



REPUBLIC OF KENYA



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**EMW v Republic (Criminal Appeal E031 of 2024)
[2025] KEHC 8007 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E031 OF 2024
WM MUSYOKA, J
JUNE 9, 2025**

BETWEEN

EMW APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from orders made in a ruling delivered in Malaba PMCCRC No. 61 of 2023, by Hon. AZ Ogange, Resident Magistrate, RM, on 22nd August 2024)

JUDGMENT

1. The appellant, Edwin Malenya Wanyama, had been charged with incest, contrary to section 20 (1) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. It was alleged that on an unknown date and time at North Teso, Busia, he had intentionally caused his penis to penetrate the vagina of a minor known as AAM, aged seven, who was his daughter. There was an alternative charge, founded on section 11 (1) of the *Sexual Offences Act*, with respect to committing an indecent act with a child, on the basis that his penis touched the vagina of AAM.
2. He denied the charges. The trial started in earnest, with the complainant, AAM, taking to the stand as PW1. She initially testified on 13th June 2024, before she was stood down, for purposes of being counselled, as it was said that she appeared to be uncomfortable. Trial resumed on 22nd July 2024, where PW1 completed her testimony-in-chief, and was cross-examined by the appellant.
3. When the hearing resumed, on 12th August 2024, the appellant had engaged an Advocate to represent him, Ms. Anono. She applied for the recall of PW1, for further cross-examination, on grounds that the appellant had not effectively represented himself. The prosecution contested that. The trial court declined to allow the recall application, in a ruling delivered on 13th August 2024.



4. The appeal herein arises from that ruling of 13th August 2023. Two grounds are listed in the petition of appeal, dated 27th August 2024, around the right to have PW1 recalled.
5. Directions were taken, on 23rd April 2025, for canvassing of the appeal by way of written submissions. I see on record submissions by the appellant, but not by the respondent.
6. The appellant submits around Article 50(2)(g) of *the Constitution* of Kenya, and section 50 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. Article 50(2)(g) is on the right to a fair trial, which includes the right to an Advocate of one's choice. Not only is one entitled to an Advocate of their own choice, but they are also entitled to be informed of that right promptly. William Oongo Arunda (hitherto referred to as Patrick Oduor Ochieng) v Republic [2022] KECA 23 (KLR)(Kairu, Msagha & Nyamweya, JJA) and Republic v Karisa Chengo & 2 Others [2017] eKLR (Maraga, CJ&P, Mwilu, DCJ&VP, Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ) are cited.
7. The right to legal representation is a constitutional right that was recognised even under the retired Constitution. The new Constitution of 2010 added the element that an accused person ought to be informed of that right promptly. A criminal trial commences at arraignment, according to Kimani v Kahara [1983] eKLR (Simpson & Sachdeva JJ), and it is at that point, before plea is taken, that the accused ought to be informed of his right to be represented in the proceedings by an Advocate of his own choice. That should be so, so that the accused gets to benefit from expert legal advice even before he takes the plea, by way of being advised on how he ought to or could approach the plea-taking exercise.
8. Being informed of such right is particularly crucial when an accused person faces a serious charge, which exposes him to a death penalty or to a long period in jail, should the prosecution be successful. It is equally important where the charge would involve a complex trial, say where the accused faces numerous counts, or the case involves lots of documentary evidence, or the offence charged comprises of numerous elements. For such, the services of an Advocate would be critical, to help the accused navigate around the complexities involved, and ensure a fair trial, where there is equality of arms, in view of the stiff penalties ahead.
9. The charge the appellant faces is a confluence of two distinct offences, incest and defilement. That alone should be viewed as making it complex. The charge is brought under section 20(1) of the *Sexual Offences Act*; it attracts a minimum penalty of not less than ten years in jail, upon conviction. The fact that the sentence is a statutory minimum of ten years, should make it more complex. There is a proviso to section 20(1) of the *Sexual Offences Act*, to effect that if the victim of incest is a female minor, regardless of age, the penalty shall be enhanced, so that the accused would be liable to imprisonment for life. That does not make the penalty mandatory. However, where the minor is of tender years, the court would be informed by section 8(2) of the *Sexual Offences Act*, which prescribes a mandatory sentence of life imprisonment for defilement of a minor aged eleven and below. An incestuous defilement of a minor of tender years ought not attract a lesser sentence. That would make the case more complex, and deserving of involvement of an Advocate.
10. The appellant has not been denied the right to appoint an Advocate of his own choice. He did appoint one. The issue is that that appointment came after PW1 had testified, yet PW1 was his primary accuser. The appellant has a constitutional right to confront his accusers, including the principal accuser. The success or failure of the prosecution hinges on the testimony of PW1, the principal accuser of the appellant. I understand that it is from that perspective that the appellant applied for recall of that witness. The respondent has argued that the appellant had all the time to appoint an Advocate, implying that he should not have waited until after PW1 testified. The trial court, in its ruling of 13th August 2024, agreed with the respondent, that the appellant should have instructed an Advocate earlier.



11. The right to legal representation is constitutional. It can be exercised at any time. As indicated above, an accused person is entitled to be informed of that right promptly. Promptly would mean at the earliest possible moment. The appellant was first presented in court on 6th March 2023, when he took plea. That was the opportune time when he should have been informed of his constitutional fair trial rights under Article 50(2) of *the Constitution*, including his right to appoint an Advocate of his own choice. He was not informed of that right promptly, and, therefore, under Article 50(2)(g) of *the Constitution*, his right to be informed of that right promptly was violated or contravened or was not observed. The matter came up several times, before PW1 testified, on 13th March 2024, yet the trial court did not, on all those appearances, comply with Article 50(2)(g) of *the Constitution*. There were a total of eleven appearances before 13th March 2024. The trial, no doubt, started on a wrong footing, with violation of Article 50(2)(g) of *the Constitution*. It was not a fair trial to that extent.
12. The right to appoint an Advocate can be exercised at any time. An accused person ought not be prevented or denied his right to recall witnesses, who had already testified, by the time he engaged an Advocate, merely because he appoints an Advocate after the trial has commenced. In the instant case, the appointment was made after PW1 testified. No explanation was given for that. None was required. One may hazard a guess that PW1 might have acted after he came to some realisation of the weight of the matter, after handling the first witness, and appreciated that he could not effectively handle it on his own. He cannot be blamed for that. He should not be punished for it. His Advocate, upon being placed on record, should be entitled to recall prosecution witnesses, who had already testified, for cross-examination, so long as the recall is not sought after the accused is placed on his defence. The Advocate was appointed to aid the appellant, and the assistance, that she was expected to provide, included recalling witnesses, for cross-examination on any areas that she perceived the appellant, as a layperson, may have failed to adequately cross-examine on.
13. The trial court declined the application to recall PW1, on grounds that she, PW1, had testified on two occasions, on 13th June 2024, when she was stood down, and on 22nd July 2024, and that the best interests of the child militated against PW1 being called to the witness stand a third time. I am not persuaded that that was a good enough reason for denying the recall of that witness. There are constitutional safeguards to a fair trial, which the trial court ignored, as it focused only on the interests of the child complainant. The best interests of the child complainant must be balanced against the rights of the accused person. Both are provided for in *the Constitution*. The minor witness need not testify in open court, in the physical presence of the appellant. Proper arrangements could be made to ensure that the appellant and PW1 are not in the same space, or if they are, one is shielded from the other. A virtual hearing is the other option.
14. The decision by the trial court, of 13th August 2024, to decline the recall of PW1, after the appellant appointed an Advocate, for cross-examination by that Advocate, violated the fair trial rights of the appellant, guaranteed under Article 50(2) of *the Constitution*. In the spirit of Article 2(4) of *the Constitution* that decision is invalid. PW1 should have been recalled, for cross-examination by the Advocate for the appellant.
15. The appeal is hereby allowed, in terms of paragraph 14 above. The original trial court records shall be returned to the trial court, for continuation of the criminal proceedings in Malaba PMCCRC No. 61 of 2023, where PW1 shall be recalled, for cross-examination by the Advocate for the appellant. The instant appeal file shall be closed. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA ON THIS 9TH DAY OF JUNE 2025.

WM MUSYOKA.



JUDGE.

Mr. Arthur Etyang, Court Assistant.

Advocates.

Ms. Winnie Anono, instructed by Mukisu & Company, Advocates for the appellant.

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

