



**AN v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 14813 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL APPEAL E002 OF 2023
JRA WANANDA, J
OCTOBER 4, 2024**

BETWEEN

AN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged in Iten Chief Magistrate’s Court Criminal Case (Sexual Offences) No. E028 of 2022 with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that in the month of April 2022 in Keiyo sub-County within Elgeyo Marakwet County, he unlawfully and intentionally caused his penis to penetrate the vagina of VJ, a girl aged 15 years. He was also charged with the alternative offence of committing an indecent act with the same child, contrary to Section 11(1) of the same Act.
2. I note that in the charge sheet dated 23/06/2022, the Appellant’s apparent age at the time of being charged was indicated to be 17 years old.
3. The Appellant pleaded not guilty to the charge and the case then proceeded to full trial in which the prosecution called 5 witnesses. At the close of the prosecution’s case, the Court found that the Appellant had a case to answer and placed him on his defence. He then gave a sworn statement and called no other witness. By the Judgment delivered on 18/04/2023, the Appellant was convicted on the main charge and sentenced to 15 years imprisonment.
4. Dissatisfied with the said decision, the Appellant instituted this appeal in person on 26/04/2023 against both conviction and sentence. His Petition of Appeal reproduced verbatim is crafted as follows:
 - i. That the learned trial Magistrate erred both in law and fact by not considering that the prosecution evidence was contradictory, questionable, doubtful and untrustworthy to warrant conviction.



- ii. That the learned trial Magistrate erred in both law and fact by failing to observe and protect the Appellant's constitutional right as provided under Article 53(i)(f)(i)(ii) of the Constitution of Kenya 2010.
- iii. That the learned trial Magistrate erred in both law and fact by failing to consider that the Appellant was a juvenile who was supposed to be convicted under the Children's Act.
- iv. That the learned trial Magistrate grossly erred in both law and fact by failing to order for an age assessment report for the Appellant.
- v. That the learned Court erred in law by failing to protect the Appellant's Constitutional rights as provided by Article 50(2)(h) of the Constitution of Kenya 2010.
- vi. That the trial Magistrate erred in law and facts by failing to evaluate and analyze the evidence on record and arriving at the erroneous conclusion that the Appellant committed the offence.

Prosecution evidence before the trial Court

5. PW1 was the child-complainant. She stated that she was 15 years old and a class 6 pupil. She testified that in April 2022, she was going to graze sheep in the forest in the morning when the Appellant grabbed her, pushed her further in the forest and defiled her. She stated that the Appellant removed her clothes and inserted his penis into her vagina, that he then threatened her with consequences should she report the incident to her mother and then ran away. She stated further that she then went home and informed her mother who took her to the chief and that she was later taken to hospital. She then identified the Appellant in Court. In cross-examination, she stated that she had never been to the Appellant's home.
6. PW2 was the complainant's grandmother. She stated that the complainant was 15 years old and was born on 17/08/2007 as per the Certificate of Birth which she referred to. She stated that in May 2022, she realized that the complainant was pregnant, that she took her to hospital and that the complainant told her that she was defiled by the Appellant. In cross-examination, PW2 stated that the complainant used to visit the Appellant's home.
7. PW3 was a clinical officer, one Hillary Kosgei. He stated that he is the one who filled the P3 Form after examining the complainant, that the complainant's labia majora was normal with whitish discharge, that she was pregnant with a 15 weeks foetus and that he concluded that she had been defiled. He then stated that he also examined the Appellant whom he found to be in fair condition and did not have any sexually transmitted disease. He then produced the respective P3 Forms for both the complainant and for the Appellant, both filled on 22/06/2022.
8. PW4 was the area Chief, Benson Kibet. He stated that on 20/06/2022, he met the complainant's mother who told him that the complainant had been defiled by the Appellant and that on 21/06/2022, he went to the Appellant's home, whom he arrested and took to the police station
9. PW5 was Corporal Rael Ndiema from Kaptagat Police Station. She stated that on 21/06/2022 at 6.30 am, she received a report of defilement and which indicated that the perpetrator had been arrested by the Chief, that she went to the Chief's office, re-arrested the Appellant and took him to the police station. She stated further that she later went to [...] school where she picked the complainant and referred her to a medical examination, that witness statements were then recorded and that she charged the Appellant. She produced the complainant's Birth Certificate which indicated that the complainant was 16 years old



Defence evidence

10. As stated, the Appellant gave sworn testimony as DW1 and called no other witness. He denied committing the offence and stated that he had been framed by the complainant's parents. He stated further that he wants to go back to school as he is also a child.

Hearing of the Appeal

11. The Appeal was canvassed by way of written Submissions. The Appellant filed his Submissions on 19/01/2024 while the State filed its Submissions on 29/02/2024 through Prosecution Counsel, Rachel Mwangi.

Appellant's Submissions

12. The Appellant submitted that at the time of the alleged commission of the crime, he was aged below 18 years and that although the prosecution informed the trial Court of this fact, the trial Court failed to take it into account. He cited the provisions of Section 8(7) of the *Sexual Offences Act* and submitted that the same required that he be sentenced in accordance with the provisions of the *Borstal Institutions Act* and the Children's Act. He also cited Section 53(i) of *the Constitution* and Section 190(1) and 191 of the Children's Act and submitted that in the circumstances, the sentence of 15 years was illegal. He reiterated that the trial Court was informed that he was born on 9/05/2005 and he also faulted the Court for failing to order for an age assessment.

Respondent's Submissions

13. In respect to the issue of the complainant's "age", Counsel submitted that the complainant stated that she was 15 years old and that this was corroborated by her grandmother who stated that the complainant was born on 17/08/2007. He also pointed out that a Birth Certificate was produced in evidence.
14. In respect to "identification" of the Appellant, Counsel submitted that the complainant was able to recognize the Appellant and was also able to identify him in Court. Counsel also pointed out that the complainant testified that the Appellant used to go to her home, and submitted that this evidence was corroborated by the complainant's grandmother who also identified the Appellant by name. According to him therefore, there was sufficient evidence that the Appellant was not a stranger to both the complainant and her grandmother.
15. On the issue of "penetration", Counsel submitted that the complainant's testimony was that the Appellant grabbed her and pushed into a bush where he removed her clothes and inserted his penis into her vagina, that this evidence was corroborated by the medical evidence of the clinical officer who testified that upon examining the complainant, she found that the complainant was 15 weeks pregnant and concluded that the complainant was defiled and that the witness also produced the Post-Rape Care (PRC) and the P3 Forms.
16. On the allegation that the prosecution evidence was contradictory, Counsel submitted that the complainant gave a clear account of what transpired, that when the Appellant was put to his defence, he stated that he did not defile the complainant and claimed that he was framed by the complainant's parents, that such claims did not displace the prosecution's water tight evidence and that the Appellant did not adduce evidence to prove his allegations that there was a grudge between him and the complainant's parents.



17. On the issue of the Appellant’s age, Counsel submitted that the charge sheet indicated that the Appellant was 17 years at the time that he was charged, and that the Appellant’s Birth Certificate indicated that he was born on 9/05/2005. She submitted further that the offence having taken place in April 2022 and the Appellant having been sentenced on 18/04/2022, there is no dispute that he was a minor at the time of trial, conviction and sentencing. Counsel then cited Section 235(b) of the Children’s Act, 2022 and observed that the provision requires that every child accused of having violated any rule of law be provided with legal assistance. She also cited the case of *Republic v Karisa Chengo & 2 Others* [2017] eKLR. Counsel also pointed out that the Appellant was not informed of this right nor was he provided with legal representation even after the Court noting that he was a minor. She cited the case of *Amos Kipchirchir Cheruiyot v Republic* [2020] eKLR.
18. Regarding the sentence, Counsel cited Section 238(1) and 239(1)(g) of the Children’s Act, 2022, and Section 22 of the *Borstal Institutions Act* which deals with how a child who has attained 16 years of age may be handled. She observed that in this case, the Appellant was sentenced 18 days to his 18th birthday and that a custodial sentence at a Borstal Institution would have sufficed. She cited the case of *Amos Kipchirchir* (supra) and the case of *SCN v Republic* [2018] eKLR and conceded that the trial Magistrate erred in sentencing the Appellant to 15 years imprisonment. She submitted however, that in reviewing the Appellant’s sentence, the Court should consider the prevalence and seriousness of the offence committed even as it considers the rights of the complainant.

Determination

19. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See *Okeno vs. Republic* [1972] E.A 32)
20. The issues arising for determination are evidently the following:
 - a. Whether the Appellant was still a minor at the time of the trial and therefore, whether the failure to inform him of his right to legal representation or to provide him with such representation violated his rights and vitiated the trial.
 - b. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.
 - c. Whether the sentence of 15 years imprisonment was proper.
21. Regarding the definition of a child, the Children’s Act, 2022 provides that “a child” means:

“an individual who has not attained the age of eighteen years”
22. Regarding litigation relating to a child or minor, Article 53(2) of *the Constitution* provides that “a child’s best interests are of paramount importance in every matter concerning the child.”
23. The above principle is reiterated in Section 8(1) of the Children’s Act as follows:

“8. In all actions concerning children, whether undertaken by public or
(1) private social welfare institutions, courts of law, administrative authorities or legislative bodies—
(a) the best interests of the child shall be the primary consideration;”



24. Section 235(b) of the Children’s Act then provides that:

- “ 235. Guarantees to a child accused of an offence
 - Every child accused of having violated any rule of law shall—
 - (a)
 - (b) be provided by the state with legal assistance in the preparation and

25. There is also Section 36(1) of the Legal Aid Act No 3 of 2016, which recognizes children as being among the persons eligible to receive Legal aid services. It provides as follows:

- “ 36. Persons eligible for legal aid
 - (1) A person is eligible to receive legal aid services if that person is indigent, resident in Kenya and is—
 - (a)
 - (b) a child;
 -

26. Section 43 then provides as follows-

- “ 43. Duties of the court
 - (1) A court before which an unrepresented accused person is presented shall—
 - (a) promptly inform the accused of his or her right to legal representation;
 - (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
 - (c) inform the Service to provide legal aid to the accused person.
 - (1A) In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—
 - (a) the severity of the charge and sentence;
 - (b) the complexity of the case; and
 - (c) the capacity of the accused to defend themselves.
 - (2) The Service shall provide legal aid to the accused person in accordance with this Act.
 - (3) Where a child is brought before a court in proceedings under the Children Act (Cap. 141) or any other written law, the court may



where the child is unrepresented, order the Service to provide legal representation for the child.

27. Applying the above legal provisions to the facts of this case, I note that the charge sheet indicated that the Appellant was 17 years at the time when he was charged. The record also reflects that on 1/12/2022, about 6 months after the Appellant had taken plea, and long after the first 4 Prosecution witnesses had testified, the Appellant asked for an age assessment test to be conducted on himself to ascertain his age. The Prosecution Counsel who handled the case before the trial Court is also recorded to have informed the Court that the Prosecution was in possession of the Appellant’s Birth Certificate, which indicated that the Appellant was born on 9/05/2005 and that he was therefore 17 years of age. The trial Magistrate appears to have accepted this statement since she then ordered that the Appellant be remanded at the Eldoret Juvenile Remand and on subsequent Court sessions, he expressly referred to the Appellant as a “minor”. The Magistrate is however not recorded to have made any orders regarding the Appellant’s request for an age assessment test.
28. I note that in her Submissions in this Appeal, Prosecution Counsel Ms Mwangi conceded that the offence having taken place in April 2022 and the Appellant having been sentenced on 18/04/2022, there is no dispute that he was a minor at the time of trial, conviction and sentencing. She in fact submitted that the Appellant was sentenced 18 days to his 18th birthday. That the Appellant was still a minor during the trial and up to the time of sentencing is therefore not disputed. Ms Mwangi further conceded that the Appellant was not informed of his right to legal representation nor was he provided with such representation even after the Court noted that he was a minor.
29. In view of the foregoing, it is clear that although the record reflects that the trial Court noted that the Appellant was still a minor, the same record indicates that the Appellant was unrepresented. The same record does not also at all indicate that the Appellant was informed of his right to legal representation as required by law. It is therefore clear that the trial was conducted in violation of not only the clear provisions of the Constitution, but also of the Children’s Act, and the Legal Aid Act as well.
30. The right to fair trial is enshrined in Article 50(2) and provides, inter alia, as follows;
- “ (2) Every accused person has a right to fair-trial, which includes the right-
“.....
c) have adequate time and facilities to prepare a defence;
.....
g) to choose, and be represented by, an Advocate, and to be informed of this right promptly;
h) to have an Advocate assigned to the Accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
.....”
31. Further, Article 25 of the Constitution stipulates as follows:
- “ Fundamental Rights and freedoms that may not be limited
25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—



.....
(c) the right to a fair trial;
.....”

32. Clearly therefore, the right to fair trial is not only a fundamental principle of law, but is also one of the 4 rights that are recognized under Article 25 of *the Constitution* as being non-derogable. Consequently, I find that the Appellant’s rights to a fair trial as prescribed under Article 50 of *the Constitution* were violated by the manner in which the trial was conducted.

33. In view of my findings above, there is no reason for me to determine whether the Prosecution proved its case beyond reasonable doubt.

34. Regarding sentence however, I make reference to Article 53(1)(f) of *the Constitution* which provides as follows:

“ 53 Every child has the right—
(1)
(f) not to be detained, except as a measure of last resort, and when detained, to be held—
(ii) for the shortest appropriate period of time; and
(ii) separate from adults and in conditions that take account of the child’s sex and age”

35. I also cite Section 238(1) of the Children’s Act which imposes a restriction in the sentencing of a convicted minor in terms that:

“No court shall order the imprisonment of a child

36. I therefore hold and find that insofar as the Appellant was still a minor at the time that he was sentenced to 15 years imprisonment, the sentence was also in violation of his fundamental rights and cannot therefore stand.

37. Having found that the manner in which the trial was conducted violated the Appellant’s rights and the sentence unlawful, the question that I now have to grapple with is whether to set the Appellant free or refer the matter back to the trial Court for retrial.

38. It is an agreed principle that generally, a retrial will only be ordered where the interest of justice so requires and only where no prejudice will be occasioned to the accused. This principle was restated in the case of *Fatehali Manji vs Republic* [1966] EA 343 where the Court of Appeal guided as follows

“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 Kipngetch Terer –vs- Republic* [2015] eKLR.) In *Muiruri Vs R* [2003] KLR 552, the Court 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.”

39. Similarly, in the case of Mwangi –versus- Republic [1983] KLR 522, the Court of Appeal stated as follows:-

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”

40. Further, in the case of Pius Olima & another v Republic [1993] eKLR, the Court of Appeal again stated as follows:

“Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar v Republic, (1964) EA 481; Manji v The Republic, (1966) EA 343; Mujimba v Uganda, (1969); and Merali and Others v Republic, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.”

41. Applying the above principles to the facts of this case, as aforesaid, my finding is that the trial was conducted in disregard to the Appellant’s constitutional rights. The trial was therefore defective. However, the offence that the Appellant is alleged to have committed, defilement, is a serious offence. The complainant, if indeed she was defiled as alleged, and there is strong evidence to that effect I may say, must have suffered serious trauma which will no doubt negatively affect her psychologically for the rest of her life. I think she needs to obtain closure to this case and the only way, in my view, through which she may obtain closure is for the trial to proceed to its logical conclusion and be determined on merits.

42. The offence is stated to have been committed around April 2022, about 2 years and 3 months ago. This is a relatively short time and I believe that the witnesses are still available. In my view, balancing the interests of the Appellant and that of the complainant, I believe that the interests of justice will be served by ordering for a retrial. I do not discern any irreparable prejudice that will be occasioned to the Appellant if such retrial is ordered since there is no question of a retrial giving the Prosecution a second bite at the cherry by enabling it to restructure or fill gaps in the case.

Final Order

43. The upshot of the above is that I order as follows:

- i. This Appeal is allowed and the conviction is quashed and the sentence set aside.
- ii. The Appellant shall be retried before a Magistrate of competent jurisdiction other than Hon. C.A. Kutwa (SRM as at the material time).



- iii. The Appellant shall be escorted to the relevant Police Station for purposes of preparing a fresh charge sheet and he should then be presented before the relevant Magistrate's Court at the Iten Law Courts not later than the 8th day of October, 2024 for purposes of taking a fresh plea.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Kirui for the State

Appellant present (virtually from Iten Law Courts)

Court Assistant: Brian Kimathi

