



**David v Republic/ODPP (Criminal Revision Application  
E018 of 2023) [2024] KEHC 1369 (KLR) (29 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL REVISION APPLICATION E018 OF 2023**

**TA ODERA, J  
JANUARY 29, 2024**

**BETWEEN**

**FELIX HAMISI DAVID ..... APPLICANT**

**AND**

**REPUBLIC/ODPP ..... RESPONDENT**

**RULING**

1. The Applicant, Felix Hamisi David, filed a Notice of Motion dated 22.5.2023 through the firm of Suyianka Lempaa & Co. Advocates, seeking the following orders:
  1. Spent.
  2. That this Honourable Court be pleased to call for and examine the record of the proceedings in respect to the Senior Principal Magistrate Court Criminal Case No. E62 of 2022 at Ogembo Law Courts for purposes 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 the proceedings therein.
  3. That this Honourable Court be pleased to revise the orders issued and the custodial sentence handed down to the Applicant herein on 11<sup>th</sup> May, 2023 by the Senior Principal Magistrate Court at Ogembo Law Courts in Criminal Case No. E62 of 2022 thus quash the conviction therein and set aside the sentence imposed on the Applicant herein.
  4. That costs of this application be provided for.
2. The grounds on the face of the application are that the Applicant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The case proceeded for hearing and the Applicant was convicted and sentenced to serve 3 years imprisonment. The trial court is alleged to have infringed upon the Applicant's right because it failed to inform him of his right to choose and be represented by an advocate, failed to inform him of his right to be assigned an advocate



by the State if substantial injustice would be occasioned on him, failed to wait for a probation report despite having ordered for the same, to confirm the social life of the Applicant, which was contrary to the sentencing policy. The court treated him as a second offender without previous records being availed hence prejudicing the Applicant. The foregoing prejudiced the Applicant and the proceedings leading to the conviction and sentence were therefore a nullity. The entire trial was at best a mistrial and the conviction should be quashed and the sentence set aside.

3. The Application was supported by an affidavit sworn by the Applicant on 22.5.2023. He deponed that he had been charged with the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code* at the Senior Principal Magistrate's Court at Ogembo Cr. Case No. E062 of 2022. The case proceeded for hearing and he was convicted and sentenced to serve 3 years imprisonment. He deponed that the Trial Court failed to inform him of his right to choose to be represented by an advocate; failed to inform him of his right to be assigned an advocate at the State's expense if substantial justice would be occasioned on him. He deponed that the trial court failed to wait for the probation report to be availed despite ordering for the same to be availed and therefore proceeded to convict him without enquiring into his social life contrary to the judiciary sentencing policy. The trial court treated him as a 2<sup>nd</sup> offender without previous records being availed, which was to the prejudice of the Applicant. He deponed that failure to inform him of his rights rendered the trial unfair. He urged the Court to quash the conviction and set aside the sentence.

### **Submissions**

4. Mr. Maroko for the Applicant submitted that the Applicant was not informed of his rights under Articles 50(2)(g) and (h) of the *Constitution* hence a violation of right to a fair trial.
5. Mr. Ochengo for the Respondent submitted that the Applicant was fit to be sentenced. They were not opposed to the recommendations to the 2 reports.

### **Determination**

6. I have considered the Application and the Submissions from both parties.
7. The crux of the Applicant's Application is that he was not informed of his right to legal representation which violated his right to a fair trial, his right to be assigned an advocate by the State if substantial injustice would occur, failure to rely on a probation report the court had called for and treating him as a repeat offender without proof of such records
8. Articles 50(2)(g) and (h) of the *Constitution* provide thus:
  - (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;
    - (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.
9. At what point is the court required to inform an accused person of his right to legal representation? According to the Article 50(2) of the *Constitution*, it is clear that an accused person should be informed of this right at the outset, hence the use of the word "promptly". *Black's Law Dictionary*, 9<sup>th</sup> Edition, defines prompt as "to incite, esp. to immediate action." "Immediate" is defined as "occurring without delay; instant".



10. I am persuaded by the decision in *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & Another; Office of the Director of Public Prosecutions & Another (Interested Parties)* [2021] eKLR. In that case, the Court referred to its decision in Migori High Court Criminal Appeal No. 44 of 2019 *N.M.T. alias Aunty v. R* where the Court held that an accused person must be informed of his right to legal representation so that s/he elects to have counsel present or proceed on their own. The Court further held that this must be captured in the court's record. In support of this, the Court relied on the decision of the South African Court in *S v Daniels & Another* 1983(3) 275(A) at 299 G-HB where the Court held thus:

“ ... the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation.”
11. In the case of *Joseph Kiema Philip v. Republic* (2019) eKLR, Nyakundi J. held thus:

“ ... it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state. It (the court record) must show that the court did take the profile of the accused person before the trial commenced...”
12. To add my voice to the foregoing, the reason the court calls for the trial court's record is to satisfy itself as to the exact nature of the proceedings before the trial court. Only then can this Court determine whether the proceedings therein were proper or otherwise. Anything that is not recorded and not part of the proceedings will be presumed not to have occurred. Hence the reason why the trial court must record that it informed the accused person of his/her rights.
13. I have perused the trial Court file. The Applicant was not informed of his right to choose to be represented by an advocate. To that extent, I am in agreement with the Applicant that the proceedings were flawed.
14. What should happen then? I am persuaded by the decision in *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & Another; Office of the Director of Public Prosecutions & Another (Interested Parties)* [2021] eKLR. In that case, the Court referred to its decision in Migori High Court Criminal Appeal No. 44 of 2019 *N.M.T. alias Aunty v. R* where the Court held that there exists 2 schools of thought. One states that the entire proceedings, judgment and sentence are vitiated and stand null and void ab initio. The second school of thought states that the proceedings are not necessarily vitiated unless substantial prejudice was occasioned to the accused person. The Court proceeded to hold that derogation of the rights of the accused persons renders the trial a nullity. I am in agreement with the same.
15. The Applicant took plea and was afforded a chance to cross-examine the witnesses. The offence was fairly not so serious and the severity of the same neither was the charge complex. I find that the Applicant was nonetheless prejudiced.
16. I will go by the edicts of the Court of Appeal in the case of *Muiruri v Republic* (2003) KLR, 552 where the court held that a retrial would be ordered where the interests of justice dictate as much and if it is unlikely to cause injustice to the applicant. In addition, in the case of *Diriye v Republic* (Criminal Appeal 115 of 2020) [2022] KECA 24 (KLR) (4 February 2022) (Judgment), the Court of Appeal held that whether a retrial would be ordered will depend on whether the proceedings were illegal or defective. In that case, the plea taking process was found to be flawed and the Court of Appeal ordered



for a retrial. I am guided by the said decision and while the Applicant was prejudiced, I find that the same was not so serious as to warrant this Court to acquit him. In the circumstances, I hereby set aside the conviction and sentence of the Trial Court. The Applicant shall be produced before the Ogembo Law Courts for fresh plea-taking before another magistrate other than Hon. P.C. Biwott (SPM).

17. The Applicant has raised a question on the right to be provided with legal representation at the State's expense. What is the law as regards legal representation at the State's expense? In the case of *Republic v Karisa Chengo & 2 Others* [2017] eKLR, the Supreme Court held that the right to legal representation at state expense is a fundamental ingredient of the right to a fair trial. However, the right only becomes available

“if substantial injustice would otherwise result.”

The Supreme Court further relied on Section 36 of the *Legal Aid Act*, 2016 which stipulates persons entitled to legal aid and that the National Legal Aid Service will only provide legal aid where those factors are met. The Supreme Court further held:

- (93) In recognizing the discretion exercisable by any Court in making the determination as to whether the accused person is entitled to legal aid, the Supreme Court of India held as follows:

“The Court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the Court.”

- (94) In the above context, it is obvious to us that in criminal proceedings legal presentation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

- (i) the seriousness of the offence;
- (ii) the severity of the sentence;
- (iii) the ability of the accused person to pay his own legal representation;
- (iv) whether the accused is a minor;
- (v) the literacy of the accused;
- (vi) the complexity of the charge against the accused;

18. Therefore, the right to legal representation is not absolute and may be limited. In addition, the Court has the discretion to determine who is entitled to legal aid. Section 43 of the *Legal Aid Act* provides for the duties of a Court where an accused person is unrepresented. Section 43A of the said *Act* provides for the factors the court should consider in determining that substantial injustice would occur. They are:

- (a) the severity of the charge and sentence;



- (b) the complexity of the case; and
- (c) the capacity of the accused to defend themselves.
19. It therefore behooved the Applicant to establish that the Court exercised its discretion in a manner that was capricious. Looking at the circumstances of the case, the Applicant was charged with misdemeanours punishable by a maximum of 2 years, the cases cannot be termed complex and the Applicant opted not to mitigate at all.
20. I disagree with the Applicant that he has a right to be assigned an Advocate by the State. The Applicant also did not establish that the Trial Court exercised its discretion in a capricious manner and I reject that line of argument.
21. On the issue of the probation report, the trial court's record reflects thus: on 11.5.2023, the Applicant was convicted of the offence of causing actual bodily harm contrary to Section 251 of the *Penal Code*. The trial court then called for the probation officer's report and set the matter down for 17.5.2023. Later that very day, that is 11.5.2023, the Applicant was again produced before Court as a second offender. It was reported to court that he ran away from court, was chased and arrested. He took plea before Court 1 and was jailed for 7 years. On mitigation, the Applicant had nothing to say.
22. There were directions issued in Kisii HC Rev. Appl. No. E017 of 2023 *Felix Hamisi David v Republic* that is more or less related to this matter. It appears that after escaping lawful custody, the Applicant was tried in Ogembo SPMCCR. E743/2023. In fact, in the said case, he was arraigned in court on the very day, 11.5.2023. So that, the chain of events was that the Applicant was convicted in Ogembo SPMCCR No. E062/2022 and he immediately attempted to escape lawful custody and was sentenced in Ogembo SPMCCR No. E743 of 2023. He was convicted and sentenced in Ogembo SPMCCR No. E743/2023 to 7 years hence his being termed a repeat offender. It is trite law that a non -custodial sentence is available to repeat offenders. In any event probation reports are not binding on the court as they merely act as a guide and an offender in a case of escape from lawful custody or attempted escape from lawful custody generally cannot be trusted to serve a non -custodial sentence.
23. However, where a Court chooses not to rely on a probation report, it is good practice that the Court gives reasons for the same. In *Republic v Cosmas Mutinda Muia* [2021] eKLR, it was held thus:
11. It is imperative to note that the probation officer's report is not binding to the court but persuasive as it has not been subjected to cross-examination in court. However, the same cannot be ignored as held by Odunga J in *Republic v Antony Mwema Mutisya* [2020] eKLR that:
- “... in undertaking a resentencing the court must consider whether the circumstances of the accused during his/her incarceration have changed for the better or for worse. It is therefore important that not only should a report be availed to the court concerning the position of the victim's family and the offender's family but also the report from the prison authorities regarding the conduct of the offender during the period of incarceration. It is therefore my view that where a resentencing is directed the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate report. However, the failure to do so is not necessarily fatal to the sentence.” (Emphasis ours)
24. I am persuaded by the decision in *Haron Mandela Naibei v Republic* [2014] eKLR where the Court held thus:



10. A court is entitled to call for a probation report on an accused before passing its sentence. However, such a probation report is not binding on the court. The report only acts as a guide. A court can either adopt or ignore such a report. In the case of *Samuel Maobe Sereti v Republic* (2004) eKLR the court held that: -

“Of course the court is not bound by the recommendations of the probation officer but having called for the report and the report being favourable the court should have stated why it felt that it was not proper to place the Appellant on probation.”
25. Indeed, in *Republic v Peter Mutuku Mulwa & another* [2020] eKLR, G.V. Odunga, J. (as he then was) held thus
  - “ 10. I must however state that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting out its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court’s duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so.”
26. It would have been ideal for the trial court to wait for the probation report. I however cannot fault it for failing to wait for it in view of the Applicant’s immediate actions after conviction and further, on account that the probation report is not binding. In addition, the prescribed sentence for assault causing actual bodily harm is 5 years. The Applicant was sentenced to 3 years which is, in the circumstances, not excessive.
27. The proceedings of that same day before another court within the same precincts satisfies his being termed a second/repeat offender.
28. However, in light of the trial court’s failure to inform the Applicant of his right to elect to be presented by an advocate, I find that the proceedings were flawed and that the Applicant’s rights to a fair trial were violated.
29. The charges against the Applicant are serious, alleged assault of a person with mental disability. I would in the circumstances order a retrial.
30. The Applicant’s Application dated 22.5.2023 is allowed in the following terms:
  - a. The Applicant’s rights to a fair trial were violated as he was not informed of his right to elect to have an advocate represent him.
  - b. I hereby set aside the conviction and sentence of the Trial Court in Ogembo SPMCCR E062 of 2023.
  - c. I order re-trial of the case. It is imperative that fresh proceedings proceed before another Magistrate other than Hon. C. Sindani (P.M). The Applicant shall be produced before Senior Resident Magistrate Etago Law Courts for fresh plea-taking on 7. 2. 24.



d. I direct that the retrial be prioritized.

e. Each party shall bear its costs.

**DATED, DELIVERED AND SIGNED AT KISII THIS 29<sup>TH</sup> DAY JANUARY 2024.**

**TERESA ODERA**

**JUDGE**

In the presence of:-

Mr. Maroko for the Applicant

Mr. Koima for the Respondent.

Oigo Court Assistant

