



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muendo alias Toma v Republic (Criminal Appeal E061 of 2023)  
[2025] KEHC 14737 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14737 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E061 OF 2023  
KW KIARIE, J  
OCTOBER 22, 2025**

**BETWEEN**

**WAMBUA MUENDO ALIAS TOMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Case No. E013 of 2023 of the Senior Principal Magistrate's Court at Tawa by Hon. Stephen Jalang'o, Principal Magistrate)*

**JUDGMENT**

1. Wambua Muendo alias Toma, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on the 16<sup>th</sup> day of September 2023, at [Particulars Withheld] village in Mbooni West sub-county within Makueni County, he intentionally caused his penis to penetrate the anus and the vagina of Y.M.K., a child aged seven years.
3. The appellant was sentenced to serve life imprisonment. He has appealed against both conviction and sentence. The firm of D.M. Kyalo & Associates Advocates represented him. He raised the following grounds of appeal:
  - a. The learned trial magistrate misdirected himself in failing to inform the appellant of his right of representation by an advocate, whereas he was facing serious charges.
  - b. The learned trial magistrate erred in law and fact by relying on the wrong principle and giving a wrongful sentence for life imprisonment, which was mandatory, whereas it is a maximum sentence.
  - c. The learned trial magistrate erred in law and fact in failing to acknowledge that the mandatory life sentence is unconstitutional.



- d. The learned trial magistrate erred in law and fact in failing to acknowledge that the mandatory life sentence is contrary to the principles established in the famous Muruatetu case.
  - e. The learned trial magistrate erred in law and fact in failing to consider the evidence of the appellant (accused) and that of the Appellant's (accused's) two witnesses.
  - f. The learned trial magistrate erred in law and fact in failing to give the appellant's sworn defence a fair, objective and open-minded analysis and casually rejected the appellant's defence, without any reasons.
  - g. The learned trial magistrate erred in law and fact in failing to convict the appellant on uncorroborated evidence of the complaint.
  - h. The learned trial magistrate erred in law and fact by convicting the appellant on the hearsay evidence of the prosecution's witnesses.
  - i. The learned trial magistrate erred in law and fact by holding that the prosecution had proven its case beyond a reasonable doubt as required by the law.
  - j. The learned trial magistrate erred in law and fact by disregarding the evidence of the appellant.
  - k. The learned trial magistrate erred in law and fact by failing to establish the proper identification of the appellant.
  - l. The learned trial magistrate erred in law and fact by both convicting and sentencing the appellant.
  - m. The learned trial magistrate erred in law and fact by failing to consider the mitigation of the appellant.
4. The state opposed the appeal through Linet Wataka, learned counsel, because:
- a. There was sufficient evidence that proved the charge to the required standards.
  - b. The sentence was the prescribed one.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of Okeno vs Republic [1972] E. A 32 to guide my decision-making process.
6. The appellant has contended that he was not advised of his right to engage an advocate. Article 50(2) paragraph(g) provides:
- 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;
7. In the case of BOO vs. Republic [2020] eKLR, Mrima J addressed a similar issue as follows:
17. The right under Article 50(2)(g) of the *Constitution* must be distinguished from the right under Article 50(2)(h) of the *Constitution* given that in many instances the rights under Article 50(2)(g) and (h) of the *Constitution* are dealt with contemporaneously. The right under Article 50(2)(h) of the *Constitution*, on the one hand, places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right



under Article 50(2)(g) of the Constitution, on the other hand, deals with informing an accused person of his/her right to be represented by an Advocate of one's choice, further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2) (h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever, courtesy of Article 25 of the Constitution.

The effect of non-compliance is that the entire trial is vitiated, for it amounts to a mistrial.

8. I have examined the record herein and found that the appellant was not informed of his right to legal representation. The trial, therefore, was a mistrial. In the interest of justice, I will not consider the merits of the other grounds. I therefore quash the conviction and set aside the sentence.
9. I make an order that the appellant be released, within 7 days of this judgment, into police custody and be taken to Tawa Magistrate's Court for retrial by any other magistrate of competent jurisdiction other than Hon. Stephen Jalang'o.

**DELIVERED AND SIGNED AT MAKUENI, THIS 22<sup>ND</sup> DAY OF OCTOBER 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

