



**Charles v Republic (Criminal Appeal E070 of 2023)  
[2025] KEHC 6734 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6734 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E070 OF 2023  
A. ONG'INJO, J  
FEBRUARY 11, 2025**

**BETWEEN**

**GEORGE ISAAC CHARLES ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal arising from the conviction and sentence by Hon. R.K. LANGAT, S Principal Magistrate in Rongo Principal Magistrate's Sexual Offence Case No. 22 of 2020 delivered on)*

**JUDGMENT**

1. The Appellant George Isaac Charles was charged with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offence *Act No. 3 of 2006* on 2 Counts.
2. Particulars to Count 1 are that the Appellant on unknown dates in the month of March 2020 in Rongo Sub-County within Migori County intentionally and unlawfully caused his penis to penetrate the vagina of MAO a child aged Twelve (12) years old.
3. The particulars to the 2<sup>nd</sup> Count are that on 26<sup>th</sup> April, 2020 in Rongo Sub-County within Migori County in the Republic of Kenya the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of MAO a child aged 12 years old.
4. Based on the evidence of Eight (8) Prosecutions witnesses and unsworn statement of the Appellant the trial Magistrate returned a verdict of quantity in count II and connected the Appellant who was subsequently sentenced the Appellant to serve 20 years imprisonment.
5. The Appellant was aggrieved by the conviction and sentence and he lodged his Petition of Appeal dated 19<sup>th</sup> October 2023.



6. On 23<sup>rd</sup> October 2023, through the firm of Omonde Kisera and Company Advocate on the following grounds;-
  1. The learned trial Magistrate erred in law and fact on failing to comply with Sections 200 of the *Criminal Procedure Code* thereby treating the Appellant to unlawful and unfair trial.
  2. The learned trial Magistrate erred in law and fact on failing to find that the offence has not been proved beyond any reasonable doubt as required as required by law.
  3. The learned trial Magistrate erred in law and fact in failing to find that the Prosecutions case was not watertight and therefore unsafe conviction.
  4. The learned trial Magistrate erred in law and fact in failing to find that the Medical Exhibits were fatally defective.
  5. The learned trial Magistrate erred in law and fact in convicting on defective charge.
  6. The learned trial Magistrate erred in law and fact in melting an illegal sentence in light of the facts and circumstance of this case.
7. Reasons wherefore, the Appellant prayed that;-
  - a. Conviction be quashed
  - b. Sentence be set aside
8. This court has realized that the Appellant herein also lodged Appeal No. E069 of 2023, from against the same Judgment and the same is still pending.
9. The Prosecution case was that the Appellant defiled the complainant on unknown dates in March 2020 in a Sugarcane Plantation and PW2 saw the Appellant carry the complainant into the sugarcane plantation and the complainant reported to PW2 and she also reported to her mother and her grandmother of PW2.
10. The complainant said that on 26/4/2020, the Appellant again defiled her while she was fetching firewood.
11. That when she reported to her mother she was taken to hospital and to the Police Station the following day.
12. PW1 said that she was with Rose when the Appellant defiled her the 1<sup>st</sup> time and that even the Appellant told Rose in Dholuo that he had defiled the complainant.
13. PW2 said the Appellant took the complainant into the sugarcane plantation by force. She said the Appellant carried the complainant on his shoulder on 26/4/2020, when he found them fetching firewood and that he was armed with a panga.
14. PW3 Elizabeth Akinyi Omollo testified that the complainant was her neighbour daughter. She said that the complainant's mother died and was staying with her because the father was alcoholic. She said the complainant had stayed with her for three (3) months that on 26/4/2020. She was at home around 10;00am, that she left PW1 and PW2 at home and when she returned in the evening, she met the children who were disturbed and she asked what had happened and they told her Rasta came and defiled Mary.
15. That she did not know Rasta but she reported at Rongo Police Station and took the complainant to the hospital the following day. That the complainant was treated and P3 filled.



16. PW3 said she was a guardian of the complainant and she did not have her certificate of birth.
17. PW3 said he had no grudge with the Appellant.
18. PW4 Elijah Sife Otieno the village elder testified that on 1/7/2020, the Assistant Chief called him at 1;00pm and asked if he knew George. That when he went to Rongo he met George and he called the Assistant Chief.
19. That Police went to where he was and he identified George and he was arrested and taken to Kamagambo Police Station.
20. PW4 said the Appellant was not employed by Livondo who sells Petrol.
21. PW5 PC Roselyne Anyango testified that she is the Investigating Officer in this matter. She said that on 30xxxx, a Volunteer Health Worker went to the station with the complainant on allegations she had been defiled by a known person.
22. PW5 took the complainant to hospital and P3 was duly filled and Age Assessment was done as she did not have a birth certificate. That statement was recorded
23. PW5 said that the Appellant had relocated from home and in July 2020 he was arrested by the Chief and subsequently charged.
24. PW1 told the court that the Appellant had defiled her on various dates as she was playing with friends after giving her mandazi. PW5 visited the scene.
25. The complainant was taken to a Children Home in Uriri.
26. In cross -Examination PW5 said the complainant has been defiled by 3 people including Homa-Bay and she lost her hymen. PW5 said the complainant's mother died and the father was irresponsible and was not interested in taking care.
27. PW5 said the other 2 assailants were not arrested.
28. PW7: Joseph Nyamaga the Senior Assistant Chief North Kanyajuak Sub-Location testified that on 1/7/2020, the OCS called and told him there was a suspect to be arrested by the name Joseph. That he called the clan elder who traced the suspect in Rakwaro. He said the suspect had defiled a child. That he took him to police station. He said he found the suspect next to Livondo's Shop. He said the village elder had no boundary dispute with the Appellant and he was not aware of any difference between the Appellant and the village elder.
29. PW6, the Clinical Officer Dancun Nyabala of Awendo sub-County Hospital testified that the complainant was taken to Rongo Hospital on 30/4/2020 with history of vaginal bleeding. That the child reported having been defiled by 3 different people known to her on diverse dates and that on 26/4/2020, she was defiled by George, that the child was treated at Kitere.
30. PW6 examined the complainant and found she had bruises on the labia and her hymen was perforated.
31. PW6 produced treatment notescard, PRC and P3 forms Exhibits 2 & 3. He also produced P3 in respect of to the Appellant.
32. PW8 PC Dennis Nyarango produced Age Assessment Report on behalf of the Investigating Officer PEXhibit – 6.
33. When the Appellant was placed on defence, he gave unsworn statement and said that he was a Security Officer in Kisumu employed by HEP Security Services. He denied having committed the offence.



34. That on 1/7/2020 while he was selling fuel at Rakwaro the village elder went to where he was at 5:30pm with Police officers who arrested him. He said the village elder claimed that he was disturbing people on the village. The Appellant said he did not know the minor.
35. This Appeal was canvassed by way of written submissions.
36. The Appellant's brief submissions are dated 4<sup>th</sup> October 2024.
37. The Appellant's counsel argued that the trial Magistrate did not comply with the Provision of Section 200 of the *Criminal Procedure Code* and that in the circumstances the Appellant was not accorded fair hearing.
38. That the trial court undertook casual appreciation of the evidence presented and the said evidence was not watertight to support a conviction in the matter and that is why the Appellant was acquitted in Count I.
39. The Appellant's counsel submitted that the charge of defilement was not proved beyond all reasonable doubt as required by law.
40. The Respondent's submissions on the other hand are dated 14/10/2024, they submitted that all ingredients of defilement namely age of the complainant, penetration and positive identification of the assailant were proved beyond all reasonable doubt.
41. Regarding the Appellant's submissions the Respondent responded that the trial Magistrate who took over the proceedings found when the Appellant had already been placed on defence and that no prejudice was suffered.
42. The Respondent relied on the holding in *Republic vs= David Chepkwony Kebi (2021) eKLR*.
43. The Respondent contended that fair hearing under Article 50 of *the Constitution* was adhered to as the Appellant was informed of the charge with sufficient detail to answer to it as enshrined in Article 50 (2) (b),(c) and (j).
44. The Respondent relied further in the holding in *Rosslyne vs= Republic (2020) eKLR* and in the case of *Joseph Kamau Gichuki vs= Republic (2013)*.
45. Regarding sentence the Respondent submitted that sentence provided for under Section 8 (3) of the Sexual Offence Act provided for a sentence of imprisonment for a term not less than 20 years and it was therefore lawful.
46. It was also submitted that the evidence of PW1 was corroborated by the evidence of PW2.
47. The Respondent urged the court to dismiss the Appeal.

### **Analysis and Determination.**

48. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R (2013) eKLR* thus;  

.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
49. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:-



- i. Whether the trial magistrate complied with the provisions of Section 200 of the *Criminal Procedure Code*.
  - ii. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
  - iii. Whether the medical exhibits were fatally defective
  - iv. Whether the charge sheet was defective
  - v. Whether the sentence was illegal.
50. Whether the trial magistrate complied with the provisions of Section 200 of the *Criminal Procedure Code*.
51. Section 200 (3) of the *Criminal Procedure Code* provides as follows:
- (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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.
52. In *Ndegwa v Republic* [1985] KLR at 534, the Court of Appeal cautioned as follows:
- Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial.”
53. From the above provision of Section 200(3) it is clear that although it is mandatory for the Court to explain to the accused his right to ask for the recall of witnesses, it is not mandatory for the Court to accept such request.
54. However, due to the importance of having a trial conducted from commencement to conclusion by the same magistrate or judge, Section 200(4) provides that;
- Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”
55. It therefore follows that for a conviction to be set aside or for a retrial to be ordered on account of failure to comply with Section 200(3) of the *Criminal Procedure Code* it has to be demonstrated that the accused person was materially prejudiced by that failure.
56. In this case the record reflects that the Magistrate who delivered the judgment only took the Appellants unsworn statement without complying with the mandatory provisions of Section 200(3) CPC which requires the court to explain to the Accused his rights to apply for recall of witnesses where a succeeding Magistrate is taking over the proceedings.
57. In *Paul Ochieng Omollo v Republic* [2018] eKLR wherein Cherere J while quoting the holding in *Bob Ayub v Republic* [2010] Eklr stated that it is incumbent upon the court to inform the accused person of his rights with or without any form of application.
58. It is therefore clear that the omission by the trial Magistrate to comply with section 200(3) of the *Criminal Procedure Code* when taking over the matter and before taking the Appellants unsworn



statement vitiated his right to fair trial as enshrined under Article 50 of *the Constitution*. In the circumstances and in consideration of the Provisions of Section 200 (4) of the *Criminal Procedure Code* and in consideration of the overwhelming evidence adduced by the prosecution witnesses and in consideration of the rights of the victim herein who is 12 years old who is an orphan this court finds that the interest of justice requires this matter to be remitted back to the trial Magistrate to comply with the provisions of Section 200 (3) *Criminal Procedure Code* before taking the Appellants defence.

59. Considering the finding in regard to the provisions of Section 200 (3) of the *Criminal Procedure Code* I find it unnecessary to re-evaluate the evidence adduced during trial as is mandated of the first Appellate Court.

60. Mention in the trial court on 18<sup>th</sup> February, 2025.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**A. ONGINJO**

**JUDGE**

Judgment delivered in the presence of:

