

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCR MISC. APPLICATION NO. E015 OF 2025

JOHN NYAGA.....PETITIONER

VERSUS

REPUBLIC.....

RESPONDENT

R U L I N G

1. The Applicant was charged, tried and convicted for the offence of rape contrary to section 3(i) (a) as read with section 3 (c) of the Sexual Offences Act. He committed the offence against one M.C.M on 3rd November 2023 at Keereria village Matakiri Location in Tharaka South Sub-County within Tharaka Nithi County.

2. He was sentenced to serve 10 years imprisonment.

The trial court stated in the sentence issued on 3rd September, 2024 that the 10 years' would be deemed to have commenced on 2nd November 2023 when the Accused was first arrested.

3. The Applicant has now approached this court in the present Application seeking a declaration that his fair trial rights were violated.

4. From my reading of the Application, the Applicant has come under certain provisions of the Constitution and his prayer for a declaration qualifies the said Application as a Constitutional Petition.

5. In his undated homemade petition, the Applicant has listed 11 grounds which upon my reading sound like submissions. It is my understanding however that

the Applicant's complaint is that his trial rights under Article 50 of the Constitution were violated and that this court was clothed with the jurisdiction under Article 23 and 165 of the Constitution to redress the violation of infringement of his constitutional rights.

6. At the hearing of the Application on 16th July, 2025, the Applicant made oral submissions in which he clarified to the court that his complaint was that he was not provided with an advocate during his trial and that he was unable to adequately conduct his defence because he is not educated. He asked the court to relook his trial and sentence and exercise mercy on him. He further stated that his Judgement was delivered virtually.

7. The Application is opposed by the Respondent. In their submissions dated 20th July, 2025, the

Respondents identified one issue being whether the Applicant's right to legal counsel under Article 50(2) (h) of the Constitution were violated. They submitted that the right to legal representation at State expense was not automatic and was limited to cases where substantial injustice would result.

8. They submitted that the Applicant had not demonstrated the injustice that he suffered in the trial.

Analysis and determination

9. This Court's revisionary jurisdiction is provided by Section 362 of the Criminal Procedure Code as follows:-

362. "The High Court may call for and examine the record of any criminal proceedings before any subordinate court

for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

10. In exercising the power of revision, the court is mandated by Section 364 to exercise an appellate jurisdiction as follows:-

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357

and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

11. In this case, the Applicant has raised a Constitutional issue being a violation of his fair trial rights. He has rightly cited the Constitution as giving this court the jurisdiction and mandate to inquire into such violation and offer redress.

12. I called for and examined the trial file. The record shows that the Applicant, (then Accused) was presented before Hon. Gacheru (RM) for plea on 6th November, 2023 and he pleaded not guilty. The matter was set for pre-trial and on the 7th December 2023, the Accused told the court that he had received the charge sheet, witness statements, P3 Form and Post Rape Care (PRC) Forms. On 29th January 2024, he confirmed to the court that he was ready to proceed with the trial.

13. The Prosecution then made an Application for the court to declare the victim of the offence (who was a mentally challenged person) a vulnerable witness. The court granted an order after looking at a psychiatrist's report produced in court.

14. The trial proceeded where the Prosecution presented 4 witnesses, all of whom the Accused cross-examined.

15. The Accused was put on his defence and he gave sworn evidence and was cross-examined by the Prosecution Counsel.

16. From the above record I have not found any irregularity in the proceedings before the trial court. The record shows that the Applicant was able to adequately conduct his defence.

17. Article 50 of the Constitution guarantees an accused person fair trial rights which include the right to legal representation as follows:

**“50(2) Every accused person has the right to a fair trial, which includes the right—
(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;**

50(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 this right promptly.”

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18. In the case of **Republic Vs. Karisa Chengo & 2 Others (2017) eKLR**, the court set out the parameters to be considered in determining what may constitute substantial injustice as follows:-

1. The seriousness of the offence;

2) The severity of the sentence;

3) The ability of the accused person to prepare his own legal representation;

4) Whether accused is a minor;

5) The literacy of the accused and

6) The complexity of the charge.

20. As already stated, the Applicant faced a serious charge of rape which earned a mandatory minimum sentence of 10 years' imprisonment. He had a right to legal representation by an advocate of his own choice at his own expense. However, for him to qualify for an advocate at State expense, it had to be shown that he met the parameters set out in the Chengo Case (*supra*). As already shown above, he understood the charge, cross-examined witnesses and mounted his defence adequately.

21. It is my view that the fact that he was convicted does not demonstrate prejudice or injustice. It just shows that the case against him was proven to the required legal standard.

22. The Applicant had a right to appeal which he has chosen not to exercise. As provided by Section 364 (5) of the Criminal Procedure Code, he cannot insist on having his sentence revised when he could have appealed. An Appeal would afford him a second chance for the court to relook the evidence.

23. In the result, the Applicant's application lacks merit and is dismissed. His recourse lies to the Court of Appeal.

**Ruling delivered, dated and signed at Chuka
this 30th day of July, 2025.**

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant acting in person and Ms Rukunga for the State; Muriuki (Court Assistant).

ORIGINAL