Nyangata v Republic (Criminal Appeal E063 of 2024)
[2025] KEHC 10692 (KLR) (22 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10692 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E063 OF 2024

RK LIMO, J

JULY 22, 2025

BETWEEN

ABEL NYANGATA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C.N. NJALALE (Principal Magistrate) in Kitale Chief Magistrate's Court Sexual Offence No. E050 of 2020 delivered on 21st August, 2024)

JUDGMENT

1. Abel Nyangata, the appellant herein was charged with two counts of defilement contrary to section 8(1) (2) of *Sexual Offences Act* No.3 of 2006 vide Kitale CM's Court Sexual Offence Case No.50 of 2020. In Count 1, the particulars were that on the 14th February 2020 at Mitoni Mbili Farm within Trans-Nzoia County he willfully and unlawfully committed an act which caused penetration by inserting his male genital organ namely penis into a female genital organ namely vagina of F.N. a child aged 8 years.

2. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. This alternative charge however is not relevant in this appeal.

3. In Count II, the appellant was charged with attempted defilement contrary to section 9(1) (2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the charge were that on 14th February 2020 at Mitoni Mbili in Trans-Nzoia East Sub-County within Trans-Nzoia County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of L.N. a child aged 10 years with his penis.

4. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of *Sexual Offences Act* but the alternative charge is also not relevant in this appeal.

5. The appellant denied committing the offences in both counts and after trial he was found guilty in Count 1 and acquitted in the second Count. He was sentenced to serve 60 years in prison and got aggrieved and filed this appeal.

6. The following is a brief summary of the evidence tendered by the prosecution and the defence mounted.

7. L.N. a minor and the first complainant testified that she was in Class 4. She stated that on 14/2/2020 she had visited F.N. the 2nd complainant and another minor. She stated that the appellant gave them 100/- to go and buy maize and told them to go into the bedroom to get the money but when they went inside, the appellant pushed them on the bed and defiled her and F.N. and as he was doing so someone knocked the door and he fled. She stated that she heard a lady ask "unafanyia nini watoto".

8. The minor recalled being taken to hospital and being issued with a P3 Form.

9. F.N. (PW2) on her part testified that she was in Class 4. She testified that on 14/2/2020 at 1pm after school she was sent to get maize by her mother and told to go to Moranga's (appellant) place. She stated that she went with PW1 and that the appellant told them to follow him to his bedroom where he pushed them to bed.

10. She testified that the appellant then opened his zip and told PW1 to remove her pant. She stated that he cried but the appellant waved his hand to signal silence. She stated that the appellant did tabia mbaya to L.N. (PW1) and also did the same to her as PW1 cried. She stated that someone knocked and did not see who it was.

11. She stated that they later went home and did not tell anyone because the appellant had threatened them. She recalled that the following day they were taken to Cherangany hospital and recalled going for age assessment and making a statement.

12. Kennedy Okeyo (PW3) a clinical officer working at Cherangany Sub-County Hospital testified that 2 children were taken to the hospital on different dates for examination. That F.N. was taken on 18/2/2020 at 4pm and on examination he noted that the labia was broken and there was loss of virginity. He concluded that there was penetration.

13. The clinical officer stated that on 21/2/22 L.N was taken to the same facility for examination and he found that the labia was intact and there was no penetration but attempted defilement. He further stated that all tests conducted were negative and that the HIV test on the appellant also turned negative. He tendered treatment chit and P3 Form in respect of L.N. as PExhibit 2 and 3 respectively, while the treatment notes and P3 Form with respect to F.N. was tendered as PExhibit 4 and 5 respectively.

14. PC Florence Motai (PW4) from Cherangany police station testified that on 22/2/2020 she received a report about the complainants F.N. and L.N who were brought by their parents. She stated that the complaints were about defilement and that she referred the minors to Cherangany Sub-County Hospital for medical examination.

15. She stated that the doctor's findings were that F.N. (1st complainant) was defiled while there was attempted defilement on the 2nd complainant (L.N.). She testified that she recorded statements from witnesses and later charged the appellant. She tendered photographs of the homestead of the appellant as follows;-

a. A sitting room and a bed – Pexhibt 1(a) to (e)

She also tendered the age assessment report of Phanice indicating she was 9 years old. It appears the investigating officer got mixed up since none of the complainants in the case was known as Phanice.

16. When placed on his defence, the appellant denied both charges and stated that on 14/2/2020 he was working in the homestead of Andrew Rosana where he worked as a manager. He recalled that one Moraa Phanice gave him 100/- for maize he was selling and that after paying for the maize, she went telling him that she would send children to pick the maize which was 2Kgs. He stated that one Rebecca Ondieki was home when the children went and picked the maize.

17. He stated that the children were 4, two of whom he was alleged to have defiled. He said he gave them maize and they went back. He stated that Rebeca later went away at about 3-4pm on getting the vegetables she had reportedly gone for.

18. He stated that he remained at home with John Etabo. He stated that there were other buyers of maize who went to check for the maize.

19. He further testified that on 18/2/2020 the Chief called him and he went with him to Kachibora police station where he was notified of defilement and locked in before being later charged. He stated that the husband to Phanice was called to testify but failed to come.

20. He admitted under cross-examination that the two complainants were among the children who went to his residence on the material day for maize. He stated that he had no grudge with the children or differences with the parents of the complainants. He also clarified that he was commonly known as "Moranga" in the locality and used to sell maize from his house. He said that the children had no reason to frame him or lie in court.

21. Rebecca Kwamboka Ondieki (DW2) testified that the appellant used to sell vegetables to her and was his customer. She stated on 14/2/2020 at 11am, she was with the appellant in his house when children went there to purchase maize and recalled seeing the children giving the appellant Kshs.100/-. She stated that she was present when the children picked the maize and even greeted them and told them to greet their mother. She stated that she remained with the appellant until around 2pm.

22. She defended the appellant stating that if he needed sex he would have asked for it from her or raped her. She blamed the neighbours for being jealous of the appellant because of the work he was doing.

23. She stated under cross-examination that the children who went to the appellant for maize were two. She further stated that she was a single mother of a child aged 18 years. She denied the suggestion that the children were invited by the appellant to his bedroom.

24. She further admitted that the parents of the complainants were not jealous of the appellant and had no dispute with him.

25. The trial court evaluated the evidence tendered and found that though there was inconsistencies on the dates on which the offences were committed they were not significant and did not go into the root of the case. The trial court found that the prosecution's case proved the 1st count. It found that F.N was defiled. However with respect to the 2nd count that appellant attempted to defile L.N, the trial court found that the element of age was not proved and acquitted the accused.

26. The appellant having been convicted of Count 1 was sentenced to serve 60 years in jail.

27. He felt aggrieved and filed this appeal raising the following grounds namely;

i. That the trial court erred by relying on evidence of a single witness without warning itself on its dangers.

ii. That the trial court erred by not appreciating that critical witnesses were never called.

iii. That the prosecution's case was not proved to the required standard.

iv. That the trial court erred by disregarding a credible defence.

v. That the trial court erred by shifting the burden of proof and drawing adverse inference.

vi. That the sentence meted out was harsh and excessive.

28. In his written submissions dated 3/3/2025, the appellant raises fresh grounds albeit without first seeking leave of this court pursuant to Section 350(b) of the *Criminal Procedure Code*.

29. He contends that he was not informed of his right to legal representation during trial and that his rights under Article 50(2)(b) were violated and as a result exposed to unfair trial.

30. He also faults the trial court for non-compliance of Section 200(3) of the *Criminal Procedure Code* submitting that Hon Kesse Principal Magistrate took over the trial from Hon M.N. Osoro without first complying with Section 200(3) of the *Criminal Procedure Code*, which according to him led to mistrial. He has cited a number of authorities to buttress the point.

31. He also submits that the charge sheet was defective because the charge states that he was charged under Section 8(1)(2) of *Sexual Offences Act* which in his view does not exist and that the charge sheet should have been phrased that he was charged with defilement contrary to section 8(1) as read with Section 8(2) of *Sexual Offences Act*.

32. The appellant submits that the framing of the charge violated Article 50(2)(b) of *the Constitution* and Sections 134, 137 (a) (1) (ii) and 214(1) of the *Criminal Procedure Code*. The appellant contends that the charge sheet did not contain sufficient details to enable him answer to the charge. He submits that the error on the charge sheet was not curable under section 382 of the *Criminal Procedure Code*. The appellant contends that the charge sheet did not contain sufficient details to enable him answer to the charge. He submits that the error on the charge sheet was not curable under Section 382 of the *Criminal Procedure Code*.

33. He further submits that the prosecution failed to prove its case beyond reasonable doubt. He submits the evidence of PW1 was unreliable adding that 'kitu yake" cannot be equated with the genital organs because the minor stated that he removed 'kitu yake' and 'inserted mine."

34. He submits that the lady who knocked the door asking "unafanyia nini watoto" was never called as a witness.

35. He submits that there was material contradictions on how defilement took place between the testimony of PW1 as compared to testimony of PW2. He contends that the evidence was cooked up. He wonders why the father of the minors was not called as a witness.

36. He faults the medical evidence given by PW3 stating that he never gave his professional qualifications to demonstrate his competence. He faults the trial magistrate for assuming the qualifications of PW3.

37. He further faults the medical conclusion that the complainant (PW2) in Count 1 lost virginity because the labia was broken. He submits that virginity is lost through breakage of hymen and contends that the conclusion made by PW3 was an unintellectual perception.

38. He further faults the prosecution for not calling the Chief who took action by reporting the matter.

39. The respondent has conceded to this appeal vide written submissions dated 17/4/25 by Mark Mugun Principal Prosecution's Counsel. The State points out that the trial was handled by 3 magistrates and concedes that the 2nd magistrate failed to comply with mandatory requirements of Section 200 of the *Criminal Procedure Code*. The State cites the proceedings of 14/6/23 as a demonstration of non-compliance with Section 200 of *Criminal Procedure Code* because the succeeding magistrate simply went on to take the evidence of PW3 and PW4 without making reference to Section 200 of *Criminal Procedure Code* and informing the appellant of his rights under that section. The State has cited decision in Henry Kailutha Nkarichia & Ambrose Mungatia Nkarichia –vs- R (2015) KECA 111 KLR where the inter alias held that failure to comply with Section 200 *Criminal Procedure Code* renders the trial a nullity. In the same breadth the decision in Anthony Otieno Ndonji –vs- E (2019)KECA 229 KLR has also been cited. The State submits that though the 3rd magistrate took over the proceedings and duly complied with Section 200 *Criminal Procedure Code* the proceedings by the 2nd magistrate had been marred by non-compliance of Section 200 of *Criminal Procedure Code*.

40. The State pleads for a retrial submitting that it is in the interest of justice to do so because the incident took place not long ago. It cites the decision of Fatehali Manji –vs- R (1966) EA 343 where the appellate court found that a retrial can be ordered where original trial was defective/illegal or vitiated by a mistake by a trial court.

41. This court has laid out both the appellant and the respondent's contention.

42. For the interest of judicial time, I will only delve on two issues raised in this appeal which I consider significant and important in disposing this appeal. The appellant has raised several grounds which I find were not properly raised because they were additional grounds raised at submissions stage without leave of this court as provided under Section 350(b) of the *Criminal Procedure Code*. I will not touch on them and will only touch on two issues namely;

    i. Whether the prosecution's case was proved beyond reasonable doubt.

        i. Non-compliance with Section 200 of *Criminal Procedure Code*.

43.

    (i) Whether the prosecution's case was proved beyond reasonable doubt.

    The mandate of this court as a first appellate court is to re-evaluate the evidence taken at the trial with a view to making own conclusions.

44. This court has re-evaluated the evidence from the proceedings from the trial court and I must say that this court struggled in trying to make sense on the evidence recorded. The way the prosecution presented the evidence left a lot to be desired. Going by the charge sheet, the 1st Count was in respect to a complainant referred to as F.N for purposes of concealing or protecting her identity being a minor. The complainant in the second count was known as L.N but for reasons best known to the prosecution, it called L.N as the first witness (PW1) and then F.N as PW2. This was inadvisable because of the attendant likelihood of confusion and mix up.

45. When PW3 was called to testify he gave evidence first in respect of F.N but when it came to tendering exhibits he then began with L.N and tendered treatment notes and P3 Form as PExhibit 2 and 3. The trial court did not indicate what was PExhibit 2 and what was PExhibit 3. With respect to F.N he tendered treatment notes and P3 Form as "PExhibit 4, 5". The trial court did not indicate again whether the production was being marked respectively.

46. I have perused at the P3 Form and treatment notes tendered and I find that the same were not duly marked. One has to read the names on the treatment chit and P3 Forms to distinguish which ones belongs to which complainant.

47. The proceedings and the exhibits were not properly marked and the trial magistrate could have done better.

48. This court has tried to make sense of what PW3 told the trial court with respect to the physical examination he carried out and it is rather confusing. He began by stating that he was testifying 'on behalf of complainants' who were taken to hospital on 24/2/2020. Then in the next line he again talks of 18/2/22 and the 14th and 21st as the date of the defilement. Now trying to tie the testimony with the exhibits tendered is a tall order and requires some construction and assumptions which are not tenable.

49. What is however more glaring is what the appellant has clearly pointed out. PW3 testified as an expert witness. Section 48 of the *Evidence Act* provides as follows;

    1. When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

    (2) Such persons are called experts.

50. The opinions of experts are admissible in law if the witness establishes that he has special skill or expertise in the area of Science, Law or Art where he/she has come to testify. In the absence of that the evidence is rendered hearsay and inadmissible in law. PW3 simply stated that he worked at Cherangany Sub-county Hospital from 2018. But even cleaners, clerks and accountants were also employed by hospitals. They cannot however purport to treat patients or come to testify in court and tender medical evidence because they are not experts in the field of medicine.

51. The prosecution and the trial court fell into error by failing to lay basis on the expertise of PW3 before testifying. Again why would he testify on behalf of complainants? The complainants were found competent to testify and had not been declared vulnerable witnesses pursuant to Section 31 of *Sexual Offences Act* so as to require an intermediary to step in.

52. This court finds that the evidence of PW3 was rendered hearsay and inadmissible in law because there is nothing on record to show whether he was a doctor or a clinical officer and therefore an expert in the field of medicine to make the trial court admit his opinions with respect to the elements of penetration and age. The two ingredients are crucial in cases of defilement as defined under Section 8(1) of *Sexual Offences Act*.

53. It is true that under Section 124 of the *Evidence Act*, evidence of a victim can be found sufficient on its own if a court for reasons, to be recorded, that the victim is telling the truth. In this instance, there were three trial magistrates. The 1st magistrate took the evidence of the victims but failed to record the demeanour of the witnesses. It is difficult to know if the trial magistrate had reasons to believe that the minors were speaking the truth.

54. The prosecution's case whichever way one looks at the proceedings hanged on a very thin thread given the anomalies pointed out. This is one case that was simply badly investigated and badly prosecuted. It could not be sustained.

55. ii) Non-compliance with Section 200 of *Criminal Procedure Code*.

As clearly conceded by the respondent, the trial in the lower court was conducted by three different magistrates. The 1st magistrate took the evidence of the complainants PW1 and PW2 on 23/8/2021 on 14/6/2023. The 2nd magistrate took over the trial and omitted reference or complying with Section 200 of *Criminal Procedure Code* which provides;

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(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.

(4) 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.

It is essential under Section 200 (3) that the rights of the accused are secured so that he is not unduly prejudiced by changes of magistrates before the trial is concluded. As held in the case cited by the State in Anthony Otieno Ndonji –vs- R (2019)KECA 229 KLR

> "It is absolutely necessary to comply with the said provisions (Section 200) if there is a want of compliance with the provisions on the part of judicial officer, the proceedings are automatically vitiated."

There was clear infringement of Section 200 by the succeeding magistrate and the proceedings thereafter rendered the trial a nullity. The 3rd magistrate could cure the defect by belatedly complying with Section 200 of *Criminal Procedure Code*. The same could only be done by recalling PW3 and PW4 and hearing the matter afresh. The same was not done and the State is correct to state that the 3rd magistrate who took over the trial from the 2nd magistrate could not sanitize the previous illegality.

56. The respondent has asked for a retrial but I have looked at the proceedings and find that the prosecution had difficulties availing witnesses because most of them did casual jobs and had no permanent residence. It forced the prosecution to close their case with the evidence of 5 witnesses after trying severally to avail other witnesses. In such scenario, it is inadvisable to order for a retrial as it is unlikely to meet the ends of justice.

57. In the premises, this court finds that in this appeal, the prosecution's case for the afore-stated reasons could not be sustained. The trial court fell into error to find otherwise. This court hereby allows this

appeal. The conviction is set aside and sentence quashed. The appellant will be set free forthwith unless lawfully held.

DELIVERED, DATED AND **SIGNED** AT **KITALE** THIS **.....22ND ..... DAY OF .....JULY....., 2025.**

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Mr Mugun for the Respondent

Oscar Nyongesa the appellant

Duke/Chemosop – Court assistants