TM v Republic (Criminal Appeal E039 of 2024) [2025] KEHC 16802 (KLR) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E039 OF 2024

WM MUSYOKA, J

NOVEMBER 14, 2025

BETWEEN

TM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief Magistrate, CM, in Busia CMCSOA No. E044 of 2023, of 28th August 2024)

JUDGMENT

1. The appellant had been charged with defilement, contrary to section 8(1), as read with section 8(2), of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. The allegation was that on 12th April 2023, at the [Particulars withheld] area, in Matayos Sub-County, Busia County, he had caused, intentionally and unlawfully, his penis to penetrate the vagina of EA, a child of 10 years. He denied the charge. A trial was conducted, where 4 witnesses testified for the prosecution.

2. PW1, MA, appears to have been the guardian of the child, for the relationship between her and the child, was not disclosed. She was called home, from a funeral, on 12th April 2023, and she was informed, by the child complainant, and a nyumba kumi official, that the appellant had defiled the child. She took the complainant to hospital. PW2, YA, was the child of tender years. She testified through an intermediary, CN, a child protection volunteer. She identified the appellant as her cousin. She stated that the appellant had defiled her, by inserting his penis into her vagina. She stated that that happened on many occasions. She was recorded as breaking down several times, in the course of her testimony, including during cross-examination by the appellant.

3. PW3, Selah Simiyu, was the Clinician who had attended to the child, on 13th April 2023, after the defilement, on 12th April 2023. She was informed, by the child, that that was the second time that she had been defiled. Her tests recorded a broken hymen and negative HIV and syphilis tests. She said the

child was 10 years old. She produced treatment notes, P3 form and Post Rape Case Forms. PW4, No. 261723, Meresa Akinyi Ouma, was the investigating officer. She received the report, on 12th April 2023, and had PW2 sent to hospital. She said the child was 10 years, and had informed her that the appellant had defiled her, on 2 occasions. She relied on a child health and nutrition card, which she produced, and which indicated the year of birth of the child as 2013.

4. It was ruled, on 22nd November 2023, that the appellant had a case to answer. He was put on his defence. He made an unsworn statement, on 15th July 2024. He denied the offence.

5. Judgment was delivered, on 28th August 2024. The appellant was convicted. The court found that all the elements of the offence had been established. The appellant was sentenced, to 30 years' imprisonment, on 9th October 2024.

6. The appellant was aggrieved, hence the instant appeal. He grounds his appeal on the charge being defective and bad for duplicity; the testimonies of the witnesses were contradictory; the defence was disregarded; and there was violation of the rights under Articles 49 and 50 of *the Constitution*, hence there was a mistrial. He principally seeks a declaration of a mistrial, and prays for a re-trial.

7. An advocate, Mr. Ashioya, came on record, to represent the appellant. He lodged another petition of appeal, grounded on insufficiency of the evidence; contradictions in the evidence; proper age of the child not properly ascertained; over-reliance on uncorroborated and circumstantial evidence; contradictions in the medical evidence; and the sentence being excessive. The prayers are for setting aside the conviction and sentence, or reduction of sentence.

8. Directions were taken on, 24th April 2025, for canvassing of the appeal by way of written submissions.

9. I have only seen or come across written submissions by the appellant. They raise several issues. It is submitted that there was no eyewitness. There is also submission on burden of proof and corroboration. Miller vs. Minister of Pensions (1947) 2 All ER 372 (Lord Denning), Martipei Parmaya vs. Republic [2017] KEHC 905 (KLR) (C. Kariuki, J) and Jacob Omondi Ogingo vs. Republic [2011] KEHC 1104 (KLR) (Ali-Aroni, J), are cited.

10. I sit in this appeal as a first appellate court. Such a court handles the appeal by way of a re-trial. It re-considers and re-evaluates the evidence, recorded by the trial court, afresh, and draws its own conclusions. See Okeno vs. Republic [1972] EA 32 (Sir William Duffus P, Law & Lutta, JJA). I have evaluated the entire record, from the pleadings, the testimonies recorded from the witnesses, and the judgment of the court, and I have drawn my own conclusions.

11. My preliminary view is that the trial was not handled properly.

12. The starting point should be with *the Constitution* of Kenya, 2010. Kenya is still in a new constitutional dispensation, and it would appear that some trial courts are yet to come to grips with what it requires, when it comes to criminal trials. It has come up with new principles and standards that had not been clearly spelt out in *the Constitution* retired in 2010, nor in the Criminal Procedure Code, Cap 75, Laws of Kenya. The fair trial or hearing principles, in Article 50 of *the Constitution* of 2010, have introduced to the menu, of a criminal trial, a fresh raft of principles, and added emphasis on those existing prior.

13. It cannot be emphasized enough, that *the Constitution* is the supreme law in Kenya, by dint of its Article 2. All the other laws derive their legitimacy from it. It binds all persons and all State organs, institutions and entities, including the courts. It is the first port of call, for anyone exercising judicial authority. What *the Constitution* requires to be done, regarding criminal trials, should take primacy over what the Criminal Procedure Code, and other legislation governing criminal trials, may have to say on the subject.

14. The fair hearing principles and standards, in Article 50 of *the Constitution*, spell out how a trial is to be conducted, and how an accused person is to be handled or treated, right from when he is arraigned or presented to court for the first time, during trial and at the end of it. The rights of an accused person, at trial, are spelt out. He should be informed of the charges that he faces. The charges should be read to him in a language that he understands. He should be given the evidence in advance. He should be afforded facilities to prepare himself for the trial. He should be informed of his rights to legal representation, and of his right to be provided with an Advocate paid for by the State, should he be unable to afford one of his own. He is entitled to confront his accusers, by way of cross-examination. He is entitled to adduce evidence, if he so wishes, and to challenge that presented by the prosecution. In a nutshell, that is a brief on some of those rights.

15. Where the rights are granted by law, a corresponding duty is imposed. In the case of the fair trial principles, in Article 50, the duty bearer is the trial court. It is the duty of the trial court to ensure that the trial measures to the standards in Article 50, in terms of the language used in court; the advance disclosure of the evidence; the provision of facilities to the accused for purposes of preparation for trial; communication on his rights and entitlements, with respect to legal representation generally, and to an Advocate provided by the State; the right to confront witnesses; among others.

16. This is a heavy duty, on the trial court, to ensure that *the Constitution* is complied with. Where there is no compliance, or the compliance does not meet the standards, the trial would be a nullity, by dint of Article 2(4) of *the Constitution*. A trial court should strive not to labour in vain, by ensuring that it complies with Article 50. Upon that compliance, it should keep a record of what it has done, towards that compliance. If the record is silent, on the compliance, the presumption would be that there was no compliance.

17. So, what happened here?

18. The appellant was arraigned on 14th April 2025. The record is silent on the language that the appellant was comfortable with. It is silent on whether an inquiry was made in that direction, and on what the appellant might have said with regard to that. The record indicates that the trial court proceeded, using the 2 languages of the court, English and Kiswahili, and the responses, by the appellant, were recorded in Kiswahili. However, there is nothing to show that that was a language that he was competent in, or he preferred to use at trial.

19. Article 50 casts a duty, on the court, to inform the accused person of his right to legal representation, by an Advocate of his own choice. The record is silent on whether the trial court addressed that issue. Additionally, the trial court is required, by Article 50, as read with the *Legal Aid Act*, Cap 16A, Laws of Kenya, to inform the accused person of the right to an Advocate provided by the State. That should be preceded by an evaluation of the circumstances of the accused person, in terms of assessing his means and his ability to navigate the trial process, taking into account the seriousness of the offence, and the complexity of the charges.

20. The trial court did not address itself to that subject, going by the silence in the record. Yet, the appellant faced a charge that exposed him to a sentence, upon conviction, of a statutory or mandatory life imprisonment. In the end, upon conviction, he was sentenced to 30 years' imprisonment. The charge was serious, in the circumstances, and all due precautions ought to have been taken, to ensure that the appellant was in a position to meaningfully participate in the trial, and if not, to inform him of his right to appoint an Advocate of his own choice, and, if he could not afford to appoint one, from his resources, of his right to apply to have one appointed for him, paid for by the State. That was not done.

21. Article 50 also talks of advance disclosure of the prosecution evidence. That essentially should be a copy of the charge sheet, witness statements, treatment notes, P3 form, and other documents that the prosecution purposes to rely on at trial. This serves several purposes. One, it informs the accused person of the charges facing him. Two, it helps him to prepare in advance for the trial, so that he is not caught flat-footed when witnesses are presented. Three, it helps him formulate his defence, and work out strategies on how to confront his accusers, by way of cross-examination of the prosecution witnesses, and also by way of his defence.

22. When the appellant was arraigned, on 14th April 2023, the trial court did not address the matter of advance disclosure of the evidence. The record is silent on whether that issue came up. It is silent on whether the trial court enquired, from the appellant, as to whether that evidence was furnished to him, or on whether the prosecution was asked if it had availed it. No order was made with regard to that. The trial commenced on 3rd May 2023, and there is no minute or note, in the trial record, pointing to that evidence being availed to the appellant prior to 3rd May 2023, or thereafter. The presumption then would be that that advance evidence was not shared with the appellant, and he went into the trial blindly, in the absence of the same.

23. How did all this impact on the appellant?

24. It is difficult to tell. But what is clearly discernible is that the appellant did very little cross-examination, if any. He had no questions for PW1. For PW2, he had only 1 question, to which the response was, “alinifanyia tabia mbaya.” For PW3, he had only 3 questions, to which the response was, “I did not visit the scene. You were not brought to hospital for examination.” To PW4, he said only 3 questions, to which the responses were, “I had known you before. You were arrested by neighbours. The neighbours called you whether after they arrested you.”

25. This was a person facing a charge that could take him to jail for life, and, indeed, it took him there for 30 years. Yet, the questions he posed, ought to raise doubts about his preparedness for the trial, or his capacity to meaningfully participate in the proceedings, to the extent of effectively confronting his accusers. It tells of a dire need for an Advocate. It also tells of a lack of information on what the witnesses were to testify on, if he did not have prior access to their statements, and the documents they were to rely on.

26. It raises serious questions on the fairness of the whole trial process. Was there equality of arms, between the appellant and the prosecution? Did the trial court do enough, to ensure that he was effective in the trial process? The trial was about him and his future, much as it was also about the complainant. Justice cuts both ways. It should be done to both the accused and the complainant. The trial court owes a duty to both, the accused and the complainant. The duty to ensure that offenders are brought to justice and punished, ultimately, for the wrongs that they commit to society; and the duty to ensure that the person accused is presumed innocent until proven guilty, and is taken through a fair trial process, where all the safeguards, in Article 50, are taken into account.

27. So much for the constitutional principles and standards. What about the actual trial? How was the process and the evidence handled?

28. Let me start with the charge. The complainant, according to the pleadings, the charge, was said to be a child of 10, whose name was given as EA. At trial, no EA testified. The person, who was presented as the complainant, testified as PW2. She identified herself as YA, or simply Y, and not EA or E. No effort was made, by the prosecution, to connect or link the person identified in the charge as EA, to the person at the witness box, identified as YA.

29. This was a criminal trial. Standard of proof was beyond reasonable doubt. One of the critical facts, to be proven beyond reasonable doubt, would be the identity of the victim of the crime. There would be an identity crisis, where the person named in the charge is different, from the person placed in the witness box. It would be a discrepancy or anomaly that ought to raise doubts about the identity of the person against whom the offence was committed. It is something that the prosecution ought to have addressed, even if it required amendment of the pleadings or the charge. Parties are bound by their pleadings. The pleadings, in this case, were not aligned to the testimony of the complainant, PW2, YA, in terms of the identity of the victim named in the charge as EA.

30. The medical records did not help either. PW2 identified herself as YA. The mother and child health booklet was in respect of a child identified as UA or EA. The patient medical record pass book, basically the treatment notes, related to EA. I have not come across P3 form, but I do see a Post Rape Case Form, from which the P3 form is usually generated. It related to EA. What is in a name? Everything. It is about identity, and any confusion, on the real or actual name of a victim of a crime, would go to identification, and doubts around that could be fatal to a prosecution.

31. The trial court, in the judgment, did not address itself to that issue, about the identity of the EA in the charge sheet, and the YA in the witness box. It was a critical matter, which the court ought to have addressed its mind to, as it raised issues as to whether the victim of the offence was properly identified, hence whether the case was established to the required standard.

32. What I find more fundamental is the fact that the judgment appears to have been founded on material that was not in the trial record, of what the witnesses stated in their testimonies, or on material that was not reflected in the documents put in evidence as exhibits.

33. PW2, the minor, YA, is recorded, in the judgment, at paragraph 16, as having said that “the accused took her into a bush removed her clothes and defiled her.” With respect, she did not say that, going by her recorded testimony. She did not talk about where the incident happened. She did not talk about her clothes being removed. After voir dire examination, she was recorded as saying, “I know the accused. He is known as T. He is my cousin. The accused did bad manners to me. “alifanya tabia mbaya” alichukua kitu yake ya kukojoa akaingiza kwa kitu yangu ya kukojoa. The accused defiled me by inserting his penis in my vagina. The accused defiled me on many occasions … alinifanyia tabia mbaya.” That is all that PW2 said. There was no mention of a bush, or removal of clothes.

34. None of the other witnesses talked of a bush, or removal of clothes. PW1 just talked about being informed of the defilement. She did not talk of where the incident happened, nor of the clothes of PW2 being removed. PW3 was the clinician, she did not talk about that either. PW4 was the investigating officer, she did not mention a bush, or talk about clothes being removed.

35. Then there is the matter of the medical evidence. At paragraph 17, of the judgment, it is recorded that the clinician, PW3, had “told the court that the labia minora was reddened …” That statement, by the trial court, is not supported by the recorded and other evidence. In her testimony, in court, on 15th November 2023, the witness, PW3, did not talk about the labia minora at all, leave alone describing it as “reddened.” The Post Rape Case form merely recorded that the “labia minore larger than labia majori.” The treatment notes talk of the “labia minora is bigger than labia majori.” There was no mention of it being “reddened.” There could be a sense that the appellant was convicted based on evidence that was not in the record.

36. Paragraph 19, of the judgment of the trial court, also introduces 2 disturbing elements, that are not supported by the material on the record.

37. It is about the age of the complainant, PW2. The trial court, at that paragraph of the judgment, says she was 12, at the time of the commission of the offence, “according to the charge sheet, and the age assessment report.” I am not sure where the trial court got the age 12 from. According to the charge sheet, the complainant, EA, was “a child aged 10 years.” There was no age assessment done. No age assessment report was produced. The document, that PW4, the investigating officer, relied on, to prove the age of PW2, was a child health and nutrition card. The age, that PW4, sought to prove, was not 12 years, but 10 years. PW3, also said PW2 was 10 years old. The trial court contradicted itself, at paragraphs 19 and 22 of the judgment. At paragraph 19, it concluded that the charge sheet and the age assessment report had established the age of PW2 to be 12, and then, at paragraph 22, it expressed satisfaction, “that there was penetration of a child aged 10 years as evidenced by the evidence of record.”

38. Still on the medical evidence, the trial court, at paragraph 23 of the judgment, states that “the Doctor noted that there were abrasions and lacerations.” Yet, there was no such evidence in the medical records availed and produced as exhibits. PW3, the clinician, did not mention any such injuries. None of the other witnesses said anything about that, including PW2 herself. The Post Rape Case form did not either, for it merely recorded “no bruises or inflammation.” The treatment notes bear the same report, of “no bruises or inflammation.”

39. The way the trial court handled the evidence, and the other material, should raise doubts, as to whether the appellant received a fair trial, for the trial court appeared to read, into the record, material that was not in that record, and to put words into the mouths of the witnesses, or to read items, into the documents, that were non-existent.

40. In view of everything, that I have discussed above, it would be my conclusion that the trial of the appellant was not satisfactory. He did not get a fair trial. I shall, accordingly, declare a mistrial, and order a retrial. The consequence of the above, is that the conviction of the appellant herein is hereby quashed, and the sentence imposed on him set aside. He shall be released forthwith, from prison custody, and shall be handed over to the police, who shall present him before the Chief Magistrate’s Court, at Busia for retrial, by a Magistrate other than Hon. EA Nyaloti, CM. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 14TH DAY OF NOVEMBER 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the appellant.

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