



REPUBLIC OF KENYA



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**Ajwang' v Republic (Criminal Appeal E012 of 2024)  
[2024] KEHC 15558 (KLR) (3 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E012 OF 2024  
RE ABURILI, J  
DECEMBER 3, 2024**

**BETWEEN**

**JOSEPH OCHIENG AJWANG' ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment, conviction and sentence in Winam SPM SO Case No. E035 of 2022 delivered on 31/3/2023 by Hon. C.N.C Oruo, Senior Resident Magistrate)*

**JUDGMENT**

1. The appellant herein Joseph Ochieng Ajwang' was charged with the offence of defilement contrary to section 8 (1) (3) of the [Sexual Offences Act](#) No. 3 of 2006 the particulars being that on the 13<sup>th</sup> May 2022 at [Particulars Withheld] within Kisumu County intentionally caused his penis to penetrate the anus of XYZ, a child aged 14 years old.
2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#).
3. In the second Count, the appellant was charged with committing an unnatural offence contrary to section 162 (a) of the Penal Code the particulars being that on the 13<sup>th</sup> May 2022 at [Particulars Withheld] within Kisumu County intentionally caused his penis to penetrate the anus of XYZ, a child aged 14 years old.
4. The prosecution called nine (9) witnesses after which the appellant was placed on his defence.
5. In the impugned judgement, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt and that the appellant's defence amounted to a mere denial and afterthought. The trial magistrate convicted the appellant and subsequently proceeded to sentence the appellant to serve 20 years' imprisonment.



6. Aggrieved by the sentence imposed, the appellant filed his petition of appeal dated 14<sup>th</sup> May 2024 raising the following grounds of appeal;
  - a. That the trial learned magistrate erred both in law and fact by failing to prove the ingredients forming the offence beyond reasonable doubt.
  - b. That the trial learned magistrate erred both in law and fact by relying on evidence as a whole without proper analysis.
  - c. That the trial learned magistrate erred both in law and fact deliberately resting the burden of proof to me contrary to section 107 (1) of the *Evidence Act*.
  - d. That the trial learned magistrate erred both in law and fact by imposing a mandatory sentence without considering that I was a first offender and a sole bread winner in my family.
  - e. That the trial learned magistrate erred both in law and fact by failing to evaluate the veracity and the circumstances that surrounded the offence in question.
  - f. That the trial learned magistrate erred both in law and fact by wholly relying on the evidence of medical practitioner that was not water-tight for a lawful conviction.
  - g. That the trial learned magistrate erred both in law and fact by showing, failing to consider my ALIBI defense statement that was not shaken by the prosecution.
  - h. That the trial learned magistrate erred both in law and fact by failing to consider that the investigation tendered was shoddy and flimsy regarding the production and authenticity of birth certificate related to its content.
  - i. That I wish to be present during the hearing of the appeal.
7. In response the prosecution opposed the appeal entirely. Mr. Marete Principal Prosecution Counsel prayed that the sentence be enhanced to more than 20 years due to the special relationship the appellant had with the victim who was his student.
8. The appellant submitted in in writing and orally.

### **The Appellant's Submissions**

9. The appellant submitted that his rights were violated as the trial court failed to explain to him his rights before the commencement of the trial. He testified that he was given the relevant documents after the testimony of PW1. It was his submission that the prosecution failed to disclose all the evidential material they sought to rely on and his right to legal representation.
10. It was the appellant's submission that the investigations carried out was shoddy and further the age of the complainant was not proved beyond reasonable doubt. The appellant further submitted that the PRC form presented in court was fraudulently obtained as it had not stamp to show that it was obtained from a recognized Hospital/Health facility.
11. The appellant submitted that the learned magistrate failed to consider his alibi defence that remained unshaken by the prosecution.
12. It was further submitted that the trial court declined to order for a pre-sentencing report to establish the appellant's conduct before it proceeded to impose on him a mandatory sentence.
13. The appellant submitted that the charge sheet was amended to fix him.



## **The Respondent's Submissions**

14. Mr. Marete for the State submitted opposing the appeal on conviction and sentence as all ingredients of the offence were proved beyond reasonable doubt.
15. On the age of the complainant, it was submitted that the same was proved through PExh 1, the Birth Certificate.
16. It was further submitted that the complainant knew the appellant well as he was his teacher who planned and fraudulently obtained leave form for the complainant to leave school. He submitted that the form had only one stamp hence it was not properly filled.
17. Mr. Marete submitted that penetration was proved through the testimony of the complainant who described how the incident went down which testimony was corroborated by the testimony of the doctor who testified on the lacerations in the complainant's anus.
18. Mr. Marete further submitted that proceedings were supplied to the appellant and he actively participated in the trial. He further submitted that the charge sheet was not defective and that there was no amendment of the same after closure of the prosecution case. Mr. Marete testified that P Ex 1 was stamped once.
19. Mr. Marete further submitted that the sentence was too lenient considering the relationship between the appellant and the complainant.

## **Analysis & Determination**

20. The role of the first appellate court is now well settled as was stated in the case of *Okeno v R* [1977] EALR 32 and later in *Mark Oiruri Mose v R* [2013] eKLR among other many decisions that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
21. The evidence before the trial court was as follows: PW1, the complainant was taken through a *voire dire* examination and found understanding of the nature of an oath and so he gave sworn testimony. It was his testimony that he was 14 years and a student at Oriwo Boys Secondary where the appellant was a teacher.
22. It was his testimony that on the 13<sup>th</sup> May 2022 the appellant sent a student to call him from class and so he proceeded to the science department where he found the appellant alone. He testified that the appellant asked him to accompany him to Kisumu for the weekend as he had no classes and he agreed. The complainant testified that the appellant informed him that he would procure a leave chit from the teacher from the teacher on duty which the appellant eventually did and that the chit provided for medication as the reason to leave school.
23. The complainant testified that he changed into his long trouser and left school and found the accused at the gate. He testified that at the gate, the watchman queried him as to why his leave chit only had one stamp instead of two but the appellant intervened and they left together. It was his testimony that they proceeded to Migosi Kisumu at the appellant's house where the appellant gave him civilian clothes to change into.
24. The complainant testified that he watched some shows on the appellant's laptop, drank some soda and after sometime the appellant came and switched off the laptop and told him to go to sleep. He testified



- that they slept on the same bed and that he woke up with pain in his anus and that the accused's penis was in his anus. The complainant testified that he pushed the appellant off and went to the toilet where the appellant followed him and locked him in.
25. It was his testimony that the following morning, he tried to leave but the house was locked from inside, that he only managed to escape when he accompanied the appellant to Migosi to have his laptop repaired and he subsequently managed to reach his relative who took him to St. Monica Hospital from where he was referred to JOOTRH. He testified that they were told to report the incidence to the police with whom they returned to the appellant's house where his clothes were recovered.
  26. PW2, AOO the complainant's cousin corroborated his testimony regarding receiving the complainant's call on the 14<sup>th</sup> and subsequently taking him to the hospital and reporting the incident to the police.
  27. PW3 POO a teacher at Oriwo Boys High School testified that on the 13<sup>th</sup> May 2023 he was among the teachers on duty. It was his testimony that on that day the appellant approached him telling him that his relative, the complainant had an eye problem and needed spectacles so he requested for a medication form from the nurse which the appellant provided and he filled his part and returned the same to the appellant. In cross-examination PW3 testified that when a student goes to spend out there must be two signatures as the head teacher is also to counter sign.
  28. PW4 LJO testified that he was the security guard on duty at Oriwo Boys High School on the 13<sup>th</sup> May 2022 stationed at the main gate when the complainant approached him with a gate pass. He testified that the chit had only one stamp for the teacher on duty instead of two to include that of the principal or deputy so he sent him back but the appellant intervened and informed him that the complainant was going for treatment.
  29. PW6 BAO, the school nurse at Oriwo Boys High School testified that she never treated the complainant nor did she recommend that he go for medical attention. In cross-examination, she testified that she is the one who recommends to the teacher on duty for a student to go for treatment.
  30. PW7 Austine Owino testified that he is a clinical officer and that he filled the PRC form for the complainant after examination. He testified that on examination he saw bruises on the complainant's anus.
  31. PW8 Calvin Okoth Odhiambo testified that he filled the complainant's P3 form. He testified that on examination of the complainant's anus he noticed bruises and lacerations at 6 – 9 o'clock.
  32. PW9 the investigating officer reiterated the complainant's testimony and that following the complainant's report police officers went and arrested the appellant where they recovered the complainant's school clothes. PW9 produced that complainant's Birth Certificate as P Exh 8 that showed the complainant was born on the 21<sup>st</sup> July 2007.
  33. In his defence, the appellant gave sworn testimony denying the charges against him. He testified that on the 13<sup>th</sup> he was at school when the complainant used his phone to call home for medication and later told him that he was allowed to go home for medication by his parents. The appellant testified that he spoke to the teachers on duty to facilitate the permission after which he left the school at 1300hrs for Kisumu.
  34. The appellant testified that they eventually boarded the same vehicle with the complainant and that they parted ways at Kisumu with the complainant heading to Manyatta while he proceeded to his house in Migosi.



35. He testified that at 1900hrs, the complainant knocked at his house and informed him that he had not found the person he was going to stay with so he allowed him to stay and at 9pm instructed him where to sleep as he went to his bedroom where he spent the night till morning.
36. The appellant testified that when he woke up he went to shower and on returning did not find the complainant as well as his laptop. He testified that the complainant returned at 7pm with police officers and he was subsequently taken to Kondele Police Station and charged.
37. DW2, KKK testified that on the 13<sup>th</sup> May 2022 he came to collect clothes at the appellant's home. He testified that he slept at the appellant's place from the 12<sup>th</sup> May 2022 and left on the 14<sup>th</sup> May 2022.

### **Analysis and Determination**

38. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant who is self-represented and the prosecution counsel appearing for the Respondent State. I find the following issues for determination:
  - a. Whether the appellant's constitutional rights were breached.
  - b. Whether the prosecution's case against the appellant herein was proved beyond reasonable doubt and
  - c. Whether the sentence imposed was excessive and harsh or unconstitutional.
39. The appellant submitted that his constitutional rights were violated as the trial court failed to explain to him his rights before the commencement of the trial; that he was only given the relevant documents thus that the prosecution failed to disclose all the evidential material they sought to rely on and that his right to legal representation.
40. Article 50(2)(j) provides: -
  - “(2) Every accused person has the right to a fair trial, which includes, the right-(j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;..”
41. The Supreme Court of India in *Natasha Singh v CBI*[2013] 5 SCC 741 had this to say concerning the right to a fair trial:

“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized”.
42. The operative words in article 50(2)(j) are; “to be informed” and “to have reasonable access” to “the evidence the prosecution intends to rely on”.
43. In *Joseph Ndungu Kagiri v Republic* [2016] eKLR, Mativo J stated:

“Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused



person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence. The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling *the Constitution* and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.”

44. The court record reveals that on the 20<sup>th</sup> May 2022 when the matter first came up for hearing, the prosecution indicated that they had supplied the appellant with the witness statements. The court proceeded to take the evidence of the complainant and the appellant subsequently cross-examined him.
45. When the suit came up for mention on the 3<sup>rd</sup> June 2022, the appellant informed court that he was yet to be supplied with a P3 form, charge sheet and treatment notes and the prosecution noted that they would supply the same at the next mention date.
46. The hearing proceeded on the 6<sup>th</sup> July 2022 and it is not clear if the documents sought were given to the appellant, but the appellant took part in the proceedings and even proceeded to carry out his defence by cross-examining the prosecution witnesses. The appellant cannot therefore turn around and tell this court that his right to be supplied with witness statements was violated which application he failed to make before the trial court and further, as explained hereinabove, the appellant was well conversant with the proceedings which he took part in.
47. The appellant also alleged that he was not informed of the right to legal representation, Article 50(2)(g)(h) of *the Constitution* should be read together with the *Legal Aid Act*, No 6 of 2016.
48. The preamble to the *Legal Aid Act* states it to be

“ An Act of Parliament to give effect to articles 19(2), 48, 50(2)(g) and (h) of *the Constitution* to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes.”
49. The *Legal Aid Act* operationalizes Article 50(2)(g)(h) of *the Constitution*. Article 50(2)(g)(h) of *the Constitution* and the *Legal Aid Act* deal with access to justice, by providing legal aid services to indigent persons in Kenya. They provide for inclusion, non-discrimination and protection of marginalized groups. Sections 3 and 4 of the *Legal Aid Act* are particularly to the point.
50. Section 43 of the *Legal Aid Act* imposes a duty on the court, before whom an unrepresented person is presented in court, especially for plea-taking, to comply with article 50(2)(g)(h) of *the Constitution*, by informing that person of his right to legal representation of his own choice, and where substantial injustice is likely to arise, to inform him of his right to be assigned an advocate by the state, and where the accused is found to require such aid, to inform the National Legal Aid Service to provide legal aid service to the accused person.
51. According to section 43(1A) of the *Legal Aid Act*, in determining whether substantial injustice is likely to occur, the court should take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend himself.



52. Informing an accused person of his rights, under article 50(2)(g)(h) of *the Constitution*, and assessing whether the accused requires legal aid from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. These rights are constitutional imperatives, commanded by *the Constitution*, and trial courts have a duty to ensure that they comply with the same such that failure to comply ought to automatically render the subsequent trial null and void, for violation of the accused person's guaranteed constitutional right to fair hearing.
53. The appellant was charged with the offence of defilement, contrary to section 8 (1) as read with section 8(3) of the *Sexual Offences Act*, where the punishment is pretty stiff, attracting a minimum of 20 years imprisonment.
54. That penalty clearly points to substantial injustice occurring, where the accused could face a long jail term, should he be convicted, and should attract the benefit of Article 50(2)(g)(h) of *the Constitution*, particularly where the accused person is indigent. The severity of the charge and the penalty should be the trigger for the trial court to inform the accused of those rights, and to especially consider whether the accused would have capacity to defend himself, in terms of being capable of conducting his own defence, or to instruct an Advocate of his own choice.
55. I have carefully scrutinized the trial court record. When plea was taken on 20<sup>th</sup> May 2022, Article 50(2)(g)(h) of *the Constitution* and section 43 of the *Legal Aid Act* were not complied with.
56. The trial court did not inform the appellant of his right to legal representation and to legal aid services by the State, in case he was indigent. The court did not consider whether there was a likelihood of the appellant suffering substantial injustice, along the lines of section 43(1A) of the *Legal Aid Act*, on account of severity of the charges and sentence, the complexity of the charge and the capacity of the appellant to defend himself.
57. The failure to comply with the fair trial principles in article 50(2)(g)(h) of *the Constitution* and section 43 of the *Legal Aid Act* meant that the appellant was subjected to an unfair trial. Article 2(4) of *the Constitution* provides that:

“ ... any act or omission in contravention of this Constitution is invalid.”
58. In my view, the omission or failure to comply with article 50(2)(g)(h) of *the Constitution* amounted to a contravention of that provision of *the Constitution*, and rendered the entire trial unfair and therefore invalid. The failure to comply with section 43 of the *Legal Aid Act* meant that the objectives of that Act were not met, in terms of making justice accessible to all, creating a level playing ground for all, ensuring that the indigent in society get to access the same facilities as those available to persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.
59. Should I overlook the non-compliance on the basis that the appellant did not suffer prejudice as a result? Whether the appellant suffered prejudice or not, from the non-compliance, is not even an issue, for the failure or omission to obey constitutional commands by itself that renders the prosecution invalid. *The Constitution* is the supreme law, and what it commands must override everything else.
60. In view of the failure or omission to comply with the constitutional dictates, I agree with the appellant, that his trial did not meet the constitutional threshold, which, by dint of article 2(4) of *the Constitution*, reduced it to a nullity.



61. On whether this Court should order a retrial, in the case of Ahmed Sumar vs Republic (1964) EA, the Court of Appeal set down some of the criteria that the court should consider before ordering a retrial. The court stated:

“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.”

62. From the facts read out to the appellant, it appears that the potentially admissible evidence is likely to result in a conviction. The appellant was sentenced on 31<sup>st</sup> March 2023, about one year eight months ago. He has not served a substantial part of the 20years imprisonment. In my view, he will not suffer any prejudice if a retrial is ordered.
63. The court has to consider whether indeed the complainant was violated and justice needs to be done both for appellant and complainant so that if the appellant is found to have committed the offence, then he should face the full force of the law.
64. I find that this is a proper case to order a retrial which I hereby do. The lower court to be returned to Winam law Courts for a retrial before a different Magistrate.
65. Signal to issue.
66. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF DECEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

