



Bule v Republic; Republic (Prosecutor); Bule (Accused) (Criminal Appeal E020 of 2025) [2025] KEHC 13128 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E020 OF 2025
FR OLEL, J
SEPTEMBER 24, 2025**

BETWEEN

GUFU WATO BULE APPELLANT

AND

REPUBLIC RESPONDENT

AND

REPUBLIC PROSECUTOR

AND

GUFU WATO BULE ACCUSED

(Being an appeal arising from the conviction sentence delivered on 28.05.2025, delivered by Hon Christine Wekesa (SPM) in Marsabit MCSO No E004 of 2024)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 25th day of May 2024 in Marsabit North sub-county of Marsabit county, intentionally caused his penis to penetrate the vagina of AG, a minor child aged 11 years
2. In the alternative, he was charged with the offence of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on the 25th day of May, 2024, in Marsabit North sub-county of Marsabit County, intentionally and unlawfully touched the vagina of AG, a child aged 11 years.



3. The Appellant took plea and denied the charges faced. The prosecution called six witnesses, and on being placed on his defence, gave sworn evidence and called one witness in support of his case.
4. The trial magistrate considered the evidence proffered and found the Appellant guilty of the offence of defilement contrary to section 8(1) as read with section 8(2) of the [sexual offences Act](#) No. 3 of 2006, and after mitigation, proceeded to convict him and sentenced him to serve life imprisonment.

B. Evidence at Trial

5. PW1 AG underwent voir dire examination and gave sworn evidence. She stated that she did not know her age and recalled that on the material day, she was playing with her sister, within their compound, when the accused called her and took her to his house, where he proceeded to remove her underwear and defiled her. Despite her resistance and screams, the accused did not stop and only released her once he was done. When she went home, she reported the incident to her parents, who took her to hospital as she was bleeding from the injuries sustained during the incident.
6. She confirmed that the accused did not stay within their Manayatta and identified him as the culprit before the court. She also clarified that, when the accused called her, they walked to Kiwanjani where he stays, and that is where the incident occurred.
7. PW2 GM stated that PW1 was her 4th born daughter aged 11 years. She recalled that on 25.05.2024 at about 6.00 pm, she was informed by her other daughter, RG, that while on their way to fetch water with PW1, the accused had called PW1 and they remained behind as she continued with her journey to the water point. Enroute back, she found PW1 and asked her why the accused had called her, and she had opened up and told her sister what had transpired.
8. PW1 told them that the accused had taken her to the house of his son and proceeded to defile her therein. She physically checked PW1 and saw a wound within her vagina. She was also limping and also had scratch marks on her hands. Thereafter, she took PW1 to the local hospital, and were referred to Marsabit County Referral Hospital for further treatment and medication. She identified the accused as a person known to her
9. PW3 RG stated that she was 14 years old and was in Grade 8. She recalled that on the material evening, she was at home, while PW1 was playing within their compound. She saw the accused outside their home, beckoning PW1 to go to him, and warned her sister (PW1) not to entertain him. Shortly thereafter, she went to her uncle's home, and later, when she came back, PW1 told her that the accused person had held her hand, taken her away, and proceeded to defile her. She reported this incident to her mother, who physically examined PW1 and observed that she had bruises on her private parts. Under cross-examination, PW3 reaffirmed that she saw the accused beckon her sister and also knew where the accused resided near the airport.
10. PW4 GW confirmed that PW1 was his daughter and had been away from home when the incident occurred, but was informed about it by his wife (PW2). PW3 had seen the accused beckon PW1 as she went to collect water, and later, when she came back, PW1 had informed her that the accused had defiled her, which fact was corroborated by the doctor who examined the child. Under cross-examination, he confirmed that he knew the accused, and though he did not witness the incident, PW1 had confirmed that it was the accused who had defiled her.
11. PW5 Dr Sora Samuel testified that he worked at Marbait County and referral hospital as a medical officer and recalled examining PW1 on 27.05.2024 at the hospital. She gave a history of having been violated by a person known to her. She was in fair general condition; her labia Majora had no physical



- injuries, but he noted some minor lacerations and redness on the labia minora at the nine O'clock position on the right side. The injuries were approximately 3 days old.
12. She was given emergency contraception, and the injuries were assessed as grievous harm. He filled out the P3 form and post rape care form, and produced them as exhibits before the court.
 13. PW PC Meshack Muita confirmed that he was the investigating officer of the case and recalled that on 27.05.2024 at about 11.30 hours, a report of alleged defilement was made at Turbi police station vide OB 8/27/5/2024 by PW2. She had stated that on 25.05.2024, her daughter was playing outside their homestead in the evening hours, when the accused, who was a person well-known to them, called her and proceeded to defile her at the neighbouring homestead, which belonged to his son. PW1 informed her sister PW3 of what transpired, and she, in turn, informed PW2 when she came back home at about 7.00 pm
 14. He issued the P3 form and directed them to seek medical attention at Marasabit County referral hospital, and once the investigations were complete, he opted to charge the accused with the offence before court. He produced PW1's birth certificate, which indicated that she was born on 01.04.2013. He also identified the accused as the person he arrested. Under cross-examination, he confirmed that he did not witness the incident, but the doctor's report had corroborated PW1's evidence.
 15. The appellant was placed on his defence and gave sworn evidence. He stated that he was 80 years old and denied defiling PW1, insisting that the charges against him had been fabricated. DW2 AG, also gave sworn evidence and stated that the accused was his father, who was a frail old man, suffering from high blood pressure and rarely left home. The charges he faced were fabricated as he was unable to walk two manyatta's away to where the PW1 family resided, and furthermore, nobody also saw him walk into the said manyatta. He reiterated that the accused was over 80 years old and, considering his fragile health, was unlikely to have been the assailant.
 16. The learned trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and, after mitigation, sentenced the Appellant to serve life in prison.

C. The Appeal

17. Dissatisfied by the conviction and sentence passed, the Appellant filed the following grounds of Appeal that;
 - a. That the learned trial magistrate violated the Appellants' rights under Article 50(2),(g) of *the Constitution* by failing to inform him of his right to legal representation, considering the seriousness of the offence.
 - b. That the learned trial magistrate violated Article 50(2),(h) by failing to see that the Appellant by virtue of his advanced Age and the seriousness of the offence, was entitled to legal representation at the state's expense because substantial injustice would otherwise be occasioned to the appellant.
 - c. The learned trial magistrate did not properly analyse the evidence before her, which was riddled with contradictions and discrepancies.
 - d. That the learned magistrate allowed the PRC form (Exhibit 3) to be produced without reference to the Appellant.
 - e. That the learned Magistrate did not properly consider the Appellant's defence and casually dismissed it without giving any reason.



18. The Appellant prayed that his Appeal be allowed, the conviction and sentence be set aside, and he be set free.

D. Submission

i. Appellants' Submissions

19. The appellant submitted that he was 81 years old when arraigned before the trial court and had promptly informed the court of his advanced age and need for assistance, but his plea was ignored. More critically, the court violated his rights as enshrined under Article 50 (2),(g) of *the Constitution* of Kenya, 2010, and Section 43(1) of the *Legal Aid Act*, by not informing him of his right to counsel to assist him during trial, considering that the offence he faced attracted a life sentence and this inaction/violation had caused him substantial injustice as he was unable to follow the proceedings to his detriment. Reliance was placed in the case of Joseph Kiema Philip Vrs Republic (2019) KEHC 7989 (KLR) & Chacha Mwita Vr Republic (2020) KEHC 5392 (KLR), where the right to representation was discussed and upheld.
20. Further, he had also informed the court that he wanted his son to be present during the trial, as he was unable to comprehend the rigors of trial and cross-examine witnesses. He again faulted the court for not noting his incapacity and uphold the need to appoint a legal representative paid by the state to assist him. Reliance once again was placed in the Supreme Court case of Republic Vrs Chengo & 2 others (2017) KESE 15 (KLR), David Njoroge Macharia Vrs Republic (2011) KECA 406 (KLR) & Pett Vrs Greyhound Racing Association (1968) 2ALL E.R 545 at page 549.
21. The appellant further challenged the evidence adduced and stated that it was full of numerous contradictions and inconsistencies, which he elaborated at length, and when the same was considered in totality, it cast aspersions as to the truthfulness of the said witnesses and veracity of the prosecution case. Reliance was placed on the case of Dickson Elia Nsamba Shapwata & Another Vrs Republic, CR App No 92 of 2007 & Mutua Munyoki Vrs Republic (2017) KECA 376 (KLR).
22. The appellant also pointed out that PW5, who was the doctor, did not fill in the PRC form but was allowed to produce the same without any reference to the applicant, and the trial court had also failed to consider his evidence in defence, both lapses which had led to an injustice. Reliance was placed on the case of Republic Vrs Teresa Wairimu Thuo (2019) Eklr & MTG vrs Republic (2022) KEHC 189 (KLR).
23. The appellant prayed that the court find that his conviction was not safe and proceed to set aside both is conviction and sentence.

ii. ODPP Submissions

24. The state supported this Appeal on the grounds that, due to the accused's advanced age, the trial court ought to have invoked the provisions of Article 50,(2),(g) and (h) of *the constitution* and Section 43 of the *Legal Aid Act* to ensure that the appellant was represented given the serious nature of the offence and the sentence it attracted.
25. Substantial injustice did occur because, during the 1st hearing of the case in response, when asked if he was ready to proceed, the accused stated that, "I want my son to be called, I am too old". He was not granted his request, and during subsequent proceedings, it did not appear that the accused person properly followed the said proceeding, and this was amplified by his inability to cross-examine critical witnesses. There was ample evidence that the accused could not defend himself, and thus grave injustice had occurred. The state prayed that this Appeal be allowed and a retrial be ordered.



Analysis & Determination

26. This court has examined the Record of Appeal, the grounds of appeal, and given due consideration to the submissions by the parties' respective Counsel.
27. The Appeal is conceded on the grounds that substantial injustice had occurred during trial due failure of the court to apply provisions of Article 50,(2),(g) and (h) of *the Constitution* and Section 43 of the *Legal Aid Act*, to aid the appellant, especially when considering his advanced age and his plea for assistance to have his son be present during hearing.
34. Article 50 (2) (g) of *the Constitution* provides that: -
- (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.
35. In the same breath, Section 43(1) of the *Legal Aid Act* provides that;
- “A court before which an unrepresented accused person is presented shall:
- a. Promptly inform the accused of his or her rights to legal representation;
 - b. If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; or
 - c. Inform the service to provide legal Aid to the accused person”.
34. At the 1st hearing of his case, in response to a question from the trial magistrate as to whether he was ready to proceed, the Appellant stated that, “I want my son to be called. I am too old,” and later during the proceeding again repeated that, “I am not aware about the charge. I did not commit the offence.” This was a cry for assistance, which should have prompted the trial court to act cautiously to ensure that the accused's rights to fair trial and representation were upheld even as the trial proceeded.
35. A review of the proceedings that took place also revealed that the appellant was unable to effectively cross-examine the witness and /or in other instances failed to ask any question at all to critical witness, which affirmed his need for assistance.
36. In *Joseph Kiema Philip Vrs Republic (2019) KEHC 7989 (KLR)*, the court discussed at length the tenor and import of these provisions and held that;
- “In order to fully comply with the dictates of Article 50,(2),(g) and(h) and section 43(i) of the *Legal Aid Act*, trial courts as a matter of constitution duty and interest of justice, ought to give the information to the accused person and/or make a preliminary inquiry at the earliest opportunity possible. A determination must be made as to whether or not the accused person would require legal representation before commencing with the case. The earliest opportunity, therefore, should be at the time of plea taking; the first appearance before plea is taken, or at the commencement of the proceedings, that is, at the first hearing.



37. Further in the said Joseph Kiema Philip case (Supra), the court further expounded that;

“In view of the principles 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 includes; the serious or nature of the offence in question thus serious offences may attract public interest to the extent that the public may require some form of representation to be accorded to the accused person to conduct his own defense; the severity of the sentence, thus legal representation is to be provided where the offence carries a death sentence and/or life imprisonment; the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the ability of the accused to comprehend the court proceedings thus the literacy of the accused and the complexity of the case which is discernable from the issues of fact and law which may not be comprehended by the accused.

38. Finally, the same principles were also extensively discussed in *Chacha Mwita Vrs Republic (2020) KEHC 5392 (KLR)*, where A.C.Mrimi J, while discussing the same principles, held that;

“I must emphasize that the accused person must be informed of his right immediately he/she appear before a court on the first appearance, regardless of whether the plea would be taken at the point in time or later. Of importance is the emphasis that since the court speaks through the record, then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take plea before ascertaining that it has fully complied with Article 50,(2), (g) of *the constitution*, amongst other requirements. Circumstances calling, a court should boldly postpone the plea taking until satisfied that the court has fully complied with the law.

39. The Appellant herein was 81 years old, had a low literacy level to discern the complex legal case he faced, and the severe consequences arising therefrom. He clearly required legal Aid to conduct his defence.

E. Disposition

40. The upshot, after considering the foregoing and the fact that this Appeal is conceded by the state, I do find and hold that the Appellants' conviction and sentence arising from the Judgment of Hon Christine Wekesa (SPM) dated 28th May, 2025, delivered in Marsabit MCSO E004/2024, is not safe and consequently set aside both the said conviction and sentence.

41. The accused shall be re-tried before a different Trial Court, which shall accord the Appellant a chance to hire his own counsel and/or accord him assistance to acquire services of counsel through the Legal Aid programme.

42. It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 24TH DAY OF SEPTEMBER 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 24TH DAY OF SEPTEMBER, 2025.

In the presence of:-



Present from Nyeri Prison.....Appellant

Mr. E. Otieno.....For O.D.P.P

Jarso.....Court Assistant

