



**Kiuro v Republic (Criminal Appeal E057 of 2022)
[2025] KEHC 18735 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E057 OF 2022
TW OUYA, J
DECEMBER 18, 2025**

BETWEEN

FRANCIS NJOROGE KIURO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. I. Gichobi, PM,
in Sexual Offence case no.13 of 2019, delivered on 12th October, 2022)*

JUDGMENT

1. The appellant herein, Francis Njoroge Kiuro, was tried and convicted before the trial court of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2002. It is alleged that on the 22nd day of January at Murang'a county, the accused intentionally caused his penis to penetrate the vagina of S.W.W a child aged 17 years and three (3) months.
2. Upon conviction, the appellant was sentenced to a term of fifteen (15) years imprisonment. He was aggrieved by his sentence and conviction and he proffered an appeal to this court vide an amended petition of appeal which he named amended grounds of appeal.
3. In his amended petition of appeal, the appellant advanced a total of four (4) grounds of appeal in which he faulted the learned trial magistrate for failing to appreciate that the provisions of Section 214 of the Criminal Procedure Code were not adhered to, failing to find that the prosecution had not provided the appellant with witness statements prior to their testifying, and as such denying him the chance to adequately defend himself against the charges levelled against him, failing to find that the prosecution did not discharge its duty pursuant to Section 107 of the Evidence Act, and for imposing on him a harsh and excessive sentence without considering his mitigation as well as the facts and circumstances that are unique to his case.



4. The appeal was canvassed by way of written submissions. In his submissions, the appellant took the position that the trial court failed to fully comply with Section 214 of the Criminal Procedure Code. That although the court directed that the complainant be recalled for purposes of cross-examination, this was never done. He maintains that he was prejudiced by the trial court's omission and that his right to a fair hearing was violated.
5. The appellant contended that his right to a fair trial was violated, as he was never provided with witness statements from the prosecution witnesses to enable him adequately prepare for his defence. The appellant submitted that the prosecution failed to prove their case against him beyond reasonable doubt, as there were huge disparities in the prosecution's case that raise doubt as to his guilt. As regards the sentence meted out on him by the trial court, the appellant was of the view that the said sentence was harsh, excessive and not commensurate to the circumstances of his case, as such this court should quash his sentence and substitute it with a lesser sentence.
6. The respondent, on the other hand, submitted that since the amendment to the charge sheet did not alter the substance of the charges against the appellant, no prejudice was occasioned by the failure to recall the complainant. According to the respondent, the only change made was the correction of the complainant's name, which did not affect the nature of the allegations or the appellant's defence.
7. Regarding the failure by the prosecution to supply the appellant with witness statements, the respondent conceded to this fact and stated that the appellant was never supplied with witness statements by the prosecution despite requesting the court to be supplied with the same. The respondent submitted that to this extent, the appellant's right to a fair trial was violated.
8. On whether the prosecution had discharged its burden of proof, the respondent submitted that the evidence presented satisfied all the essential elements of the offence charged. The respondent maintained that the case against the appellant was proved to the required standard. It was further submitted that the sentence imposed by the trial court was lawful and appropriate in view of the nature of the charge.
9. I have duly considered the evidence on record together with the grounds of appeal, as well as the parties rival written submissions and all the authorities cited by the appellant. I have also considered the entire proceedings recorded by the trial court and read and understood the impugned judgement.
10. This court is minded to first to first deal with the appellant's complaint that his constitutional rights to a fair trial were violated in the course of the trial as he was not supplied with witnesses' statements by the prosecution, as such, he was unable to adequately prepare for his defence. The appellant also complained that the trial court failed to fully comply with Section 214 of the Criminal Procedure Code. Given that the complainant was not recalled for cross-examination as such he was prejudiced.
11. Article 50 (2) (j) is clear that every accused person has a right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. Article 50 (2) (c), further makes it clear that an accused person has a right to adequate time and facilities to prepare a defence.
12. Mativo, J (as he then was) stated as follows in *Joseph Ndungu Kagiri v Republic* [2016] KEHC 4153 (KLR), regarding the right of an accused person to be supplied with the evidence that the prosecution intends to rely on: "Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with



Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence. The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the *Constitution* and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.....This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in R v Stinchcombe, where the Supreme Court of Canada observed, “The obligation to disclose was a continuing one and was to be updated when additional information was received.” I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial.”

13. From the record, it is notable that the accused had on several occasions requested the trial court to be supplied with witness statements by the prosecution witnesses before after some of the key prosecution witnesses had testified. I also noted that the accused did not cross-examine some of the prosecution witnesses, especially, PW1 and PW2, and was evidently ill- prepared for his defence. This could have been attributed to his not supplied with their witness statements.
14. Based on the above, it is evident that the accused persons constitutional right to a fair trial was violated, given that he was not supplied with any of the witness statements by the prosecution witnesses, and this in my view vitiated the entire trial.
15. Having come to the conclusion that the entire trial before the lower court was a nullity for failure to supply the appellant with the evidence that the prosecution relied on during trial, this appeal succeeds with the result that the appellant’s conviction is quashed and his sentence is set aside.
16. The next issue for determination by this court, is whether it would be in the interest of justice to acquit the appellant or remit the case back to the trial court for a re-trial.
17. The principles that guides a court in deciding whether or not to remit a case for retrial or acquit an appellant were reiterated in the case of Fatehali Manji –versus- Republic [1966] E.A. 343, wherein the court at Page 344 stated as follows; “In general a retrial will be ordered only when the original trial was defective or illegal ; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial ; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered ; each case must depend on its particular facts and circumstance and an order of retrial should only be made where the Interests of Justice require it and should not be ordered where it is likely to cause injustice to the accused person.”
18. In the present case, I have noted that the accused has been in custody from 22nd January, 2021, when he was first arrested to date. Whereas the appellant had been released on cash bail, there was no indication that he was able to meet the terms of the cash bail and he therefore stayed in custody from the date of his arrest to date, which is a period of about four (4) years and 11 months.
19. Aside from that, I note that the prosecution was unable to trace two of its witnesses, being Jackeline Gakii Mwangi and Paul Kuba Mwangi, and consequently closed its case without their testimony. It



is also evident from the proceedings that the complainant had on two occasions expressed a desire to withdraw the case against the appellant, a request which the prosecution declined, and rightly so given the nature of the offence. However, in light of these circumstances, it may now be difficult to trace the complainant or compel her to testify afresh against the appellant, particularly where she had previously indicated an intention to withdraw the matter. Without the complainant's evidence, the prosecution's case is likely to collapse.

20. Based on the above, and considering also that the appellant has already been in custody for a period of 4 years and 11 months, I am of the considered view that ordering a retrial would not be in the interest of justice as it would occasion a great prejudice to the accused.
21. In the circumstances, I am of the view that the appellant should be set free forthwith, unless lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER, 2025.

HON. T. W. Ouya

JUDGE

For Applicant.....Francis Njoroge Kiuro (Present)

For Respondent.....Muindi

Court Assistant.....Brian

