



**JO v Republic (Criminal Appeal E115 of 2021)
[2023] KEHC 18738 (KLR) (Crim) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E115 OF 2021
DO CHEPKWONY, J
MAY 18, 2023**

BETWEEN

JO APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal against the conviction and sentence of Life Imprisonment
delivered by Hon. E. Kanyiri (PM) on 15th day of July, 2021 at Makadara)*

JUDGMENT

1. The appellant, JO was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) in the main count. The facts were that :-

“On the 17th day of March, 2016 in Njiru sub-county within Nairobi County, intentionally cause his penis to penetrate the sexual organ of MM a child aged 8 years”.
2. In the alternative, the appellant was charged with an offence of indecent act with a child contrary to section 11(1) of the same Act. The particulars were that:-

“On the 17th day of March, 2016 in Njiru sub-county within Nairobi County, intentionally and unlawfully committed an indecent act with a child aged 8 years names MM by touching her private parts namely sexual organ”.
3. The appellant pleaded “Not Guilt” in both counts and the matter proceeded to full trial whereby he was found guilty of the offence in the main count, convicted and sentenced to serve imprisonment for life.



4. The appellant was aggrieved with the conviction and sentence meted against him. He then filed its appeal *vide* an undated memorandum of appeal wherein he set out the following grounds of appeal (reproduced below verbatim).
 - a. That the trial court erred in both point of law and fact by failing to observe that the prosecution's case was marred with inconsistencies and contradictions and hence did not prove their case beyond reasonable doubt;
 - b. That the trial Court erred in both point of law and fact by not finding that the evidence adduced by the prosecution cannot sustain a conviction;
 - c. That the trial Court erred in law by upholding conviction and sentence without observing that the entire prosecution case was impeachable under section 163(1) of the *Evidence Act* thus unworthy to be relied upon;
 - d. That the trial Court erred in both point of law and fact by failing to give his defence adequate consideration as per the requirements under section 169(1) of the *Criminal Procedure Code*.
 - e. That other grounds will be adduced at the hearing thereof.
5. The appellant then filed a record of appeal on November 4, 2021 and on December 14, 2021, it was admitted for hearing with directions that parties canvass it by way of written submissions. The Appellant filed his submissions on April 4, 2022 while the Respondent filed theirs on May 5, 2022.

Prosecution's Case

6. The accused person was taken through a full trial whereby the prosecution called evidence of 8 witnesses in support of their case. The accused was placed on his defence and he opted to give sworn statement in his defence and called no witness.
7. According to the prosecution, the victim, MM is a daughter to PW1, VM and PW2, PN. It was their evidence that the complainant is a special needs child who is autistic and hyperactive. They also testified that they had invited the Appellant to reside at their home as he awaited to join college since he was a distant relative of PW1. They then stated that on March 17, 2015 at around 7.00am, PW2 was at their home with his daughter M.M and the accused when he received a call to go to church and he went to church leaving the Appellant with the children. He returned home and found some men who informed him that someone who was suspected to be raping a child was in his house. PW2 then entered his house and found his daughter MM beating the sofa as he folded her legs while crying. He then asked the appellant what he had done and he told him "*pole*" (translated from Kiswahili language to mean "Sorry" in English language). It was PW2's testimony that the child got up and went to the bedroom and he noticed blood on the seat. That he also saw the child was bleeding as she walked into the bedroom. He then called his wife, PW1 and informed her that the appellant "*ameshika MM*" (translated from Kiswahili language to mean "he has forced MM" in English language). She said that he went on to tell her that "*nimepata MM. ana-bleed buko kwa shebemu zake za siri* (translated into English language from Kiswahili language to mean "I have found MM. bleeding from her private parts). PW1 went and reported the matter to Utawala Police Post on her way home. PW1 told court that when she arrived home, she found the complainant bleeding from her vagina which was very swollen. She then went, reported the matter to Ruai Police Station then took the complainant to Mama Lucy Hospital where she was examined and admitted for treatment for three days. That the appellant was arrested from a room where he had been locked and on being interrogated, he asked for forgiveness.



8. On arresting the Appellant, the police recovered a dress top with pink, black and green flowers, a black trouser with white dots, a black tight trouser and biccil swab samples which were taken to the government Chemist *vide* an Exhibit Memo form. The Investigating Officer , Jane Mwangi (PW6) also received the Birth Certificate No 74xxx for MM which shows she was born on 18th May, 2017. According to PW6, the appellant admitted having committed the offence when interrogated. The complainant was taken to Mama Lucy Hospital where she was examined and treated on 17th Marcy, 2016 and March 22, 2016 by PW7, Mercy Okello and PW8, Dr. Joseph Maundu respectively. A PRC form, Summary Discharge and P3 form dated 22nd March, 2016 as exhibits 1, 2 and 9 respectively. The investigating officer (PW6) produced the long black trouser, the dress top with pink, black and green colours, black trouser with white dots, Exhibit Memo Form, Birth Certificate as Exhibits while PW5, Anne Wangechi produced the government chemist report dated November 13, 2017.
9. The appellant was placed on defence and he opted to testify on oath whereby he confirmed that he was brought by his uncle to live with them at Utawala as he waited to join a technical college. That while living with them, he was given duties which included taking care of the house and looking after the children, washing and cleaning the compound. He did this for five months but when he reminded his uncle about the promise, he was arrested. The trial court determined the case and in its Judgment found the appellant guilty of the offence of defilement contrary to section 8(1) of the [Sexual Offences Act](#). He was convicted as per the provision of section 215 of the [Criminal Procedure Code](#) and sentences to serve a life imprisonment pursuant to section 8(2) of the [Sexual Offences Act](#).

Analysis and Determination

10. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court and the written submissions filed by both the Appellant and the Respondent. I have also read the Judgment of the learned trial Magistrate.
11. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind, that it did not see the witnesses as they testified and give due allowance to that.
12. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of *Kiilu & another v Republic* (2005) IKLR 174 that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
13. I shall first deal with the issue of legal representation, the Appellant’s case is that he was occasioned a substantial injustice being that he was unrepresented during trial.
14. Article 50 (2), (b), (g) and (h) of the [Constitution](#) provides:-

“ 50(2)



- (b) every accused person has the right to a fair trial, which includes the right to-
- (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 the state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

15. Article 50 has partially been given effect under the [Legal Aid Act](#), 2016 which provides section 43 that:-

“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 an advocate assigned to him or her; and
- c. Inform the service to provide legal aid to the accused person.

16. A reading of the aforementioned law reveals that the right to legal representation by an accused person at the expense of the state is not automatic but qualified. In other words, there must exist the condition that substantial injustice would occur.

17. In the case of [David Njoroge Macharia v Republic](#) [2011]eKLR, Nairobi Criminal Appeal No.497 of 2007, the Court of Appeal stated as follows:-

“Article 50 of the [Constitution](#) sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires some form of legal aid be given to the accused because of the nature of the offence. 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.”

18. Further, the Court of Appeal in the case of [Karisa Chengo & 2 others v R](#) [2015]eKLR stated 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 the 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.”

19. 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.
20. Furthermore, I do not find any material that suggests that the Appellant suffered substantial injustice, by not being provided with legal representation at State expense. It has not been demonstrated that that his case involved complex issues of fact or law which made him unable to effectively conduct his own defence, owing to some disability or language difficulties or the nature of the offence. In fact, the record showed that the appellant participated in the trial through cross examination.
21. However, being that the appellant was a young offender who faced two counts of a very serious charge, who was alleged to have committed the offence as a minor, who faced life imprisonment at eighteen (18) years of age, and whom, from the look of things in the pre-sentence report, would not, have afforded to pay for his own counsel. The learned trial magistrate ought to have informed him of his rights and having failed to do so violated his right to fair trial. In my view, failure to observe constitutional commands should vitiate any trial.
22. Having found that Hon. E. Kanyiri did not comply with this noble requirement behoves the court to determine whether a retrial should be ordered.
23. The law as to when a retrial should be ordered has long been settled. In the case of *Fatehali Manji v Republic* [1966]EA 343, the Court of Appeal when dealing with the same issue, gave the following guideline:-

“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 Tererv Republic* [2015] eKLR)

24. In the case of *Muiruriv 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 v 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.”

25. In the case of *Mwangi v Republic* [1983]KLR 522, the Court of Appeal held at page 538 that: -

“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.”

26. From these authorities, it is clear that in deciding whether or not to order a retrial, the court must strike a balance between the interests of justice on the one hand and those of the accused person on the other.
27. In a case of defilement, the prosecution is enjoined to prove three basic elements namely; identification of the perpetrator, age of the victim and penetration. Penetration was established by the testimony of PW7 who attended to the victim at Mama Lucy Hospital on the same date of offence and results were that she had been defiled. The medical evidence was further corroborated by that of the police doctor, PW8. Age was ascertained by the birth certificate produced by PW6 and marked as Exhibit 3 which indicated that the victim was born on 18th May, 2007, thereby placing her age at nine years as at the time of the incident. On identification, this was through circumstantial evidence as the victim did not testify. PW2 testified that he left the victim with the Appellant. When he returned he found the victim crying and bleeding from her private parts, the appellant had blood on his clothes. DNA results presented by PW5 showed the blood from the appellant’s trouser matched the blood from the victim’s cloth. The appellant did not also explain how the victim’s blood got to his trousers. Consequently, it is my finding that defilement was established beyond reasonable doubt. I have no doubt in my mind therefore that if a trial is ordered the same proceeds with a counsel it is likely to found a conviction.
28. On sentence, the Appellant submitted that the trial court did not factor in his best interests as a child since he was a minor. As the sentence is harsh, punitive and excessive. He submitted that the sentence breached his rights as provided in the [Children’s Act](#). The Respondent submitted that there was no proof that the Appellant was a minor at the time of the trial and that he was an adult. The Respondent urged that the conviction was safe and asked the court to uphold the conviction.
29. Section 8(2) of the [Sexual Offences Act](#), under which the trial court had passed the sentence provides as follows:-
- “(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”
30. The dilemma created by this scenario in which the [Sexual Offences Act](#) provides for a specific sentence, but is silent about the age of the offender, can be dealt with by reference to section 191 of the [Children’s Act](#). That provision reads as follows:-
- “(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—
- a. By discharging the offender under section 35(1) of the [Penal Code](#) (cap. 63);
 - b. by discharging the offender on his entering into a recognizance, with or without sureties;
 - c. by making a probation order against the offender under the provisions of the [Probation of Offenders Act](#) (cap. 64);
 - d. by committing the offender to the care of a fit person, whether a relative or not, or a charitable children’s institution willing to undertake his care;



- e. if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
- f. by ordering the offender to pay a fine, compensation or costs, or any or all of them;
- g. in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
- h. by placing the offender under the care of a qualified counsellor;
- i. by ordering him to be placed in an educational institution or a vocational training programme;
- j. by ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act* (cap. 64);
- k. by making a community service order; or
- l. in any other lawful manner.

31. Still, there is the question as to what the trial court is to do in respect of minors who commit offences but attain the age of majority before sentencing. The statutory scheme stipulates that a child above sixteen years old can only be held in a Borstal institution for a maximum period not exceeding three years. However, section 191(1)(l) of the *Children's Act* provides for an offender to be dealt with in any other lawful manner.

32. In the case of *Daniel Langat Kiprotich v State* [2018]eKLR, where the court stated as follows:-

“Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a Borstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.

While these dilemmas call for a reform to our juvenile justice system to provide a more nuanced statutory scheme, I am persuaded, in following the Court of Appeal in the Dennis Cheruiyot Case and the JKK Case, that when faced with the situation such as the one we have in this case, the solution lies in section 191(1)(l) of the *Children's Act*: to deal with the offender in question in any other lawful manner. In this case, I have followed these two precedents regarding the right approach to sentencing in such cases. In addition, I have taken into consideration the following particular factors in the case at hand namely:-

- a. the fact that the petitioner was accompanied by five other people during the commission of the robbery;



- b. the fact that the assailants were armed – one with a gun and the rest with pangas and clubs;
- c. the fact that the Petitioner committed two separate offences of armed robbery;
- d. the fact that the offences took place on the highway which poses particular threat to road users; and
- e. the fact that the only mitigating circumstances are the fact that the Petitioner was a minor and that he was a first offender.”

33. In the case of *R v Dennis Kirui Cheruiyot* [2014]eKLR, the appellant was aged 20 years at the time of sentencing, but was 15 years when the offence was committed. He was convicted of murder. The court sentenced him to life imprisonment. On appeal, the Court of Appeal reduced the sentence to 10 years’ imprisonment after noting the dilemma a court faces in sentencing an offender who was a minor turned into an adult at the time of sentencing or at the time of an appeal.

34. The Court of Appeal in the case of *R v Dennis Kirui* (*supra*) relied on the case of *JKK v Republic* (2013) eKLR, a decision of the Court of Appeal sitting in Nyeri. There, a minor charged with murder was convicted and sentenced to death. The court found that the appellant was under 18 years of age at the time of committing the offence although at the time of the sentence four years had elapsed making him about 21 years of age. The court reduced the sentenced from the death penalty to a custodial sentence of 12 years. The Court reasoned as follows:

“The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence”

35. I have perused the appellant’s mitigation in the proceedings. He prayed that he be forgiven and for the court to be lenient to him. From the record at the time the trial court was imposing the sentence the appellant was 23 years old. It would appear that the appellant must have been aged below the age of 18 years or had just turned 18 years at the time of the commission of the offence as per the presentencing report which indicated that the appellant was born in 1998. The probation officer did not give the exact or apparent age of the accused. Additionally, the learned magistrate’s sentiments during the appellant’s application for review of bond terms indicated that the accused was a minor and that he deserved more lenient terms. The proceedings did not indicate the source of information and whether the court relied on the accused birth certificate or information from the accused or his surety.



36. In the case of *Jared Koita Injiri v Republic*, Kisumu Criminal Appeal No.93 of 2014 eKLR. The court held:

“In this case the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

The Appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the Appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* (2015), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court. [Emphasis added]

37. Given that this court cannot make an appropriate conclusion on the accused actual age at the time of the offence, conviction and during this appeal unless it does its own inquiry. Applying the principles from these authorities, I accordingly set aside the life sentence. I have considered that the appellant is a first offender, the gravity of the offences and the life-long trauma to the victim. The appellant shall now serve a term of ten years’ imprisonment. The sentence to run from the date of arrest

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 18TH DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Chege counsel for the State

Appellant in person

Court Assistant – Gitonga/Mwenda

