



REPUBLIC OF KENYA



**DOO v Republic (Criminal Appeal E002 of 2025)
[2025] KEHC 15149 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E002 OF 2025
JK NG'ARNG'AR, J
OCTOBER 28, 2025**

BETWEEN

DOO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Kisii (W. Kugwa, RM) delivered on 26th September 2023 in Criminal Case (SO) No. 110 of 2020)

JUDGMENT

1. The appellant, DOO, faced a raft of charges. He was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#). The particulars of the offence were that on 7th November 2020 at [Particulars withheld] village within Kisii central sub-county, the appellant intentionally caused his penis to penetrate the vagina of FM a child aged 14 years. In the alternative, the appellant was charged with the offence of committing an indecent act contrary to section 11 (1) of the [Sexual Offences Act](#). The particulars of the offence were that on the same day and place, the appellant intentionally touched the vagina of FM a child aged 14 years with his penis.
2. On count II, the appellant was charged with the offence of deliberate transmission of HIV contrary to section 26 (i) (a) of the [Sexual Offences Act](#). The particulars of the offence were that on 7th November 2020 at [Particulars withheld] village within Kisii central sub-county, while having actual knowledge that he was infected with HIV, the appellant intentionally had unprotected sexual intercourse with FM, a child aged 14 years which infected the said FM with HIV.
3. Regarding count III, the appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 7th November 2020 at [Particular withheld] village within Kisii central sub-county within Kisii County, the appellant unlawfully did grievous harm to FM a child of 14 years.



4. The appellant was arraigned before the trial court to answer the charges leveled against him. He pleaded not guilty to all counts. After a full trial, the appellant was convicted on the first count of defilement. He was acquitted on counts II and III. He was accordingly sentenced to 20 years imprisonment.
5. The appellant is dissatisfied with those findings. He filed grounds of appeal raising eight grounds disputing the findings of the trial court. He complained that the ingredients to the offence of defilement were not proved beyond a shadow of doubt. He lamented that the evidence of the prosecution was marred with contradictions with shoddy investigations. In his opinion, DNA evidence was necessary to tie him to the offence. He was unhappy with the sentence that he found harsh. Finally, he complained that his rights enshrined in Article 50 (2) (g) of *the Constitution* were violated. Thus, he prayed that the appeal be allowed, his conviction be quashed and his sentence be set aside.
6. The appeal was disposed of on the basis of the parties polarized written submissions. According to the appellant's written submissions dated 12th August 2025, the evidence of the prosecution was incredible, contradictory and unreliable as it failed to prove that he committed the offence that he had been charged with. He lamented that PW2 testified twice against the understanding of a layman. In his considered view, that further violated his right under Article 50 (2) (h) of *the Constitution*. Finally, he prayed that his sentence be set aside as it was excessive.
7. The respondent opposed the appeal. It filed a notice of concession dated 25th August 2025 and written submissions of similar date. They were filed by Principal Prosecution Counsel Kitoto Victorine. Conceding, the respondent submitted that section 200 (3) of the Criminal Procedure Code was not complied with. Summarizing the facts and the law, the respondent submitted that section 200(3) of the Criminal Procedure Code was mandatory. Several decisions were cited to conclude that his conviction must fail as the trial was a nullity.
8. I have considered the submissions, examined the record of appeal and analyzed the law. As a first appellate court, I am bound to re-consider, re-value and re-analyse the evidence that was before the trial court in order to determine whether, on the basis of those facts, the decision of the trial court is justified. In so doing, I must bear in mind that I did not have the advantage of seeing or hearing the witnesses testify and should make due allowances in that regard [See *Okeno vs. Republic* (1972) EA 32].
9. Before going into the merits of the appeal, I think it is important to address whether section 200 (3) of the Criminal Code was complied with. A negative finding could potentially collapse this appeal hence the need to dispose it off first. Section 200 (3) of the Criminal Procedure Code provides:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”
10. The above provision is so cardinal as it goes into the root of an accused person's right to a fair trial given the fact that it is couched in mandatory terms. The court in *Office of Director of Public Prosecutions vs. Peter Onyango Odongo & 2 others* [2015] KEHC 91 (KLR) expressed itself as follows on the necessity of complying with this provision of the law:

“16. Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon



or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.

17. It should be noted Section 200(3) of C.P.C. gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.
18. Section 200 (3) of C.P.C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of *the Constitution* of Kenya 2010.
...
21. In my view Section 200 (3) of the Criminal Procedure Code protects the rights of the accused to a fair trial as guaranteed by *the constitution* under Article 50. (2) of *the constitution* (sic) which states every accused person has the right to a fair trial, which includes other rights as set out thereunder...

11. A look at the record shows that the matter was initially handled by S.K. Onjoro, PM. He took the evidence of PW1 and PW2. Come 11th April 2022, the matter was allocated to W. Kugwa, RM. Evidently, the provisions of section 200 (3) of the Criminal Procedure Code were not complied with as the appellant was not informed of this right. The trial court proceeded to take the evidence of PW3, PW4 and PW5 on 13th June 2023.
12. It is clear and beyond any peradventure that the appellant was not informed of his rights under section 200 (3) of the Criminal Procedure Code. It is important to clarify that the court is not being asked to mandatory recall the witnesses. It had an unreserved duty to simply inform the appellant of this right. That did not take place. It is also instructive to note that time has passed and the possibility that it would be difficult to trace the witnesses is imminent. I therefore find that a re-trial would go against the rights to a fair trial under Article 50 (2) of *the Constitution*.
13. In the end, I find that the proceedings at trial were a nullity because the trial court violated the appellant's right to a fair trial. Accordingly, since the proceedings were a nullity, this appeal must succeed. I hereby quash the conviction and set aside the sentence meted out against the appellant. I direct the appellant to be released from custody immediately unless otherwise lawfully held.

It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

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HON JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:



Siele/Kipchirchir (Court Assistants)

Appellant Present

Koime for the Respondent

