JON v Republic (Criminal Appeal E033 of 2024)
[2025] KEHC 16810 (KLR) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E033 OF 2024

A MABEYA, J

NOVEMBER 14, 2025

BETWEEN

JON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment & conviction of Hon. C.N.C. Oruo PM delivered on the 15/03/2023 and sentence passed on the 17/03/2024 in Winam SPMC in SO Case No. E002 of 2020, R. vs JON)

JUDGMENT

1. The appellant was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that, on the 5/10/2020 at [Particulars Withheld] Kisumu Central sub county within Kisumu County the appellant, being a male person caused his penis to penetrate the vagina of JA a female child aged 3 years who was to his knowledge his daughter.

2. The appellant faced a second charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that, on the 5/10/2020 at [Particulars Withheld] Kisumu Central sub county within Kisumu County the appellant unlawfully touched the vagina of AA a child aged 3 years with his fingers.

3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The appellant pleaded not guilty and a full trial ensued. The prosecution case was founded on the evidence of four (4) witnesses while the defence evidence was based on the appellant's sworn testimony.

4. In in its judgment dated 15/3/2023, the trial court found the appellant guilty on Count 1 of incest, convicted and sentenced him to serve life imprisonment. The appellant was acquitted on Count 2 as well as the alternative charges.

5. Dissatisfied with that decision, the appellant filed his petition of appeal dated 22/5/2024 raising five (5) grounds as well as supplementary grounds of appeal dated 28/7/2025 raising six (6) grounds all of which can be summarized as;

    a. That the trial court erred in law and in fact in not considering the contradictions, discrepancies and inconsistencies in the prosecution case that entails dishonesty and evenly impeach their credibility and reliability hence inconsequential to conviction.

    b. That the trial court erred in law and in fact in not making a finding that the age of the victim was not proved beyond reasonable doubt.

    c. That the trial court erred in law and in fact in not making a finding that the victim nor her intermediary was not a witness in this case hence further failed to make a finding that corroboration is not decisive in Sexual Offences.

    d. That the trial court erred in law and in fact in denying the appellant his absolute constitutional right envisaged in Article 50 (2) (g) (h) occasioning a substantial injustice.

    e. That the trial court erred in law and in fact in not appreciating the appellant's defence that overwhelmed the prosecution case.

    f. That the trial court erred in law and in fact in not making a finding that this case presented exceptional circumstances to compel a court to order an unconditional and absolute discharge as contemplated under section 35 of the Penal Code or consider suspend or non-custodial sentence contemplated in paragraph 3.2 – 3.5 of the Sentencing Policy Guidelines.

6. The appeal was canvassed by way of submissions. The appellant submitted that there were contradictions, discrepancies and inconsistencies in the prosecution case particularly in the testimony of Pw1 which impeach the credibility of his conviction.

7. That a DNA test ought to have been undertaken as it would have been the link between the victim and the appellant in light of the fact that it was alleged that there were two perpetrators of the offence. That the trial court erred in not making a finding that the victim nor her intermediary failed to testify hence there was no corroboration of the victim's evidence as provided in section 124 of the *Evidence Act*.

8. That his constitutional right to legal representation as provided under Article 50 (2) (g) (h) was infringed as the said article was not complied with by the trial court. That being a crippled man, he was entitled to an unconditional and absolute discharge as contemplated under section 35 of the Penal Code and in line with the Sentencing Policy Guidelines.

9. The state submitted that all the ingredients of the offence of incest were proved, that the appellant's defence was a mere denial that did not challenge the cogent evidence it had tendered and that the sentence imposed was lawful and the court ought not to interfere with it.

10. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion and findings but at all times bearing in mind that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

11. Before the trial court, the prosecution's case was supported by the evidence of four (4) witnesses. PW1, CA gave unsworn testimony that, the appellant is her father. That on the 5/10/2020 she was playing with her sisters A1 and A2 when her father came and sent her to buy ginger. That when she returned

she found her sisters undressed. That she informed her mother of this when she returned. That her father did 'tabia mbaya" to her sisters by removing his penis and inserting it into A1's.

12. PW2 LA, the appellant's wife testified that the victim and Pw1 are her children. That on the 5/10/2020 she left the house at 12pm leaving the children in the house. That she immediately returned to give the children lunch but Pw1 was not in the house. That when she peeped through the window, she found the appellant sleeping on the victim sweating. That the appellant was also touching a neighbours child's private parts. which child was also in the house. That as she got into the house, the appellant rushed and opened the door. That her child's private parts were bleeding and she took the two children to JOOTRH.

13. PW3 Dr. Lucy Ombok testified that she examined the victim, a 3-year-old, and filed the P3 form on 6/10/2020. That on examination she found that the minor's vagina was wounded, tender, swollen with redness around it and that her hymen was broken. Dr. Ombok produced the P3 form as P Exhibit 1 and the PRC form as P Exhibit 2.

14. That she examined another minor, AA and on examination found that her hymen was partially broken. Dr. Ombok produced the P3 form as P Exhibit 3 and PRC form as P Exhibit 4.

15. PW4 No. 24xxx PC Peninah Anyango testified that she took over the investigation of the matter from CPC Kanila. That there were two complainants, JA and AA both aged 3 years' old who alleged that the appellant defiled them. That the appellant was arrested and taken to the station.

16. When placed on his defence, the appellant denied defiling the complainant stating that two days prior to the date of the alleged incident, he had disagreements with the mother of the complainant. That the complainant's mother spent the night out with the complainant. That he was arrested on the 5/10/2020 when he returned back from work.

17. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him accordingly.

18. The first issue for consideration is whether the trial court violated the appellant's rights under Article 50 (2) (g) and (h) of *the Constitution* as contended. The same provides as follows: -

> " 50(2) Every accused person has the right to a fair trial, which includes the right-
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> (g) to choose, and be represented by an advocate, and to be informed of this right promptly.
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> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly."

19. Article 50 of *the Constitution* guarantees an accused person's right to fair trial. The said rights cannot be derogated by virtue of Article 25 (c) of *the Constitution*. Under sub article 2 (g), the court is under a duty to inform an accused of his right to be represented by counsel of his own choice. The court has to inform the accused of such right promptly before plea is taken or before the hearing commences. This is to enable the accused make an informed decision whether or not to seek services of counsel or seek services of counsel from the Legal Aid Committee.

20. In Republic v Karisa Chengo & 2 Others [2017] eKLR, the Supreme Court considered the issue of legal representation at state expense and held that: -

> " (87) Article 50(2) (h) of *the Constitution* provides that "[every accused person has the right to a fair trial, which includes the right... to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge vs Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result..." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa vs Republic; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.
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> (88] In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of *the Constitution* is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the *Legal Aid Act*. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

21. In Bernard Kiprono Koech v Republic [2017] eKLR, the Court considered an argument similar to what is now before this court and stated as follows: -

> " 39. Secondly, there is now a framework in place, which was not in place at the time of the appellant's trial, under which an accused person can apply under section 40 of the *Legal Aid Act* No. 6 of 2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:
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> 43. (1)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 have an advocate assigned to him or her; and (c) inform the Service to provide legal aid to the accused person.

40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose."

22. The appellant took plea on the 7/10/2020. From the record, it is evident that the trial court failed to inform the accused of his or his right to legal representation or of the right to have an advocate assigned to him or her.

23. The Court has considered the record and the cross-examination undertaken by the appellant, it is clear that the appellant was incapacitated in the conduct of his defence. This was a proper case where an accused should have been informed of the right to legal representation at the state expense.

24. In having proceeded with the prosecution of the appellant without having informed him that he had a right to representation at state expense and not only at his own cost, that amounted to an irregularity. No court can avoid or disregard express dictates of *the Constitution*. The prosecution was defective in so far as the likelihood of substantial injustice was to occur by failing to give the advice dictated by *the Constitution*.

25. In Robert Sang Kimeto vs. Republic [2016] eKLR, the court held that: -

> " In a recent case, Republic vs. Edward Kirui [2014] KLR, the Court of Appeal, dealt with a different irregularity namely, the non-compliance with Section 169(3) of the Criminal Procedure Code and declared a mistrial. The court cited the definition of mistrial in Black's Law Dictionary (9th Edition) as:
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> 'a trial that a judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings'.
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> The court also cited with approval a portion of the judgment of the Supreme Court of India in Murugan & Another vs. State by Prosecutor, Tamil Nadu & Another [2008] where the case of Bhagwan Singh vs. State of M. P. [2002] 4 SCC, 85 was cited, as follows: -
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> 'The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than the conviction of an innocent. In a trial where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence in acquittal appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not'".

26. In the present case, I have found that the trial court failed to adhere to the dictates of the Article 50 (2) (g) (h) and section 43 of the *Legal Aid Act*, 2016. It failed to inform the appellant that he was entitled to legal representation at the state expense or inform the Service of that fact. That led to flawed trial thereby leading to a mistrial.

27. In the circumstances, what then should be the end result? In Pius Olima & Another vs. Republic [1993] eKLR, the Court of Appeal delivered itself thus: -

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. ... The principles that emerge

> are that a retrial may be ordered where the original trial as was found by the High Court ... is defective. If the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case".

28. In the present case, the appellant was charged with a serious charge of incest. The offence resulted in the permanent loss of liberty as the appellant stood to be imprisoned for life. In the circumstances, I am persuaded that it will be in the interests of justice that a retrial be ordered in this case. The offence was committed only five (5) years ago and judgment made two (2) years ago.

29. Accordingly, I quash the conviction and set aside the sentence. I direct that there be a retrial before a different Magistrate at the Senior Principal Magistrates Court at Winam. I order that the appellant be produced before that court on 2/12/2025 to plead afresh to the charge of Incest contrary to section 20 (1) of the *Sexual Offences Act* No. 3 of 2006.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF NOVEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE