



REPUBLIC OF KENYA



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**Mwanzia v Republic (Criminal Appeal E047 of 2022)  
[2024] KEHC 5148 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5148 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E047 OF 2022**

**MW MUIGAI, J**

**MAY 16, 2024**

**BETWEEN**

**KIOKO MWANZIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon. A. Nyoike (PM) at the Machakos  
Chief Magistrate's Court in Criminal S.O No. E049 OF 2022 delivered on 7/10/2022)*

**JUDGMENT**

**Background**

1. The Appellant herein Kioko Mwanzia was charged with the offence of Defilement Contrary to Section 8 (1) as read with section 8 (2) of *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence being that Kioko Mwanzia on diverse dates between the month of August 2022 and 4<sup>th</sup> October,2022 at (Particulars Withheld) Village, Iveti Location, Kathiani Sub-county within Machakos County, knowingly and unlawfully inserted his penis into the vagina of T. N.M a girl aged 11 years.
3. In the alternative charge, the Appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
4. The particulars of the offence being that Kioko Mwanzia on diverse dates from August, 2022 to 4th October,2022 at (Particulars Withheld) Village, Iveti Location, Kathiani Sub-county within Machakos County, knowingly and unlawfully touched the vagina of T. N. M a girl aged 11 years with his Penis.



### **Trial court proceedings**

5. From the trial court proceedings, the Appellant was arraigned in court on 17/10/2022 where substance of the charge and every element thereof was stated to the Appellant in the language that he understood and he was asked whether he admits/admitted or denied the truth of charge. The Appellant replied “It’s True”.
6. The Appellant is/was notified that he is/was of the age of majority and the offence attracts a life sentence which the Appellant maintained to be true.
7. Court entered a plea of guilty and convicted the Appellant on own plea of guilt.
8. In Mitigation, the Appellant prayed for leniency.
9. In the Trial Court view, the Appellant appeared not be remorseful and readily pleaded guilty to the charges despite being informed of the severity of the sentence and proceeded to convict the Appellant to life imprisonment.

### **The Appeal**

10. Dissatisfied by the conviction and sentence of the Trial Court, the Appellant herein filed a Memorandum of Appeal dated 19<sup>th</sup> October,2022 based on the grounds that:
  - a. The Learned Trial Magistrate erred in law and fact by convicting the Appellant without according him a proper opportunity to understand the charges against him.
  - b. The Learned Trial Magistrate erred in law and fact by convicting the Appellant upon entering a plea of guilty which was not given voluntarily.
  - c. The Learned Trial Magistrate erred in law and fact by convicting the Appellant without according him the right to a fair hearing when he was convicted on a charge that he did not understand.
  - d. The Learned Trial Magistrate erred in law and fact by convicting the Appellant to life imprisonment which sentence was unconstitutional, unlawful and excessive.
  - e. The Learned Trial Magistrate erred in law and fact by failing to consider the Appellant’s mental state in spite of being made aware of the same through the Prosecution and or the police and or which was evident from the Appellant’s demeanour and actions by way of conduct and speech.
  - f. The Learned Trial Magistrate erred in law and fact by convicting the Appellant who at the time of taking plea was not of sound mind.
11. The appeal was canvassed by written submissions.

### **Submissions**

#### **Appellant’s Submissions**

12. The Appellant in his submissions dated 27<sup>th</sup> November,2023 and filed in court on 28<sup>th</sup> November, where counsel for the Appellant, submitted that on 19<sup>th</sup> November,2023 one Dr. Jeniffer Njoki a consultant Psychiatrist prepared a Psychiatric report on the Appellant. Averring that the report was duly filed in court on 15<sup>th</sup> November,2023.



13. It was the submitted on behalf the Appellant that the Doctor's opinion opined that the Appellant was not fit to plead. Contending that the Appellant's intellectual disability which is/was a neurodevelopmental disorder which started in his childhood and which impairs his social skills, judgment, decision making and other cognitive function. In the doctor's opinion was that the Appellant's mental condition cannot be treated.
14. It was the position of the Appellant that he had been on continuous medication for which he has been receiving assistance from his family. Contending that the Psychiatrist in her report aforesaid also stated that the Appellant is/was not able to do any basic work/activity without assistance. Submitting that the accused person was of unsound mind and was incapable of pleading in the matter in the Trial Court. the Psychiatrist indicated that the Appellant condition is not curable. Reliance was placed on the case of *R vs Gilbert Kiptanui Kibiloch*, KBT HCCR. C NO. 18 OF 2019, where the court released a person of sound mind to his relatives who undertook to ensure his treatment.
15. It was the submission of the Appellant that the Application dated 26/10/2022 be granted and the Appellant ought to be released to his family either unconditionally or as the court may deem fit and or direct.

### **Respondent's Submissions**

16. The Respondent in its submissions dated 30<sup>th</sup> November, 2023, where state counsel submitted on the following grounds. As to whether the Appellant understood the charge before the trial court, it was submitted that the Psychiatrist in accordance with the mental assessment report dated 9<sup>th</sup> November, 2023 concluded that the Appellant demonstrated possible Psychopathology and thus not fit to plead.
17. Averring that the Appellant has intellectual disability which is a neurodevelopment disorder which started in childhood which impairs his social skills, judgment, decision making and other cognitive function. To buttress his point counsel relied on Section 12 of the *Penal Code* and submitted that the conviction and sentence against the Appellant is not safe, since the Appellant mental condition restricted him from understanding what was transpiring in the trial court. The State counsel opined that this Honorable Court vacate the conviction and the sentence imposed by the trial court.

### **Determination**

18. I have considered the memorandum of Appeal, the Trial Court record and the submissions of the parties on record.
19. This Honorable Court vide its ruling dated 16<sup>th</sup> March, 2023, ordered that the bail/bond application is/was denied, appeal being admitted and fast racked to heard and mental examination of the Appellant by Psychiatrist at Machakos Level 5 Hospital and the Comprehensive medical report be availed to court through DR MHC during hearing and determination of the appeal.
20. Pursuant to this order, a report dated 2.08.2023 was presented to the court by Dr. Jeniffer Njoki, a consultant Psychiatrist at Machakos Level 5 hospital and the report indicated as follows;

Mental state examination on 2/08/2023

Appearance and Behavior: well kempt, calm, cooperative, maintaining eye contact

Speech: coherent, normal volume and tone

Mood and affect : euthymic



Thought : has no delusions

Perception : has no hallucinations

Memory : good short- and- long-term memory

Orientation : well oriented in time ,not oriented in place and person

Attention and concentration: poor

Judgment: good

Abstract thinking is poor

Has no insight

The mental state assessment demonstrated obvious psychopathology and possible intellectual disability. We recommend that relative be availed for corroborative history

21. Pursuant to an order dated 17.10.2023, the Appellant was taken for further medical assessment and the report by Dr. Jeniffer Njoki indicated as follows;

Mental state examination on 9/11/2023

Appearance and Behavior: well kempt, calm, cooperative, poor eye contact

Speech: coherent, normal volume and tone

Mood and affect : euthymic

Thought : normal pattern, form and content

Perception : no perceptual disturbances

Memory : good short- and- long-term memory

Orientation : well oriented in time , place and person

Attention and concentration: poor

Judgment: poor

Abstract thinking : poor

No suicidal thoughts

Has no insight

The mental state assessment demonstrates possible psychopathology and he is thus Not Fit To Plead. The accused has intellectual disability which is a neurodevelopmental disorder which started in childhood which impairs his social skills, judgment, decision making and other cognitive function. It cannot be treated.

22. Section 12 of the *Penal Code*, Cap 63 of the Laws of Kenya provides thus;

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.



23. Based on the report above, I find that the Appellant was of unsound mind at the time of the Appeal but it is not clear what his state of mind was at the Trial court and more particularly at the time of taking plea. I also note that it is not a requirement for a mental assessment to be done at the trial court for offences like the one the accused person is charged with.
24. Both the advocate for the Appellant and the state counsel have submitted that the conviction and sentence against the Appellant is not safe and I am inclined to agree with them as there is no other contradictory evidence on record.
25. This court takes cognizance that in the case of *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 226 of 2020) [2022] KEHC 114 (KLR), section 162 to 165 of the *Criminal Procedure Code* unconstitutional. Mirima J held as follows;
- “ a) A declaration hereby issues that detaining of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were ‘guilty but insane’ in prisons at the President’s pleasure pursuant to sections 162 (4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167 (1) (a), (b), (2), (3) and (4) of the Criminal Procedure Code or under any other law constitute a threat to the doctrine of separation of powers and the independence of the Judiciary.
- b) A declaration hereby issues that sections 162(4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167(1)(a), (b), (2), (3) and (4) of the Criminal Procedure Code or any other law providing for the detaining of any person with mental challenges who face a criminal trial or has been tried and a special finding made that such a person was ‘guilty but insane’ at the President’s pleasure contravenes articles 25(a), 27(1), (2), (4), 28, 29(d) and (f), 50, 51(1) and (2), 159(2)(a), (b) and (d) and 160(1) of the *Constitution*. Such provisions are hereby declared unconstitutional, null and void.
- c) A declaration hereby issues that an accused who is found to be unfit to stand trial or to continue participating in a criminal trial due to mental challenges or an accused who is tried of a criminal offence, and was found to have been insane at the time of committing the crime is a person with disability and ought to be accorded the necessary protection and assistance required under the *Constitution* and the law.
- d) A declaration hereby issues that no court of law shall henceforth commit any person facing a criminal trial found to suffer from mental challenges to any prison facility in Kenya to be detained under the President’s pleasure pursuant to any law.
- e) 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.
- f) A declaration hereby issues that any continued detention of persons with mental challenges who are facing criminal trials or who have been tried and



special findings made that such persons were ‘guilty but insane’ and that they be detained at the President’

- g) A declaration hereby issues that the Advisory Committee on the Power of Mercy established under article 133 of the Constitution has no jurisdiction to deal with persons with mental challenges who are facing criminal trials or who have been tried and special findings made that they were ‘guilty but insane’ until such a time when such persons are sentenced by Courts of Law.
- h) An order hereby issues that any prison facility in Kenya holding any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was ‘guilty but insane’ and be detained at the President’s pleasure shall forthwith make arrangements and arraign such a person before the court that committed the person to the prison facility.
- i) Once any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was ‘guilty but insane’ is arraigned before court pursuant to order (h) above, the court shall make appropriate orders and directions upon taking into account the mental status of the accused and the period the accused has been detained in prison at the President’s pleasure.
- j) In the event the prison facility is unable to arraign such a person before court as ordered in order (h) above, the facility shall immediately so inform the court and the court shall make appropriate orders and directions as it deems fit.
- k) The Honourable Deputy Registrar of the Constitutional and Human Rights Division of the High Court shall, in the next 14 days, transmit copies of this judgment to the parties in this matter as well as to the Commissioner-General of the Kenya Prisons Service, the Speaker of the National Assembly, the Registrar of the High Court and the Registrar of the subordinate courts. The Speaker of the National Assembly shall take steps towards ensuring that the impugned sections of the Criminal Procedure Code, cap 75 of the Laws of Kenya are aligned with the Constitution and in terms of this judgment.
- l) The Speaker of the National Assembly shall file an affidavit in this court on the status of implementation of this judgment in the next 12 months.

26. When dealing with a similar question, Justice Gikonyo observed as follows in the case of BN v Republic [2019] eKLR that;

- “6. I have seen a new thinking stemming from the Constitution. The thinking is based on the right to fair trial and seems to suggest that sections 162-164 of the CPC should be subjected to the ultimate yardstick: the Constitution. The major concern of this school of thought is whether indefinite suspension of criminal proceedings against the accused is in accord with the right to fair hearing especially noting that fair trial demands that trial should be concluded within reasonable time. In some cases, there may never be resumption, let alone conclusion of the trial because the condition of the accused may never improve. Even more substantial concern is whether indefinite committal of a sick accused person in a mental facility, at the mercy of the President without proper evaluation as to whether the committal affords the constitutionally



demanded facilitation and comfort of persons with disability. Needless to state that arbitrary committal of an accused person to a mental hospital derogates from the realization of rights enshrined in the Constitution. Notably, transmission of record to the Minister by the court or by the minister to the president, the making of a decision by the President and transmission of such decision to court may take unreasonably long period. All these are valid concerns and show points raised show some elements of the said sections detract from right to fair trial as well as rights of persons living with disability. It bears repeating that suspension of trial as provided in law may be life-long; this may be likened to hanging a scourge for life upon the head of a sick individual who needs care and attention. More trouble and prejudice comes where a person is not released on bond but is committed to a mental institution at the president's pleasure in circumstances which portend that the committal will be or almost for life. Take for instance a case where there are no prospects of the accused getting better or trial resuming; yet, there are no special amenities or accommodations provided for the full enjoyment of life and realization of full potential by the accused as a human being. This is one such case.

.....

The accused is a person with disability and has the right to be treated with dignity and respect. He also has a right to the realization of his full potential as a human being. In addition, he has a right to all reasonable accommodation necessary to realize his rights and potential thereof. See Article 19 and 54 of the Constitution. Courts are therefore obligated by law and Constitution to give full effect to the Bill of rights and to develop the law to the extent that it does not give effect to a right or fundamental freedom of an individual.....”

27. This court is guided by the case of *Kimaru & 17 others v Attorney General & another, supra*, on where to place persons who are found to have mental challenges. The court rendered itself as follows;

“Looking at the nature of the inquiry to be carried out under the impugned sections and the definitions of disability under the Constitution and the law, there is no doubt that an accused who is ordered to be detained at the President's pleasure falls under the category of persons with disabilities.

136. Having so found, I also hold that such persons are entitled to the protection under article 54 of the Constitution, part III of the Persons with Disabilities Act and any other relevant law.

137. Article 54 of the Constitution states as follows: -

- (1) A person with any disability is entitled—
  - (a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
  - (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;



- (c) to reasonable access to all places, public transport and information;
  - (d) to use Sign language, Braille or other appropriate means of communication; and
  - (e) to access materials and devices to overcome constraints arising from the person’s disability.
- (2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

138. This court, therefore, finds and hold that an accused who is found to be unfit to stand or to continue participating in a criminal trial due to mental challenges or an accused who is tried and a special finding of ‘guilty but insane’ made, is a person with disability and ought to be accorded the necessary protection and assistance required under the Constitution and the law.”

28. In the circumstances, the court is inclined to give an appropriate relief in the circumstances.

**Disposition**

1. In the end, I order as follows;
  - a. Dr. Jeniffer Njoki a consultant Psychiatrist at Machakos Level Five who has been attending to the Appellant prepare a conclusive report outlining how the Appellant can be handled and / or treated , the period treatment will be needed and the appropriate remedy for the condition.
  - b. The accused be detained in safe custody in Mathari hospital where he will undergo treatment pending the medical report by the Dr. Jeniffer Njoki a consultant Psychiatrist.
  - c. The Appellant be presented in court within 45 days of this Judgment for further orders considering the above latest Report on release and to where of the patient/Appellant.
  - d. Further Mention 18/07/2024 for orders based on the Report.

It is so ordered.

**RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 16<sup>TH</sup> MAY, 2024 (VIRTUAL/ PHYSICAL CONFERENCE).**

**M. W. MUIGAI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In The Presence Of:**

Mr. Eregai H/b Mr. Mwangela For The Appellant

No Appearance - For The Respondent



Patrick - Court Assistant(s)

