Kirwa v Republic (Criminal Appeal E058 of 2023)
[2025] KEHC 15530 (KLR) (28 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15530 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E058 OF 2023

DKN MAGARE, J

OCTOBER 28, 2025

BETWEEN

ERICK O KIRWA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of Hon. P.K. Mutai (PM) in Kisii CMCSO No. 8 of 2018. The Appellant was charged with defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.

2. The particulars of the offence were that on diverse dates between 26th November 20217 and 8th May 2022 at [Particulars Withheld] village within Kisii County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of FR, a child aged 11 years.

3. The Appellant was arraigned before Hon. Onjoro, Senior Resident Magistrate, where he denied the charges. Consequently, a plea of not guilty was entered. The trial court thereafter heard the evidence of six (6) prosecution witnesses. Upon the close of the prosecution case, the Appellant was placed on his defence and elected to give sworn testimony.

4. It is unclear from the record as to what happened to the trial court. The defence evidence was taken by Hon. P.K. Mutai, Principal Magistrate. Upon considering the evidence, he rendered his decision on 11.5.2023. The Court found the Appellant guilty and convicted him of the offence of defilement. The Appellant was subsequently sentenced to 20 years imprisonment.

5. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal dated 21.11.2023 raised the following grounds:

a. The learned trial magistrate erred in failing to note that no investigations were carried out and analyze evidence of the prosecution and occasioned miscarriage of justice.

b. The learned trial magistrate erred in law and fact in convicting the Appellant who was not represented by a lawyer, leading to substantial injustice.

c. The learned trial magistrate erred in law and fact in failing to take into account the tenure of the Appellant's defence.

d. The learned trial magistrate erred in law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt.

e. The learned trial magistrate erred in law and fact in failing to find that the case of the prosecution was marred with contradictions and inconsistencies.

Evidence

6. At trial, PW1, the minor testified that on 26.11.2017 at 5 pm, she was at home and the Appellant was outside their compound. She was with her friend Faith. The Appellant asked her to get in her mother's house to get a paper bag to buy charcoal. The Appellant then used to stay in the house of the minor's mother of whom they were friends and was 'like' the minor's uncle.

7. It was her further testimony that the Appellant tricked the minor's brothers, E and D to go to shop after which he went to the house where the minor was and laid her on the bed. He removed her skirt and pant and then removed his trouser and pant. He did bad manners to the minor. He used the thing on his groin which he put in the minors groin area. Faith came, beeped and called Sheila who was the minor's friend. When Sheila arrived, the Appellant had already stood up from the bed. The minor's mother came. The minor was still in the house. They went to hospital. The Appellant never came back to the house. He used to stay with them.

8. On cross examination, it was her case that she had only had sex with the Appellant on that occasion.

9. PW2 was Sheila Kerubo. The minor was her neighbor. On 26.11.2017 around 7 pm, she called the minor to send her paraffin but the minor did not come as she was with the Appellant. Another neighbor called Faith came and told her that the Appellant had raped the minor. She went and saw the Appellant holding the minor's mouth. She went back to the house to wait for the minor's mother to come. When she left, the Appellant also escaped. On cross examination, it was her confirmed case that she saw the Appellant rape the minor and he had grabbed her mouth.

10. PW3 was RWM, the minor's mother. She initially testified that she had never stayed with or known the Appellant. Upon being referred to her witness statement, she admitted that she knew the Appellant who was her boyfriend. She did not know of the incident until 27.11.2017 when she woke up, went to work but in the evening PW2 told her that the Appellant raped the minor. On cross examination, it was her case that she stayed with the Appellant for over one week and the children used to call him daddy or uncle.

11. PW4 was No. xxx PC Jumbe Bulaso, then attached to Kisii Police Station but since transferred to Mandera East. He was the Investigating Officer. He took up investigations on 28.11.2017. It was his case that following investigations, he reasonably believed that the Appellant was culpable and he arrested the Appellant to face the charges before court.

12. PW5 was Faith Nyakerario, a 19-year-old neighbor. She testified that they were at home with the minor and the Appellant came and sent the minor's brother to the shop. She went to her home to light a jiko.

She came back to escort the minor to buy charcoal but found the minor and the Appellant in bed. The Appellant was on top of the minor. She called PW2 who found the Appellant had pulled his trousers to the knee and the minor was on bed. On cross examination, it was her case that the Appellant first gave money to the minor to buy charcoal but PW5 went to light a jiko at her house and came back only to find them on bed.

13. PW6 was Daniel Nyameino, the Clinical Officer. According to him, the minor was between 11-12 years. He examined the minor on 29.11.2017 and noted foul smell and vaginal discharge. The hymen was torn and there were numerous epithelial cells but no purse cells or spermatozoa was seen. The presence of numerous epithelial cells, according to him, pointed to friction to the vagina and confirmed defilement.

14. The Appellant gave sworn evidence. He testified that in 2016, he married PW3, the minor's mother as second wife. They disagreed and he left her house. He took food to the children and bought vegetables and charcoal on 22.11.2017. He returned to his house in Nyanchwa. After two days, they started looking for him and he was arrested.

15. He was not cross examined.

Submissions

16. The Respondent filed submissions dated 22.8.2025 by which it was submitted that the Appellant had not proved prejudice as a result of being assigned a pro bono lawyer. There was as such no evidence that substantial injustice had occurred. Reliance was placed on Republic v Karisa Chengo & 2 others (2017) eKLR.

17. The Respondent also submitted that all the ingredients of the offence being age, penetration and identity were proved beyond reasonable doubt.

18. On sentence, it was submitted that the sentence was lenient and lower than the statutorily provided life imprisonment under Section 8(2) of the *Sexual Offences Act*.

19. The Appellant's filed submissions on 23.09.2025. The appellant submitted that there was no indication of an OB number on the charge sheet. The appellant submitted that he was arraigned in court on 7.2.2018. He wondered what took the investigations to take this long. The appellant stated that he was arrested after two months despite the investigating officer being assigned on 28.11.2017. He stated that nowhere in the proceedings was it indicated that he disappeared after the alleged offence.

20. He raised issues about contradictions between the evidence of PW1 and PW3 where PW3 indicated that she never stayed with the appellant. It was submitted that the record indicated that there were boys who were allegedly tricked to go to the shops but were not called in evidence.

21. He submitted that PW1 had stated in evidence that she was with Faith. However, Faith's evidence was that she came. Whence did she come from? Submissions were raised as to whether it is plausible that PW2 will witness a heinous crime and go back home, then wait to inform PW3.

22. He concluded that it was difficult to establish the truth in view of the contradictions. He postulated that the investigating officer failed to show who reported. He stated that the investigating officer stated that the offence allegedly occurred on 26.11.2017 and reported on 28.11.2017. He was assigned by the OCS to investigate on 28.11.2017. He stated that PW5 came to the house and thought that the duo were having sex. He wondered how come a 19 year old was not definite that they were having sex.

23. He also raised issue with the age of the complainant. The doctor was of the view that the child was 11-12 years. However, the birth certificate was registered on 14.12.2017. He stated that the certificate was not a replacement but a new registration. It was fabricated for purpose of the case.

24. They questioned why the officer who escorted the complainant on 29.11.2017 did not testify. The appellant submitted that PW3 was his wife. PW3 admitted to have slept out hence the fabrication of the case.

25. The appellant was warned that should appeal fail, sentence was to be enhanced. He opted to proceed.

Analysis

26. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

27. Therefore, this Court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

28. The Appellant was charged with defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No. 3 of 2006. I note this to be in error as PW1 was said to be 11 years old. I reproduce Section 8 (1)-(4) of the *Sexual Offences Act* as follows:

    (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

    (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

29. There is no doubt that should the conviction be found to be safe, the court is obligated, if the age is found to be 11 years, to substitute with a sentence of imprisonment for life. In that respect the court below was wrong in sentencing the appellant to 20 years without first interrogating the age. If the birth certificate is to be believed, she was 12 years. In that respect only could the sentence be correct.

30. However, there are two troubling aspects of the appeal. The evidence as it is appears overwhelming. However cross examination discloses that the appellant was not in a position to effectively defend himself. The questions asked clearly show that substantial injustice was likely to occur. Mr. Kimaiyo advocate appeared on the first day that is on 25.05.2018. On the adjourned hearing the court does not seem to make any enquiry on the whereabouts of the advocate and inform the appellant of the right to counsel as provided for under Article 50(2)(g) of the *Constitution* and Section 43 of the *Legal Aid Act*, 2016. The latter section provides as follows:

(1) A court before which an unrepresented accused person is presented shall -

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person.

(1A) In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration-

a. The severity of the charge and sentence;

b. The complexity of the case; and

c. The capacity of the accused to defend themselves.

(2) The Service shall provide legal aid to the accused person in accordance with this Act.

(3) Where a child is brought before a court in proceedings under the *Children Act* (Cap. 141) or any other written law, the court may where the child is unrepresented, order the Service to provide legal representation for the child.

(4) Where an accused person is brought before the court and is charged with an offence punishable by death, the court shall, where the accused is unrepresented, order the Service to provide legal representation for the accused.

(5) The provision of legal representation under sub-section (4) shall be subject to the criteria for eligibility for legal aid under this Act.

(6) Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.

31. I have read the entire evidence and I have not seen a place where the appellant was informed that he has a right to counsel. This court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted afresh to be subjected to exhaustive examination to guide

the court towards its own decision on the evidence. In Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-

1. 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

32. Secondly the matter proceeded before S.K. Onjoro SRM from plea up to 4.02.2022. Hon Onjoro had issued a warrant of arrest and delivered ruling on 03.09.2021. The appellant then went to the woods. Other proceedings involving the surety were undertaken in Criminal Revision 308 of 2022 (E191) of 2022. They terminated on 23.2.2023 before Githua J.

33. The transition between Hon. Onjoro and Hon. Mutai is not recorded in the file. The new magistrate started with finding of the state having established a prima facie case. That ruling had been delivered on 3.09.2021. The court proceeded to what appears to be compliance to Section 211 of the Criminal Procedure Code. However, there is no compliance with Section 200 of the Criminal Procedure Code. The said section provides as doth:

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) 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.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

34. Section 200(4) places the burden on the court to order a new trial if the appellant was prejudiced. The court having not understood the history of the matter, gave a last adjournment to the appellant when he made his first application for adjournment. This must have flowed from the fact that the appellant had skipped bail. However, he was already being punished by cancellation of bond. Indeed the court refused the Appellant to recall some witnesses at defence hearing level. This confusion on part of the

appellant could not have occurred had the court followed its statutory mandate to comply with Section 200(3) of the CPC.

35. The next question is whether, the Appellant was prejudiced by the failure to comply with Section 200 of the Criminal Procedure Code. The main issue in contention is the age of the minor. The doctor placed the age between 11-12 years. The birth certificate was obtained after the event. It is of no practical use to the state evidence.

36. It is thus crucial to proceed when the court did not observe the demeanor of the witnesses. One of the key witnesses was PW3 who appears to be lying whether or not she knew the appellant.

37. The court laid blame on the appellant, instead of complying with Section 200. The Court must be careful, since procedural loopholes are usually exploited in a seemingly innocent but profound manner. It may not be far from the truth to postulate that the proceedings of 09.03.2023 were meant for this court. However, the court is bound to have fidelity[1] to the rule of law. Unfortunately, failure to follow the two provisions of the law are fatal to the case.

38. In the case of Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (20 September 2017) (Judgment), Maraga J as he then was stated as doth:

> (394) It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the *Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the *Constitution*.

395. And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law "is the heritage of all mankind" and "a salutary reminder that 'wherever law ends, tyranny begins"[i] Cast the rule of law to the dogs, Lutisone Salevao once observed "and government becomes a euphemistic government of men..." He adds: "History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith."[2] The moment we ignore our Constitution the Kenyans fought for decades, we lose it.

39. Unfortunately, the judgment was a fruit of a poisoned tree. It must give way. The evident independent failings in procedure is not idle. The appellant is entitled to his day in court while the complainant is entitled to be heard. Without reaching a final indication on the strength of evidence as counsel may create craters and other loopholes in it, a retrial is paramount. As held in the case of Robert Akumu Asembo V Political Parties Tribunal & 2 Others [2013] KEHC 5218 (KLR), 'the result is that every fruit of the poisonous tree must be plucked.' I dare add that it must not only be plucked but thrown into the furnace for complete destruction.

40. However, to avoid tying the hands of the court below, the court will not deal with the weight of evidence.

[1] Soli J Sorabjee, Rule of Law A Moral Imperative for South Asia and the World, Soli Sorabjee Lecture,Brandeis University Massachusetts, 14th April 2010 at page 2. Available at http://www.brandeis.edu/programs/southasianstudies/pdfs/rule of law_full_text.pdf.

[2] [Lutisone Salevao, Rule of Law, Legitimate Governance and Development in the Pacific, (ANU Press, 2005)], Page 2.

41. In the circumstances, having found that both lapses results in the appellant suffering substantial injustice, the matter will be returned for a new trial. It is unnecessary to go into the nitty-gritty of whether it is prudent to order a retrial because the provisions of section 200(4) are couched in a more mandatory term. In any event, the factors to be considered in any case were set out in the case of Rwaru Mwangi v Republic [2007] KECA 338 (KLR), where the court of appeal set out the factors to consider before ordering a retrial as follows:

> Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See Muiruri vs. Republic [2003] KLR 552. It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial - See Mwangi vs. Republic [1983] KLR 522. We have taken all those principles into account and we think an order for retrial in this case would not be proper.

42. In this case, the conviction was done barely two years ago. The retrial is unlikely to cause injustice to the appellant. It is true that there has been a time lapse from arrest and arraignment but the same was caused partly by the appellant absconding after the court found he had a case to answer in 2021. It cannot be ruled out that a retrial may result in a conviction. Further, the errors were largely caused by the court and not the prosecution. In the circumstances, a retrial is the most appropriate.

Determination

43. In the upshot, I make the following final orders: -

    a. The conviction and sentence is hereby quashed.

    b. A fresh trial is ordered to be conducted before a court other than Hon. Onjoro and Hon. P.K. Mutai.

    c. The file shall be immediately placed before the Chief Magistrate for directions on trial.

    d. Directions on 11.11.2025 before the Chief Magistrates Court.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF OCTOBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Pro se Appellant

Mr. Koima for the Respondent

SSgt. Maina from Kisii Main Prison – present

Court Assistant – Michael