



**FMM v Republic (Criminal Appeal 16B of 2017)
[2023] KEHC 2755 (KLR) (21 March 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 16B OF 2017
SC CHIRCHIR, J
MARCH 21, 2023**

BETWEEN

FMM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant and his brother one JKM was charged with incest contrary to section 20(1) of the [Sexual Offences Act](#) (The Act). They also faced an alternative of having an indecent act with a child contrary to Section 11(1) of the [Act](#).
2. The particulars of the charge are that on diverse dates in the month of September 2016, at [Particulars Withheld] within Muranga county, caused his penis to penetrate the anus of JM a child aged 8 years, who to his knowledge was his sister
3. JKM was convicted on his own plea of guilt. The appellant herein was tried, convicted and sentenced to 15 years in prison.
4. Dissatisfied with the said judgment the appellant filed this appeal in which he sets 5 grounds of Appeal which I have summarized as follows:
 - i. That he was not given adequate time and facilities to prepare for his defence and thus his rights under Article 50(2) (c) and (f) of the [Constitution](#) were violated.
 - ii. That his right to legal representation was violated.
 - iii. That the Trial court failed to consider the fact that he was a minor.
 - iv. That the Magistrate erred by failing to consider the circumstances of the offence, which show that he was indeed a victim and not a perpetrator of the crime



v That penetration was not proved.

5. This being the first appeal this court is mandated to look at the evidence, afresh, re- evaluate and arrive at its own conclusion. (See *Okeno vs. Republic* [1972] EA 32). However, this court will also bear in mind the fact that the lower court had the benefit of seeing and hearing the witnesses first hand.
6. PW1 was the complainant. She was taken through voire dire examination, after which the court formed the opinion that she would give unsworn evidence. She informed the court that she was 8 years old; that JKM and FMM did bad manners to her; that the accused and JKM would oil her anus and do bad manners on her; that they used the part of the body which looks like a pen; that part of body is normally used by boys to pass urine; that JKM and FMM were her brothers. When she informed her grandmother what the two had done, she was taken to hospital. She told the court that [Particulars Withheld] is full name is FMM. She then identified him in court.
7. PW2 was the child's grandmother. She told the court that she noticed the complainant pulling her leg and upon inquiry, the complainant informed her that the Appellant together with her two other brothers were doing bad things to her. She informed the court that the complainant and Appellant were siblings.
8. PW3 was the medical doctor who examined the complainant. He told the court that he did not find evidence of annul penetration. He stated that there had been a lapse of time (unspecified) between the defilement and medical examination which may explain the outcome.
9. The appellant gave unsworn statement. He told the court that he was 17 years old. That the complainant was his sister. He denied that he defiled his sister. He shifted the offence to an elder brother by the name I. He however, admitted to have touched the complainant on the vagina and had fondled her breasts in the past, for which he was remorseful.

Appellant's submission.

10. The appellant has submitted that he never had time to adequately prepare for trial. That he only had between November 5, 2016 and 16th November 2016. That he has not given the charge sheet or witness statements. That the situation was aggravated by the fact that he was a minor.
11. It is further submitted that Appellant suffered prejudice on account of non-representation, particularly having been a minor. He attributes his failure to cross examine PW2, PW3 and PW4 to the fact that he was an unrepresented. He relied on the case of *P.O.O. vs. DPP & another* (2017) eKLR to buttress his submissions.
12. On the sentence, it is submitted that the sentence of 15 years was not merited. The appellant further submits that the trial court failed to take into consideration the fact that the appellant was also a victim of neglect and sexual abuse from his elder brother, one I. He attributed his actions to his own trauma which affected him to the extent that distinguishing between what was right and wrong was not easy.
13. Finally, the appellant submits that there was not proof of penetration and that the reliance on the medical report by the trial court to convict the appellant was erroneous.

Respondent's Submissions

14. The respondent's has submitted that medical evidence is not necessary to prove penetration and relied on the decision of *Daniel Kabera vs. Republic* (2021) eKLR and *Geoffrey Kiaji -vs- R. Nyeri Criminal Appeal No 270 of 2010*.



15. Regarding the alleged violation of the appellant's right to fair trial, it is submitted that the appellant had the period from September 26, 2016 to 16th November 2016 to prepare for trial. On lack of representation, is the respondent's submission that it does not constitute violation of rights.

Analysis and Determination

16. I have considered the evidence tendered in the lower court and the respective submissions. I will address the grounds of Appeal as set out by the Appellant.

Whether the Appellant was a perpetrator or victim- Ground (iv)

17. As to whether the Appellant was a victim or perpetrator, I find the appellant's argument that he was also a victim rather misguided. He is not the victim in the case. He cannot be allowed to justify a crime under the cover of victimhood. In any event he admitted to have touched his sister in a sexual way previously.

Whether penetration was proved- Ground (v)

18. On whether penetration proved, Section 2 of the Act defines penetration as
- “Partial or complete insertion of the genital organ of a person into the genital organs of another person.”
19. The medical report and testimony of the clinical officer don't indicate any penetration. The witness attributed this to the considerable amount of time that had lapsed between the time of the alleged defilement and the time of medical Examination. However, the proviso to section 124 of the Evidence Act, allows the court to convict on the evidence of the victim alone, if the court believes the victim and records reasons for such belief.
20. The complainant gave a detailed Account of how the offence was committed. Some of the relevant portions of her Evidence went as follows:
- “JKM and FMM did something bad to me. They did so on my behind. (nyuma) I mean they did bad manners to me by using oil on my anus..... They used the part of the body which looks like a pen, that part of the body is normally used by boys to pass urine. After they did bad manners to me I informed my grandmother....”
- The Grandmother (PW2) told the court
- “... then as they were going home I was observant JM pulling her right leg so much..... then I asked JK why she was pulling her leg. Then she said her brother, I, FMM and JKM had been doing bad manners to her. Then I asked whether it was in front or behind and she said it was on her anus”
21. The complainant's detailed and raw account on how the defilement took place, and the observation by the grandmother makes the evidence of defilement believable. I therefore find that penetration was proved.

Whether the Appellant's Rights under Article 50 of the Constitution were violated.

22. The right to fair trial as set in Article 50 (2) reads as follows;
- (2) “Every accused person has a right to fair-trial, which includes the right-



- a
- b
- 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;
- j to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to the evidence

23. The appellant’s first complain in this regard is that he never had sufficient time to prepare for his defence and was never given the charge sheet or witness statements. The record shows that, plea was taken on September 26, 2016 but the case was not listed for hearing. On September 28, 2016, the hearing was scheduled for October 21, 2016, but it was not heard. The hearing was also adjourned on two other subsequent dates. The hearing finally began on November 16, 2015. The appellant’s allegation that he was only given one day to prepare is therefore not true. He had notice of hearing as far back as September 26, 2016.

24. On the witness statements, the record does not indicate that the accused requested for or was supplied with any statements. Did this failure prejudiced the accused’s right to fair trial? The record reflects that save for the complainant, the appellant did not cross examine any other witnesses, even on the oral testimony they gave. There is nothing to also show that he requested to be supplied with the statements. Am not convinced his right to fair trial in this regard was violated

25. What about the right to legal representation? The fact that the accused was a minor at the time of trial was not contested. The Children Act defines a child as an individual who has not attained the age of 18 years. The appellant told the court that he was 17 years old, a fact which the court, seemed to have accepted. It is also instructive that the appellant was also remanded at Muranga Children’s home. The fact that the appellant was a child therefore seemed to have been accepted by all the parties.

26. Section 186 of the Children Act No 8 of 2001(Now repealed) provided that a child accused of having infringed any law shall-

- “a -
- b if he is unable to obtain legal Assistance be provided by the Government with the assistance in preparation and presentation of his defence.

While section 77 of the same Act provided that:

“where a child is brought before a court in proceedings under this or any written law, the court may, where the child is unrepresented order that the child be granted legal representation”.

27. Under section 36(1) of the Legal Aid Act No 3 of 2016, a child is among the persons eligible to receive Legal aid services. Section 43 of the same Act, set out the duties of the court. The section provides as follows-

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
- c. Inform the service to provide legal aid to the accused person.

43(3) of the same *Act* provides that where a child is brought in proceedings under the *Children Act* (No 8 of 2001) or any other written law, the court may, where the child is unrepresented, order the service to provide legal representation to the accused.

28. Under Article 40 of the *United Nations Convention on the Rights of the Child* (UNCRC) a child in conflict with the law has a right to legal or other appropriate assistance in preparation of his defence.
29. The *African Character on the Rights and Welfare of the Child* provides that a child in conflict with the law has a right to be afforded legal and other appropriate assistance in preparation of his defence.
30. The above two Conventions form part of the Kenyan law pursuant to the provisions of Article 2(6) of the *Constitution* and are just two of the many other international Instruments that call for legal representations for children in conflict with the law.
31. Article 53 of our constitution provides that a child's best interest is of paramount importance in every matter concerning the child.

What is substantial injustice

32. Section 43 1(A) of the *Legal Aid Act* provides that in determining whether substantial injustice referred is likely to occur the court shall take into consideration (a)the severity of the charge, (b) the complexity of the case and (c)the capacity of the accused to defend himself.
33. The *Constitution* on the other hand is silent on what constitutes substantial injustice, but on top of the provisions of the *Legal Aid Act*, the courts have attempted to define what substantial injustice is.

In the case of *Stephen Odong Nyabaya vs. Republic* (2020) eKLR, it was held

“..... It is clear that with regard to criminal matters, in determining whether substantial injustice, will be suffered a court has a right to consider, in addition to the relevant provisions of the *legal Aid Act* various other factors which include the seriousness or nature of the offence in question, the severity of the sentence and whether the accused is a minor....”

34. Whereas the Trial Court took note of the fact that the Appellant was a child, the record does show that the appellant was not only unrepresented but his right to legal representation was not explained to him at all.
35. I find that in the trial process there was a complete disregard of the provisions of the *Constitution*, the Children Act, the *Legal Aid Act* and the various international instruments touching on the rights of the child as aforesaid.
36. Consequently, I find that the accused's rights to fair Trial as set out in Article 50 were violated. The Right to fair trial is not only a fundamental principle of law, but also is non-derogable. (see Article 25 of the *Constitution*).
37. I therefore hold and find that proceedings and conviction of the Appellant violated his fundamental right to fair trial. Consequently, I allow this appeal, and quash the appellant's conviction and set aside the sentence.



38. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, AND SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 21ST DAY OF MARCH 2023

S. CHIRCHIR

JUDGE

in the presence of :-

