



**Kimathi v Republic (Criminal Appeal E002 of 2024)
[2025] KEHC 12930 (KLR) (Crim) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL APPEAL E002 OF 2024
SC CHIRCHIR, J
SEPTEMBER 18, 2025**

BETWEEN

JESSE KAIMENYI KIMATHI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the judgment of Hon. L.Mutai delivered on 15th of May 2024 in Isiolo chief Magistrate's court sexual offences case No. E005 of 2021)

JUDGMENT

1. Jesse Kaimenyi Kimathi (the Appellant) was charged with Defilement contrary to Section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006 (The Act). The particulars of the charge were that on the 24th day of February 2021 at around 8p.m at [Particulars Withheld], within Samburu County intentionally caused his penis to penetrate the vagina of C.N.a child aged 17 years. At the conclusion of the trial, he was convicted and sentenced to serve a prison term of 15 years He was aggrieved by the outcome, and moved to this Court on Appeal.

Petition of Appeal

2. In his Amended grounds of Appeal, he has faulted the trial Magistrate for failing to comply with the mandatory provisions of Article 50(2) (g)(h) of [the Constitution](#) and Section 43 of the [Legal Aid Act](#); by relying on shallow, fabricated, speculative and contradictory evidence ;by failing to give the defence witness a chance to be heard; by ignoring his defence of alibi, and by convicting on the basis of a defective charge sheet. He finally states that the prosecution's case was not proved beyond reasonable doubt.
3. The Appeal was argued by way of written submissions.



Appellant's submissions

4. It is the Appellant's submission that the offence of defilement was not proved to the required standard; that the conclusion of the Clinical Officer (PW4), to the effect that the Complainant was raped were not founded on medical examination, but on reports made by the Complainant's family.
5. It is further submitted that the Post Care Report(PCR) was not produced; that save for the presence of spermatozoa which was never linked to him, there was no other evidence showing that the Complainant was raped, as he was not subjected to a DNA test. He further contends that there was no witness who testified to seeing him taking the Complainant to the alleged scene of the crime.
6. It is the Appellant's further submission that he was never informed of his right to legal representation , yet he faced a serious offence and hence his rights under Article 50(2)(g)(h) of *the Constitution* were violated. In this regard, he has relied on the case of Jared Onguti Nyantika vs. Republic (2019) eKLR and Daniel Mpayo Ngiyaya vs. Republic (2018) eKLR. He points out that indeed the record of proceedings do not reflect any compliance with the aforesaid Article of *the Constitution*.
7. The Appellant further argues that the evidence relied on to convict him was inadequate, shallow, fabricated, contradictory and speculative. He further states that the Complainant was never subjected to medical examination to ascertain her mental capacity to testify. It is further submitted that he was denied a chance to bring his witnesses due the mobile nature of the Court.
8. It is submitted that the victim in this case was being used by her family to settle scores with persons that the family had had a disagreement with in the past. That his accusation emanated from the fact that he had a disagreement with the victim's brother named K.
9. He further states that the charge sheet was defective. He points out that he was charged under Section 8(1) of the Act yet the victim was 17 years.
10. It is the Appellant's final submission that the sentence was excessive in view of the fact that he was a first offender.

Respondent's Submissions

11. It is the Respondent's submissions that all the ingredients of the offence were proved and hence the Prosecution's case was proved beyond reasonable doubt.
12. On the right to be informed of legal representation, the Respondent admits that the record is silent on whether the Appellant was informed of this right. However on legal representation by the state appointed Advocate, it is submitted that the Appellant was not entitled to one. In this regard, the decision in Karisa Chengo & 2 others vs. Republic (2017) eKLR has been relied on.
13. The Respondent contends that in any event, a violation of a Constitutional right does not render a trial a nullity but an aggrieved person can seek compensation by way of damages.
14. On the alleged contradiction and inconsistencies raised by the respondent, it is submitted that they did not affect the substance of the prosecution's case. On the evidence of the victim lacking corroboration, it is submitted that on arriving at her decision ,the trial Magistrate correctly relied on the proviso to Section 124 of the *Evidence Act*.
15. On the Appellant's submission that he was denied a chance to summon his witnesses, it is the Respondent's submission that the Appellant was given several chances to avail his witnesses and that



by the time the Court made the ruling to close the defence case ,the defence hearing had been pending for 7 months.

16. On the defence of alibi, it is submitted that the same was never raised during trial.

Analysis and Determination

17. It is the mandate of this Court, as the first Appellate Court, to review the evidence, carry out its own evaluation and arrive at its own conclusion. The Court must however, make allowance for the fact that unlike the trial Court, it did not have the benefit of seeing and hearing the witnesses firsthand. (see . Okeno vs. Republic (1972) E.A.)
18. I have identified the following issues for determination:
- a. Whether the charge sheet was defective.
 - b. Whether the Appellant’s right to legal representation was infringed.
 - c. Whether the Prosecution’s evidence was contradictory and inconsistent.
 - d. Whether the Appellant was denied a chance to call his witnesses.
 - e. Whether the defence of Alibi was raised and ignored.
 - f. Whether the prosecution’s case was proved.
19. The Appellant has submitted that he was charged under the wrong Sections of the Act; that he was charged under section 8(1) yet the alleged victim was 17 years.
20. Section 134 of the Criminal Procedure Code (CPC) sets out the particulars that a charge sheet must contain.The Section provides:
- “Every charge or information shall contain ,and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.
21. In determining whether or not a charge sheet is defective, the principle of law governing charge sheets was stated in the case of Sigilani vs. Republic (2004) 2 KLR 480 where the court held: “The Principle of law governing charge sheets is that an accused should be judged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead the specific charge that he can understand. It will also enable the accused to prepare his defence”.
22. In the present case ,the defect was in reference to Section 8(2) of the *Sexual Offences Act* instead of Section 8(4) as the Complainant was 17 years. Section 8(2)is applicable, when the victim is 11 years and below. The Evidence led showed that the victim was indeed 17 years. In this regard, the Appellant’s complaint is valid.
23. However what was the effect of the misapplication of section 8 of the Act? Section 382 of the CPC states the following in relation to a defective charge sheet: “Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the



trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

24. Thus was the defect referred to in this case substantive enough to distort the charge or cause any prejudice to the Appellant? Did it occasion a failure of justice? was it raised during trial?
25. A perusal of the Court record shows that the issue of the defectiveness of the charge sheet was never raised during trial; The trial was conducted on the understanding that the victim was 17 years; The sentence that was ultimately passed was based on sub-section 4 and not subsection (2) of Section 8 of the Act. Therefore no prejudice was suffered by the Appellant. This ground of Appeal is therefore without merit.

Whether the Appellant’s rights under Article 50(2)(g)(h) of *the Constitution* were infringed

26. The right under Article 50 (2) (h) of *the constitution* is on the right to legal representation at the expense of the State, where substantial injustice is likely to occur on account of lack of representation. However , it is now well settled that this right is not absolute. In the case of Karisa Chengo & 2 others vs. Republic (supra), the Court of Appeal stated:

“...However, substantial injustice only arise in situation where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another, only then would the state obligation to provide legal representation arise.”

27. The charge facing the Appellant could not be said to have been severe requiring legal representation at the expense of the state. I have noted that the Appellant also cross-examined the witnesses effectively. Am not convinced that the Appellant was entitled to representation at the expense of the state as a matter of right.
28. Article 50(2)(g) on the other hand , entitles an Accused person to be informed of his right to be represented by an advocate of his choice. The record of proceedings of the trial Court is silent on whether the Appellant was informed of this right, and I would take the silence to mean the Appellant was informed. Where an Accused person has been informed , the record must reflect that he has been informed. In this regard, I am persuaded by Justice Nyakundi’s decision in the case of Joseph Kiema Philip vs. Republic (2019) eKLR where he stated: “...it is paramount that the record of the trial Court demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state...” (Emphasis added)
29. It is my finding that the right of the Appellant under Article 50(2) (g) of *the constitution* was infringed.
30. What then are the consequences of infringement?
31. The Respondent has argued that constitutional violation need not nullify a trial; that the Appellant should sue for damages instead. In this regard, I have carefully considered the decision in Julius Mbugua Kamau Mbugua vs. Republic [2010] KECA 109 (KLR) , which the respondent has relied on to buttress its submissions. I have noted that unlike in this case , the infringement in the cited case was in respect to the length of time the Accused was held in police custody before being presented to court



for plea. The court of Appeal then declined to nullify the trial ,and held that the Accused was at liberty to sue the state for damages

32. The violation in this case occurred in the course of and was attached to, the trial process and therefore the infringement was directly raises the question of whether the trial can be said to have been fair. In other words ,unlike in a case where there has been a delay in bringing a suspect to court, and therefore can be looked at as a separate issue from the actual trial of a suspect , the infringement occurred in the course of trial of the suspect. Where an infringement has occurred in the course of trial , then the trial process has been tainted.
33. Further Julius Kamau’s case was a pre-2010 constitution decision. Under the current Constitution pursuant to Article 25 (c) , the right to fair trial is unlimited. In the prevailing circumstances, I am persuaded by the position taken by Justice Mrima in the case of SK v Republic [2023] KECA 721 (KLR) where he observed that the right under Article 50(2) (g) unlike 50(2) (h), is not qualified , and that upon derogation from this right , the trial should be nullified. It is my finding therefore that the proceedings of the trial court and the judgment herein was a nullity and must be set aside.
34. The next issue that naturally arises is whether a retrial should ordered. The relevant consideration when deciding on whether a retrial is appropriate has been restated in several decisions of the courts . In Samuel Wahini Ngugi v Republic [2012] KECA 180 (KLR) the court of Appeal held: “ The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows: It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered..... Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”
35. Further in the case of John Ouma Orungo & 2 others v Republic [2013] KECA 513 (KLR), the court of Appeal, again, stated : In a more recent decision, on the same issue, this Court in the case of Rwaru Mwangi vs. Republic Cr. Appeal No. 18 of 2006 (ur) was more exhaustive in the matters that need to be considered before ordering a retrial. It stated:

“ Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment in court of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not. See Muiruri vs. Republic (2003) KLR 552. It is also necessary to consider whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result for a retrial.”
36. Turning to the present case , the omission was on the part of the court. I have also looked at the potentially admissible evidence available and am of the considered view that a retrial should be ordered .
37. In conclusion I hereby proceed to make orders as follows:
 - a). The conviction of the Appellant is hereby quashed and the sentence is set aside.
 - b). The Appellant shall be retried by any Magistrate at the Isiolo Chief Magistrate’s court. He shall be presented before the Magistrates court for plea taking on 25th September 2025.



DATED , SIGNED AND DELIVERED AT ISIOLO, THIS 18TH DAY OF SEPTEMBER 2025.

S. CHIRCHIR .

JUDGE.

In the presence of :

Roba Katelo- Court Assistant

Jesse Kaimenyi- The Appellant.

Mr. Ngetich for the Respondent

