



**Mburu v Republic (Criminal Appeal E039 of 2023)  
[2024] KEHC 14146 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14146 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E039 OF 2023  
JM NANG'EA, J  
NOVEMBER 7, 2024**

**BETWEEN**

**DANIEL WAINAINA MBURU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrate's Court at Nakuru (Hon. P.A Ndege-SPM ) delivered on 3/10/2023 in Sexual Offence Case No. E009 of 2022.)*

**JUDGMENT**

**Background to the Appeal**

1. The appellant is dissatisfied with the judgement of the above stated lower court before which he was convicted of the offence of sexual assault contrary to section 5 (1) (A)(1)(2) of the *Sexual Offences Act* No. 3 of 2006 (sic), as per charge sheet presented to the court on 7/2/2022, and sentenced to serve out a period 13 years in prison.
2. The particulars of the charge state that on 3/2/2022 at [Particulars Withheld], within Nakuru County, the appellant unlawfully used his fingers to penetrate the anus of MN He denied the charge.
3. After a full hearing, the trial court convicted the appellant of the charge and sentenced him to 13 years imprisonment.
4. The grounds of appeal as per "Petition of Appeal" filed on 17/10/2023 may be condensed as follows:
  - a. That the learned trial magistrate erred in law and fact by failing to inform the appellant of his right to be represented by Counsel, in violation of Article 50 (2) (9), (h) and (i) of *the Constitution* of Kenya 2010.



- b. That the learned trial magistrate erred in law and fact by convicting the appellant against the weight of the evidence.
  - c. That the learned trial magistrate erred in law and fact by finding that the charge was proven beyond reasonable doubt.
  - d. That the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant.
  - e. That the learned trial magistrate erred in law and fact by failing to warn himself of the danger of convicting the appellant upon uncorroborated evidence.
- And
- f. That the learned trial magistrate erred in law and fact in failing to afford the appellant a fair trial by ensuring that relevant witness statements and documents were supplied to him, and further by not allowing him to call witnesses in his defence and offer mitigation statements before sentencing.
5. The appellant therefore prays that the appeal be allowed; his conviction and sentence set aside and that he be acquitted of the charge.

### **Guiding Principles**

- 6. It is trite law that a first appellate court has the duty of re-assessing or re-evaluating the evidence presented before the trial court and arrive at its own conclusions on both matters of fact and law while being mindful of the fact that unlike the lower court it did not have the advantage of watching the demeanour of witnesses {( see the case of Okeno V. Republic ( 1972) EA 32}.
- 7. In Pandya V. Republic (1957) EA 336, it was held that an appellant “is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the judge or magistrate with such material as it may have decided to admit. The appellate court must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it. When the question arises as to which witness to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness, but there may be other circumstances quite apart from manner and demeanor which may show whether a statement is credible or not.....”.

### **Evidence adduced before the Trial Court.**

- 8. The prosecution evidence as per the trial court’s record is that MN was a PP1 pupil at [Particulars Withheld]. She did not know her age. Giving sworn evidence after voire dire examination, she stated that she knew the appellant who lived at S’s home and that he once bought her “mandazi”. She referred to him as W. The appellant allegedly inserted his fingers in her anus on a date she didn’t state. She related the incident to her mother who took her to hospital. M.N also seemed to tell the trial court that it was one P who had made the report to her mother. Under cross-examination by the appellant and the court, the subject said that P lied to her mother that the appellant penetrated her, but on re-examination by the prosecution Counsel, she changed her statement to say that the appellant actually inserted his fingers in her anus.
- 9. The said P (PW2) aged 6 also testified on oath giving his full name as PN. He told the court he was a resident of [Particulars Withheld] and a class 2 pupil at the same school as MN On a day he could not



also tell, his mother went away and left her with his siblings, MN and W. It would appear that he also left home thereafter and went to a road where he saw W who is his brother. The two had then returned home together and W bought them mandazi. According to PW 2, a certain lady told his mother when she returned home that evening that W inserted fingers in M.N's anus. He disputed the claim saying that he had only bought them mandazi.

10. MN's mother testified as PW3. She told the court that she is a resident of [Particulars Withheld] On 3/2/2022 in the evening upon her returning home after visiting with her mother, her children, PW2 and MN, related to her that a bar operator called Mama F advised them to report that W inserted his fingers in MN's anus. Revealing that W is her nephew with whom she resided at the same Trading Centre, PW3 reported the incident to the police and took her daughter to Lare Hospital for medical examination. When cross-examined by the appellant, PW3 stated that upon conducting her own investigations she established that the appellant did not commit the act.
11. Medical examination of M.N didn't yield any obvious abnormalities in her anal region as per medical examination report dated 6/2/2022 tendered by PW4, a Clinical Officer.
12. The appellant was put on his defence after the close of the prosecution case. As is his right, he chose to remain silent and called no witnesses.

### **Appellant's Submissions.**

13. Learned Counsel for the appellant argued inter alia that he was not accorded a fair trial guaranteed by Article 25 (c) of *the constitution* of Kenya 2010 as alleged in the Memorandum of Appeal and therefore the trial is a nullity. It is contended that the appellant was entitled to be supplied with evidence the prosecution intended to rely upon in advance of trial, a duty the prosecution is said to have failed to discharge. In this regard, Counsel placed reliance on case law in Joseph Ndung'u Kagiri (2016) eKLR.
14. . The appellant further submits that all the essential ingredients of the sexual assault as charged were not established. His advocates cite the Court of Appeal in John Irungu V. Republic (2016) eKLR where it was held that in a case of sexual assault, penetration extends beyond penetration involving genital organs only but entails "penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person, or even by objects manipulated for that purpose". It is the defence submissions that penetration of M.N's anus as alleged herein was not established in light of the medical evidence presented.
15. The prosecution evidence is also attacked for being riddled with contradictions and thus insufficient to sustain a conviction. According to the appellant, the proviso to section 124 of the *Evidence Act* which empowers the court to convict in sexual offences on the basis of the evidence of the victim only if it "is satisfied that the victim is telling the truth" implicating the accused, cannot aid the prosecution either. The trial court is faulted for not analyzing the alleged victim's evidence in this regard and reaching its conclusion.
16. The defence points out the prosecution's failure to call the bar owner who was said to have been privy to the appellant's criminal act. The court is told that the default should invite the court to make a finding that the evidence, if presented, would have been adverse to the prosecution case as observed in the judicial decision in Nicholas Kipng'etich Mutai (2020) eKLR cited in the defence submissions. The appellant further submits that all the essential ingredients of the offence have not been proven.



## Respondent's Submissions in Reply.

17. The Prosecution Counsel concedes that the record does not show that the appellant was informed of his right to legal representation, hence his apparent inability to effectively cross-examine prosecution witnesses. Counsel reckons that this is a serious offence that merited legal representation of the appellant in the interest of justice. The court is referred to the judicial determination in Joseph Kiema Philip V. Republic (2019) eKLR which directs inter alia that the record of a trial court must indicate that “the accused was informed of his right to legal representation and if it is the case that he cannot afford an advocate, one may be appointed for him at the expense of the state”. The prosecution further points out that the appellant was not supplied with documents necessary for him to prepare for trial as contended by the defence.
18. For the stated reasons, the prosecution concurs with the defence that the appellant's right to fair trial which includes legal representation guaranteed in Article 50 (2) (g) of *the Constitution* was infringed. The State therefore concedes the appeal. Nevertheless, the Prosecution Counsel thinks that the Republic has a strong case on the merits as medical evidence is said to prove penetration of the complainant's anus and that recognition of the appellant as the perpetrator was established. According to the prosecution, if there are any inconsistencies in their evidence the same are immaterial and cannot vitiate a conviction. A retrial is thus recommended so as not to occasion a miscarriage of justice.
19. In support of the argument for a retrial, reference is made to case law in Samuel Wahini Ngugi V. Republic (2012) eKLR, Ahmed Sumar V. R(1964) EALR 483 and Lolimo Ekimat V. Republic (unreported). Jurisprudence that emerged from these decisions is 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. Where, however, conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not follow that a retrial should be ordered. The superior hastened to add that the court's decision will depend on the particular facts and circumstances of each case before it.

## Analysis and Determination

20. I will consider all the grounds of appeal together. The following issues arise for determination:
  - (a) Whether the appellant's constitutional right to fair trial under Article 50 of *the constitution* was infringed.
  - (b) Whether the prosecution proved the appellant's guilt before the trial court beyond reasonable doubt.
  - (c) Is retrial warranted in the circumstances of the case?
21. It is common ground that the appellant did not have the benefit of legal counsel and was not informed of his right in that behalf during his trial in the lower court. The record does not also show that he was provided with the prosecution witnesses' statements and copies of documents the prosecution exhibited at trial. Article 50 (2) (g) of *the Constitution* provides that every person has the right to fair trial including the right “to choose, and be represented by, an advocate, and to be informed of this right promptly”. In sub Article (2) (i), every accused person is guaranteed the right “to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence”.
22. By dint of Article 25 (C) of *the Constitution*, the right to fair hearing is one of only of four sacrosanct rights that cannot be abrogated under any circumstances. As held in the cited cases, the trial court was not only obligated to accord the appellant fair trial as stated but also record compliance in that regard



for the benefit of courts with supervisory jurisdiction such as this court. The court does not therefore have difficulty in holding, which I hereby do, that the appellant's constitutional right to fair trial was violated. Issue (a) as framed is determined in the affirmative.

23. After setting out the prosecution evidence, the trial court only stated that there was sufficient evidence proving the charge and proceeded to convict the appellant pursuant to the provisions of Section 215 of the Criminal Procedure Code. There is no analysis of the evidence and no reasons are given for the decision.
24. Section 169 (1) of the Criminal Procedure Code enacts that every judgement "shall contain the point or points for determination, the decision thereon and the reasons for the decision.....". The trial court's judgement neither contains points/issues for determination nor reasons for the decision to convict the appellant and so it is not in compliance with law.
25. Regarding the merits of the appeal, M.N gave inconsistent evidence on the appellant's complicity as shown above. PW2 and PW3 have exonerated the appellant. One Mama F who allegedly implicated the appellant was never called to testify. Section 143 of the *Evidence Act*, however, provides that "no particular number of witnesses are required to prove any given fact". Indeed evidence is not counted but rather it is weighed. Even the evidence of one witness may be sufficient to prove a fact if the evidence is credible (see also case law in Benjamin Mbugua Gitau eKLR V. Republic ( 2011)).
26. Having so noted, the said Mama F was a crucial independent witness who would have helped shed light on the appellant's guilt or innocence given that she was the one who reportedly sounded the alarm. As submitted by the defence Counsel, the appellant would be justified in the circumstances to deem that the witness' evidence would have been adverse to the prosecution. The proviso to section 124 of the *Evidence Act* alluded to above, which was amplified in JWA V. Republic (2014) eKLR, does not also aid the prosecution given M.N's unreliable evidence. It is therefore evident that the defects in the record of the trial court notwithstanding, the prosecution evidence falls short of proof of the offence charged beyond reasonable doubt.
27. Is retrial necessary? As held in Haji V. Republic (Criminal Appeal No. E020 of 2023), Neutral Citation; {2023}KEHC 26948 (KLR) which cites with approval other cases including Mwangi V. Republic (1983) KLR 552, retrial may be ordered if proceedings before the lower court are illegal or defective. Retrial cannot be ordered for reason of insufficiency of evidence to sustain a conviction as that would be tantamount to allowing the prosecution to fill gaps in its case. The case law further lays it down that retrial cannot be authorized unless the appellate court is of the opinion that on a proper consideration of admissible or potentially admissible evidence, a conviction might result. Where the defects necessitating retrial were not caused by the prosecution as in the instant case, retrial may be ordered (see the case of Samuel Wahini Ngugi supra relied upon by the Prosecution Counsel).
28. It is indeed the law that among other circumstances retrial cannot be ordered if on proper consideration of evidence adduced for the prosecution, a conviction might not result. Contrary to the Prosecution submissions, the medical evidence proffered by PW4 does not prove penetration. The evidence of the other prosecution witnesses is inconsistent in material respects. In the circumstances it cannot be reasonably expected that a conviction would ensue if the case is reheard. No purpose would therefore be served by retrial.

### **Determination**

29. The upshot is that all the grounds of appeal succeed except ground (d). There is no basis for the contention that the trial court shifted the burden of proof to the appellant.



30. The appeal is accordingly allowed. The appellant's conviction and sentence are set aside and substituted with an order acquitting him of the charge pursuant to section 215 of the Criminal Procedure Code. He be set at liberty unless otherwise lawfully held.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024 IN THE PRESENCE OF:**

**J.M NANG'EA, JUDGE**

The Prosecution Counsel, Ms Sang

The Appellant's Advocate, Mr. Mbiyu

The appellant, present

**J.M NANG'EA, JUDGE**

