



**Rimui v Republic (Criminal Appeal E020 of 2022)
[2024] KEHC 12442 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E020 OF 2022
WM MUSYOKA, J
OCTOBER 18, 2024**

BETWEEN

SAMUEL GATIMU RIMUI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. TA Madowo, Resident Magistrate, RM, in Busia CMCSOC No. E020 of 2020, of 6th April 2022)

JUDGMENT

1. The appellant, Samuel Gatimu Rimui, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on divers dates in the months of August and November 2019, at Malaba Township, Teso North Sub-County, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of CNN, a girl aged 13 years. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.
2. PW1, CN, was the minor complainant. She described the appellant as a neighbour. With regard to the August 2019 incident, the appellant allegedly attacked her at his house, tied her hands behind her back, gagged her mouth with a cloth, took her to his bed, and defiled her. With respect to the November 2019 incident, the appellant allegedly took her to his bedroom, removed her inner clothing and defiled her. She informed her teacher, PW2, JNW, of the incident, on 9th February 2020, and the matter was escalated to the police. PW2, the teacher, narrated how PW1 reported to her, in the presence of her father, PW3, BN, that she had been defiled by the appellant. PW3, the father, testified that he was with PW2 and another teacher, when PW1 disclosed that she had been defiled by the appellant. He escorted her to the police, where they made a report, and from thence to hospital for treatment.



3. PW4, David Olunga, was the clinical officer who examined PW1. He conducted a number of laboratory tests, all of which turned negative. The hymen was missing, and she had no injuries in her vagina. She had had a fungal infection, which was treated. PW5, No. 23xxx Inspector of Police Stephen Loktuk, was the investigating officer, having taken over from the initial investigator, who had since gone on transfer.
4. The appellant was put on his defence, vide a ruling that was delivered on 29th September 2021. He made a sworn statement, on 4th October 2021. He did not call a witness. He denied the charges. He alleged that the case was a frame-up, driven by succession and inheritance fights between him and PW3, who he described as a stepbrother.
5. In its judgment, delivered on 6th April 2022, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to 20 years imprisonment, on 16th May 2022.
6. The appellant was aggrieved, and brought the instant appeal, revolving around fair trial principles being violated; denial of the right to recall a witness; the trial being plagued by considerable defects and technical errors, which undermined his constitutional rights; and the evidence being fabricated. The appellant asks for a fresh hearing.
7. He later filed supplementary grounds of appeal, which turned on the medical evidence not supporting the conviction, as it provided no evidence of defilement; the case being founded on circumstantial evidence, which the trial court should have handled with caution; a missing hymen not being proof of defilement; the age of PW1 not being established; his alibi defence not being believed; vital witnesses not being called; among others.
8. Directions were given on 14th May 2024, for canvassing of the appeal by way of written submissions. Both sides filed written submissions, which I have read through, and noted the arguments made.
9. This appeal will rise or fall on account of technicalities of procedure. The appellant has raised some, in his grounds of appeal. I have very scrupulously gone through the original trial court record, and the record of appeal, and I have noted a key one, which I shall hereafter highlight. Whether I will ultimately decide the appeal on merits may well depend on my findings with regard to that technical flaw.
10. The trial of the appellant was conducted in Busia CMCSOC No. E020 of 2020. The original trial court record in Busia CMCSOC No. E020 of 2020 has been availed, together with a typescript. Both indicate that the proceedings, at the trial, commenced on 17th February 2020, when the appellant was presented before Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM. Some application was argued before the Chief Magistrate, which was allowed, and bond terms were suspended. The next appearance came on 27th February 2020, before Hon. Madowo, RM, when a hearing date was allocated. On the same date, Mr. Ipapu, Advocate for the appellant, argued for a review of the order of 17th February 2020, with regard to bond, and his plea was accepted, for the earlier orders were revised. The matter was then mentioned on 5th and 9th March 2020, before Hon. Madowo, RM, with regard to presentation of a pre-bail report, and a ruling was delivered thereon on 12th March 2020, and bond was approved on 13th March 2020. The matter came up on 26th June 2020 and 29th October 2020, when hearing dates were fixed. The hearing commenced in earnest on 5th November 2020, when PW1, PW2 and PW3 testified.
11. The narration in paragraph 10 above is meant to highlight that the original record has no minute of the appellant being arraigned for the purpose of taking plea, and of him actually pleading to the charges that he faced, before the trial commenced on 5th November 2020. That would be a fundamental flaw in the trial. An accused person can only be subjected to a trial after he has been arraigned in court,



- the charges read to him, and he denies them. Without a plea being taken, there would be no basis for conducting a trial. One of the constitutional fair trial principles, at Article 50(2)(b) of *the Constitution* of Kenya, 2010, is that an accused person be informed of the accusations made against him. That information is communicated to him at plea-taking, so that where he does not understand the charges, the trial court can make him understand them, by having them read and explained to him in a language he understands, and a translation or interpretation has to be provided, should need arise. This exercise, at plea-taking, is so fundamental that a breach of it should invite declaration of a mistrial. See *Wanjema v Republic* [1971] EA 493 (Trevelyan, J), *Adan v Republic* [1973] EA 445 (Sir William Duffus P, Spry VP & Mustafa JA), *Ombena v Republic* [1981] eKLR [1981] KLR 450 (Law, Miller & Potter, JJA).
12. Due process is a critical plank of the criminal process. Failure to arraign an accused person, and to require him to plead to the charge against him, and to plough straight into presenting the case against him, would be a failure to observe due process. It is such a fundamental breach in the process that no conviction can be founded on it. It would be a clear case of a mistrial.
 13. From the papers, in the court file in Busia CMCSOC No. E020 of 2020, I have come across an ex parte application, filed in Busia CMC Misc. No. 31 of 2020, but placed in the trial court file. It was by the initial investigating officer, and it sought that the appellant be denied bail/bond, on grounds that are detailed in the affidavit supporting the application. It is that application that was placed before Hon. Ambasi, CM, on 17th February 2020, and was allowed. What is of importance is the averment in the affidavit of the investigator, that the appellant had been presented in court, on 14th February 2020, for plea, in Busia CMCSOC No. E020 of 2020, and he had pleaded not guilty, and was admitted to bond. There is no minute, in the original trial court records in Busia CMCSOC No. E020 of 2020, of any court appearance on 14th February 2020, when the appellant allegedly pleaded to the charges that he faced.
 14. In view of the above, I shall find, as I hereby do, that there was a mistrial. Consequently, I hereby quash the conviction of the appellant, of 6th April 2020, and set aside the sentence that was imposed on him on 16th May 2022. He has invited me to order a retrial, which I hereby do. Accordingly, the appellant shall be released forthwith, from prison custody, and shall be handed over to the police, for the purpose of being presented before a magistrate's court for the retrial. As there has since been established a court at Malaba, the retrial shall be conducted by the court at Malaba. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 18TH DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Mr. Samuel Gatimu Rimui, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

