



REPUBLIC OF KENYA



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**Nderitu v Republic (Criminal Appeal 123 of 2017)
[2025] KECA 2187 (KLR) (11 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2187 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 123 OF 2017
S OLE KANTAI, A ALI-ARONI & GV ODUNGA, JJA
DECEMBER 11, 2025**

BETWEEN

JOHN NGUNJIRI NDERITU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of the High Court at Kerugoya
(Gitari, J.) delivered on 8th November, 2018 in H.C. CRA No. 59 of 2016)*

JUDGMENT

1. This is a second appeal from the original conviction and sentence of the appellant, John Ngunjiri Nderitu for the offence of defilement contrary to section 8 (1)(3) (as per charge sheet) of the *Sexual Offences Act*, it being alleged that on diverse dates between 15th and 31st December, 2015 at the place named in the charge sheet he intentionally caused his penis to penetrate the vagina of “EW” a child aged 14 years. He was convicted and sentenced to serve 20 years imprisonment, and his appeal to the High Court of Kenya at Nyeri was dismissed by Ngetch, J. in a judgment delivered on 26th July, 2017.
2. Being a second appeal our mandate is limited by section 361 (1)(a) Criminal Procedure Code to determine matters of law only but not to go to the facts of the case which have been considered by the trial court and re-assessed on first appeal - that mandate has been the subject of various judicial pronouncements by this Court in such cases as Michael Ang’ara Paul vs. Republic [2021] eKLR where the Court pronounced:

Being a second appeal our jurisdiction is limited by Section 361(1) (a) Criminal Procedure Code where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial court and re-evaluated on first appeal unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two courts



demonstrably acted on wrong principles in making those findings or the conclusions are perverse – Chemagong v Republic [1984] KLR 611.”

3. Upon being charged, the appellant pleaded not guilty, and when the hearing commenced, the child’s mother, “JG” (PW1), testified that on 28th February, 2015 she was called by her mother “CM” (PW2), who lived with the child and informed that the child had missed her monthly period. The child told her that she had been defiled by the appellant, a former farmhand. She reported the matter to the police, and the appellant was arrested; the child was 14 years old, and she produced a birth certificate and P3 Form, which were marked for identification; she testified that the child was mentally challenged, was examined at the hospital and found to be pregnant.

4. CM testified that she lived with the child who was mentally challenged. Between 15th and 31st December, 2015 she noticed that the child had not received her period as it was she who used to supply pads to the child. She called PW1, who took the child to the hospital, and a medical examination revealed that the child was pregnant; the child delivered a baby and stated that it was their farmhand (the appellant) who had defiled her. Upon hearing the prosecution evidence and upon being called upon to cross-examine PW2 the appellant stated to the trial court:

I admit the child is mine. I wish to plead guilty to the charge.”

5. The charge was read over and explained and he answered:

It is true.”

6. Whereupon a guilty plea was entered and the Court Prosecutor applied for a mention date to get facts of the case. The case was adjourned 5 times and on the 6th time the Court Prosecutor informed the Court:

Facts are as per the evidence on record. I have exhibits.

Birth notification Exhibit 1. P3 Form exhibit 2.

DNA results Exhibit 3(b). Exhibit Memo exhibit 3(a).”

7. The appellant told the Court”

I admit the charge. It is true.”

8. He was convicted on his own plea of guilty.

9. Needless to say, those documents (exhibits) were not availed to the appellant and were produced as part of evidence to assist the court in making a determination in the case.

10. At the High Court on first appeal the appellant raised various grounds including that he did not understand the consequences of pleading guilty; that facts of the case were not read to him, amongst other grounds.

11. We think that there are issues of law calling for our determination.

12. The State Counsel at the High Court in opposing the appeal addressed the Judge as follows:

The appellant has raised ground that he did not understand the consequence of pleading guilty suggested that plea was unequivocal (sic).



We submit he understood that he was pleading to especially that charges were read afresh to him. We however note that facts were not fully ready (sic) in the event that you find that plea was unequivocal (sic). Based on that we urge court to consider giving order for re-trial as there is overwhelming evidence... The minor complainant with (sic) 14 years with mental challenge and it is in the interest of justice that in event this court find the plea was equivocal that a retrial must be conducted...”

13. The Judge was not impressed by the submission where she was being asked by the respondent to order a retrial and as we have seen the appeal was dismissed.
14. When the appeal came up for hearing before us on 5th November, 2025 the appellant was present appearing in person. We asked Mr. Naulikha, learned counsel for the respondent, whether the plea was unequivocal as required in law; he answered in the negative adding that the appellant should have been warned of the consequences of pleading guilty absent which the appellant did not get a fair trial.
15. The correct procedure for taking a guilty plea was elaborately explained by Spry V. P. in the celebrated case of Adan vs. Republic [1973] EA 446 as follows:

When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded.”

16. In the case before the magistrate two witnesses testified after which the appellant told the Court that he wanted to plead guilty to the charge. When the Court Prosecutor was asked to state the facts of the case, he did not have them and asked for adjournment several times after which he merely stated that the facts of the case were as per evidence recorded. He then produced various documents as part of the evidence which were not availed to the appellant. We are of the respectful opinion that this plea was not unequivocal as per the procedure set in Adan vs. Republic (supra).
17. Then there is the issue whether the appellant should have been warned of the consequences of his pleading guilty to the charge. The State Counsel before us conceded, and we think that he was right to do that, that failure to warn the appellant of consequences of pleading guilty could have led to an unfair trial. This Court in Wakianda vs. Republic [2016] KECA 181 (KLR) had this to say on that issue:

We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the



accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the *Constitution* guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare.”

18. The appellant was faced with a charge that called for a minimum sentence upon conviction and it was the duty of the trial court to warn him of the consequences of his entering a plea of guilty, more so as he had initially pleaded not guilty. Nowhere in the record does it show that he was given a warning by the magistrate and we think that the Judge on first appeal acted in error in not finding otherwise. This again leads us to the conclusion that the appellant was not accorded a fair trial.

19. What order should we therefore make?

20. The record shows that the appellant took plea on 5th March, 2015 which is over 10 years ago. Although he was granted bond, he was unable to raise it and remained in custody throughout the trial. The appellant in his written submissions pleads that he has suffered enough during his incarceration and cites the case of *Martin Bahati Makoha & Another vs. Republic* [2018] KLR where Ngenye - Macharia, J. (as she then was) observed:

... I take into account that the Appellants were arrested sometime in March, 2008 and since the day of plea on 5th March, 2008, they have been in custody. As at date, that period commutatively adds up to exactly ten years and two days. They have suffered more than sufficient sentence in the circumstances...”

21. This Court in considering what orders to make in a similar scenario had this to say in *Obedi Kilonzo Kevevo vs. Republic* [2015] KECA 127 (KLR): -

What orders should we then make in the circumstances of this case? Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant.

In the case of *Muiruri vs. Republic* [2003] KLR 552, the court considered a similar situation and held as follows, inter alia:

1. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.
2. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

In the criminal justice system, the law requires that the right of the appellant must be weighed against the victims’ right.”

22. The appellant was sentenced to 20 years imprisonment for the offence he was charged with. He has been in custody for over 10 years. We do not think that, in the circumstances, ordering a retrial would meet the justice of the case. We think he has suffered enough and learnt the lesson that he should keep to the standards and confines set by society and what the law demands. Subjecting the complaint to



re-live the events that took place more than 10 years ago, assuming that the witnesses are still available, may also not be in the best interest of the complainant.

23. In the circumstances where we have held that the appellant did not get a fair trial, we allow the appeal by quashing the conviction and setting aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER, 2025.

S. ole KANTAI

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JUDGE OF APPEAL ALI- ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

