



**Opiyo v Republic (Criminal Appeal E010 of 2023)
[2024] KEHC 7732 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E010 OF 2023
RE ABURILI, J
JUNE 28, 2024**

BETWEEN

WYCLIFF ONYANGO OPIYO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence by the Hon. C. Oruo on the 24.2.2023
in the Senior Principal Magistrate's Court at Winam in SO Case No. 68 of 2019)*

JUDGMENT

Introduction

1. The appellant herein W. O. was charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act*.
2. The particulars of the offence were that on diverse dates between 7th December 2019, at Nyalenda Estate in Kisumu East sub-county in Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of S.O.O a girl aged 11 years old.
3. The trial court after considering the evidence presented by the prosecution as well as the appellant's defence, found the appellant guilty of the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* and sentenced the appellant to life imprisonment.
4. Aggrieved by the conviction and sentence, the appellant filed his petition of appeal dated 13th March 2023 and subsequently had other grounds filed on his behalf by his advocate on record cumulatively raising the following grounds of appeal:
 - i. That the trial court erred in law and fact by ignoring, failing to appreciate the appellant's rights as set out under Article 50 (2) (g) and (h) of *the constitution* i.e. to be promptly informed of his right to counsel and be assigned an advocate.



- ii. That the learned trial magistrate erred in law and in fact by failing to consider that the ingredients forming the offence of defilement were not proved to the required standard.
 - iii. That the trial magistrate erred in both law and facts by failing to consider the mitigating factors that called for leniency.
 - iv. That the trial magistrate erred both in law and facts by failing to consider that the appellant was a first offender remorseful and as such for a non-custodial sentence.
 - v. That the trial magistrate erred in both law and facts in convicting the appellant on basis of presumptions without observing that no medical evidence was tendered in respect of the appellant being sexually active.
 - vi. That the learned magistrate erred in both law and facts by failing to note and consider the evidence tendered by the prosecution was full of contradictions, inconsistencies and doubtful evidence all painting a fabricated case.
5. The appellant filed written submissions while the respondent made oral submissions in disposal of the suit.

The Appellant's Submissions

6. The appellant submitted that the trial court failed to inform him of his right to have counsel on record and that it was the duty of the court to ensure that one was provided to him by the state as he could not afford one. It was his submissions that the seriousness of the offence and the technical nature of the evidence adduced that was beyond his comprehension as was held in the case of *Republic v Karisa Chengo & 2 Others* [2017] eKLR.
7. The appellant thus submitted that as a result of the denial of legal representation of an advocate, all the evidence that was adduced by the prosecution was not tested for veracity or contested in court and thus the judgement was based on a one sided evidence.
8. The appellant further submitted that his right under article 50 (3) were violated as all the information availed to him in trial were in English and included technical words and legalese that he could not comprehend and as such he was not able to defend himself sufficiently. He relied on the case of *Patrick Kubale Wesonga v R* Cr. A No. 204 of 2005 whereby the court held that such an omission would vitiate the trial at the subordinate court.
9. It was submitted that the prosecution failed to produce credible evidence to prove the age of the minor despite the element of age being very critical in defilement cases as was held in the case of *Kaingu Kasomo v Republic* Criminal Appeal No. 504 of 2010.
10. It was submitted that there was no evidence of penetration and the only evidence was that the hymen was broken.
11. The appellant further submitted that the mandatory sentence passed by the trial court was illegal and unconstitutional and the same needs to be set aside and replaced with one of 30 years as was in the case of *Jared Koita Injiri v R* [2019] eKLR. On the illegality of the sentence, the appellant relied on the case of *Francis Karioko Muruatetu & Anor v R*, SC Pet. No. 16 of 2015.

The Respondent's Submissions.

12. Mr. Marete submitted on behalf of the respondent that he opposed the appeal on among others the fact that the victim positively identified the perpetrator who was a neighbour. It was his submission that



penetration was proved by the complainant and corroborated by the doctor. Mr. Marete submitted that the trial court appreciated section 124 of the *Evidence Act* before convicting the appellant.

13. It was submitted that the age of the victim was proved to be 11 years through the production of a birth certificate showing the victim was aged 12 years as she was born on 9.6.2008

Analysis and Determination

14. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the applicable law in this appeal. The issues for determination emanating therein are as follows;

- i. Whether the appellant's right to a fair trial was violated
- ii. Whether the prosecution's case was proven beyond reasonable doubt and
- iii. Whether the appellant's sentence was excessive and harsh.

15. On whether the appellant was given a fair trial under Article 50 of *the Constitution*. This lays the foundation for all trials and minimum guarantees; the accused persons are entitled to in so far as ensuring the protection and preservation of the rights embodied in Article 50.

16. The challenge to the constitutionality of that trial, of the appellant came as a result of the interplay between Articles 50 (2)(g) and (h). The broad band rights under these Articles relate to (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 expertise, if substantial injustice would otherwise result, and to be informed of this right promptly.

17. In Section 208 of the *Criminal Procedure Code* records as follows:

- “(1). If the accused person does not admit the truth, of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence if any
- (2). The accused person or his advocate may put questions to each witnesses produced against him.”

18. The right to a fair trial is also entrenched as a fundamental human right in a number of international and regional instruments i.e. the *Universal Declaration of Human Rights (UDHR)* – Article 10, ICCPR Article 4, *African Charter on Human and Peoples Rights* Article 7. The motion of a right to a fair trial under Article 50 of *the Constitution* or in the international or regional instruments embodies broader list of specific rights than those prescribed in the outlined articles.

19. The appellant submitted that the trial magistrate erred by failing to appoint an advocate to him to guide him in his case considering he was a student and further in contravention of Article 50 (2) (h) of *the Constitution*.

20. The appellant appears to be contesting the trial court's omission to advise him of his entitlement to legal counsel, as stipulated in Article 50(2)(g) of *the Constitution*. This provision guarantees the accused the right to select a preferred advocate for representation and mandates the trial court to notify the accused of this entitlement.

21. In *Jared Onguti Nyantika v Republic* [2019] eKLR, it was stated that that is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing. The court linked Article 50(2) (g) with Article 25(c) of *the Constitution*, which states



- that the right to fair trial shall not be limited. Similarly, in *Daniel Mpayo Ngiyaya v Republic* [2018] eKLR, with regard to Article 50(2) (g), it was stated that where an accused person faced a serious charge or sentence, the court is bound to inform him of the right to legal representation, and that it would amount to miscarriage of justice to fail to do so. The importance of legal representation, in general, cannot, therefore, be gainsaid.
22. Parliament passed the *Legal Aid Act*, No. 6 of 2016, to give effect to among other Articles of *the Constitution*, Article 50(2) (g) and (h), so as to facilitate access to justice and social justice. These objectives are stated in the preamble to the Act, as well as in section 3 of the Act. Section 3, in particular, states some of the objects of the Act as to provide affordable and accessible legal aid to indigent person in Kenya in accordance with *the Constitution*, and to provide legal awareness. The same theme is pursued in section 4, which sets out the guiding principles, and lists the principles of inclusiveness non-discrimination, and protection of marginalized groups. For the purpose of implementation, certain duties have been cast on the court. Section 43 states as follows in that regard:
- “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.”
23. The court had occasion, in *Joseph Kiema Philip v Republic* [2019] eKLR, to examine the *Legal Aid Act*, with respect to its application. In that case, the court highlighted the link between the *Legal Aid Act*, 2016, and the constitutional requirement that trial courts inform an accused person of their right to represented by advocates of their own choice. It was pointed out that the objective of the *Legal Aid Act*, 2016, is to give effect to Article 50(2) (g) of *the Constitution*, so as to facilitate access to justice and social justice. It was stated that section 48, it should in fact be section 43, of the *Legal Aid Act*, 2016, imposes duties on the courts, with respect to an unrepresented person, which include a duty to promptly inform him of their right to legal representation, if substantial injustice is likely to inform him of their right to an advocate to be assigned to him by the State and to inform the State to provide legal aid to the accused person.
24. It was emphasized that trial courts, as a matter of constitutional duty, and the interest of justice, must give the information to the accused person, and make a preliminary enquiry, at the earliest possible time, to determine whether the accused person would require legal representation. The court stated that the trial record ought to indicate that the rights under Article 50(2) (g) (h) were communicated to the accused person.
25. The *Legal Aid Act* commenced on 10th May 2016. Its design is to breathe life to the constitutional provisions on the right legal representation, and, in particular, access to legal representation by the indigent. The statute talks about social justice, inclusiveness, non-discrimination and marginalized groups. It is no doubt intended to focus on the needs of the poor and their inability to access justice. The poor are, invariably, ill-educated and lack access to information on legal and constitutional rights, hence the need for them to be informed of these rights before the trial kicks off.
26. It is on the basis of that that the court, in *Joseph Kiema Philip v Republic* [2019] eKLR, stated that trial court must place it on record that the rights under Article 50(2) (g) (h) were communicated to the



- accused person. Both the Constitution and the Legal Aid Act state this duty on the part on the trial court in mandatory terms. That, to my mind, would mean that a trial, where these mandatory provisions are not observed, should be vitiated, for the poor will not get to enjoy the rights in the Constitution, unless the trial courts carry out their constitutional duty to inform them of those rights, as commanded of them by the Constitution and the Legal Aid Act.
27. In David Njoroge Macharia v Republic [2011] eKLR and Karisa Chengo & 2 others v Republic [2015] eKLR, the courts emphasized that one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction.
 28. The appellant herein faced a charge of defilement of a minor aged eleven years, which attracted a penalty of life imprisonment. The charge was a very serious one, for upon being found guilty, the appellant faced his whole life in jail, and he was indeed sentenced to that exact period. That being the case, the trial court should have informed him of his right to legal representation and directed that he be provided with an Advocate at State expense, in the event that he was unable to hire an advocate of his own choice. the accused is a young man just about 17 years old and he told this court as much, that he was born in 2004.
 29. Ultimately, the cost of keeping a convict in jail for life is, no doubt, higher than that of allocating to him an advocate to defend him at the trial, which is only Kshs 30,000 as of now.
 30. It is also not lost on this court that the appellant was a minor of 17 years at the time of the trial, a fact that was established by the trial court on the plea day of 13/12/2019 and even prior to setting his bail terms. The other question then, is, did the trial court take into account the principles of sentencing where the accused, during the period of the trial was, in fact, a minor? I have perused the trial court record and I am unable to find any such consideration of age being taken into account. In addition, despite establishing that the appellant was a minor, the proceedings were conducted as if he was an adult, contrary to the dictates of the Children's Act, the one repealed and the 2022 Act.
 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.
 32. The law imposes a responsibility on the courts to inform accused individuals of their legal rights, enabling them to fully utilize the law and, more specifically, the rights granted to them under Article 50(2) (h) of the Constitution and the Legal Aid Act. This obligation is emphasized by the Court of Appeal in the case of Elijah Njibia Wakianda v Republic [2016] eKLR, which stated emphatically that the trial court should act as an educator for the accused person regarding these matters.
 33. 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. furthermore, the accused was a subject aged 17 years when he was presented to court to take a plea. No minor can represent themselves in criminal cases. This is also in line with Article 43 of the UN Convention on the Rights of the Child. This is important because a child does not have the capacity to understand legal procedures and is, therefore, unable to represent himself or herself. Thus, it is the responsibility of all duty bearers to ensure that all children within the criminal justice system are represented. See also "A Prosecutor's Guide to Children in the Criminal Justice System"-2020, Part 1, 1.2. Page 4.



34. The duty to inform an accused person of their right to legal representation and to ensure minors are represented by advocates is a constitutional and statutory imperative, stated in Article 50(2) (g) of *the Constitution* and section 43 of the *Legal Aid Act*, as read with Article 43 of the *UN Convention on the Rights of the Child*. Failure to inform the appellant minor then, of that right violated his fair trial rights and amounted to denial of the right to be informed of their right to be represented by an advocate and led to an injustice. A trial where fair hearing and fair trial rights have been compromised in this manner cannot stand.
35. Article 50(2)(h) of *the Constitution* mandates that every accused person is entitled to be assigned an Advocate by the State at State expense, if substantial injustice would otherwise result, and to be informed of that right promptly. The importance of this right was addressed in *Joseph Ndungu Kagiri v Republic* [2016] eKLR, *Macharia v R* [2014] eKLR, among others.
36. However, it has been held that the right to legal representation is qualified and subject to the substantial injustice test. Thus, not everyone, is entitled to an Advocate at State expense, with each case being considered on its own merit. In *Charles Maina Gitonga v Republic* [2018] eKLR, it was stated that legal representation at State expense is not an inherent right available to an accused person under Article 50 of *the Constitution*, adding that, under section 36(3) of the *Legal Aid Act*, an accused person has to first demonstrate that he was unable to meet the expenses of trial.
37. Even then, the accused person must be informed of that right and under section 43, the trial court is obliged to consider the circumstances of each accused person. Much as the accused person is required to make his case for such assistance, the court does have a duty to assess the situation and inform the accused appropriately. The law is meant to assist the indigent, the marginalized, the excluded and the discriminated, largely the poor. It would in my view, remain defeatist to again require them to make a justification. The trial court must nonetheless be proactive and inform, as dictated by Article 50 (2) (g) & (h) of *the Constitution*.
38. In the instant case, as the appellant was then a minor, there can be no such qualification or exemption to accessing legal representation. I therefore find that the appellant suffered substantial injustice, by not being provided with legal representation at State expense. The charge against the minor was very serious, carrying up to life imprisonment upon conviction and it involved complex issues of fact and law which made him unable to effectively conduct his own defence as minor.
39. Article 50(2)(g) & (h) of *the Constitution* and section 43 of the *Legal Aid Act* are in mandatory terms. I find that the failure to observe constitutional commands vitiated the appellant's trial provisions were not observed. The appellant, therefore, received an unfair trial and the conviction cannot stand.
40. Without delving into any of the other grounds of appeal, I find this appeal successful to the extent stated hereinabove. I find that the trial of the appellant was a mistrial. I quash the conviction of the appellant and set aside the sentence of life imprisonment imposed on him.
41. I however order that as the charge is a serious one and the appeal herein has taken a short period to be determined, and taking into account the rights of the victim of the alleged defilement, the appellant shall be presented before the Magistrate's Court at Winam for a retrial, with the trial court informing him of all his rights to legal representation under Article 50(2) (g) &(h) of *the Constitution* and section 43 of the *Legal Aid Act*, and ensuring that the appellant is properly guided on the need to have an advocate representing him from the time of taking plea until conclusion of the case.
42. The original trial court file was never availed to this court. The court relied on the record of appeal filed by the appellant's counsel to hear and determine the appeal. Copy of this Judgment to be supplied to the trial court. The Prosecution to take up this matter with DCIO for necessary action



43. This file is closed

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE, 2024.

R.E. ABURILI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

