



REPUBLIC OF KENYA



**GKR v Republic (Criminal Appeal E054 of 2024)
[2025] KEHC 6967 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E054 OF 2024**

JM NANG'EA, J

MAY 27, 2025

BETWEEN

GKR APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from conviction and sentence of the Chief Magistrate's Court
at Molo (Hon. D. Mosse- Principal Magistrate) in S.O. Case No.
E170 of 2023 following Judgement delivered on 13th June, 2024)*

JUDGMENT

1. The Appellant was charged in the lower court with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11 (1) of the same Act.
2. The particulars of the main charge are that on 24th December 2023 in Kuresoi South Sub County, within Nakuru County the Appellant allegedly caused his penis to penetrate the vagina of MC who to his knowledge is his daughter.
3. It is alleged in relation to the alternative charge that on the same date and at the same place the Appellant intentionally touched MC's vagina using his penis.
4. The Appellant initially pleaded guilty but later changed plea to that of "not guilty". Upon full trial, he was convicted of the main charge of incest and sentenced to life imprisonment pursuant to the provisions of Section 20 (1) of the *Sexual Offences Act*. Aggrieved by both his conviction and sentence, he preferred the instant appeal vide the Petition of Appeal dated 11th July, 2024 on the following grounds:-



- i. That the Learned Trial Magistrate erred in law and in fact in failing to inform the Appellant of his right to be represented by Counsel thus violating his fundamental right to a fair trial under Article 50 (2) (g) of the constitution.
 - ii. That the Learned Trial Magistrate erred in law and fact by convicting the Appellant on insufficient evidence laden with glaring contradictions, gaps, inconsistencies, falsehoods, uncorroborated evidence and which evidence in totality did not meet the threshold of proof beyond reasonable doubt.
 - iii. That the Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant and failing to consider the defence advanced by the Appellant in the judgement and by treating the defence casually and insufficiently throughout.
 - iv. That the Learned Trial Magistrate erred in law and fact by failing to properly evaluate the evidence tendered before her in totality thereby arriving at an injudicious decision to the grave prejudice of the Appellant.
And;
 - v. That the Learned Trial Magistrate erred in law and fact by harshly and unlawfully sentencing the Appellant to the minimum sentence provided for under the law which sentence did not capture the mitigation adduced by the Appellant, did not reflect the Appellant's previous record and which went against the weight of the evidence adduced (sic).
5. There are some other purported Grounds of Appeal and Petition of Appeal on record which are neither signed nor dated, and have not also been filed in the court's e-filing portal. The same will be disregarded owing to the defects.
 6. Broadly, the Grounds of Appeal may be condensed into three to wit; that the learned trial magistrate erred in law and fact by failing to accord the Appellant a fair trial contrary to the constitution and the law; that the learned trial magistrate erred in law and fact in convicting the Appellant against the weight of evidence and, finally, that the learned trial magistrate erred in law and fact by meting out life imprisonment sentence against the Appellant that is not appropriate in the circumstances of the case.
 7. The Appellant therefore wants the impugned decision set aside and/or quashed and he be set at liberty.

Appellant's Submissions

8. Regarding the contention that the Trial Court failed to inform the Appellant of his right to legal representation, it is submitted that the Appellant was thereby denied his fundamental right to be represented by Counsel during his trial thereby violating his constitutional right to fair trial, reference being made inter alia to the pronouncement in the case of Francis Ochieng Osura vs Republic [2019] eKLR and Owuor vs Republic [2022] KECA 18 KLR.
9. The defence Counsel also submitted that The Legal Aid Act No. 6 of 2016 gives effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the constitution on the critical right of fair trial. Further, that Section 43 (1) (a) of the Act provides for the duties of the court which include, as stated in Kiema Phillip vs Republic [2019] eKLR, informing the accused person of his right to legal representation at the earliest opportune time.
10. The Appellant further submitted that the failure to call a crucial witness, a "Nyumba Kumi" elder, created an evidential vacuum which cannot be cured and the omission was thus fatal to the



Prosecution's case. Reliance was placed in the Court of Appeal of East Africa case of *Bukenya & Others vs Uganda* [1972] EA 549 to buttress this argument.

11. The Appellant argued that the evidence of PW1 was hearsay; that the age assessment report produced by PW4 was opaque as it comprised of one sentence to wit; that there was failure to note that the relationship of MC and the Appellant was not proven beyond reasonable doubt.
12. Regarding the sentence imposed, the Appellant contends that no reasons and/or exceptional justification was given by the trial court for meting out the sentence which is described as excessively harsh.

Respondent's Submissions

13. On its part, the Respondent's Counsel retorted that the age of MC was proven by the medical age assessment report thereby meeting the age ingredient. On the element of penetration, it was submitted the medical evidence presented by PW3 corroborated the evidence of MC, and further regarding identification PW1 testified to finding the Appellant in bed with MC.
14. As regards defence, the court is told the defence put forth is not strong enough to rebut the evidence of the Prosecution.
15. Finally, the Respondent pointed out that the prescribed sentence for the offence of incest as charged is life imprisonment the trial court imposed.
16. The Prosecution submissions are silent on the constitutional and legal issues raised in the defence submissions.

Analysis and determination

17. I have considered the Grounds of Appeal alongside the evidence adduced before the Trial Court, and the rival submissions. I am also reminded of the duty of the first appellate Court, to re-consider, re-analyze and re-evaluate the evidence adduced before the Trial Court and make my own independent conclusion.
18. In *Mohamud Omar Mohamed vs Republic* [2020] eKLR in considering the principles to be considered on appeal cited the *Okeno vs Republic* [1972] EA 32 where the Court of Appeal for Eastern Africa stated that:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 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 findings and conclusions; it must make its own findings and draw its own 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* 1978) E.A. 424.”



Whether the Appellant’s right to be informed of his right to be represented by Counsel under Article 50(2)(g) of the constitution was violated by the Trial Court.

19. The Appellant has faulted the Trial Court of failing to inform him of his right to legal representation thereby violating his rights and not affording him a fair trial. Article 50 of the constitution codifies the right to a fair hearing for everyone.
20. Article 50 (2) (g) of the constitution provides that every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly.
21. Section 43 (1) of the Legal Aid Act gives effect to this constitutional provision and states that:-
 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;
22. The duty of the Court in this regard is two-fold. Firstly, the court is charged with the duty of informing an accused person of the right to choose legal representation and, secondly, to inform him of this right promptly. The Prosecution was silent on this issue and chose to dwell on ingredients of the offence and the sentence.
23. A perusal of the record of the lower court shows that the Appellant’s rights under Article 50 (2) (g) of the constitution were not explained to him. The Right to fair trial is one of the rights that cannot be limited under Article 25 (c) of the constitution. The accused faced a serious charge which attracted a life imprisonment sentence. Failure to inform him of his right under Article 50 (2) (g) of the constitution amounted to a miscarriage of justice.
24. Musyoka J in HO v Republic [2020] eKLR held that:-
 - “(26) The constitutional provisions on the right to legal representation, as stated in Article 50 (2) (g) (h) and the provisions of the Legal Aid Act in general, clearly put a damper on the mantra that every citizen is expected to know the law, and that ignorance of the law is no defence. They clearly are alive to the general ignorance of the law and lack of awareness with regard to legal processes and rights amongst the general populace. It is against that reality that the law has placed a burden on the courts to enlighten accused persons of their rights in law, so that they can benefit from the law, and, specifically, the rights that accrue to them under Article 50(2) (h) of the constitution and the Legal Aid Act. That reality was highlighted by the Court of Appeal in Elijah Njihia Wakianda vs. Republic [2016] eKLR, where it was stated that the trial court should play the role of an educator of the accused person so far as these matters are concerned.
 - (27) From the record of the trial court, it is clear that the appellant was not represented by an advocate. The record is silent as to whether he was ever informed of his right to be represented by an advocate in the proceedings, so that he could make a decision as to whether or not to appoint one of his own choice. The duty to inform an accused person is a constitutional and statutory imperative, stated in Article 50(2) (g) of the constitution and section 43 of the Legal Aid Act. Failure to inform the appellant of that right violated his fair trial rights and amounted to injustice. A trial where fair hearing rights have been violated in this manner cannot possibly stand.



- (30) Article 50(2) (g) (h) of the *constitution* and section 43 are in mandatory terms. I believe failure to observe constitutional commands should vitiate any trial. These provisions were not observed. The appellant, therefore, received an unfair trial and the conviction should not stand.”
25. Similarly, Aburili J in *Opiyo vs Republic (Criminal Appeal E010 of 2023) [2024] KEHC 7732 (KLR)*
- (31) The constitutional provisions regarding the right to legal representation, as outlined in Article 50(2) (g) (h), along with the stipulations of the *Legal Aid Act* in a broader sense, unequivocally restrain the notion that all individuals are presumed to be acquainted with the law and that pleading ignorance of the law holds no validity. These provisions distinctly acknowledge the prevalent lack of legal understanding and awareness concerning legal procedures and rights within the general population.”
26. The Court in *Ochume vs Republic (Criminal Appeal E008 of 2021) [2024] KEHC 9470 (KLR)* held that:-
- “... Trial courts ought to be vigilant in the way they handle trials, to ensure that justice is done for both the victim of the offence and the perpetrator. Justice cuts both ways. The victim is entitled to have her tormentor subjected to punishment; while the accused is entitled to a fair trial, which meets the constitutional and legal thresholds.”
27. I agree with the reasoning in the cited decisions. The Trial Court having failed to inform the Appellant of his right to choose, and be represented by legal Counsel, the Appellant was denied his constitutional and legal right to fair trial, thus vitiating the trial and the consequent conviction and sentence.
28. The conviction is accordingly quashed and the sentence imposed against the Appellant is set aside.
29. Is retrial warranted in the circumstances?. As held in *Haji vs Republic (Criminal Appeal No. E020 of 2023), Neutral Citation;{2023}KEHC 26948 (KLR)* which cites with approval other cases including *Mwangi vs Republic (1983) KLR 552*, retrial may be ordered in a situation as obtains herein 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).
30. I find that this is a suitable case for retrial and the court shall not determine the appeal on merits. It is noted that the Prosecution has not conveyed any difficulty in procuring attendance of witnesses.
31. I therefore direct that the Appellant be retried in the Molo Chief Magistrate’s Court, before any other Magistrate other than Hon. D. Mosse - PM. The Appellant is directed to be produced before the Chief Magistrate on 4/6/2025 at 9.00am for allocation of the matter to a magistrate with jurisdiction, and thereafter the case shall be heard on priority basis.

J. M. NANG’EA,

JUDGE.



JUDGEMENT DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF MAY, 2025 IN THE PRESENCE OF:

Ms Sang for the Republic

The Appellant's Advocate, Mr Bore

The appellant

The Court Assistant, Jeniffer

J. M. NANG'EA,

JUDGE.

