



**Kahiga v Republic (Miscellaneous Application E009 of 2023)  
[2023] KEHC 20166 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20166 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E009 OF 2023**

**SM MOHOCHI, J**

**JULY 7, 2023**

**BETWEEN**

**CALOS MATHENGE KAHIGA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is an application by way of letter dated May 30, 2023, from W. Kenda & Co. Advocates, contesting the correctness, legality or propriety of the learned trial magistrate's Hon. B. Rugut (PM)'s Conviction and Sentence made on the 29<sup>th</sup> day of May, 2023 at Molo who sentenced the applicant to a fine of Kshs. 10,000/= in default to serve a sentence two months' imprisonment.
2. The applicant attached in the aforesaid letter, his Kenya Certificate of Primary School Results Slip, his School Leaving Certificate and his Certificate of Birth all indicative that the applicant was and still is, a minor as per the *Children's Act*.
3. The application contests, the legality and constitutionality of the entire proceedings in Chief Magistrate's Court Criminal Case No.1177 of 2023 (R vs Calos Mathenge Kahiga)
4. This Application was virtually placed before the Court on the June 4, 2023. The Court by way of directions, called for the trial Court file in the Chief Magistrate's Court at Nakuru, Criminal Case Number E1177 of 2023 Republic Vs Calos Mathenge; that appropriate review orders shall thereafter be issued.
5. On the 3<sup>rd</sup> of July 2023 the Applicant was availed from prison, he informed the court he is a minor, unable to pay the fine, he prayed for probation to be able to continue his education and stated that his age was fifteen (15) years old.;



6. The power of High Court to call for records is provided for under Section 362 of the [Criminal Procedure Code](#): -
- “The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.
7. Section 364 of the [Criminal Procedure Code](#) provide for the Powers of High Court on revision as follows: -
- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may: —
    - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
    - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
    - (c) in proceedings under section 203 or 296(2) of the Penal Code, the [Prevention of Terrorism Act](#), the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#), the Prevention of Organized Crimes Act, the [Proceeds of Crime and Anti-Money Laundering Act](#), the [Sexual Offences Act](#) and the [Counter-Trafficking in Persons Act](#), where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
  - (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:  
Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
  - (3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the Court which imposed the sentence.
  - (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
  - (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.
8. The Trial records reveal that the applicant pleaded guilty to two counts of cheating contrary to section 315 of the [Penal Code](#), he was unrepresented, and the prosecutor did not bring the minority status of the applicant to the attention of the court. The court did not inquire on the age of the applicant; the applicant’s age was described as “a juvenile” in the charge sheet.
9. The trial court did not accord the applicant an opportunity to mitigate before sentencing and was thus denied a critical constitutional fair trial guarantee.



10. This court finds that the appellant was a minor when he committed the offence and was subjected to the criminal trial process as an adult being deprived off all his entitled protection of the law.
11. The *Constitution* of Kenya, the *Children's Act* as well as international instruments on rights of children are explicit on protection and rights of children especially when they come into conflict with the law; that such child in conflict. Such child is presumed to need protection and care.
12. The trial court and all courts are under obligation to address the needs of, inter alia, children and is bound by article 21(3) of the *Constitution* which provides as follows: -

“All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, and youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.”

13. Article 53 (2) of the *Constitution* provides for the overriding principle that; A child's best interests are of paramount importance in every matter concerning the child and this is in addition of the other guarantees as enshrined in article 53(1) including; the right of every child not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time; and separate from adults and in conditions that take account of the child's sex and age.
14. Section 186 of the *Children Act* provides for statutory guarantees to a child accused of an offence to include that: -

“Every child accused of having infringed any law shall—

- a. Be informed promptly and directly of the charges against him;
  - b. If he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;
  - c. Have the matter determined without delay;
  - d. Not be compelled to give testimony or to confess guilt;
  - e. Have free assistance of an interpreter if the child cannot understand or speak the language used;
  - f. If found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court;
  - g. Have his privacy fully respected at all the proceedings;
  - h. If he is disabled, be given special care and be treated with the same dignity as a child with no disability.”
15. Section 191 (1) of the *Children's Act* provide for the methods of dealing with child offenders 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.”
16. From the foregoing it is apparent the appellant was a child in need of protection when he committed the offence and stood trial and the trial court, failed in its cardinal duty, to afford him the requisite protection. The trial court ought to have inquired on the applicant's age prior to the plea.
17. The constitutional and statutory failing by the trial court, fatally contaminated the trial against the applicant.
18. What is the course available to the court in such circumstances? In other words, should the court order a retrial? The Court of Appeal in the case of *Abmed Sumar v R* (1964) EALR 483 offered the following guidance:
- “...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;.....”
19. The Court of Appeal in the case of *Samuel Wabini Ngugi v R* [2012] eKLR held: -
- “The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Abmed Sumar v R* (1964) EALR 483, the Court found as follows: -
- ‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case



but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person’

20. That decision was echoed in the case of *Lolimo Ekimat v R*, Criminal Appeal No 151 of 2004(unreported) when this Court stated as follows: -

“...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.”

21. In *Muiruri v Republic* (2003), KLR, 552 and *Mwangi v Republic* (1983) KLR 522 and *Fatehali Maji v Republic* (1966) EA, 343 the view expressed was that: -

“Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it.”

22. It is evident that the plea-taking process was not done in full compliance of the law and the same was prejudicial to the applicant. It is for that reason, the conviction and sentence that followed was illegal. Having pleaded guilty, the applicant cannot be availed a right to appeal and for that reason, I will revise the order of the lower court, quash the conviction and set aside the sentence imposed.

23. The applicant may forthwith, be released from custody, unless otherwise lawfully held.

**SIGNED, DATED and DELIVERED in open Court at Nakuru on**

**this 7<sup>th</sup> July 2023**

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**Mohochi S.M**

**JUDGE**

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