



REPUBLIC OF KENYA



**Nyamweya v Republic (Criminal Appeal E028 of 2023)
[2023] KEHC 26784 (KLR) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E028 OF 2023
HI ONG'UDI, J
DECEMBER 22, 2023**

BETWEEN

BENARD RATEMO NYAMWEYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment delivered by Hon. W. Kugwa on
6th December 2022 in C.M.'s Kisii Criminal Case (S.O.) No. 79 of 2020)*

JUDGMENT

1. Benard Ratemo Nyamweya, the appellant, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars being that the appellant on 26th August 2020 in Kisii Central Sub-County within Kisii County intentionally caused his penis to penetrate the vagina of FAO, a girl aged 8 years. 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.
2. The appellant denied the charges and a plea of not guilty was entered with the case proceeding to full hearing. The Prosecution called a total of four (4) witnesses before closing its case on 17th February 2021. On 19th March 2021, the Trial Court S.K. Onjoro PM in his Ruling found a prima facie case to have been established and placed the appellant on his defence.
3. The appellant elected to give a sworn statement of defence with four (4) witnesses to call. He testified on 2nd June 2021, while his first witness (DW2) testified on 23rd November 2021. An adjournment was granted to him to call his remaining witnesses on 26th January 2022.



4. The appellant stopped coming to Court and a warrant of arrest was issued against him and a summons for his surety. He was finally presented to Court under a warrant of arrest on 2nd August 2022. In the meantime, the matter had on 4th May 2022 been re-allocated to Court No.6 (Hon. W. Kugwa R.M.).
5. When the appellant was presented to Court on 2nd August 2022, the Court cancelled his bond and he was remanded in custody to await the determination of his case. The Court further directed that submissions be heard on 6th September 2022. Finally, submissions were filed and a Judgment date for 28th November 2022 issued on 8th November 2022.
6. The appellant was convicted and sentenced to serve thirty-one (31) years imprisonment following which he filed the present appeal dated 9th June 2023 through the firm of Sonye J. Ondari & Co. Advocates. The following are his grounds of appeal:
 - i. That the Learned Trial Magistrate erred in law and fact in convicting and sentencing the Appellant whereas the proceedings were conducted in a language that the accused did not understand thereby making the trial utterly unfair and/or occasioning a miscarriage of justice;
 - ii. The Learned Trial Magistrate misdirected herself on the law and fact in her failure to inform, explain, advice and/or warn the appellant in proceeding without legal representation given the severity of the sentence of the offence charged;
 - iii. The Learned Trial Magistrate erred in law and fact for her failure to accord the Appellant an opportunity to defend himself in a language that he understood;
 - iv. The Learned Trial Magistrate erred in law and fact in her failure to accord the Appellant an opportunity to properly mitigate in a language he understood and therefore her failure to appreciate and consider the Appellant's mitigation is attributed to the failure to conduct the proceedings in a language that the Appellant understood;
 - v. As such, the Learned Trial Magistrate erred in law and fact by sentencing the Appellant to a severely harsh sentence in the circumstances.
7. For reasons to be stated below, I shall not delve into the evidence adduced nor the submissions filed.
8. This matter was initially heard by Hon. S.K. Onjoro R.M. who placed the appellant on his defence on 19th March 2021. The said Court heard the evidence of DW1 and DW2. For whatever reason, Hon. S.K. Onjoro R.M. was not able to finalize the matter. The same was re-allocated to Hon. W. Kugwa on 4th May 2022 by the Hon. S.N. Abuya C.M.
9. The appellant went underground until 2nd August 2022 when he resurfaced. It is at this point that things moved in the wrong direction. Section 200(1) and Section 200(3) of the [Criminal Procedure Code](#) provide for the process of taking over a part heard criminal case. It provides thus:

200 (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
10. In the instant case this process was not adhered to. It was never explained to the appellant. He was not given an opportunity to state how he wanted the matter to proceed. At no point did he close the defence case. Was he prejudiced? The answer is yes. Besides not being given an opportunity to exercise his right under Section 200(3) of the [Criminal Procedure Code](#), he was never given an opportunity



to call his remaining three (3) witnesses. Instead, the Learned Trial Magistrate simply closed his case unannounced and called for submissions.

11. My finding is that the failure by the Trial Court to
 - (i) comply with Section 200(3) of the *Criminal Procedure Code*,
 - (ii) to allow the appellant to call his remaining witnesses,
 - (iii) to formally close the defence case, amounts to a miscarriage of justice, and a violation of the right to a fair trial.
12. I therefore set aside the conviction and sentence and order for a retrial before a competent court other than that presided over by Hon. S.K. Onjoro or Hon. W. Kugwa.
13. The matter should be heard and determined within six (6) months of today's date. In the event of a conviction, the Trial Court must clearly consider while sentencing, the period the appellant was in remand custody and the prison.
14. The appellant to be presented by the Prison Department before the Kisii Chief Magistrate on 27th December 2023 for plea-taking.
15. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT KISII THIS 22ND DAY OF DECEMBER 2023.

H.I. ONG'UDI

JUDGE

In the presence of:

Mr. Aming'a for Mr. Osonyi for Appellant

Mr. Ochengo for the State

Otieno: Court Assistant

Appellant

