



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL CASE NO. E052 OF 2024**

**FELIX ATOLWA Alias BOI .....**  
**APPELLANT**

**VERSUS**

**REPUBLIC (ODPP) .....**  
**RESPONDENT**

**(Being an appeal from the Judgement by Hon. V. O. Amboko (SRM) in  
Kakamega CM's Court Sexual Offence Case No. E087 of 2022 delivered  
on 31<sup>st</sup> October 2023)**

**JUDGEMENT**

1. The Appellant Felix Atolwa alias Boi was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 20 years imprisonment.

2. The evidence before the court was that the victim, who was aged 13 years at the time of the offence was defiled by the Appellant while she was enroute to school. The victim's testimony was that the Appellant was known to her as he lives near her school and that on 27/6/2022, while she was on her way to school, the Appellant followed her, grabbed her and defiled her after tying her hands and feet with a rope. A man who was herding cows nearby tried to intervene in vain. After the ordeal, the victim proceeded to school and informed her teacher who notified her mother. Thereafter, she was taken to hospital after a report had been made to the police.
3. The victim's testimony was corroborated by her mother and the Clinical Officer. The Clinical Officer produced a P3 form which confirmed the defilement. He produced the victim's treatment notes, laboratory report, and PRC form as exhibits. The Investigating Officer produced the Birth Certificate that indicated that the victim was born on 23<sup>rd</sup> July 2009.
4. When placed on his defence, the Appellant claimed that he knew nothing concerning the incident and denied being

called “Boi”. His witness was his mother who testified that the Appellant had been unwell although she did not know the specific days of his indisposition.

5. Aggrieved by the conviction and sentence, the Appellant filed a petition of appeal which he later amended and raised the following grounds of appeal:-

- (a) *That the age of the complaint was not proved by the prosecution beyond reasonable doubt.*
- (b) *That the learned trial magistrate erred in law and facts by not observing that the facts contained did not support the charges.*
- (c) *That the appellant went through unfair trial.*
- (d) *That the trial court erred in both law and facts in not observing that penetration was not proved.*
- (e) *That the learned trial magistrate erred in both law and facts in not making findings that the vital prosecution witness who witnessed the minor (PW1) being defiled was not availed/called to testify.*
- (f) *That the trial court failed to consider the whole period the appellant spent whilst still on trial - commence from date of arrest - 03.08.2022.*

6. The appeal was canvassed through written submissions.

### **Analysis and Determination**

7. This being a first appellate court, its duty is to analyse and re-evaluate the evidence afresh with a view to making its own independent decision bearing in mind the fact that it did not have the benefit of observing and hearing the witnesses as they gave evidence. See **Okeno v. Republic [1972] EA.**
8. The following issues arise for determination from the petition of appeal and the parties' submissions:-
  - (a) *Whether the Appellant's right to a fair trial were violated.*
  - (b) *Whether the ingredients of defilement were proven.*
  - (c) *Whether the failure by the Prosecution to call certain witnesses vitiated the proceedings.*
  - (d) *Whether the trial Magistrate failed to apply Section 333 (2) of the Criminal Procedure Code.*
9. On the first issue, the Appellant claims that the trial magistrate failed to inform him that he had a right to legal representation therefore resulting in an unfair trial.

10. Article 50 (2) (g) of the Constitution provides that every accused person has a right to a fair trial which includes the right to a Counsel of his choice and to be promptly informed of this right. This right is further extrapolated by the Legal Aid Act which stipulates in Section 43 (1) (a) that:-

**“(1)A court before which an unrepresented accused person is presented shall—**

**(a)promptly inform the accused of his or her right to legal representation.”**

11. I have perused the record and established that the trial Magistrate who first took the Appellant’s plea failed to indicate whether the Appellant was informed of his right to legal representation during the plea-taking stage or during subsequent attendances. This was crucial in view of the fact that the Appellant faced charges that attract a mandatory minimum and severe sentence.

12. The statutory requirement for the court to inform an accused person promptly of his right to legal representation enjoins the court to notify the accused of the right at the earliest appearance in court, in any event,

before the case is fixed for hearing. The prompt notification would afford the accused the opportunity to look for an advocate if he deems it necessary. It is incumbent on the trial court to communicate to the accused that he has a right to retain the services of an advocate, and to document the fact of the communication. If it is not documented for purposes of the record, it is presumed not to have been done.

13. In **Dennis Omweri Edwin v. Republic [2024] KEHC 1317 (KLR)**, T.A Odera J. stated thus:-

**“At what point is the court required to inform an accused person of his right to legal representation? According to the Article 50(2) of *the Constitution*, it appears that an accused person should be informed of this right at the outset, hence the use of the word “promptly”. Black’s Law Dictionary, 9<sup>th</sup> Edition, defines prompt as “to incite, esp. to immediate action.” “Immediate” is defined as “occurring without delay; instant”.”**

14. As has been held by courts, the duty to inform an accused person of his right to legal representation is a

constitutional and statutory imperative. Courts are mandated to promptly inform an accused person of this right and the right cannot be derogated as it is pivotal in realizing a fair trial. In **HO v. Republic [2020] KEHC 7957 (KLR)**, Musyoka J, held that:-

**“The constitutional provisions on the right to legal representation, as stated in Article 50(2) (g) (h) and the provisions of the Legal Aid Act in general, clearly put a damper on the mantra that every citizen is expected to know the law, and that ignorance of the law is no defence. They clearly are alive to the general ignorance of the law and lack of awareness with regard to legal processes and rights amongst the general populace. It is against that reality that the law has placed a burden on the courts to enlighten accused persons of their rights in law, so that they can benefit from the law, and, specifically, the rights that accrue to them under Article 50(2) (h) of the Constitution and the Legal Aid Act. That reality was highlighted by the Court of Appeal in *Elijah Njihia Wakianda vs. Republic [2016]***

**eKLR, where it was stated that the trial court should play the role of an educator of the accused person so far as these matters are concerned.”**

See also, **Sheria Mtaani na Shadrack Wambui v. Office of the Chief Justice & another, Office of the Director of Public Prosecutions & another (interested parties) [2021] KEHC 4855 (KLR).**

15. Having held that the Appellant’s constitutional right to a fair trial were violated, the court has no option but to declare a mistrial. Where an accused person’s constitutional right to a fair hearing has been violated, the proceedings are vitiated as the entire process is tainted with unconstitutionality. The foundation of the hearing is faulty and the outcome undesirable as it may lead to prejudice to the accused. See **KO v. Republic [2023] KEHC 18310 (KLR)** where Musyoka J held:-  
**“Should I overlook the non-compliance on the basis that the appellant did not suffer prejudice as a result? Whether the appellant suffered prejudice or not, from the non-compliance, is not even an issue, for the failure or omission to obey constitutional**

commands by itself renders the prosecution invalid. The Constitution is the supreme law, and what it commands must override everything else.

The constitutional fair trial rights, in this case, were not upheld, which rendered the trial unfair. The trial did not reach the constitutional threshold for fairness, which rendered the trial unconstitutional, in view of the failure or omission to comply with the constitutional dictates. I agree with the appellant, his trial did not meet the constitutional threshold, which, by dint of article 2(4) of the Constitution, reduced it to a nullity.

The configuration, for what should happen at arraignment, changed fundamentally upon the coming into force of the Constitution of Kenya, 2010, and courts presiding over a plea taking exercise should come to terms with it. It is no longer enough to just have the charges read to the accused, have him plead to them, consider whether to release him on bond, and thereafter allocate a date for hearing. All the constitutional

**prerequisites for a fair trial, stated in article 50 of the Constitution, must be adhered to. For some of them, there has to be compliance before the trial kicks off in earnest, and a trial court, which decides to plough on with the trial, in disregard of article 50, wastes precious judicial time, for the entire exercise would be totally a nullity.”**

16. The failure to comply with the constitutional imperative for fair trial vitiated the proceedings and rendered them invalid. The conviction and sentence must be set aside. The other issues that fell for determination are therefore rendered moot.
17. On reviewing the evidence without going into the merits, I find that this is an appropriate case for a retrial. I therefore convey the matter back to the Chief Magistrate’s Court, Kakamega. The matter shall be heard *denovo* before any court other than Hon. V. O. Amboko, SRM.
18. The matter shall be mentioned before the Chief Magistrate on 23/2/2026.

Dated, signed and delivered at Kakamega this 10<sup>th</sup> day of February 2026.

**A. C. BETT  
JUDGE**

**In the presence of:**

Appellant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

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