Harrison v Republic (Criminal Appeal E123 of 2025)
[2025] KEHC 18719 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18719 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL E123 OF 2025

DR KAVEDZA, J

DECEMBER 19, 2025

BETWEEN

JAMES MWANGI HARRISON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal presents an opportunity to interrogate the non-derogable right to fair hearing as provided under Article 50 of *the Constitution* as a facet of the broader concept of due process, which is geared towards ensuring that legal proceedings adhere to rules and procedures established by both substantive and procedural laws. The appeal further puts into perspective the long-established doctrine of stare decisis, which means that decisions of a higher court are binding on lower courts within the same jurisdiction. This doctrine is underscored under Article 165(6) of *the Constitution* which vests this court with supervisory jurisdiction over subordinate courts.

2. The Appellant was charged, tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of January 2018 and June 2020 at Nairobi and Nakuru counties within the Republic of Kenya, he intentionally and unlawfully used his penis to penetrate the vagina of R.W.M, a child aged 11 years old.

3. Dissatisfied with the order of conviction and sentence, the Appellant lodged this appeal on 28th August 2025. He faults the trial court for convicting him on grounds that can be summarised as; failure by the prosecution to discharge its burden of proof beyond reasonable doubt, disregarding the Appellant's defence of alibi and disregarding the directions of this Court in HCCRMISC E185 of 2024 Republic vs James Mwangi Harrison.

4. The Appellant filed written submissions in support of the appeal dated 31st October 2025. On its part, the respondent has conceded the appeal through written submissions dated 20th November 2025.

5. The record shows that the complainant (PW 1) testified on 30th August 2022 before Hon. Kitagwa and was cross examined.

6. On 4th November 2024, when ten (10) prosecution witnesses had testified, the State sought to withdraw the case against the Appellant under Article 157(6)(c) of *the Constitution*, section 87(a) of the Criminal Procedure Code and Section 40 of the *Sexual Offences Act*. On 6th November 2024, the trial court delivered a ruling disallowing the State's application and directed that the matter proceeds to its logical conclusion.

7. The said ruling and order precipitated the filing of a revision application before this court by the State being HCCRMISC E185 of 2024 Republic vs James Mwangi Harrison. In that application, the State averred that on 21st August 2024, the Director of Public Prosecution received a letter of even date from the complainant's family requesting to have the matter before the lower court withdrawn and upon thorough interrogation, they came to the realization that the allegations against the accused person may have been a set up and the facts vis-à-vis the evidence cannot sustain a conviction.

8. Further, through a Supplementary Affidavit sworn on 18th December 2024 by the Prosecution Counsel, the State annexed a report by Eric Gachoka, a Children Officer which stated,

> 'the minor RWN, 14 years old states that the alleged defilement incident never took place and regrets the testimony she gave in court which is untrue. She continues to say that she has never had any suicidal tendencies and she is focused on her studies."

9. After considering the revision application on merit, this Court delivered a ruling on 30th January 2025. At paragraph 20 of the ruling, I stated as follows;

> "It is my considered view that in view of the significant shift in the evidence given by the complainant at the trial and the compelling evidence adduced before this court, it would be in the interest of justice that the trial court is given an opportunity to weigh the said evidence in considering the application for withdrawal."

10. Ultimately, the Court issued the following orders: -

    i. The complainant shall be escorted to the investigating officer to record a fresh statement in the presence of her parents and the children officer and not later than 15th February 2025.

    ii. Upon compliance with order (i) above, the lower court file shall be mentioned before the trial court on 18th February 2025 for purposes of taking directions on recalling the complainant to take her evidence afresh.

    iii. The Director of Public Prosecutions shall thereafter be at liberty to make a fresh application for withdrawal of the matter.

11. I have now meticulously perused the record of the trial court, including both the handwritten and typed proceedings. The record speaks for itself. The orders and directions issued by this Court were not complied with. The investigating officer did not record a fresh statement from the complainant as directed. Equally, the complainant was never recalled to testify afresh in accordance with the express terms of the orders.

12. Instead, on 30th January 2025, the matter was merely mentioned before the trial court. The State Counsel is recorded as having brought to the attention of the court the ruling delivered by this Court. No steps were taken towards compliance. The matter was then fixed for mention on 18th February 2025.

13. On 18th February 2025, there is again no indication on record that the orders of this Court had been complied with, or even partially complied with. No explanation was proffered. No extension of time was sought. No variation of the orders was requested. Rather, the matter was fixed for hearing on 25th February 2025, on which date the last prosecution witness testified and the prosecution proceeded to close its case.

14. The orders issued by this Court on 30th January 2025 were clear, unequivocal, and binding. They were not issued casually, nor were they intended to be treated as advisory or cosmetic. They were judicial commands, issued after the Court was satisfied that the complainant, who was the principal prosecution witness, had, subsequent to her testimony in court, made statements materially contradicting her earlier evidence on the occurrence of the offence before the trial court.

15. The purpose of the said orders was to safeguard the integrity of the trial process and to ensure that the ends of justice were met, while at the same time maintaining a delicate balance between the rights and interests of the complainant and those of the accused person. By directing that the complainant records a fresh statement and be recalled, the Court intended to afford the trial court an opportunity to interrogate, test, and re-evaluate the contradictory versions of events, and thereafter to make an informed and judicious determination on the propriety and sustainability of the charges facing the Appellant.

16. Further, recalling the complainant would have enabled the trial court to observe her demeanour first-hand, a matter of particular significance given that her initial testimony was taken by a different judicial officer. While demeanour is not decisive, it remains a relevant consideration in assessing credibility, particularly in cases that turn substantially on the evidence of a single witness.

17. In the absence of compliance with these directions, the trial proceeded on a fundamentally defective footing. The failure by the investigating officer, the prosecution, and the trial court to ensure adherence to the binding orders of this Court before allowing the trial to continue amounted to a mistrial and occasioned a grave miscarriage of justice. The prejudice was twofold. First, the complainant was denied a structured and safeguarded opportunity to clarify and contextualise the alleged contradictory statements attributed to her. Second, the Appellant was exposed to a real risk of conviction on the basis of untested and compromised evidence.

18. This is because the averments that the complainant had been coerced were raised by her parents in a letter dated 21st August 2024 addressed to the court and in the Children's Officer's report dated 18th December 2024. As previously noted by this Court, the complainant ought to have sworn an affidavit and be examined by the court on the allegations of coercion raised.

19. The jurisprudence on this point is clear. I agree with, and adopt, the position articulated by the Court of Appeals of Texas in Villareal Villarreal vs. State 788 S.W.2d 672, where the Court held that:

> " the general rule is that a new trial should be granted where a witness has testified to material inculpatory facts against the accused and after the verdict, but before the motion for a new trial has been acted upon, makes an affidavit that he testified falsely."

20. Similarly, in State vs. D.T.M., 78 Wash. App. 216; 896 P.2d 108, the Court of Appeals of Washington was confronted with comparable circumstances involving materially inconsistent testimony by a key witness. The Court found that the integrity of the trial had been irreparably compromised and ordered a retrial in the interests of justice.

21. In the present case, injustice is not only apparent, it is glaring. It stands in open defiance of the principles that underpin a fair trial. To paraphrase Nyamu, J (as he then was) in Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443, where justice is denied, the gates of hell open wide to give way to frustration, despondency, dejection, desolation, and hopelessness. People lose faith in the rule of law and are driven to seek other means, legal or otherwise, to achieve what they perceive to be justice. Justice is not a cloistered virtue. Where justice is not only done but is also seen to have been done, public confidence in the legal system is enhanced. Conversely, where proceedings strike a reasonable person as unjust, the legitimacy of the process is eroded.

22. The failure to comply with this Court's orders resulted in a mistrial of the Appellant and occasioned him prejudice. Any finding of guilt made in these circumstances cannot be allowed to stand, particularly in light of the significant evidential shift in the complainant's account, which lay at the heart of the prosecution case.

23. Black's Law Dictionary, 9th Edition, defines a mistrial as:

> " A trial that the judge brings to an end, without a determination on the merits because of a procedural error or serious misconduct occurring during the proceedings."

24. I entirely agree with this definition and add that where a superior court is satisfied that there has been a manifest failure to abide by its orders, it must intervene decisively to remedy the resultant injustice. Court orders are not issued in vain. They are binding directives that remain in force unless set aside, varied, or stayed by a court of competent jurisdiction. In criminal proceedings, non-compliance of the nature evident in this case strikes at the very root of the right to a fair trial and may lead to the unlawful deprivation of liberty through no fault of the accused person.

25. Section 354(3)(a) of the Criminal Procedure Code donates to this Court wide appellate powers. In an appeal from conviction, the Court may reverse the finding and sentence and acquit or discharge the accused, or order that he be tried by a court of competent jurisdiction; or alter the finding while maintaining, reducing, or enhancing the sentence; or alter the nature of the sentence with or without altering the finding.

26. The exercise of these powers is discretionary and must be guided by the interests of justice and the peculiar circumstances of each case. In the present matter, an outright acquittal would not serve the interests of justice, particularly given that the failure lay not in the insufficiency of the evidence per se, but in the manner in which the proceedings were conducted in disregard of express judicial directions.

27. I am guided in this regard by the decision of the Court of Appeal in Obedi Kilonzo Kevevo vs Republic [2015] eKLR, where the Court stated:

> " 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."

28. Applying this principle, I am satisfied that the Appellant did not receive a satisfactory trial. Equally, I am persuaded that ordering a retrial will not occasion injustice or prejudice to him. He will have the opportunity to confront and challenge any evidence that may be led by the prosecution, including the testimony of the complainant, in a trial conducted in strict compliance with procedural safeguards and judicial directions.

29. A retrial, properly conducted before a different judicial officer, will also serve the broader public interest by ensuring that the matter is determined on its merits, in a manner that is fair, transparent, and consistent with the rule of law.

30. In the premises, I hereby make the following orders:

    i. The appeal succeeds to the extent that the proceedings before the trial court are hereby declared a mistrial.

    ii. The conviction and sentence, arising from the said proceedings are hereby set aside.

    iii. The Appellant shall be retried before a court of competent jurisdiction other than the court that conducted the impugned trial.

    iv. The Appellant shall present himself before the Officer Commanding Station (OCS) Lang'ata Police Station on 5th January 2026.

    v. Thereafter, the appellant shall be presented before the Chief Magistrate Kibera Law Courts for fresh plea and the court is at liberty to set new bond terms.

    Orders accordingly.

JUDGEMENT DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2025

D. KAVEDZA

JUDGE

In the presence of:

Mr. Kihang'a for the Appellant

Mr. Mutuma for the Respondent

Karimi Court Assistant.