Sang'alo v Republic (Criminal Appeal E044 of 2024)
[2026] KEHC 980 (KLR) (2 February 2026) (Judgment)

Neutral citation: [2026] KEHC 980 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E044 OF 2024

WM MUSYOKA, J

FEBRUARY 2, 2026

BETWEEN

NICK IMUNU SANG'ALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction, by Hon. RN Ng'ang'a, Resident Magistrate, RM, in Busia MCSOAC No. E100 of 2021, delivered on 1st February 2022, by Hon. EC Serem, Resident Magistrate, RM, and sentence passed by Hon. Serem on 1st March 2022)

JUDGMENT

1. The appellant was convicted of defilement, of a minor of 15, on 28th June 2021, at Moding Sub-Location, Teso North, Busia, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya.

2. A trial was conducted. 5 witnesses testified. PW1, the complainant, testified that the appellant was his boyfriend, and that the 2 had sex on the material day. He had invited her to his house, to wash his clothes, and she went there, washed the clothes, and the sexual contact happened. PW2 was the mother of PW1. She did not know the appellant. She testified that she was called to Moding Police Station, after the appellant was arrested. PW3 was a clinician. He medically examined both PW1 and the appellant, on 28th June 2024. They confirmed to him that they had had sex. PW4 was the arresting officer. He found PW1 and the appellant in a house together, PW1 was in a state of undress, on a bed. PW5 was the investigating officer.

3. The appellant was put on his defence, on 14th December 2021. He made an unsworn statement, on 22nd December 2021. He denied the offence. He stated that PW1 was at his house, washing clothes, when the police stormed in, and arrested him.

4. Judgment was delivered, on 1st February 2022, convicting the appellant. He was sentenced, on 1st March 2022, to 20 years imprisonment.

5. The appellant was aggrieved, hence the instant appeal. The grounds revolve around the case not being proved, to the required standard; the elements of the offence not being established; discrepancies in the evidence; lack of corroboration; bias on the part of the trial court; and the mode of arrest being improper.

6. He later filed supplementary grounds of appeal, around violation of trial rights; the trial being defective; penetration not having been proved beyond doubt; his identification, as perpetrator, being questionable; the burden of proof being shifted to him; the sentence being unconstitutional; section 200 of the Criminal Procedure Code, Cap 75, Laws of Kenya, not being observed; voir dire examination was not conducted; and the evidence being full of hostilities.

7. The appellant has argued his appeal vide written submissions. He submits that the trial was unfair, on account of failure to be informed of rights to legal representation, and the evidence was not disclosed to him in advance. The trial is said to be illegal, for he was not allowed to make a final address. He argues that penetration was not proved beyond doubt. He says that he was not positively identified as the perpetrator. No medical evidence linked him to the offence. His defence was not given due consideration, and burden of proof was shifted to him. He submits that the sentence was unconstitutional, and the plea was defective and the conviction unsafe. There is also submission on voir dire, and of hostile evidence.

8. The elements of defilement are 3: age of the complainant, penetration of the genitals of the victim, and the identification of the perpetrator. The appellant does not contest the age of the victim, but raises issues around penetration and his identification as perpetrator.

9. On penetration, the definition points to insertion of the penis or other object into the vagina of the female, or into the anus of the victim, regardless of gender, whether fully or partially. Corroborative evidence of the penetration is no longer required, so long as the testimony of the victim appears truthful to the trial court. The trial court herein had PW1 before it. It saw and heard her, and believed her. She was the victim. It had happened to her. It was her vagina that was penetrated, and she described what had happened. She was at the house of the appellant, at his invitation. She washed his clothes, and they went to a bed, and had sex. She said that he put his penis inside her vagina. That was a straightforward narrative of what transpired. The trial court believed the account. It was adequate proof of penetration.

10. Although corroborative evidence, on penetration, was not mandatory, it was, nevertheless, available. PW3 was the clinician, who attended to both PW1 and the appellant, the same day, shortly after the sexual encounter. He testified that both PW1 and the appellant confirmed having sex; meaning that penetration had happened. The P3 form, produced in evidence, presented the supporting forensics. The hymen was broken, and had whitish mucus discharge, which was also noted on the labia majora and minora. It was non-foul smelling, meaning it was fresh. The post-rape care (PRC) form, presented in evidence, carried the conclusion, that non-traumatic penetrative vagina intercourse was likely. The whitish substance was identified, in the post rape care form, as semen. The proof of penetration was, no doubt, overwhelming.

11. On identification, it is argued that there was nothing to prove or establish that it was the appellant who penetrated the vagina of PW1. The argument appears to be made because the appellant was not medically examined, despite he and PW1 being presented to PW3, shortly after their arrest from the house of the appellant.

12. Was the identification of the appellant, as the perpetrator of the penetration, in doubt? I do not think so. In the first place, the 2, him and PW1, were arrested at the house of the appellant. PW1 testified that the arrest happened just when the sex was happening, between them. The police evidence confirmed that. They stormed in, were let in by the appellant, and found PW1 on a bed, in the house of the appellant, undressed. The appellant denied that, but conceded that PW1 was indeed in his house, at the material time when the police stormed in, but washing clothes. Yet, when put on his defence, he was careful not to give a sworn statement, lest he was subjected to vigorous scrutiny, by way of cross-examination. The evidence placed him at the house where PW1 said she was defiled. The police evidence pointed to catching the 2 in a rather compromising situation, with PW1 on the bed, undressed. The appellant was dressed up, ostensibly as he had a chance to dress up, because the police knocked first, and he had to get the door or gate, to let them in. The trial court saw those who gave those narratives, heard them, and it believed the versions given by PW1 and the police witness.

13. Secondly, and more importantly, PW1 was the victim of the defilement. The appellant invited her to his house, allegedly, to wash his clothes. In his unsworn statement, in defence, he said PW1 was indeed, in his house, when the police came, and alleged that she was washing his clothes. PW1 described the appellant, as his friend, and said that that was not the first time they had sex. The evidence pointed to the 2 being overly familiar with each other. The issue of the identification of the appellant, as the perpetrator, should not be in doubt. They were found together. When presented to PW3, the clinician, the 2 confirmed to him that they had just had sex. When the forensic tests were done, semen was noted in the vagina of PW1, which had no foul smell, as it was still fresh, confirming what PW1 and the appellant had just informed the clinician, that they had just had sex. The penetration was described as non-traumatic, which explained the absence of tears and lacerations, as it had been consensual, and not forced. PW1 told the court that the appellant talked to her, after she finished washing clothes, and sex followed after that. There was no suggestion of use of force. After all, they were friends, who had had sex before. The evidence, overall, pointed to a proper identification of the appellant, as the perpetrator of the penetration.

14. Besides the elements of defilement, the appellant has raised other issues. He argues that the medical evidence did not link him to the offence. The answer to that is that the law does not require DNA analysis of samples taken from him, to link him to the offence. The law states that the evidence or testimony, of the complainant or victim, would suffice, if believed by the trial court to be the truth. The trial court found it truthful. I agree with the trial court, from my own re-evaluation and re-analysis of the evidence.

15. He says that he was not given a chance to make a final address or submissions prior to judgment. That is true. What I see, from the trial record, is that at the close of the defence, the court allocated a date for the judgment. The record is silent on whether the issue of submissions arose. Anyhow, submissions or closing remarks are not mandatory. The trial court, in a case where oral evidence was adduced, determines the matter based on the evidence adduced, that is the testimonies recorded, and the exhibits placed on record. Submissions or closing statements have no evidential value. They are summaries of the evidence on record, or analysis of the evidence, and possibly the applicable law. The trial court can, quite properly, determine a matter, despite absence of the summaries or arguments. A judgement, founded on oral or viva voce evidence, cannot be upset, on the basis that submissions were not taken from the parties, at the end of the oral hearing.

16. Whereas submissions would be critical, with respect to applications, where the court relies only on documents and other filings, and not oral or viva voce evidence, arguments would be crucial, to breathe life into the filings and documents, but they would not be, where a full-blown trial, by way of viva voce evidence, was conducted.

17. He argues that his defence was not considered. He did not have much of a defence. Indeed, he presented no defence at all. He made an unsworn statement, which is of little probative value, for it is not available for subjection to scrutiny or testing, by way of cross-examination. It is as good as choosing to remain silent in defence. Indeed, giving on unsworn statement has the potential of being counterproductive. The material in it is of little value as a defence, but it could be of some corroborative value, to the evidence by the prosecution, in terms of confirming aspects of it. On the burden of proof being shifted to him, I note that he has not demonstrated in what respect there was a shift in the burden. I have very closely considered the evidence on record, and I have not seen any incidence of such shifting of burden of proof.

18. He submits that the plea-taking was defective. He has not demonstrated how that was so. I have looked at the trial record, on the argument, and I do not see anything there which exposes defects in the taking of the plea, which would have the effect of vitiating the conviction.

19. On the sentence being unconstitutional, I note that he was sentenced to 20 years imprisonment. That is the minimum provided, upon conviction for defiling a child aged between 13 and 15, under section 8(3) of the *Sexual Offences Act*. PW1 was 15 years old. The sentence, imposed, is what is prescribed by law.

20. On the constitutionality of the sentence, I am alive to the decisions in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), which would have suggested that a mandatory minimum sentence is unconstitutional. The principle, in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), relating to unconstitutionality of mandatory minimum sentences, among others, was, by the decision in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), restricted to murder, and does not apply here.

21. The position stated in Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), was held, in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), Republic vs. Manyeso [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) and Republic vs. Ayako [2025] KESC 20 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), to be bad law, where it was reiterated that the sentences, under the *Sexual Offences Act*, are lawful and constitutional. There is nothing to demonstrate the unconstitutionality of the sentence that the trial court pronounced.

22. I will consider next the issue of the trial court not complying with the constitutional provisions on fair trial or fair hearing, on legal representation, adequate time to prepare for trial, and advance disclosure of evidence.

23. I have looked at the record, and I have noted that indeed the trial court did not inform the appellant of his trial rights on legal representation. The provision is meant for individuals who are indigent, and lacking adequate knowledge to navigate around a trial. Looking at the trial record, I note that the appellant subjected all the witnesses presented by the State to extensive cross-examination. The answers given point to relevance. He was able to navigate around the trial. He was no ignoramus. He did not suffer any prejudice for non-compliance.

24. On adequate time to prepare for the trial. I note that he was arraigned on 29th June 2021, and the trial did not start until 15th October 2021, when 2 prosecution witnesses testified. That was adequate time, roughly 3 months, for him to prepare for trial. He was not ambushed.

25. On disclosure of advance evidence, I note that at plea-taking, on 29th June 2021, the trial court directed that he should be furnished with witness statements. When the matter was mentioned, on 13th July 2021, the appellant confirmed that he had been supplied with witness statements. The matter came up on 16th September 2021, for hearing, when it was adjourned, as PW1 was not available, for she was in school. The appellant addressed the court, indicating that he did not object to the adjournment, but he did not raise any issue about advance evidence not being disclosed, or what was disclosed being inadequate. When the case came up, for hearing, on 5th October 2021, when it proceeded, he said he was ready, and did not raise any issue on lack of advance evidence. At the next hearing, on 23rd November 2021, he, again, indicated that he was ready for trial, and did not raise any issues. From the record, there is no material pointing to non-disclosure of advance evidence, or lack of adequate time or facilities to prepare for trial. He was admitted to bond, on 6th July 2021, 3 months before the trial commenced on 5th October 2021. That gave him more than adequate time to prepare for trial.

26. There was the issue about the mode of his arrest being improper. I am not quite clear as to what this argument is about. I, of course, understand that it has something to do with how he was arrested. I have gone through the testimonies of the complainant, the arresting officer and the appellant, and I have been unable to find anything illegal, or unlawful, or improper, in the manner the arrest was effected. The police are entitled to storm into premises, where they have credible information, as was the case here, that a crime or offence, particularly a felony, was in progress or in the process of being committed, or about to, so as to stop the commission or prevent it. Prevention of crime is one of the duties of the police.

27. Section 200 of the Criminal Procedure Code is about what should happen to a trial, where the trial magistrate is transferred. It requires the magistrate taking over the case to ask the accused whether he would like the case to start de novo, or to proceed from where the other magistrate left off. That only applies to where the matter is part-heard. It does not apply where the trial is wholly conducted by the magistrate who is subsequently transferred, inclusive of the judgement being written by him or her, leaving the incoming magistrate with the role of only reading the judgement. In the instant case, Hon. Ng'ang'a conducted the trial to the end, and wrote the judgement. Hon. Serem only delivered the judgement, written by Hon. Ng'ang'a, and then sentenced the appellant. What was done, in that instant, was proper and procedural.

28. On the omission, by the trial court to conduct a voir dire examination, before taking the testimony of PW1, the legal position is that voir dire does not have to be conducted with respect to any child witness. It is meant for children of tender years, for it is intended to gauge or assess their general intelligence, in terms of ability to express themselves, and to understand the significance of telling the truth. Children of tender years are those under 10. Ages 11 and 12 are in the middle, the court may or may not conduct voir dire on them. Teenagers, aged 13 and above, would need no voir dire, for they are old and mature enough, intellectually. They have the ability to express themselves, and have a good awareness of their surroundings, and certainly have capacity to understand the significance of honesty and truthfulness.

29. Overall, I am not persuaded that the appeal herein is merited. I disallow the appeal, and I hereby dismiss it. The conviction is hereby affirmed, and the sentence confirmed.

30. I note that the appellant had filed another appeal, in Busia HCCRA No. E006 of 2022, arising from the same conviction in Busia CMCSOC No E100 of 2021. The dismissal of the appeal herein, that is

Busia HCCRA No. E044 of 2024, should have the effect of rendering the appeal, in Busia HCCRA No. E006 of 2022, otiose. The appeal file, in Busia HCCRA No. E006 of 2022, shall, accordingly, be closed.

31. The appellant had also filed Busia HC Criminal Application No. E030 of 2024, for leave to appeal out of time. That application was needless, as he had already filed Busia HCCRA No. E006 of 2022, and he went on to file Busia HCCRA No. E044 of 2024, which I have now determined in this judgment. The file, in Busia HC Misc. Criminal Application No. E030 of 2024, shall, accordingly, be closed.

32. He also filed Busia HC Misc. Criminal Application No. E032 of 2025. That matter is still pending. He is seeking bond pending appeal. I have dealt with his appeal against conviction and sentence. I have affirmed the conviction, and confirmed the sentence. He cannot, in the circumstances, be admitted to bond pending appeal. The application, in Busia HC Misc. Criminal Application No. E032 of 2025, is superfluous. The file, relating to it, shall, accordingly, be closed.

33. The remedy, now available to the appellant, following dismissal of the appeal, herein, should be to challenge the dismissal, at the Court of Appeal, within the timelines, relating to appeals to that court. The High Court has now become functus officio, so far as the conviction and sentence, in Busia CMCSOA No. E100 of 2022, is concerned.

34. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA,

THIS 2ND DAY OF FEBRUARY 2026.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Nick Imunu Sang'alo, the appellant, in person.

Advocates

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