



**Ngunge v Republic (Criminal Case 45 of 2023)  
[2024] KEHC 11425 (KLR) (Crim) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11425 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL CASE 45 OF 2023  
CM KARIUKI, J  
OCTOBER 1, 2024**

**BETWEEN**

**JOHN NJUGUNA NGUNGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of Honourable S N MWANGI  
Senior Resident Magistrate delivered on 6th April 2021 in the Chief  
Magistrate Court at Nyabururu criminal case No. 137 of 2019)*

**JUDGMENT**

1. The Appellant was charged with the offense of defilement contrary to section 8(1) as read with section 8(2) of *Sexual Offences Act* No. 3 of 2006 and on an alternative charge of committing an indecent act with a child contrary to section 11(1) Sexually offense *Act No. 3 of 2006*.
2. Particulars were that on 28<sup>th</sup> September 2019 in Subukia Sub-county within Nakuru County, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of JNW. (JNW) a child aged 5 ½.
3. He pleaded not guilty to the charge, and the matter proceeded to a hearing.
4. The prosecution called four (4) witnesses, and on being put on his defense, the Appellant gave an unsworn defense.
5. He was convicted and sentenced to life imprisonment, thus precipitating the filing of the instant appeal in which he set out four (4) grounds.
6. The parties were directed to canvass appeals via submissions, which they filed and exchanged.



## **Appellant submissions.**

8. Grounds of Appeal
  - a. The learned trial magistrate erred in law by awarding a life sentence but failed to note that this sentence was against the spirit of *the constitution* of Kenya and that it did not serve the objectives of sentencing as listed on page 15, paragraph 4:1 of the policy guidelines 2016.
  - b. The learned trial magistrate erred in law and fact when he failed to note that the Appellant was not accorded a fair hearing since he was not provided with the relevant documents that the prosecution wished to rely on being witness statements prior to the commencement of the hearing of the case.
  - c. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant in a prosecution case which was not proved according to the required standards Elements of the offense of defilement were not proved, it was not proved that the Appellant Penetrated the Victim, there was no proper identification of the perpetrator.
  - d. That, the Appellant's defense was not conclusively analyzed. These gaps were to be filled in favor of the Appellant.
9. Submit that the recent law developments have clearly shown that courts can divert from them the mandatory minimum sentences enshrined in the sexual offenses act.
10. In Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General
11. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in S vs. Malgas 2001 (2) SA 1222 SCA 1235
12. The International Covenant on Civil and Political Rights of 1966, which Kenya ratified in 1972, and for that reason, the Covenant forms part of Kenyan law pursuant to Article 2(6) of *the Constitution*. Article 10(3) of the Covenant stipulates that: -
  - a. "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."
13. Whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose, the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of *the Constitution*.
14. Support from the opinion held by the Court of Appeal in Dismas Wafula Kilwake vs Republic [2019] eKLR:
15. The Appellant was not accorded fair hearing.
16. Re-examining the record of the proceedings, it will dawn on you that the plea was taken on the 28<sup>th</sup> day of October 2019, and a hearing date was taken. That was on 12/3/2012, mentioned on 28 /11/2019, and stated on pages 1-4.
17. On page 8, lines 12<sup>th</sup> March 2020, the Coram was Hon.S.N. Mwangi (SRM), the prosecutor, court clerk, and the accused were present- the court started the matter. There Were directions by the court for the accused to be supplied with witnesses' statements, but the trial court did not address this issue before the commencement of the matter, see pages 2, lines 7.



18. The proceedings went on without providing the Appellant with the prosecution witness statements until 10 /7/2020 - page 18, when the Appellant requested again for the prosecution witnesses' statements. See pages 23, lines 11-12.
19. This was an error of law. The Appellant was not accorded a fair hearing by not being provided with the relevant documents that the prosecution relied on, which were witness statements prior to the commencement of the hearing of the case. (See. Article 50 of *the constitution*)
20. In the present case, the Appellant was unrepresented; thus, it was the duty of the trial magistrate to be the protector, guarantor, and educator of the process, ensuring that the accused person was not lost at sea in the maze of the intimidating judicial process.
21. In the court (Kamau J) in Cr. Appeal No. 52 of 2016 Jacob Mwangama Mwandigha vs Republic (2017) e KLR, rendered that in a case where a trial court has made errors or omissions, the case was not a good one to order retrial as it would prejudice the accused. The conviction was thus quashed.
22. For the glaring omissions by the trial court, this court has been urged to set aside the conviction on account of violation of the Appellant's rights under Article 50 of *the Constitution*.
23. In *Ann Njogu & 5 Others vs Republic Misc. Appl. No 551 of 2007*, the court rendered that, upon a determination that the constitutional rights of the applicants have been violated, any prosecution against them or any of them, on the basis of the events ... is null and void and will remain so, irrespective of the weight of the evidence that the police might have in support of their case. This is on the simple reason that such a prosecution would be based on illegality and a null and void case --- that there is no yet known cure for the nullity .... once it is shown that his/her constitutional and fundamental rights were violated.
24. In Thomas Patrick Gilbert Cholmondeley vs Republic (2008) e KLR, the court, in a very similar situation, rendered that,
  - ii. "We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial copies of documentary exhibits to be produced at the trial and such like items."
25. Any prejudice occasioned by an accused is an essential factor for consideration. In Simon Githaka Malombe vs Republic Nyeri CA Cr. Appeal No. 314 of 2010 (2015) eKLR, the Court of Appeal quashed the conviction on the ground that the prosecution had failed to furnish witness statements to the Appellant despite requesting them, stating that:

"Denial of witness statements in the present case reduced the trial to a fabricated sham."
26. In MEM vs. Republic Nakuru MCCRA No. 314 of 2015 (2018) e KLR, the court expressed the view that:
  - i. "Failure by a Court to record whether or not any accused person has been furnished with witness statements verges on a technical, that instead, our case law provides a more functional approach. While it is a salutary price for a trial court to record, to indicate that it has given no orders or an accused person to be provided with the statements, or had facilitated their supply, failure to record this is not necessarily fatal."



27. To prove the charge of defilement, age must be proved that the victim was a minor, that penetration took place and was proved, and that the assailant's penis penetrated the victim's genitals. Lastly, Identifying the assailant is key to proving the offense of defilement.
28. The prosecution fronted PW 1 and PW4 to prove penetration. However, their evidence did not prove penetration as it was not based on any evidence. The evidence of PW 1 and PW 4 could not be conclusive to prove that the Appellant defiled the victim without any other corroborating evidence.
29. On the evidence of penetration, the learned appellate judge fell in error when he held that PW4, the clinical officer who examined PW 1, presented evidence that she had a broken hymen sign of recent sexual activity and whitish discharge -stated on pages lines 11-13 of the typed proceedings in the High court judgment.
30. The trial magistrate erred when he believed the evidence of PW 1 when he held that she checked her private parts and saw sperms and blood which were inside her private parts. She also stated that the nurse checked the complainants' private parts and confirmed there were sperms and was bleeding from her private parts.
31. This is contrary to the evidence of PW4, the clinical officer, That the victim was examined and that the age of injuries was three weeks from the time of the offense. That, the hymen was freshly torn, a vaginal wall was inflamed, and the anal canal was normal. Blood discharge was noted on vaginal or ivies
32. The prosecution case was premised on evidence of Identification given by a single identifying witness PW2. The learned trial Magistrate held that:
  - a. "According to the accused, he denied being the assailant; however, they were not strangers to each other as the complainant testified of how the accused person used to visit their home, which was confirmed by the accused person in his defense. See pages 12, lines 14 -17. ,=
33. The trial Magistrate fell in error by failing to analyze the evidence of Identification in the face of other evidence given by other prosecution witnesses and the prevailing circumstances at the scene of the crime. Thus, PW2 could not identify a stranger on a fateful day, considering the circumstances that prevailed and the fact that the assailant was a stranger,
34. In *Roria V Republic* (1967) EA 583
35. The records of the proceedings and judgment that the Appellant's defense was not considered. The Appellant elected an unsworn statement of defense and told the court that on 25<sup>th</sup> October 2019, the Appellant went to a farm and noticed that his Vegetables needed CN fertilizer, so he went to Kabazi to buy CN.
36. The prosecution must rebut the Appellant's allegations that he was framed by PW 1, the complainant's mother because she was his enemy. See section 309 of the CPC.
37. The trial magistrate did not critically analyze the Appellant's defense against all other prosecution witnesses' evidence.
38. In the case of *Justus Kiruthu Mwangi vs Republic*, the court observed that,
  - i. The role of the court when it comes to the determination as to the admissibility or otherwise of an alibi defense is to weigh such a defense against the totality of the prosecution evidence to determine whether it is dislodged or not."



## Analysis and Determination

39. The duty of the first appellate court in a criminal appeal is quite comprehensive. The court is required to re-evaluate the evidence presented in the trial court, analyze it, and draw its conclusions.
40. In the case of *Kiilu and Another v Republic*, the court observed, "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its conclusion. This means the appellate court must weigh conflicting evidence and make its findings rather than simply relying on the conclusions of the trial court. This process ensures that the appellate court independently determines whether the trial court's decision was correct, providing a thorough review to safeguard against any potential errors in the initial judgment.
41. The court observed, "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its conclusion.
42. One notable criminal appeal case in Kenya is Julius Kitsao *Manyeso v. Republic (Criminal Appeal No. 12 of 2021)*. In this case, the Appellant was convicted of defiling a minor and sentenced to life imprisonment by the trial court. The conviction was based on overwhelming evidence, including testimonies from multiple witnesses and medical reports<sup>1</sup>.
43. The Appellant challenged the conviction and sentence, arguing that the trial court had erred in its judgment. However, both the High Court and the Court of Appeal upheld the conviction and sentence, finding that the evidence presented was sufficient to support the trial court's decision. In Kenya, to successfully prosecute a defilement case, the following key elements must be established:
44. Age of the Victim: The victim must be a minor, defined as anyone under the age of 18 years. Proof of age is typically established through birth certificates, school records, or medical examinations<sup>1</sup>.
45. Penetrative Act: There must be evidence of penetration, however slight. This can be established through medical reports, testimonies, and other forensic evidence<sup>1</sup>.
46. Identification of the Offender: The accused must be positively identified as the perpetrator. This can be done through witness testimonies, DNA evidence, or other forms of identification.
47. Failure to prove any of these elements beyond a reasonable doubt can result in the case being dismissed<sup>1</sup>.
48. In amended grounds of appeal, the grave man of Appellant's complaints is a breach of *the constitution* in failing to follow guidelines in sentencing and in not ensuring compliance of rights to the supply of witnesses' statements and documents to be relied on by prosecution in the trial, failing of trial court to find that ingredients of offense were not proved to the required standard and failure to consider Appellant's defense.
49. Of the gravest omission is a denial of the Appellant's fair trial by refusal of prosecution to supply witnesses statements and documents relied on in the trial.
50. On 29.10.2019, a day after the plea, the court ordered the Appellant to be supplied with all documents, which include witnesses' statements and medical documents, to be relied on during the trial.
51. The prosecution did not supply any of the documents as ordered, and the matter proceeded with the star witnesses of the prosecution case, namely pw1 (mother of the victim) and pw2, the victim.



52. On 1 July 2020, the Appellant reminded the court that he was not supplied with the documents as ordered by the court and sought to be so supplied. The prosecution, who had denied the Appellant the statements in breach of court order, ironically opposed the application for supply of the same, saying it was too late.
53. The court reiterated the order once more for the supply of documents and adjourned the matter to another date, i.e., 6.8.2020.
54. The accused/Appellant informed the court that he was not supplied with the statements, but the court proceeded with the hearing pw3 IO testimony notwithstanding. Eventually, PW4 testified without the supply of documents ordered by the court.
55. Article 50 of *the Constitution* of Kenya outlines the right to a fair trial in criminal cases. Here are some key provisions:
- a. Adequate Time and Facilities: The accused must have adequate time and facilities to prepare a defense<sup>1</sup>. Right to Legal Representation: The accused has the right to choose and be represented by an advocate and to be informed of this right promptly.
  - b. Access to Evidence: The accused must be informed in advance of the evidence the prosecution intends to rely on and have reasonable access to that evidence.
  - c. Right to Challenge Evidence: The accused has the right to adduce and challenge evidence<sup>1</sup>.
56. Article 25 of *the Constitution* of Kenya explicitly states that the right to a fair trial is one of the fundamental rights that cannot be limited under any circumstances. This means that, regardless of the situation, the right to a fair trial must always be upheld and protected.
57. This provision ensures that every individual accused of a crime is guaranteed a fair and impartial trial, safeguarding against any form of injustice or abuse of power. It underscores the importance of maintaining the integrity of the judicial process and protecting the rights of the accused at all times.
58. The trial court and prosecution apparently seem to have ganged up against the accused /Appellant in denying him a fair trial. This is a man who clearly told the court he went up to class 2 and needed statements on 10.7.2020 and was unrepresented, but the court ignored the command of *the constitution* on fair hearing, which is an unlimited right.
59. If the right to a fair trial is violated under Article 25 of *the Constitution* of Kenya, several remedies are available to the affected individual:
- a. Declaration of Invalidity: The court can declare any law or action that violates the right to a fair trial as invalid<sup>2</sup>. Appeal: The individual can appeal the decision to a higher court, seeking a review and reversal of the conviction or sentence based on the violation of their fair trial rights<sup>1</sup>.
  - b. Judicial Review: The individual can file for judicial review, challenging the legality of the trial process and seeking orders to quash the conviction or sentence<sup>1</sup>.
  - c. Compensation: The court may order compensation for the individual for any harm suffered due to the violation of their fair trial rights
  - d. Order for a New Trial: The court may order a retrial to ensure that the individual's right to a fair trial is upheld. Where retrial can be ordered in Kenya, a retrial in criminal proceedings may be ordered under specific circumstances where the original trial is deemed invalid.
60. Here are some critical grounds for ordering a retrial.



- i. Defective Trial: If the original trial was fundamentally flawed due to procedural errors or violations of the accused's rights, a retrial may be ordered. This includes instances where the trial court did not follow proper legal procedures.
  - ii. New Evidence: If new evidence emerges that could significantly impact the outcome of the case, a retrial may be considered to ensure justice is served<sup>1</sup>. Misconduct: If there was misconduct by the prosecution or other parties involved in the trial, such as tampering with evidence or witness intimidation, a retrial may be necessary<sup>1</sup>. Judicial Errors: If the trial judge made significant errors in applying the law or in their instructions to the jury, a retrial may be ordered<sup>1</sup>.
  - iii. Interests of Justice: Generally, a retrial should only be ordered if it serves the interests of justice and does not cause undue prejudice to the accused<sup>1</sup>. For example, in the case of *Fateh Ali Manji v. Republic* (1966) EA 343, the Court of Appeal held that a retrial should only be ordered where the interests of justice require it and not where it would cause injustice to the accused.
61. In the instance case, the Appellant has served five (5) years plus, the identification evidence is false as no parade was conducted, yet the Appellant was a stranger to the 51/2 years victim. The trial court never considered even the possibility of informing the Appellant of the rights of representation in a case where she knew the mandatory minimum sentence was life and went ahead to award the Appellant the same.
62. Thus, the court finds that the Appellant was very prejudiced in the fussy trial, and any retrial in the circumstances would be a travesty of justice.
63. The court makes the orders;
- a. The trial is declared unconstitutional, invalid, null, and void.
  - b. The Appellant shall be released forthwith unless otherwise lawfully held.

**JUDGMENT DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 1<sup>ST</sup> DAY OF OCTOBER 2024.**

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**CHARLES KARIUKI**  
**JUDGE**

