

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. E057 OF 2025**

**DONALD SHIMIYU ONDIEKI ..... APPELLANT**

**- VERSUS -**

**REPUBLIC ..... RESPONDENT**

(Being an appeal from the judgment, conviction & sentence of **Hon. F. Rashid**

**PM** delivered on the 8/5/2025 in **Kisumu CMC in Sexual Offences Case No.**

**E006 of 2024, R. vs Donald Shimiya Ondieka**)

**J U D G M E N T**

1. The appellant was charged with the offence of defilement contrary ***to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.*** The particulars of the charge were that, on **2/2/2024** at Nyalenda sub-location, Kisumu sub-county within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of E.N. a child aged 2 years.
2. 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.***

3. The appellant pleaded not guilty and the matter proceeded to trial and whereas the prosecution called four (4) witnesses, the appellant gave a sworn testimony in his defence.
4. In its judgment dated **8/5/2025**, the trial court found the appellant guilty of the main charge, convicted and sentenced him to serve life imprisonment.
5. Dissatisfied by that decision, the appellant filed his petition of appeal dated **23/6/2025**. Although several grounds of appeal were raised for determination, the single decisive issue that will resolve this appeal is whether the trial magistrate complied with **Article 50 (2) (g) of the Constitution**.
6. **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 an accused make an informed decision whether or not to seek services of counsel or seek services of counsel from the Legal Aid Committee.

7. 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.*

*(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".*

8. 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:*

*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.”*

9. The appellant took plea on the **28/3/2024**. From the record, it is evident that the trial court failed to inform him of his right to legal representation or of the right to have an advocate assigned to him despite having to put up a defence for a serious offence.
10. The subordinate court's failure to comply with Article 50 (2) (g) of the *Constitution* rendered the trial a nullity. 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 the accused should have been informed of the right to legal representation at the state expense. This is so because the offence under which the appellant was charged carried a life sentence.
11. In **Robert Sang Kimeto v 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 (9<sup>th</sup> Edition) as:***

***‘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’.***

*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: -*

*‘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’.*

12. 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* states that

**“... any act or omission in contravention of this Constitution is invalid.”**

13. 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 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.

14. In the circumstances, what then should be the end result? In **Pius Olima & Another v 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”.*

15. In the present case, the appellant was charged with a serious charge of defilement of a 2 year old. The offence resulted in the 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 two (5) years ago and judgment made a year ago.

16. Accordingly, I quash the conviction and set aside the sentence. I direct that there be a retrial before a different Magistrate at the Chief Magistrates Court, Kisumu. I order that the appellant be produced before that court on **20/4/2026** to plead afresh to the charge of defilement contrary to ***section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.***

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 25<sup>th</sup> day of **March, 2026.**

**A. MABEYA, FCI Arb**

**JUDGE**