



**PGW v Rebuplic (Criminal Appeal E009 of 2022)  
[2023] KEHC 20131 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20131 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E009 OF 2022  
FN MUCHEMI, J  
JULY 13, 2023**

**BETWEEN**

**PGW ..... APPELLANT**

**AND**

**REBUPLIC ..... RESPONDENT**

*(Being an Appeal from the judgment and the sentence of Honourable V. S. Kosgei RM, in Karatina PM, SOA Case No. 172 of 2019 delivered on 28th February 2022)*

**JUDGMENT**

**Brief Facts**

1. The appellant lodged this appeal against the entire judgement of the Principal Magistrate Karatina whereas he was convicted of the offence of defilement in Count II and sentenced to serve life imprisonment. He was also convicted of the offence of assault causing bodily harm in Count 1 but did not appeal in regard to this count.
2. Being dissatisfied with the said conviction and sentence. The appellant preferred an appeal on the following grounds set out in summary as follows:-
  - a. That the Learned Trial Magistrate erred in law and in fact in finding that the prosecution proved its case beyond reasonable doubt;
  - b. That the Learned Trial Magistrate erred in law and in fact in failing to consider that the matter was factually and materially conflicted, which discrepancies went to the root core of the matter.
3. This appeal was disposed by way of written submissions.



### **Appellant's Submissions**

4. The appellant submits that he is mentally disabled and/or incapacitated. He relies on section 162 (2) of the *Criminal Procedure Code* and the case of *Karisa Masha v Republic* (2015) eKLR and submits that the trial court ought to have determined that he is a person of unsound mind and if it was satisfied that he was and was incapable of making a defence, the court ought to have postponed the proceedings. The appellant further relies on section 162(5) of the *Criminal Procedure Code* and submits that he ought to have been detained in a mental hospital or any other suitable place of custody through an order made by the president. He further submits that in the course of detention, a medical officer is obligated to forward a certificate confirming the same to the Director of Public Prosecutions.

### **Respondent's Submissions**

5. The respondent in opposing the appeal submitted that the prosecution proved the ingredients of the offence of defilement. Further that the victim, PW3, testified that on September 10, 2021 that she was aged 11 years meaning that she was aged five (5) years at the time of the incident. PW1, the grandmother to the victim corroborated that evidence and PW4 produced the victim's birth certificate which showed that the victim was born on October 24, 2010.
6. The respondent further submitted that the element of penetration was proved by the evidence of the victim and that of PW2. The victim testified that on the material day, she was coming from the shop where her grandfather bought her milk and phone credit. As she was walking home she met the appellant who chased her to a bush and assaulted her using a stick to hit her on her head and legs. The appellant then removed her innerwear and threatened to put the stick he was holding in her vagina and anus as he defiled her. The appellant then took the victim's panties and used it to wipe himself on his private parts and threw the panty on the tree. The victim further testified that the appellant threatened her that he would cut and throw her in the toilet if she told her grandmother what happened. The respondent submits that although the victim referred to the stick as what was used to penetrate her, it is evident that the appellant penetrated her using his penis because he wiped himself after the act. Further, the respondent submits that the victim could not have seen exactly what penetrated her because her eyes were closed.
7. According to the respondent, the evidence of penetration was corroborated by that of PW2, Dr. Stephen Nderitu, who testified that when he examined the victim, there were injuries on her vaginal wall, her hymen was torn and that she had lacerations on the anus.
8. On the identification of the perpetrator, the respondent submitted that the appellant was known to the victim because he used to visit them in their home and to fetch firewood and water for them. The respondent submits that this was a matter of recognition because the victim was not meeting the appellant for the first time.
9. The respondent further submits that Dr. Stephen Nderitu was the expert witness who testified and conducted the medical examination of the victim after the incident. As such, his evidence was factual and proved the fact that the victim was defiled as it corroborated the victim's testimony. The respondent thus argued that the prosecution had proved its case beyond reasonable doubt and that the appellant was rightly convicted. As such, she prayed that this Honourable court dismiss the appeal.

### **Issues for determination**

10. The main issues for determination are:-



- a. Whether the trial court complied with the law in particular sections 162 and 163 of the *Criminal Procedure Code*.
- b. In the event that the law was complied with, whether the prosecution proved its case beyond reasonable doubt.

## The Law

11. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

12. Similarly in the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R* (1957) EA 570). 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 finding and 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, see *Peters v Sunday Post* [1958]EA 424.” This was also set out in the case of *Kiilu & another v Republic* [2005] KLR 174.

### A. Whether the appellant was properly tried in accordance with the law

13. The appellant argues that he is mentally disabled and/or incapacitated and therefore the court ought to have followed the procedure as laid out in section 162 (2) of the *Criminal Procedure Code*. Section 162 (1) and (2) of the *Criminal Procedure Code* stipulates:-

1. When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.
2. If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

Section 163 of the Criminal Procedure Code stipulates:

(1)If a person detained in a mental hospital or other place of custody under section 162 or section 280 is found by the medical officer in charge of the mental hospital or place to be



capable of making his defence, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions.

(2)The Director of Public Prosecutions shall thereupon inform the court which recorded the finding concerning that person under Section 162 whether it is the intention of the republic that proceedings against that person shall continue or otherwise.

(3)In the former case, the court shall thereupon order the removal of the person from the place where he is detained and shall cause him to be brought in custody before it , and shall deal with him in the manner provided by Section 164: otherwise the court shall forthwith issue an order that the person be discharged in respect of the proceedings brought against him and released from custody and thereupon he shall be released, but the discharge and release shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

14. I have perused the trial court proceedings and noted that the court took cognisance of the accused person's mental status at the onset. The learned magistrate then deferred plea taking and ordered that the accused be taken for mental assessment. On March 22, 2019, the trial court received a mental assessment report from Nyeri Provincial General Hospital dated 14/3/2019 indicating that the accused was of normal mental status and fit to plead. However the report recommended that the accused required treatment and that he ought to be monitored for signs of relapse. The trial court was not satisfied as to the contents of the report and directed that the appellant person be taken to Kenyatta National Hospital for another mental assessment test.
15. Due to the high costs of taking the accused to Kenyatta National Hospital, the orders were vacated and the accused person was taken to Embu Level 5 Hospital where the accused was diagnosed as having a mental relapse and thus he was declared not to be fit to stand trial. The court directed that the accused be treated at Mathari Mental hospital until such time he would be fit to stand trial. A report dated 4<sup>th</sup> November 2019 from Mathari National Teaching and Referral Hospital indicated that the accused was fit for trial and the hospital issued a Certificate of Capability to make Defence pursuant to section 163(1) of the *Criminal Procedure Code*. The appellant was thus supplied with the charge sheet and the witness statements in preparation for the trial. Pursuant to section 164 of the *Criminal Procedure Code*, the case proceeded for hearing on January 17, 2020. During the hearing, the court noted that the appellant was still speaking incoherently which was a sign of relapse. The appellant then continued with treatment as directed by the court.
16. On perusal of the defence, it is evident that the appellant was still confused and his narration of events was uncoordinated. Before putting the appellant on his defence, the trial court had directed that a progress report be filed. The record shows that no such report was filed and that the court did not pursue the matter further. Instead, the appellant was put on his defence and was subsequently found guilty of the offence and convicted accordingly. He was sentenced as provided by the law.
17. The failure of the court to ensure that the appellant's mental state confirmed before the appellant gave his defence leads to the conclusion that his mental status was unknown at the time he gave his defence. Despite proof of the actus rea, in a criminal trial, it is critical and a legal requirement as well that mens rea be proved for an accused to be convicted of the offence. In this case, the court ought to have called for expert evidence to confirm that the appellant was mentally fit to plead before it proceeded to with the defence case. As such I reach a conclusion that sections 162 and 163 of the *Criminal Procedure Code* was not complied with in the trial.
18. It is my finding that due to the non-compliance with the law, the magistrate conducted a mistrial which renders the conviction and sentence invalid. Consequently, the conviction is hereby quashed and sentence set aside



19. This matter is hereby remitted to Karatina Principal Magistrate court for retrial. Due to the time taken in the earlier proceedings and in this appeal, the Principal Magistrate shall have the trial conducted and concluded within four (4) months

20. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**F. MUCHEMI**

**JUDGE**

**Judgement delivered through video link this 13<sup>th</sup> day of July 2023**

