



REPUBLIC OF KENYA



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**Mwaiti & another v Republic (Criminal Appeal E047 & E048 of 2021  
(Consolidated)) [2024] KEHC 4781 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4781 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E047 & E048 OF 2021 (CONSOLIDATED)**

**PJO OTIENO, J**

**MAY 6, 2024**

**BETWEEN**

**MARGARET MWAITSI ..... 1<sup>ST</sup> APPELLANT**

**JULIA SHWIYAZA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentencing of Hon. R.N.  
Akee (RM) in Kakamega Criminal Case No. 1019 of 2021 dated)*

**JUDGMENT**

1. The two appellants, with another, were arraigned before the Resident Magistrate in Kakamega in Criminal Case No. 1019 of 2021 charged with the offence of trafficking in person contrary to section 3(3) as read with sub section 5 of the Counter Trafficking in Persons Act No. 8 of 2010.
2. The particulars of the offence were that on the 9<sup>th</sup> day of June, 2021 at Makokho village, Makokho sub location, Iguhu location in Kakamega Sub County within Kakamega County, the appellants jointly with others not before court transported GM a child aged 7 months in abuse of power for the purpose of vulnerability.
3. The appellants pleaded not guilty to the charge and the case proceeded to full trial with the prosecution calling two witnesses. PW1, Geoffrey Mungoto Muchesia testified that the child belonged to Ann Aluvamusi, then 1<sup>st</sup> accused, and that the witness was called to Iguhu Police Station where he was informed that the child who was 7 months old was missing and had been sold. Nothing of substance arose from the cross-examination.
4. PW2, No. 256934 PC Elizabeth Wafula testified that they received a complaint from Ann Aluvamusi, the mother to the child to the effect that she had gone to Nairobi to work as a house girl and left her



seven-month old baby with the 1<sup>st</sup> appellant and that when she returned the 1<sup>st</sup> appellant informed her that the child was with one Esther who turned out to be the 2<sup>nd</sup> appellant. She stated that the child has not been found to date.

5. The evidence of PW2 marked the close of the prosecution case with the court ruling that a prima facie case had been established and the accused persons were put on defense.
6. DW1, the child's mother who was a co-accused to the appellant but acquitted gave sworn evidence and stated that her missing son was born on 11/3/2020 and that she had problems with her health and where to stay and that the 1<sup>st</sup> appellant who was her longtime friend offered to take care of her son and so she travelled to Nairobi to work as a house help so that she could be sending money to the 1<sup>st</sup> appellant to sustain her and her child. When she returned home she did not find her son and the 1<sup>st</sup> appellant informed her that she had given the child to a maid. She stated that the 2<sup>nd</sup> appellant was a friend of her grandmother's and stated that she had never given her son.
7. On cross examination she stated that she was an orphan who looked upon the 1<sup>st</sup> appellant as a mother and her brothers had been taken by sponsors. She looked up to the 1<sup>st</sup> appellant who was like a mother to her because she had been a long time. She said that she agreed with the 1<sup>st</sup> appellant that she would look for work and be sending to the said accused money for the upkeep of the baby. When asked question by the 1<sup>st</sup> appellant, she swore to have left her with the child and that the said accused had accepted that fact in the presence of the village elder.
8. The 1<sup>st</sup> appellant testified as DW2 and stated that she was summoned on phone and attended the Iguhu police station and was questioned about the child. He accepted knowing the accused as they come from the same village but did not know about the child.
9. On cross examination she stated that she gave the 2<sup>nd</sup> appellant, as a person with whom they go to the same church, the child and that she had no idea where the child was taken.
10. The 2<sup>nd</sup> appellant testified as DW3 and in her sworn statement she stated that she was friends with the 1<sup>st</sup> appellant who was working at their land in Nandi. That on the material day she was called and sent money, Kshs 300, using the phone belonging to the 1<sup>st</sup> appellant and that when he reached Iguhu police station he was arrested and charged with child trafficking. He denied knowing Penina. When cross examined by the prosecutor, she confirmed to court that the child was in a safe place. When cross examined by the 1<sup>st</sup> appellant she said that she gave the child to Penina.
11. A reserved judgment was subsequently delivered and the appellants were convicted and sentenced to thirty years' imprisonment. The judgment dissatisfied the appellants who lodged their separate appeals which later consolidated. Both petitions were amended and thus the appeal was argued on the basis of the amended pleadings.
12. The 1<sup>st</sup> appellant in the amended petition of appeal dated 15<sup>th</sup> September, 2023 challenges the conviction and sentence on the grounds that;
  - a. That the learned trial magistrate erred in law and fact in convicting the appellant yet the charge and offence that the appellant was responding to at the time of plea on 16<sup>th</sup> June, 2021 was not recorded contrary to section 207 of the Criminal Procedure Code.
  - b. That the learned trial magistrate erred in law and fact in convicting the appellant on the weight of evidence of prosecution witnesses whose testimony was obtained in absence of oath contrary to section 151 of the Criminal Procedure Code.



- c. That the learned trial magistrate erred in law and fact in convicting the appellant and failing to appreciate that there was no evidence against her that she had on 9<sup>th</sup> June, 2021 engaged in any of the acts enlisted in section 3(1)(d) of the Counter Trafficking in Persons Act No. 8 of 2010 for the purpose of exploitation as defined in section 2 of the Counter Trafficking of Persons Act No. 8 of 2010.
  - d. That the learned trial magistrate erred in law and fact in convicting the appellant on the basis of the evidence of PW1 which was hearsay evidence and which did not fit or support ingredients of the offence of trafficking in persons that the appellant was charged with.
  - e. That the learned trial magistrate erred in law and fact by failing to deliver a judgment that did not comply with section 169 of the Criminal Procedure Code.
13. The 2<sup>nd</sup> appellant also filed an amended petition of appeal dated 7<sup>th</sup> August, 2023 and faults the conviction and judgment on the grounds that:-
- a. The learned trial magistrate erred in fact and in law by presuming the appellant guilty against her constitutional right to fair hearing before judgment was entered.
  - b. The learned trial magistrate erred in fact and in law in failing to give the accused sufficient time and facilities to prepare her defense against her constitutional rights.
  - c. The learned trial magistrate erred in fact and in law in failing to explain to the appellant the charge in detail against her constitutional right.
  - d. The learned trial magistrate erred in fact and in law by denying the appellant her right to fair trial by denying her a chance to mitigate before sentencing.
  - e. The learned trial magistrate erred in fact and in law by failing to consider the nature of the case and the fact that substantial injustice would occur if the appellant would not have an advocate assigned to her at the state's expense.
  - f. The learned trial magistrate erred in fact and in law in not only shifting the burden of proof, but also the instance of proof as well as lowering the standard of proof to the prejudice of the appellants.
  - g. The learned trial magistrate did not comply with section 169 of the Criminal Procedure Code in writing the judgment herein.
  - h. The judgment of the subordinate court is against the weight of evidence on record.
14. For the above set of reasons both appellants pray that the appeals be allowed conviction quashed and the sentence set aside.
15. After several adjournments including invitation to the directorate of Criminal Investigation, Department of Homicide Investigations, and prodding the appellants by cross examination to reveal the whereabouts of the child and hitting a dead end, the reluctantly court settled to have the appeal heard, even with the whereabouts of the child unknown, by way of written submissions to be highlighted but come the day of such highlights, both the prosecution and the counsel for the 2<sup>nd</sup> appellant opted to rely on the written submissions and forewent the right to highlight. Only the counsel for the 1<sup>st</sup> appellant addressed the court in highlighting the filed submissions.



## 1<sup>st</sup> Appellant's Submissions

16. It is her submission as written and highlighted that from the record of the trial court at page 7 of the record of appeal, it is not indicated that the charge was read out to the accused persons and this was a contravention of section 207 of the Criminal Procedure Code which requires that the substance of the charge shall be stated to the accused person by the court and that failure to do so was procedurally fatal in which regard she places reliance on the case of Muhammad Asif v Republic (2017) eKLR where the court observed as follows;

“I have perused the record of the trial Court and indeed note that on the day the plea was taken on 31<sup>st</sup> May 2016, the record does not indicate that any charge was read to the Appellant, and what the Appellant was responding to at the time of taking plea. To this extent, there was a defect in the procedure of taking plea before the trial Court which cannot sustain his conviction. I am of the view that this ground is sufficient to dispose of the appeal.”

17. She further submits that the two prosecution witnesses at pages 10,11 and 12 of the record of appeal failed to take oath as required under section 151 of the Civil Procedure Code and sections 17 and 18 of the Oath and Statutory Declaration Act thus making the conviction and sentencing of the appellants a nullity to which regard she cites the case of Samwel Muriithi Mwangi v R (2006) eKLR.
18. It is her contention that from the evidence tendered by the prosecution, there is nothing to point to the fact that she transported the child on 9/6/2021 in abuse of power for purposes of vulnerability as required in section 3(1) of the Counter Traffic in Persons Act. She contends that the evidence of PW1 was that he was told that “they sold the child” which was hearsay evidence and that the prosecution did not attempt to produce in court the person who allegedly told PW1 that the child had been sold nor was there evidence that the child was indeed sold.
19. She also submits that the judgment of the trial magistrate failed to comply with section 169 of the Criminal Procedure Code as it failed to analyze and resolve the issues, giving reasons for her decision as was set out by the court of appeal in the case of Charles Wanyonyi & Others v R Kisumu Criminal Appeal No. 134 of 2004.

## 2<sup>nd</sup> Appellant's Submissions

20. It is her submission that the trial magistrate cancelled her persons bond while awaiting sentencing even before they had put their submissions to mean that the fate of the accused had been sealed at this juncture thus contravening the accused persons right to be presumed innocent until proven guilty as set out under article 50(2) of *the Constitution*. She further submits that the accused persons needed legal representation as set out in article 50(2)(h) of *the Constitution* based on the severity of the charge and the capacity of the accused persons to defend themselves as they appeared to not understand what they were doing by blaming each other. She argues that the record of the trial court does not show if the accused persons were given a chance to mitigate before sentencing and that the judgment did not comply with the provisions of section 169(1) of the Criminal Procedure Code.
21. She lastly contends that the prosecution failed to prove the ingredients of the offence as set out in the case of Benard Onyandi v R (2016) eKLR that is; recruitment, transportation, transfer harboring and receipt of child for purposes of exploitation.



## Respondent's Submissions

22. It is the submission by the prosecution that they concede to a) the fact that the record does not reflect whether PW1 and PW2 took oath before they testified; b) they tendered no evidence to prove acts of exploitation or knowledge by the accused persons that the child was going to be exploited; c) that PW1's evidence was hearsay hence not admissible and; d) that the judgment of the trial court was not in compliance with the provisions of section 169 of the Criminal Procedure Code. The prosecution thus concedes to the appeal and opposes it not.

## Issues

23. Even with the concession by the prosecution, this being a first appellate court, it has the mandate to reappraise and reexamine the evidence on record afresh and to come to own conclusion without feeling bound to concur with the trial court. With the mandate in mind, the court has anxiously considered the two sets of grounds of appeal, the proceedings of the lower court and the submissions by both the appellants and the respondent and discerns the seven issues presenting themselves for determination to be: -
- a. Whether the charges were read out to the accused persons and if not, what is the appropriate remedy
  - b. Whether the prosecution witnesses took oath before testifying and if not, what is the appropriate consequence and /or remedy
  - c. Whether the appellants right to a fair trial under article 50(2)(h) of *the Constitution* was infringed
  - d. Whether the appellants right to a fair trial under article 50(2)(a) of *the Constitution* was infringed
  - e. Whether the appellants were allowed to mitigate
  - f. Whether the judgment of the trial court complied with the provisions of section 169 of the Criminal Procedure Code
  - g. What is the fate of the appeal?

## Analysis

Whether the charges were read out to the accused persons and if not, what is the appropriate remedy

24. Section 207 of the Criminal Procedure Code provides in mandatory terms that the substance of a charge ought to be read to the accused persons by the court after which they shall be asked whether they plead guilty or not guilty.
25. The appellants were first presented before court on the 16<sup>th</sup> day of June, 2021 and the proceedings of the day are captured as follows on page 7 of the record of appeal as follows;

“

“ 16. 6.2021  
Before N.R. Akee RM  
Jacky court clerk



Rotich prosecution  
Accused 1,2,3 present  
English/Kiswahili interpretation  
Count 1  
Accused 1-Si ukweli  
Accused 2-Si ukweli  
Accused 3-Si ukweli  
Count 2  
Accused 1-Si ukweli  
Accused 2-Si ukweli  
Accused 3-Si ukweli  
Court-Plea of not guilty entered”

26. From the proceedings of the day as captured in the record of appeal, it is not possible to tell whether the charges were read out to the accused persons and since the same is not captured on the record, the only conclusion that can be drawn is that the same was not done. The effect of the failure by a trial court to comply with section 207 of the Criminal Procedure Code was addressed in the case of Muhammad Asif v Republic (2017) eKLR where the court observed as follows;

“I have perused the record of the trial Court and indeed note that on the day the plea was taken on 31st May 2016, the record does not indicate that any charge was read to the Appellant, and what the Appellant was responding to at the time of taking plea. To this extent, there was a defect in the procedure of taking plea before the trial Court which cannot sustain his conviction. I am of the view that this ground is sufficient to dispose of the appeal.”

27. I resonate with the above decision that failure to read out the charges to the accused and record the same was a defect in the procedure of plea taking which can be cured by way of a retrial.  
Whether the prosecution witnesses took oath before testifying and if not, what is the appropriate remedy

28. Section 151 of the Criminal Procedure Code requires in mandatory terms that every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.

29. The proceedings at page 11 of the record of appeal is silent on whether the two prosecution witnesses were examined upon oath. I have perused the entire proceedings and I have noted the trial magistrate captured that the sureties and the accused persons were examined on oath. My take would be that for the court not to capture whether the prosecutions were examined upon oath can only lead to the conclusion that they did not take oath.

30. The effect of non-compliance with section 151 of the Criminal Procedure Code was addressed by the court of appeal in Samwel Muriithi Mwangi v Republic [2006] Eklr where it was held as follows;

“In the record before us, there is no way in which we can determine, one way or the other, that the witnesses were or were not sworn before they gave their evidence. Most likely, they took



the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section 151 of the Criminal Procedure Code and the other provisions we have set out herein. That, in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence. It does not matter that the issue is being raised for the first time in this appeal. If the trial was a nullity then it does not matter at what stage that issue is raised.”

31. The court went ahead to address the appropriate remedy in such a case by stating as follows;

“We are, in the circumstances, inclined to order a retrial. We accordingly allow the appellant’s appeal, quash the conviction recorded against him, set aside the sentence of death and order that he be tried de novo before a different magistrate. Those shall be our final orders in the appeal.”

Whether the appellants right to a fair trial under article 50(2)(h) of *the Constitution* was infringed

32. Article 50(2)(h) of *the Constitution* accords an accused person the right to an advocate assigned by the state, at the state’s expense, if substantial injustice would otherwise result.

33. The 2<sup>nd</sup> appellant contends that the accused persons ought to have been given free legal representation by the state based on the severity of the charge and the incapacity of the accused persons to defend themselves as they appeared to not understand what they were doing by blaming each other. The court of appeal in the case of David Macharia Njoroge V R (2011) eKLR analyzed the applicability of article 50(2)(h) by holding as follows;

“State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where „substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided.”

34. This position was echoed by the court of appeal in Karisa Chengo & 2 Others V R, CR Nos. 44, 45 & 76 OF 2014 where it was observed as follows;

“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 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.”

35. That said, I therefore find that the appellants right to legal representation in relation to the offence they faced was not absolute.

Whether the appellants right to a fair trial under article 50(2)(a) of *the Constitution* was infringed

36. Article 50(2)(a) of *the Constitution* of Kenya, 2010 accords an accused person the right to presumed innocent until the contrary is proved.
37. This doctrine was articulated by Lord Viscount Sankey, L. C. in *Woolmington v. D.P.P.* [1935] A.C. 462 by holding as follows;

“Throughout the web of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to...the defence of insanity and subject also to any statutory exemption. If, at the end of and on the whole of the case, there is a reasonable doubt, created by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

38. The 2<sup>nd</sup> appellant contends that the appellants right to be presumed innocent was contravened by the trial magistrate when she cancelled the accused persons bond while awaiting sentencing even before they had put their submissions to mean that the fate of the accused had been sealed at this juncture.
39. I have perused the proceedings of the trial court at page 15 of the record of appeal and after the cross examination of DW3 which marked the close of the defence case, the trial magistrate notes as follows;

“ Court-Accused bond cancelled awaiting sentence. Parties to put in submissions.

Prosecutor-I wish to put in oral submissions.

Court-parties to give oral submissions

Accused 1-I understand

Accused 2-I understand

Accused 3-I understand

Court-Submissions on 30.9.2021

N.R.AKEE, RM”

40. I agree with the 2<sup>nd</sup> appellant that the move by the trial court to cancel the accused persons bond ‘awaiting sentence’ even before the parties had submitted and a judgment given was akin to the court



making a determination on the fate of the accused persons before the end of the whole case thus infringing the accused persons right to be presumed innocent until proven otherwise. This defect in procedure occasioned a mistrial.

### **Whether the appellants were allowed to mitigate**

41. It is trite law that sentences should be reserved and pronounced only after mitigating factors are known as was observed in *John Muoki Mbatha V R Criminal Appeal No. 72 of 2002* (unreported) where it was held as follows;

“As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be reserved and be pronounced only after the court receives mitigating circumstances if any are offered.”

42. At page 5 of the record of appeal which captures the judgment of the trial court, the trial magistrate at paragraph 8 notes as follows;

“In the mitigation, the 1<sup>st</sup> accused person prayed for leniency while the 2<sup>nd</sup> accused person prayed for leniency and stated that she gave the child to the 3<sup>rd</sup> accused person as she did not have the means to take care of the child. The 3<sup>rd</sup> accused also prayed for leniency and asked the court to forgive her.”

43. If you look at the record of appeal at pages 16 and 17 which captures the defence hearing, the mitigation cited by the trial magistrate was actually the defence that was offered by the accused persons. It is settled procedure that mitigation occurs after judgment and before sentencing. The trial court sentenced the accused persons in her judgment without according them the chance to mitigate as captured at page 6 of the record of appeal.

44. That said, it is my finding that failure to mitigate does not vitiate a conviction but a sentencing and the appropriate remedy would be a retrial.

Whether the judgment of the trial court complied with the provisions of section 169 of the Criminal Procedure Code

45. Section 169 of the Criminal Procedure Code requires that every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

46. I have perused the judgment and indeed the trial magistrate failed to identify the issues for her determination and analyze them. The judgment appears to be a summary of what transpired during the trial. The effect of failure to comply with section 169 of the Criminal Procedure Code was addressed in *Republic v George Onyango Anyang & another [2016] eKLR* where the court held as follows;

“28. In the instant case the trial court did not set out the point or points for determination but generally considered the entire evidence on record and made general conclusion on the matter instead of setting out, the point or



points of determination, make a decision thereon and give reasons for the decisions contrary to Section 169 (1) of CPC. The trial magistrate failed to comply with Section 169 (1) of CPC by failing to set out the points of determination, the decision and reasons for such decision. I find as the judgment is dated and signed it is in my view valid judgment inspite of partial compliance with Section 169 (1) of CPC as the default in it can be corrected by evaluation and analysis of the evidence on appeal. In this appeal I have evaluated and analyzed the entire evidence and as such I find the failure to comply with Section 169 (1) of CPC by the trial Court did not prejudice the appellants as this court has evaluated and analyzed the entire evidence and has come to its own conclusion.”

**What is the appropriate remedy?**

47. Having established that the trial was procedurally defective, should the appeal be allowed in its entirety or a retrial ordered. The principles governing a retrial were pronounced in *Fatehali Manji v Republic* [1966] EA 343 where the East Africa Court of Appeal as follows:

“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 insufficiency 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; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

**Rendition and Final Orders**

48. Accordingly, for the reasons set out above, it is adjudged that the proceedings were vitiated. I direct that a retrial be conducted by a court different from the trial court. Appellants be presented for the taking of plea within seven (7) days from today.

Dated, signed and delivered at Kakamega this 6<sup>th</sup> day of May, 2024.

**PATRICK J. O. OTIENO**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

Ms. Kadenyi and Mr. Maritim for the Appellants

Ms. Chala for the Respondent

Court Assistant: Polycap

