



**Maracha v Republic (Criminal Appeal 5B of 2023)
[2024] KEHC 9468 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 5B OF 2023**

**TA ODERA, J
JULY 5, 2024**

BETWEEN

JARED MATIBA MARACHA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. C.N SINDANI (PM) delivered at
Ogembo Principle Magistrate’s Court S.O. NO. E038 of 2022 on 24th April, 2022)*

JUDGMENT

Introduction

1. The Appellant herein was aggrieved with the decision of the Judgement of the learned trial Magistrate delivered on 25th April, 2024, and thus filed this Appeal vide a Petition dated Appeal on 4th May,2023 which was based on the following grounds;
 - a. That the Appellant pleaded guilty to the offense because he was drunk while the charges were read to him.
 - b. The learned Magistrate erred in law and in fact by failing to accord him fair hearing given that that he was a layman who was not conversant with the law during plea taking.
 - c. That the learned trial magistrate erred both in law and in fact by not considering that he was threatened to plead guilty not knowing the repercussions of him pleading guilty.
 - d. The learned magistrate erred in law by failing to consider that the accused person was young when he was arrested and charged of an offense he did not commit.



- e. The learned magistrate erred in law by not issuing warning of advice the consequences of not pleading guilty as required by the law and thus a breach of his constitutional rights to a fair hearing.
 - f. That the sentence that was imposed on him was harsh and excessive.
2. Based on the above grounds the Appellant the setting aside of his conviction and sentence and ordering for retrial.

The Factual Background

As first appellate court, this court has a duty to re-evaluate the evidence adduced before the trial court and arrive at its own conclusion but bearing in mind that I neither saw nor heard the witnesses. See *Okeno vs. Republic (1972) EA 3*.

3. The Appellant was charged with the offence of defilement contrary to section 8 (3) of the Sexual Offence *Act No. 3 of 2006*. The particulars of the offence were that the on the 31st day of October 2021 in Sameta sub-county within Kisii County the Appellant intentionally caused his penis to penetrate the vagina of VMN a girl aged 6 years.
4. The appellant was also charge with faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences *Act No. 3 of 2016* wherein the particulars of the offense were that on the 31st day of October 2021 in Sameta sub-county within Kisii County the Appellant touched the vagina of VMN a child aged 6 years.
5. On 25th April, 2022, was arraigned in court for plea taking. The substance of the charges and their elements were read out to the Appellant in the Kiswahili language and he pleaded guilty to the main count. He was subsequently cautioned of the seriousness of the offense and the charges were read again to him wherein he pleaded guilty once more. A plea of guilty was entered. The prosecutor went ahead and read the facts of the case to him and the accused confirmed that the same were correct. The Accused was convicted on his own plea of guilty. When he was asked to mitigate, the appellant indicated that he had nothing to say. The trial court thus proceeded to sentence him to serve life imprisonment.
6. It is against the above decision the learned trial magistrate to convict him on his own plea of guilty and sentencing him to life sentence that the appellant has filed this Appeal based on the grounds that I have highlighted above.

Written Submissions

7. This court directed the parties the Appeal dispose of the Appeal through written submissions. All the Parties have filed their submissions for my consideration.
8. The Appellant submitted that was not equivocal given that the trial court did not consider the procedures of plea taking as outlined in section 207 of Criminal Procedure Code of 207 and as were emphasized in the cases of *Aden vs Republic (1973)* and *Kariuki Vs Republic (1984) eKLR*. The Applicant contended that he was never asked the language he understood aside from the proceedings indicating that the language used was Kiswahili. He also submitted that the caution given to him ought to have been given to him before the charges were read to him and not after he had pleaded guilty. He also claimed that the evidence produced did not support the charge of defilement. The Appellant equally claimed that the trial court did not give him room to mitigate prior to sentencing him to life sentence.



9. The Appellant also decried that the trial court failed to afford him the right to legal representation under article 50 (2) (g) by failing to remind him such right. To support his submissions, the Appellant relied on the cases of Chacha Mwita vs Republic (2020) eKLR and Karisa Chengo and two others vs Republic (2017) Joseph Kiema vs Republic 2019 eKLR.
10. The appellant equally submitted that the trial court did not consider the decision of Julius Kitsao Manyeso vs Republic (2021) eKLR which declared the intermittent mandatory life sentence under section 8(3) as constitutional.
11. On his part the learned prosecution counsel submitted that the appellant can only challenge sentence in a plea of guilty. He underscored that the charge was read in Kiswahili which the appellant indicated he understood. He further argued that every element of the offence was read to the Appellant and the Appellant pleaded guilty by saying Kiswahili “ni Kweli”. The Learned counsel equally observed that the appellant was questioned of the consequences of pleading guilty but he still pleaded guilty and indicated which the Appellant indicated “ni kweli”. He went on to reveal that the facts of the case were read to the Appellant and he responded saying “ni kweli”. He thus contended that the appellant was rightfully convicted on his own plea of guilt. The learned counsel went on to submit that in mitigation he indicated that he had nothing to say. He contended therefore that the appellant was not remorseful for at all for his actions.
12. The learned counsel dismissed the Applicant’s claim that he was drunk while taking plea as an afterthought. He disclosed that the accused person as per the charge sheet was arrested on 23rd April, 2022 and was presented before court on 25th April, 2024. He argued that scientifically person cannot remain drunk for two days.
13. On sentence the learned counsel argued that the sentence was reasonable considering the appellant defiled a 6-year-old child and was not remorseful.
14. The learned counsel called for dismissal of the Appeal.

Determination

15. Having considered the Appeal herein, the submissions of all the parties the impugned decision of the lower court, I find that the issue for determination is should quash the conviction set aside the sentence and order for a retrial.
16. Section 207 of the Criminal Procedure Code (cap 75) provides as follows regarding guilty pleas:
 - “(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
 - (2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make order against him, unless there appears to it sufficient cause to the contrary. Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”
17. In the case of Adan V Republic [1973] E.A. 445 Court of Appeal of East Africa laid down the steps to be taken where there is a guilty plea as follows:



- (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
 - (ii) The accused's own words should be recorded and if they are in admission, a plea of guilty should be recorded;
 - (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
 - (iv) If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.
 - (v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.
18. The Appellant argued that his plea was imperfect for reasons that;
- a. The caution of the seriousness of the offence was not read to him by the court before taking the plea,
 - b. He was not asked of the language he understood,
 - c. He was not informed of his right to legal representation.
19. In order to determine whether the above issues were not considered by the trial court to warrant the grant of the order of retrial prayed for by the Appellant.

PROCEEDINGS

25/4/2022

Magistrate: Hon. C.N. Sindani, P.M.

Prosecutor-Vane

Court clerk- Gladys

Accused-present.

Language- Swahili

The substance of the charge(s) and every element-thereof has been stated by the court to the accused parson in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies;

Main charge: Accused: kweli

Court: Plea of guilty entered.

Court: Accused cautioned of the charge, read to him again. - -

Main charge: Accused- kweli.

Court: plea of guilty entered.

Prosecutor: Facts are that the accused and the victim her father and daughter, she is aged 6 years on 31/10/2021 the complainant was under the custody of her grandmother the accused came took her to another house far a bit removed her clothes, removed his trouser too and had sexual intercourse with the minor. Later after 3 days when the minor was at school her teacher noticed a funny walking style which forced the teacher to interrogate and confirmed that she had been defiled by her father who had



told her not to tell anyone, and that she lie that she had been hurt by a stick while playing. Teachers took her to Kiogoro sub-county hospital where she was examined P3 form and PRC form filled. She was treated and matter reported to Itumbe police station. The accused on noticing the report he eloped but later was arrested on 23/4/2022 and charged. I wish to produce the P3 form (exhibits), IPRC form (EXT-2) copy of birth certificate(Exh.3) and treatments notes (Exh.4). That is all.

Accused; ni kweli.

Court: Convicted on own plea of guilty. .

Prosecutor': no records.

Accused: I have nothing to say.

Court: I have considered all aspects the accused person is to serve life imprisonment. He has a right of appeal in 14 days.

I have carefully perused the proceedings of the lower court and I find that the claim by the Appellant that he was not cautioned of the seriousness before taking a plea is inaccurate given that the person upon pleading guilty for the first time the court warned him of the seriousness of the offence allowed him to take plea again. It is also not true for him to claim that he was not informed of the language he understood before he took plea. From the proceedings it's clear that the language used was Kiswahili which the appellant demonstrated he understood by his responses in the same language.

20. Of much interest to me is the appellant's claim that his Constitutional right under Article 50 (2) (g) that prior to plea taking he was not informed of his right to a legal representation. Various court have emphasized that the right of a litigant to be informed of his right to legal representation promptly is non-derogable right.
21. Wendo J in the case of Migori High Court Criminal Appeal No. 44 of 2019 N.M.T. alias Aunty vs. R observed as follows regarding this right;
 28. Article 50(2)(g) of *the Constitution* dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in Joseph Kiema Philip (supra) stated as follows: -

.... The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings... (emphasis added).
 29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later... (emphasis added). Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of *the Constitution* among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.
 30. In this case the trial court explained the right to representation to the Appellant at defence stage. That was too far late in the day.”



22. In the case of HO v Republic [2020] eKLR, Musyoka J held as follows:

In David Njoroge Macharia vs. Republic [2011] eKLR and Karisa Chengo & 2 others vs. Republic [2015] eKLR, the courts emphasized that one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years' imprisonment. The charge was a very serious one, for upon being found guilty, the appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trial court should have informed him of his right to legal representation and directed that he be provided with an Advocate at State expense. Ultimately, the cost of keeping a convict in jail for twenty years is, no doubt, higher than that of allocating to him an advocate to defend him at the trial.

26. The constitutional provisions on the right to legal representation, as stated in Article 50(2) (g) (h) and the provisions of the *Legal Aid Act* in general, clearly put a damper on the mantra that every citizen is expected to know the law, and that ignorance of the law is no defence. They clearly are alive to the general ignorance of the law and lack of awareness with regard to legal processes and rights amongst the general populace. It is against that reality that the law has placed a burden on the courts to enlighten accused persons of their rights in law, so that they can benefit from the law, and, specifically, the rights that accrue to them under Article 50(2) (h) of *the Constitution* and the *Legal Aid Act*. That reality was highlighted by the Court of Appeal in Elijah Njihia Wakianda vs. Republic [2016] eKLR, where it was stated that the trial court should play the role of an educator of the accused person so far as these matters are concerned.

27. From the record of the trial court, it is clear that the appellant was not represented by an advocate. The record is silent as to whether he was ever informed of his right to be represented by an advocate in the proceedings, so that he could make a decision as to whether or not to appoint one of his own choice. The duty to inform an accused person is a constitutional and statutory imperative, stated in Article 50(2) (g) of *the Constitution* and section 43 of the *Legal Aid Act*. Failure to inform the appellant of that right violated his fair trial rights and amounted to injustice. A trial where fair hearing rights have been violated in this manner cannot possibly stand.

.....

30. Article 50(2) (g) (h) of *the Constitution* and section 43 are in mandatory terms. I believe failure to observe constitutional commands should vitiate any trial. These provisions were not observed. The appellant, therefore, received an unfair trial and the conviction should not stand. (emphasis mine)

23. A review of the proceedings of the trial court it is outright that the trial court did not inform the Appellant of his right to a legal representation promptly before him taking plea as was clearly observed by Wendo J the case of Migori High Court Criminal Appeal No. 44 of 2019 N.M.T. alias Aunty vs. R. such failure amounted to a violation of his constitutional right to a fair trial under article 50 (2) (g) and section 43 of the *legal Aid act*.



24. Since the appellant faced an unfair trial, I hereby declare a mistrial for the failure to observe the mandatory provisions in Article 50(2) (g) (h) of *the Constitution* and section 43 of the *Legal Aid Act*. Consequently, I hereby quash the conviction and sentence of the appellant, in Ogembo Principal Magistrate S.O. NO. E038 of 2022, and set aside the sentence imposed upon him.
25. On whether this court should order a retrial. It is trite law that a re-trial can only be ordered where there were a defects or illegalities in the proceedings and where injustice will not be occasioned to the parties. In the case of *Fatehali Manji Vs Republic* [1966] EA 343 the Court of appeal held: -

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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 own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.” (See *Philip Kipngetich Terer –vs- Republic* [2015] eKLR)

Also in the case of *Muiruri Vs R* [2003] KLR 552, it was held that: -

“It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See *Zedekiah Ojuondo Manyala Vs Republic* (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or the court’s.”

The primary case herein was registered in the year 2022 in the lower court and appellant pleaded guilty and so there has been an inordinate delay in dealing with this matter as it has taken about 1 year and 8 months to dispose off between the date of plea and conclusion of the appeal. The prosecution cannot be blamed for the defect as it was the duty of the court to inform accused persons of their right to counsel at the earliest possible opportunity. In the circumstances I find that this is a case fit for retrial and I proceed to issue the following orders:

- a. That there shall be a retrial of the appellant at Ogembo law courts.
- b. That the Deputy Registrar is directed to return the lower court file to Ogembo Chief Magistrate’s Court.
- c. The case be mentioned before Chief Magistrate at Ogembo on 17.7.24 for fresh plea.
- d. Production order to issue for appellant.

26. It so ordered.

T.A ODERA

JUDGE

5.7.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Appellant

Koima for Prosecution



