



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mang'era v Republic (Criminal Appeal E0106 of 2022)  
[2023] KEHC 19914 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19914 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E0106 OF 2022**

**RPV WENDO, J**

**JULY 11, 2023**

**BETWEEN**

**DANIEL SAMAYA MANG'ERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. M. O. Obiero –  
Senior Principal Magistrate in Migori Senior Principal Magistrate's  
Sexual Offences Case No. E022 OF 2022 delivered on 14/10/2022)*

**JUDGMENT**

1. Daniel Samaya Mang'era, the appellant, was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#).

In the alternative, the appellant faced a charge of committing an indecent Act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#).

The particulars of the charge are that on diverse dates between the month of April, 2022 and May 22, 2022, in Kuria West Sub County within Migori County, wilfully and unlawfully caused his penis to penetrate the vagina of YKS, a child aged thirteen (13) years or that he touched her vagina.

2. The prosecution called a total of four (4) witnesses and when called upon to defend himself, the appellant gave a sworn statement and did not call any other witness.

Upon conviction, the appellant was sentenced to serve fifteen (15) years imprisonment. No finding was made on the alternative charge. He is dissatisfied with the judgment of the trial court and filled this appeal based on the following grounds:-

1. That the court did not comply with Article 50(2)(g)(h), 27 (1) and 2, and 48 of the [Constitution](#);



2. That the offence of defilement was not proved to the required standard;
  3. That the court failed to order DNA testing;
  4. That the prosecution failed to call key witnesses;
  5. That the appellant's defence was not considered;
  6. That the sentence is harsh and excessive.
3. The appellant therefore prayed that the conviction be quashed and sentence set aside or varied.

He submitted that PW1's evidence was contradictory in that at first, she claimed that the appellant had defiled her once but later changed the narrative to say that he had been doing it repeatedly for long; that PW2, complainant's mother, said that the appellant had been defiled four times. He relied on the cases of *Ramkrishbana Denke Pandya vs Republic APP No 6 of 1990 EACA 913* where the court considered contradictions in the evidence and held that it was hard to tell the lies from the truth.

As for failure to call other key witnesses, the appellant stated that PW1 said that she was once defiled in the presence of other children but none of the children was called as a witness. He relied on the decision of *Bukenya vs Uganda (1972) E A 54* and *Francis Obonyo Angweny vs Republic HCCRA 218 of 2004*.

4. On DNA testing, it was submitted that though courts have held that DNA testing is not proof of defilement or rape, yet it is only DNA that could link the appellant to the complainant's pregnancy; that the court erred in finding that the pregnancy was his.

The appellant also submitted that there was no medical evidence to prove defilement because a broken hymen alone is not proof of defilement. He relied on HCCRA 126 of 2013 *Josephat Machoka Nyabwabu vs Republic*.

In summary, the appellant urged that the case is a frame up and the court failed to consider his defence.

The prosecution counsel filed submissions in opposing the appeal.

5. On whether Article 50 (2) (g) and (h) were complied with, counsel submitted that the court explained to the appellant his right to counsel under Article 50 (2) (g) and that he took part in the proceedings. As for the right under Article 50 (2) (h), counsel argued that the same is not an absolute or automatic right because one has to establish that 'substantial injustice' will result if counsel is not availed to an accused at State expense. Counsel relied on the decisions of *Karisa Chengo & 2 others vs Republic Criminal Appeal 44, 45 and 76 of 2017* and *Halgryn 2002 (2) Sacr 211 (SCA)*; and *Sheria Mtaani na Shadrack Wambui vs Office of the Chief Justice & Office of the Director of Public Prosecution (2021)eKLR* only persons charged with murder and children in conflict with the law have an automatic right to legal representation at State expense.

As to whether the offence of defilement was proved; counsel submitted that the age of the complainant was proved by production of the birth certificate.

6. On penetration, it was submitted that the complainant clearly narrated what the appellant who is her step father did to her on several occasions till May 22, 2022 when the complainant informed PW2 of the previous incidents. Counsel submitted that penetration was proved and relied on the decisions of *Fappyton Mutuku Ngui vs Republic (2012) eKLR* *AML vs Republic (2012) eKLR* and *Kassim Ali vs Republic (Criminal Appeal 84 of 2005* where the court held that the fact of defilement or rape is not proved by way of DNA testing. According to counsel, defilement was proved through both oral and documentary evidence.



Counsel also submitted on the competence of PW2 as a witness. She relied on Section 127 (3) of the Evidence Act which provides that a wife or husband is a competent witness for the prosecution where the children of either of them was the victim to sexual offence, bigamy or act affecting the person of their children.

On sentence, it was the respondent's submission that Section 8 (3) provides that upon conviction, one is liable to a sentence of not less than twenty (20) years imprisonment and that the sentence is illegal and the court should regularise it.

The court was urged to dismiss the appeal and align the sentence with the law.

I have duly considered all the grounds of appeal, the oral submissions and the evidence on record. The first issue I wish to deal with is whether Article 50 (2) (g) and (h) of the Constitution were complied with. I note that the appellant did not file any submissions on the said ground. Article 50 of the Constitution guarantees an accused's right to fair trial. By dint of Article 25 (c), the rights under Article 50 cannot be limited. The said Article provides as follows:-

50(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 his right promptly.

7. Under Article 50 (2) (g), the court is required to inform the accused of his right to make a choice of counsel to represent him. He has to be informed of the said right promptly. I have perused the court record where the court should have indicated that the said right was explained to the appellant but I find that the court never explained the said right to the appellant. In the case of Chacha Mwita vs Republic Criminal Appeal 33 of 2019 J Mrima considered the said provision. He observed that some people were not able to defend themselves and it is proper that they are informed of the right to choose counsel to represent them. If they cannot afford counsel, they may need to apply to the committee on Legal Aid for assignment of counsel.

In Mphukwa vs S (CA&SR) 360 OF 2004 2012, the court emphasised the need for the court to inform an accused of the right, the court stated as follows:-

'...a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.

If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice ...'



8. In *Joseph Kiema Philip vs, Republic (2019)EKLR*, J Nyakundi emphasised the need to record the fact that accused has been informed of the right to choose counsel. The court said:-

'...it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced...'

9. Having failed to inform the appellant of the right, the consequence is that the proceedings are rendered a nullity and hence the proceedings are quashed and sentence set aside. Like held in the Chacha Mwita's case (supra), the question is whether the court should order a retrial.

The grounds for ordering a retrial were well captured in the case of *Ahmed Sumar vs Republic (1964) EALR 483* where the East African Court of Appeal stated thus:-

'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.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. 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.'

10. In the instant case, the appellant was convicted and sentenced to 15 years imprisonment on October 14, 2022. So far he has not served one year of the term. He has therefore not served a substantial part of the sentence. I have also considered the potentially admissible evidence on Record. I find that there is overwhelming evidence that the offence of defilement was committed and same is likely result in a conviction. The appellant faced a serious charge of defilement and it is only proper that the case is reheard so that justice may be done to the victim too, as she was a child of thirteen (13) years. If the perpetrator is found guilty then he should face the full force of the law.

I find that this is a proper case for ordering a retrial which I hereby do. Because of the above findings, I have found it unnecessary to consider the other grounds of Appeal.

The conviction is quashed, sentence set aside and the appellant will be released to the Officer in Charge Station Kehancha police station to be presented to the Senior Principal Magistrate Migori Court for retrial on July 14, 2023. This case should be expedited, being a retrial.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 11TH DAY OF JULY, 2023.**

**R. WENDOH**

**JUDGE**

**In presence of; -**

Mr. Kaino Prosecution Counsel

Appellant Present

Ms. Emma/ Phelix –Court Assistant

