18. The second instance is where the accused person is changing plea, from not guilty to guilty. The record must reflect that intent, to avoid a conflict in the record of the proceedings, where there would be two conflicting pleas, one of not guilty, followed by another of guilty. The record must reflect that the accused person expressed an intent to change plea, and charges are read afresh to him, and a fresh plea is recorded. That would close the proceedings relating to the earlier plea. As indicated above, the taking of plea paves way for the trial in earnest. It marks the commencement of the trial, so that if there was a prior plea taking exercise, that other exercise must be closed first.

19. When the appellant took plea on 17th November 2020, a trial commenced, based on the plea of not guilty. That trial should have been closed first, before another trial commenced on a plea of guilty. That closure should have been marked by the record reflecting that the accused person had evinced an intention to change plea, and that the trial court was going to take plea based on that. The trial court ought not have just started taking a second plea, while there was an outstanding plea. It was untidy, improper and prejudicial.

20. The way the trial court went about it was even messier. Firstly, the record is silent on whether the appellant expressed a wish to change plea, before the charges were allegedly read and explained to him, and before he allegedly pleaded to them. There are questions that ought to be asked. If indeed a fresh plea was taken, was it done freely and voluntarily? And if it was, why is it that that does not appear in the record?

21. The record reflects that the matter came up on 13th March 2023, for mention, when the appellant was given another mention date, 5th April 2023, and was reminded that the matter had a date for hearing, being 24th April 2023. Then, in a strange turn of events, the charges were read to the appellant, and he pleaded to them, and the mention slated for 5th April 2023 was converted into a date for reading the facts to him. I say strange because there is no record of what prompted the reading of the charges to the appellant. The court had just given dates for mention and hearing, what then prompted it to just read the charges to the appellant, without any preliminaries. Did the appellant evince an intent to change plea? If he did, why was that fact not recorded? The appellant was ambushed with the charges being read to him. Was he ready for that?

22. For avoidance of doubt, the record for 13th March 2023 reads as follows, from the original handwritten trial record:

> " 13/3/2023
>
> Before: Hon. EA Nyaloti – CM
>
> Pros: Mumo

C/A – Opuka/David

Inter: Eng/Kisw

Accd - /Present

M. 5/4/2023

Hg. 24/4/2023

Signed

Ct. crere

Accd: Ni ukweli

Ct. Mention on 5/4/2023 for fact

Signed

Accd warned of the severe sentence"

23. The events that followed were the reading of the facts, conviction and sentence. It is not clear when those events happened, for there are two dates indicated in the record, 5th April 2023 and 12th May 2023. The relevant handwritten record reflects as follows:

" 5/4/2023

Before: Hon. EA Nyaloti – CM

Pros: Mumo

C/A – David

Inter: Eng/Kisw

Accd - /Present

Facts

On the 25/11/2020 at 4:30 PM. The complainant aged 3 years was going home when it started raining.

The complainant took shelter at the accused's house. The accused took the complainant and defiled the child. The child's mother came and found the complainant on the bed naked. The complainant's mother raised alarm. The accused was arrested and charged with the offence.

Accd. The facts are true.

Pros. I wish to produce the treatment notes, the P3 form of a child aged 3 years. PRC form exhibit 3. and birth certificate Exhibit 4.

Ct. The accd is convicted on his own plea of guilty.

Pros. There are no previous records.

Mitigation

I have no mitigation. Let the court decide my fate.

Ct. I have considered the facts of the case. I have considered that the accd is a 1st offender. I have also considered the age of the victim and the accd. The accd is sentenced to life imprisonment which is assessed to 40 years imprisonment.

Signed

ROA

Order

The accused's details be entered in the Sexual Offences Register.

Signed

12/05/2023"

24. I am persuaded that the reading of the charges to the appellant for a second time, when he allegedly pleaded guilty, was not properly handled, or properly recorded, and that ought to raise doubts on whether the plea of guilty was unequivocal. The appellant had previously pleaded not guilty, on 17th November 2020, and before the plea of guilty was recorded, in 2023, the record should have reflected that he had expressed a wish or intention to change plea. It should not have been the case that, just out of the blue, the court read charges afresh to him, and he pleaded guilty, in the absence of a record indicating his intention to change his plea.

25. On the threshold for fair trial not being reached, contrary to constitutional stipulations, the appellant cites Articles 50(2)(c)(e)(g)(h)(j) of *the Constitution*, on not being informed of his rights to legal representation, not being familiar with the language used in court, lack of adequate time and facilities to prepare for trial and the case not being disposed of expeditiously.

26. *The Constitution* casts a duty on the court at two levels, with respect to the right to legal representation. The duty is to inform the accused person of his right to legal representation by an Advocate of his own choice, at one level, and at the other level, to inform him of his right to an Advocate provided by the State, at State expense, should he be unable to afford an Advocate of his own choice or at all. These are new rights under *the Constitution* of Kenya promulgated in 2010. Prior to 2010, the trial court was under no obligation to inform accused persons of the right to legal representation, for it was presumed that they knew about it, and it was not, at the time, a constitutional right to be informed about it. In any event, the mantra, that ignorance of the law is no defence, held supreme. As for the right to an Advocate paid for by the State, that right did not exist, as a constitutional right, and it was only available in murder cases, by dint of judicial regulations. The right to be informed of these rights has been made a constitutional obligation, on the part of the court. Failure to comply, by the trial court, would render the trial unfair, for not keeping to constitutional dictates.

27. It should be emphasized that the provisions are not decorative. They must be complied with. Non-compliance should invite consequences. The principal consequence is to vitiate the trial, by rendering it a nullity, under Article 2(4) of *the Constitution*. Sadly, most of the trial courts continue to proceed in the pre-2010 mode, where there was no obligation to communicate those two twin rights to the accused. In a sense, it would amount to ignoring the command by *the Constitution*, that trial courts inform accused persons of their rights in that regard. *The Constitution* of Kenya is the supreme law in the land, by dint of Article 2. It cannot be ignored.

28. I have, in other cases, discussed the importance of the right to legal representation, particularly where the charges are serious, in terms of the penalties prescribed. See Ogombe v Republic [2023] KEHC 21011 (KLR) (Musyoka, J) and Tom v Republic [2024] KEHC 14939 (KLR) (Musyoka, J), among

others. My colleagues, who have handled similar matters, in Ann Wairimu Kimani v Republic [2011] KEHC 1287 (KLR) (Sergon, J), Chacha Mwita v Republic [2020] eKLR (Mrima, J), AOJ v Republic [2021] KEHC 8076 (KLR) (Ong'injo, J), Gitonga v Republic [2023] KEHC 2624 (KLR) (Gitari, J), Marete & another v Republic [2024] KEHC 14744 (KLR) (Gitari, J) and Opiyo v Republic [2024] KEHC 7732 (KLR)(Aburili, J), among others, have taken a similar stance.

29. In Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi - 231/99 [2000], that right was explained in the following terms:

> " Legal assistance is a fundamental element of the right to a fair trial, more so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case. The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words be able to argue their cases on equal footing."

30. In Pett v Greyhound Racing Association [1968] 2 All ER (Master of the Rolls, Lord Justice Davies & Lord Justice Russel), it was said:

> " It is not every man who has the ability to defend himself on his own. He cannot bring out the points 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 been trained for the task?"

31. In the instant case, the offence was allegedly committed on 15th November 2020. The appellant was arraigned in court on 17th November 2020. These events happened some ten years after the current Constitution of Kenya was promulgated in 2010. The trial court was obliged to bend to the demands and commands of *the Constitution*, particularly regarding Article 50(2)(g)(h). The *Legal Aid Act*, Cap 16A, Laws of Kenya, became operational on 30th May 2016, to give effect to Article 50(2)(g)(h) of *the Constitution*. Section 43 of the *Legal Aid Act* requires the trial court to inform the accused person of his right to an Advocate provided by the State at State expense, after assessing his circumstances, and finding that he is indigent and the charges he faces are complex, considering the gravity of the penalty upon conviction. These are duties imposed on the trial court, by *the Constitution* and the relevant statute.

32. Did the trial court obey those commands? From the record before me, I have been unable to find compliance. That issue was not adverted to, on 17th November 2020, when the appellant was first produced in court, for plea; neither was it raised on 13th March 2023 and 5th April 2023/12th May 2023, when the charges were allegedly read to the appellant for a second time and when he pleaded guilty to them. For all practical purposes, the trial court turned a blind eye to Article 50(2)(g)(h) of *the Constitution* of Kenya and section 43 of the *Legal Aid Act*. As stated above, *the Constitution* of Kenya, 2010, is the supreme law in Kenya, by dint of its Article 2. Whatever it commands must be adhered to, and any non-adherence has consequences. A trial mounted in violation of *the Constitution* is a nullity, by virtue of Article 2(4) of *the Constitution*.

33. The charges that the appellant faced exposed him to a long period in prison, were he to be convicted, for the sentence is mandatory imprisonment. That alone made the charges grave. That was a circumstance that brought his case within section 43 of the *Legal Aid Act*, and the trial court ought to have dealt with his case in accordance with that law. He did not have an Advocate. An attempt should have been made to understand his circumstances, to facilitate compliance with *the Constitution* and the *Legal Aid Act*. No effort was made in that direction, for I see nothing of it in the record that is before me.

34. The second constitutional issue he raises is about the language used in court. He submits, in his written submissions, that he was only conversant with Teso, and a translation or interpretation ought to have been provided in that language. This submission is not idle. The appellant faced a charge which, upon conviction, would have exposed him to a lifetime in jail. That would have required that his trial be handled with a higher level of scrupulous compliance with *the Constitution* and the *Criminal Procedure Code*, than in lesser cases. Language is at the centre of fair trial. An effort should have been made to understand whether he was conversant enough with the languages of the court, English and Kiswahili, before the trial court carried on in those languages.

35. There is no indication, in the record of 17th November 2020, when he was first arraigned, nor that of 13th March 2023 and 5th April 2023/12th May 2023, when he allegedly pleaded a second time to the charges, that an effort was made to establish whether the appellant was conversant with the official languages of the court, and, if he was not, which language he would have liked to use, for the court to make arrangements to provide an interpreter. I see from the charge sheet that the appellant is a Kenyan adult. It should not be assumed that every Kenyan adult is conversant with either English or Kiswahili, or both. There are chances, for some reason or other, that they may not, necessitating provision of an interpreter. The record was kept in such a sketchy fashion that I doubt that the trial court would have recorded his request for an interpreter, if he were to ask for one.

36. The handwritten proceedings of 17th November 2020 were recorded in English, there is no indication, in their body, of the language that was in fact used in court. The typed record indicates that the appellant responded in Kiswahili, but that is not borne out in the original handwritten record. The reply by the appellant, to the charge, is recorded in English. The proceedings of 13th March 2023 and 5th April 2023/12th May 2023 reflect his reply to the charges to be in Kiswahili, but his response to the facts as read is in English. There is no indication that the response in English was in his exact words in English. Indeed, there is nothing to indicate that he spoke Kiswahili or English, or that he was conversant with them.

37. I am not at all suggesting that the appellant was not conversant in these two official languages of the court. Perhaps he was. However, the record is silent on whether he was, given that there is no record of the court seeking confirmation from him on whether he was conversant with them. The law on plea taking is clear that the charges are to be read to an accused person in a language he understands, and they are to be recorded as much as possible in the exact words used. See section 207 of the *Criminal Procedure Code*. Where a clean record is not kept, on what exactly transpired, in terms of the language, should the accused person later claim that there was no compliance, in the absence of a clear record, the benefit would go to him.

38. The other issue the appellant raises is about adequate time and facilities to prepare for trial. It is alleged that he pleaded guilty on 17th November 2020. The appellant should have been subjected to a trial thereafter. He was granted bond, but he never got to process it, ostensibly on account of indigence. No trial was ever conducted, based on the plea of not guilty. He was kept in limbo for two years plus. Did he have the time to prepare for trial? I believe the two years were adequate, if a trial were to be conducted thereafter.

39. Did he have the facilities? *The Constitution*, at Article 50(2), requires advance disclosure of the evidence to be presented against an accused person. An accused person must be furnished with the evidence that the prosecution is to rely on, in advance of the hearing, to enable him to prepare for trial. So that he would know the nature of the case he would face, whether in terms of who was going to testify and what they were to say in court, and the documents and other materials that were to be presented as exhibits. So, what should be disclosed or furnished upon the accused should be the lists of witnesses, copies of witness statements and copies of the documents to be exhibited as evidence. As such disclosure and furnishing of evidence is a constitutional imperative, the trial court is expected, for accountability, to record compliance.

40. I have very carefully and closely scrutinised and perused the record of the trial court of the events recorded between 17th November 2020, when plea was taken for the first time, and 13th March 2023 and 5th April 2023/12th May 2023, when plea was taken a second time, and I have seen no recording of the fact that the appellant was ever furnished with such evidence. I see that, on 5th April 2023/12th May 2023, certain documents were presented to court and produced as exhibits, subsequent to the purported plea of guilty by the appellant, being treatment notes, P3 form, PRC form and birth certificate. Given the silence as to whether there had been pre-trial disclosure of those documents, one would be left to wonder whether the appellant pleaded guilty to the charge from an informed position. Trial starts or commences at plea taking. To put it differently, the taking of plea is part of the trial process. The evidence, the prosecution relies on, should be disclosed before plea is taken, particularly where the accused is pleading guilty, so that he can be informed of what he is pleading to. The evidential material, in this case, was placed on record after the appellant had already allegedly pleaded guilty and conceded to the facts. There is no proof that he had had a chance to see that material before he pleaded.

41. Let me reiterate what I have said hereabove, that it could be the position that in fact there was compliance, and the evidence had been shared with the appellant. However, the fact of that compliance is not reflected in the trial records, and, in the event of an issue being raised, that there was non-compliance, the appellant would have the benefit of the doubt. Failure to share the prosecution evidence with the appellant, and to have him plead to charges, which sent him to prison for 40 years, without having seen the evidence, would render the trial unfair.

42. On the matter of the case not having been disposed of expeditiously, I believe that I have addressed it above. The appellant pleaded not guilty on 17th November 2020, and a trial should have ensued immediately. No trial was ever conducted on the not guilty plea, for no witness was ever presented. The guilty plea came in 2023, more than two years after the appellant had been arraigned in court and pleaded not guilty. The trial record is silent on what caused that delay.

43. The appellant has raised the issue of the trial court convicting him before hearing both sides. I am not too sure whether I understand this submission. At plea taking, where a plea of guilty is recorded, the accused person is given a chance of addressing the court, after the charges are read to him. The record herein reflects that he got that chance, on 13th March 2023, when he allegedly pleaded "ni ukweli" to them. He got a second chance, when he is recorded as allegedly saying that the facts were true, on 5th April 2023/12th May 2023. He also got a chance to say something in mitigation, on the same date. If he had anything else to say, besides what he was recorded as having said, he should have said it on those three occasions. Of course, I say this without prejudice to what I have said elsewhere above.

44. On failure by the trial court to interrogate him, from which interrogation the court would have discovered the truth and ordered a full trial, I would agree, the trial court, given the gravity of the charges, should have taken time to question the appellant, on the circumstances. I have discussed the need for that in paragraphs *33* and *38* of this my judgement, hereabove. I note that it was recorded, with

respect to the proceedings of 17th November 2023, that the appellant was cautioned on the severity of the possible sentence. However, the said caution was sounded after the court had recorded the plea from the appellant, and it was recorded after it had signed its record. Curiously, the court did not sign the record after it made the caution. The recording of the caution looks like it was an afterthought, which appears to have been added to the record after the proceedings were over. The fact that the trial court did not append its signature, after recording the caution, meant that it did not own it

45. On whether there was a conspiracy or strategy to implicate him, for some ulterior motive, that was an issue that could have come to the fore, had the trial court taken time to interrogate the appellant, in seeking to comply with section 43 of the *Legal Aid Act*. Had that been done, it would have become apparent that a full trial was necessary, which, the full trial, would have given opportunity to the appellant to bring out those facts.

46. On the trial court not considering the medical evidence before recording a plea of guilty, I would state that the trial court is not required, under that process, to scrutinise any of the evidence produced after a plea of guilty being recorded. In the sequence of events, in section 207(2) of the *Criminal Procedure Code*, the evidence is placed on record after the conviction, but before sentence. The evidence is not for utility in determining whether to convict, but rather it is for assisting the court in assessing sentence after it has convicted. The conviction is founded on the admission of guilt by the accused person, and not on any evidence that may be placed on record by the prosecution. The placing on record is for completeness of the record, particularly to assist with sentencing. Indeed, it is not even mandatory, under section 207(2) of the *Criminal Procedure Code*, that any evidence be placed on record. The trial court cannot be faulted on that score.

47. The appellant raises two issues about sentence. The first is around section 333(2) of the *Criminal Procedure Code*, about the time that the appellant spent in custody not being factored in sentencing, and the second is about the life sentence being translated, by the trial court, to 40 years, instead of the 30 years prescribed by the Court of Appeal in Ayako v Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA). I will deal with the two in turn.

48. Let me start with section 333(2) of the *Criminal Procedure Code*. That provision states that the duration of every sentence of imprisonment should be calculated or reckoned from the date the sentence is pronounced. It carries a proviso to the effect that where the convict had spent some time in custody, prior to sentence, the period spent in custody should be considered. The provision is in mandatory terms, and a convict is entitled to benefit from it. The application of section 333(2) is not a matter of discretion by the court.

49. I note that in the sentence, that was pronounced on 5th April 2023/12th May 2023, the trial court did not apply section 333(2) of the *Criminal Procedure Code*. The period that the appellant had spent in custody was not considered or mentioned or factored in the sentence. The sentence order did not refer to that period. There was no order that the time he spent in custody be reckoned in calculating the actual period that he would spend in prison, within the forty-year sentence.

50. According to the charge sheet, the appellant was arrested on 16th November 2020 and was arraigned in court on 17th November 2020. He was granted bond on 17th November 2020. That bond was never processed, and his spent the entire period between 16th November 2020, when he was arrested, and 5th April 2023/12th May 2023, when the sentence was pronounced. The period, running from 17th November 2020 and 5th April 2023/12th May 2023, ought to have been considered, in computing the forty-year period that he is to spend in prison custody. That period, in figures, amounted to roughly 864/907 days: or 2 years, 4 months, 19 days/2 years, 5 months, 28 days.

51. Ayako v Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA), declared sentences of life imprisonment unconstitutional, and stated that where a court considers imposing life imprisonment, it should translate that period into thirty years imprisonment. I see that, on 5th April 2023/12th May 2023, the trial court considered imposing life imprisonment, as mandated by section 8(2) of the *Sexual Offences Act*, after it had convicted the appellant under that provision. No doubt, guided by Ayako v Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA), it decided to translate the life imprisonment to a definite term, and it chose forty years, instead of the thirty years prescribed in the Ayako decision. That was an error. The trial court was bound by a decision of the Court of Appeal. Ayako v Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA) had prescribed thirty years imprisonment as the ceiling, and, therefore, the trial court could not impose a term of imprisonment which was higher than thirty years.

52. The appellant is, however, unlucky. Ayako v Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA) no longer applies. It was declared to be bad law by the Supreme Court, in Republic v Ayako [2025] KESC 20 (KLR)(Mwilu, DCJ & VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), on grounds that whatever sentence is prescribed by statute is lawful and constitutional, and the courts, in the spirit of separation of powers, ought not to change or alter the same. The said decision cannot now offer any relief to the appellant. In view of Republic v Ayako [2025] KESC 20 (KLR)(Mwilu, DCJ & VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), the proper sentence to impose on the appellant, upon conviction under section 8(2), is life imprisonment.

53. Overall, the appeal herein is allowable on sentence, unfortunately by way of enhancement. It is also allowable for non-compliance with *the Constitution*. The effect of allowing the appeal on constitutional grounds would be to declare that the trial was not fairly conducted. Such determination would render that trial a nullity. In the criminal process the language used is that there was a mistrial, or the trial conducted amounted to a mistrial. The effect of a declaration of nullity or mistrial would be that the proceedings conducted by the trial court would be rendered a total nullity, which cannot sustain a conviction, hence the conviction of the appellant in those proceedings would be quashed, and the sentence imposed on him set aside.

54. As the errors which would cause the nullification of the proceedings were not caused by the prosecution, but by the trial court, the consequence should not be that the appellant would be set free, the prosecution should be given another chance to present its case. The circumstances and seriousness of the offence would militate against not holding a re-trial. So, the appellant should be released to the police, by the prison authorities, from their custody, so that the police can present him before the trial court for a fresh trial.

55. So, the final orders shall be that the appeal herein is allowed. The proceedings, that the trial court conducted on 13th March 2023 and 5th April 2023/12th May 2023, are hereby declared to have amounted to a mistrial, because of which the conviction founded on them is quashed, and the sentence imposed on the appellant set aside. The Kenya Prison Service, which has custody of the appellant, shall forthwith release him to the police, who shall present him in court, for re-trial, at Busia, by a magistrate other than Hon. Nyaloti, CM. The original trial court records shall be returned to the trial court, for the purposes of the re-trial. To facilitate a proper re-trial, the plea taking proceedings of 17th November 2020 are hereby vacated, to enable the trial court to conduct a fresh plea taking exercise. The instant file shall be closed. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. James Omojong, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.