

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
CRIMINAL APPEAL NO.E003 OF 2025

MOHAMUD MOHAMED HAJJI
APPELLANT

VERSUS

REPUBLIC

.....RESPONDENT

*(Being an appeal against the conviction and sentence in
Isiolo Criminal S.O.No. E012 by Hon. L.Mutai (CM)
delivered on on 31st of 2024 by Jan,2025)*

JUDGMENT

- 1.The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of Sexual Offences Act No.3 of 2006. The particulars of the offence are that on diverse dates between May and September 2024 at Chechelesi area in Isiolo Sub-County within Isiolo County caused his penis to penetrate the vagina of A.I a child aged 12 years. He also faced an alternative charge of indecent act with a child, contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006 by unlawfully touching A.I's vagina.
- 2.The Appellant was tried, convicted on the main charge and sentenced to serve 19 years and 9 months imprisonment.

Petition of Appeal

- 3.Dissatisfied with the conviction and sentence, the Appellant lodged this Appeal. The grounds of appeal ,as set out in his amended Petition of Appeal dated 25th June 2025 are:-

- a) That the Learned Trial Magistrate erred in law and in fact by failing to find that the complainant carried herself in a manner that made the Appellant to reasonably believe that she had attained the age of majority.
- b) That the Learned Trial Magistrate erred in law and in fact by failing to find that the complainant's father offered to marry off the complainant thus making the Appellant to reasonably believe that the complainant had attained the age of majority
- c) That the Learned Trial Magistrate erred in law and in fact by failing to conduct a proper *voire dire* before taking the testimony of the complainant.
- d) That the Learned Trial Magistrate erred in law and in fact by failing to find that the prosecution's case was marred with material inconsistencies
- e) That the Learned Trial Magistrate erred in law and in fact by failing to find that the complainant's family had a motive to frame the Appellant.
- f) That the Learned Trial Magistrate erred in law and in fact by giving the Appellant a harsh sentence under the circumstances of the case.
- g) That the Learned Trial Magistrate erred in law and in fact by convicting the Appellant under a different provision of the law contrary to the one in the charge sheet.
- h) That the Learned Trial Magistrate erred in law and in fact by failing to inform the Appellant of his right to legal representation.

- i) *That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the charge sheet was defective.*
4. The Appeal was canvassed by way of written submission.

Appellant's Submission

5. The Appellant contends that the charge against him was not proved beyond reasonable doubt. That the complainant did not disclose that she was a minor when the Appellant proposed to her and the complainant's father accepted dowry. The Appellant cited Section 8(5) of the Sexual Offences Act in support of this submission.
6. The Appellant further contends that PW3 was physically abusive to the complainant. That the charges were an act of PW'3 rage directed at the Appellant when the complainant became pregnant.
7. On the sentence it is submitted that in the circumstances of this case, the sentence meted against the Appellant was harsh.

Respondent's Submission.

8. The Respondent submitted that the prosecution proved all the ingredients of the offence of defilement beyond reasonable doubt. It is submitted that the Appellant did not raise any issue with regards to deception but instead hopelessly denied the charges and could not dispel the overwhelming evidence tendered by the prosecution.
9. The Respondent however concedes that there was failure to inform the Appellant of his right to legal representation and urges the court to refer the case for a retrial.

Analysis and Determination.

10. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa had the following to say in this connection:

"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 whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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; it must make its own findings and draw its own 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..."

11. Issues for determination;
- a). whether the Appellant's right to fair trial was infringed
 - b). whether the defence of section 8(5) of the Act is available to the Appellant
 - c) whether the sentence was excessive.

The right to legal representation

12. The right to legal representation is enshrined under Article 50 (2)(g) of the constitution . It is an aspect of fair trial , which pursuant to Article 25, is an unlimited right.

13. In the English case of **Pett vs. Greyhound Racing Association (1968) 2 All ER 545** this is what Lord Denning had to say about the right and the significance of it:-

“It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.”

14. In **Republic -vs- Karisa Chengo & 2 Others [2017] eKLR** the supreme court of Kenya had this to say about the right to legal representation as an element of fair trial:- *the right to legal representation under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more”*.

15. It is the duty of the trial court to inform persons facing any criminal charge of their right to be represented by an Advocate of his choice. The information should be relayed promptly. In the present case, the record of proceedings of the trial Court is silent on whether the Appellant was

informed of this right. I will take the silence to mean that the Appellant herein was not informed, because where it has been done, the record of proceedings must reflect it. In this regard am persuaded by the decision of the high court in the case of Joseph **Kiema Philip vs. Republic (2019) eKLR** where the Judge stated: “...it is paramount that the record of the trial Court demonstrate that the accused was informed of his right to legal representation

16. In view of the foregoing , including the various positions taken by the higher courts , I have no hesitation in holding that the Appellant’s right to fair trial in this case was infringed. The trial was therefore a nullity.

17. The next question is whether to order for a retrial.

18. In determining the above question the decision in the case of **Ahmed Sumar vs. R (1964) EALR 483**, provides a guide. The court held:

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and

circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused”

19. It is also well established that the decision to order a retrial must be made based on the circumstances of each case.

20. In the present case, the error was committed by the trial court; it is also on record that the incident took place about a year ago; the Appellant was convicted in February this year and the Appellant has spent about 12 months in jail when the period served prior to completion of trial is taken into account. I have also looked at the evidence of the prosecution, and subject to proper compliance with all procedural issues, the prosecution the prosecution is likely to secure a conviction. In the circumstances of this case therefore a retrial is an appropriate remedy.

21. In conclusion:

- a). The trial of the Appellant is hereby nullified. The conviction is hereby quashed and sentence set aside.
- b). The Appellant will be subjected to a Retrial, to be conducted at the chief magistrate’s court at Isiolo
- c). The Appellant to be presented to the court on 22nd December 2025 for plea-taking.

Dated, signed and delivered at Isiolo this 3rd day of December 2025.

S. Chirchir

Judge.

In the presence of:

Roba Katelo- court Assistant

The Accused

Mr. Kitheka for the Accused

Mr. Ngetich for the Respondent.

ORIGINAL