



**DWG v Republic (Criminal Appeal E022 of 2021)
[2024] KEHC 999 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E022 OF 2021
RM MWONGO, J
FEBRUARY 6, 2024**

BETWEEN

DWG APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was initially charged with defilement Contrary to Section 8(1)(2) of the [Sexual Offences Act](#) No 3 of 2006 for unlawfully and intentionally causing his penis to penetrate the vagina of EKN a child of 9 years on 8th July, 2019 in Mwea West sub-county within Kirinyaga County. After a hearing the trial court convicted him on 25th August, 2021. He was sentenced to serve life imprisonment.
2. Dissatisfied, he appealed under Kerugoya High Court Criminal Case No E022 of 2021. This Court’s ruling in that case on 25th April, 2023 directed that the evidence of the complainant in Baricho Senior Principal Magistrate S.O No 22 of 2019, be re-taken to ascertain the age of the complainant.
3. The High Court directed that the additional evidence “shall be taken in the presence of the appellant and his advocate if he opts to have one. He will be at liberty to cross examine the witness.
4. As directed by the High Court, the trial court reconvened the proceedings in the lower court so as to re-take the evidence of the complainant. However, in the process of the recommenced proceedings the trial court has since pronounced the Appellant unfit to stand trial and seeks further directions.

Appellant’s Submissions

Unfit to stand trial

5. The appellant was found to be unfit to stand trial after being mentally assessed. It is submitted by the defence that the appellants mental status did not change the fact that the honorable judge did find the



evidence on record as regard to the age of the complainant not sufficient for the purpose of sentencing as the age determines the sentence to be imposed.

6. That the appellant is entitled in law to choose either to cross-examine or not to cross examine the witness provided the witness is placed in the witness box. That the honorable court should treat the absence of cross examination as evidence not subjected to testing by cross-examination.
7. The appellant urges the honorable court to make a finding that the age of the complainant was not proved beyond reasonable doubt and to find the appellants appeal is merited, and should allow it, set aside the sentence and set him at liberty.
8. That in the event that honorable court does not set me him at liberty then consider the [*Judiciary Sentencing Policy Guidelines*](#) and sec 333 (2) of the [*Criminal Procedure Code*](#).

Respondent submissions

9. The respondent submits that it is for this Court to direct the Trial Court to interrogate the entire circumstances surrounding the offender's mental state and make an informed decision thereon.
10. The offender being a person with disability and the minor being a victim of sexual assault, the trial Court should endeavor to have the offender committed to an institution where he will receive proper treatment and be treated with dignity and reasonable accommodation away from custody.
11. The prosecution does not encourage termination of the proceedings. Rather, it argues that the offender's condition is one that may be indefinite, and proceedings in regard to the taking of the complainant's evidence should be suspended until such time when the offender will be able to defend himself.
12. The prosecution argues that the Court should direct the trial Court to proceed under Section 164 of the [*Criminal Procedure Code*](#) and carry out a thorough inquiry to establish the most appropriate order; set terms and conditions to attach to either bond or such security it may set or proceed to make order that will ensure the offender is taken care of properly and prevented from harming himself or others.
13. The trial Court should be directed to evaluate the potency of such committal after receiving expert opinion or report as it may decide in order to be properly informed of the appropriate institution in the best interest of the offender's condition.

Issues for Determination

14. The only issue for determination is what steps should be taken when the appellant is found unfit to stand trial when the evidence of the offence is complete except for proof of the age of the victim.

Analysis and Determination

15. Following an appeal by the offender the high court determined that the trial court should re-take evidence from the complainant concerning her age. However, when the trial court sat to take such evidence in the presence of the offender, he was pronounced unfit to stand trial. The trial court now seeks further directions.
16. Section 162 (1) [*CPC*](#) states that:

“When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.



- (2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.
- (4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy thereof to the Minister for consideration by the President.
- (5) Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.”
17. The appellant submits that his appeal be allowed, his sentence set aside and he be set at liberty. That in the event that honorable court does not set him at liberty then it should consider the [Judiciary Sentencing Policy Guidelines](#) and sec 333 (2) of the [Criminal Procedure Code](#).
18. On the part of the respondent, they submit that the Court should direct the trial court to proceed under Section 164 of the [Criminal Procedure Code](#) and carry out a thorough inquiry to establish the most appropriate order; set terms and conditions to attach to either bond or such security it may set or proceed to make order that will ensure the offender is taken care of properly and prevented from harming himself or others.
19. The following decision declared that sections of the [Criminal Procedure Code](#) on detention of persons of unsound mind at the President’s pleasure were unconstitutional for infringing on the principle of separation of powers and independence of the Judiciary.
20. In [Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission \(Interested Party\)](#) (Petition 226 of 2020) [2022] KEHC 114 (KLR) the court stated:
- “A declaration hereby issues that no prison facility in Kenya shall accept and detain any person found to suffer from mental challenges under the President’s pleasure. For clarity, a prison facility shall only accept such persons with mental challenges committed to the facility under the orders of the court which orders shall not include any order to hold such persons under the President’s pleasure.”
21. In the present case, the unsoundness of mind has arisen after the trial court had convicted the appellant, but on appeal in the High Court the sentence was found to be subject to the confirmation of the victim’s age. Hence the court ordered that the correct age be determined through a fresh hearing of the victim as tested by cross examination of the appellant.
22. I am of the view that the circumstances of this case prompt the need for further investigation into the actual mental status of the appellant. The medical assessment report done by the doctor on 31st July 2023 that found him unfit to stand trial concluded as follows:

“ 1. 1. Dennis has a psychotic disorder.



2. He requires treatment and follow up in a psychiatry clinic. He was started on medication and a review after one month is recommended” (Emphasis added)
23. The doctor’s report is a key element in the consideration necessary in this case. My understanding is that psychotic disorders affect brain function by altering thoughts, beliefs or perceptions and thus they may have the feeling that others are manipulating their thoughts. It is also well known that, like many other illnesses, psychosis may be episodic, meaning that it occurs in episodes. Thus, it is treatable, and it is possible for the patient to recover. In my view, that is why the doctor recommended early treatment and review.
24. There is no evidence that the appellant has been facilitated as required by the doctor and reviewed. I therefore consider that the prudent action in this case is to order as follows:
 - a. The appellant shall be facilitated by the Prisons Service to attend a psychiatry hospital or clinic for further medication and or treatment.
 - b. That after such treatment he shall again be assessed and a report filed in this court within three (3) months from the date hereof.
 - c. The proceedings for re-hearing the complainant’s evidence are suspended until further notice pursuant to Section 162 (2) and 164 of the CPC.
 - d. The appellant, after treatment aforesaid, shall be at liberty to apply for bail or bond on such terms as may be appropriate given the circumstances, and at the discretion of the court.
 - e. In the meantime, the appellant shall be held in custody by the Kenya Prison Service.
25. Orders accordingly.

DATED AT KERUGOYA THIS 6TH DAY OF FEBRUARY 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. DWG the Appellant in Person
2. Mamba for the State
3. Murage, Court Assistant

