Mekubo v Republic (Criminal Appeal E032 of 2025)
[2026] KEHC 4430 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4430 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E032 OF 2025

TW CHERERE, J

MARCH 5, 2026

BETWEEN

ISAAC NYARIBO MEKUBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence in Nyamira CMCR 1694 of 2019 by Hon. C.I. Agutu (SRM) on 23rd September 2025)

JUDGMENT

1. The appellant was charged with the offence of Abduction with intent to confine contrary to section 259 of the Penal Code, the particulars being that on diverse dates between 10th September 2019 and 07th October 2019 at Ogembo Township in Nyamira County, jointly with others not before court, he abducted CMN with intent to cause her to be secretly and wrongfully confined.

2. The appellant was further charged with the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006, the particulars being that on diverse dates between 10th September 2019 and 07th October 2019 at Ogembo Township in Nyamira County, he intentionally and unlawfully caused his penis to penetrate the vagina of CMN, a child aged fourteen (14) years.

3. Appellant was also charged with an alternative count of committing an indecent act with a child by touching the vagina of CMN contrary to section 11(1) of the same Act.

4. PW1, RO, stated that he is a driver and the father of the complainant, CMN. He told the court that on 27th September 2019 he was informed that his daughter had not arrived at school. She was aged fourteen (14) years and was a Class 8 pupil at [Particulars Withheld] Primary School in Nairobi. He reported the matter at Manga Police Station on 27th September 2019. On 07th October 2019 he was informed

by police officers that his daughter had been traced at Ogembo. He accompanied police officers to Ogembo where the minor was found by the roadside with another boy. He stated that the appellant was later arrested. In cross-examination he stated that he knew the appellant only after the incident and that he did not personally find the appellant with the complainant at the time of tracing.

5. PW2, CMN, testified that she was 14 years old and a pupil in Class 8 in 2019. She testified that on 31st August 2019 she was in Nairobi at her aunt's house and attended a crusade where she met the appellant. She stated that the appellant gave her his phone number and later they communicated. She contended that on 01st September 2019, Appellant sent her money through M-Pesa and later travelled by bus from Nairobi to Kisii and then to Ogembo using Transline Classic bus. She stated that the appellant picked her from the stage and took her to his house. She testified that they stayed together for about one week and had sexual intercourse twice. She stated that she washed his clothes and performed domestic chores. She further testified that she later left and stayed with a person called Thomas before being traced by police officers in Ogembo. She was then taken to Manga Police Station and later to hospital for examination. In cross-examination she stated that she had told the appellant that she had finished school and did not disclose her age.

6. PW3, PC No. 84xxx Iddi Salim, the investigating officer, stated that on 27th September 2019 a report was received at Manga Police Station that a minor had gone missing, whereupon investigations were commenced. He indicated that on 07th October 2019, through phone tracking, the complainant was traced to Ogembo. He explained that upon being located, the complainant led the police officers to the house where she had been staying. He further stated that from the house of the appellant's cousin, the officers recovered a brown suitcase containing assorted clothes. He produced the following exhibits: a brown suitcase marked as Exhibit 1; a black purse marked as Exhibit 2; a Safaricom card registration printout marked as Exhibit 3; a pair of red shoes marked as Exhibit 5; a bus ticket for Transline Classic marked as Exhibit 7; an inventory of the recovered items marked as Exhibit 9; and the Birth Certificate of the complainant marked as Exhibit 10 showing she was born on 18th April 2005. He stated that the complainant was therefore 14 years at the time. He further testified that the complainant was escorted to Manga Sub-County Hospital where she was examined and a P3 form filled.

7. PW4, Joel Ongaro, stated that he was a Clinical Officer and that he worked with Dr. Cyrus Makori, whose signature he was familiar with. He informed the court that Dr. Makori examined the complainant and completed the P3 Form. He stated that upon examination, there were no bruises seen on the genitalia. He testified that the vaginal orifice was open and the hymen was broken. He further stated that no spermatozoa were seen and that there was no positive laboratory finding of recent defilement. He produced the P3 Form as Exhibit No. 11 and the treatment notes as Exhibit No. 12. In cross-examination, he stated that he did not know if the accused person had been examined and confirmed that laboratory results did not reveal

8. At the conclusion of the trial, the Court on 09th September 2025 found the Appellant guilty of Count abduction with intent to confine contrary to section 259 of the Penal Code Code and defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. On 23rd September, 2025 Appellant was sentenced to serve 20 years imprisonment.

9. Aggrieved by the conviction and sentence, the Appellant filed this appeal.

10. Upon considering the Amended Petition of Appeal dated 17th December 2025, the appellant's written submissions dated 20th January 2026 and the respondent's written submissions dated 28th January 2026, the issues that arise for determination in this appeal are as follows:

1. Whether the continuation of proceedings after withdrawal under section 87(a) of the Criminal Procedure Code violated Article 50(2)(o) of *the Constitution* on protection against double jeopardy.

2. Whether section 200(3) of the Criminal Procedure Code was complied with upon change of trial magistrate and, if not, whether any non-compliance occasioned prejudice to the appellant.

3. Whether the charge sheet was defective in law.

4. Whether the prosecution proved the ingredients of the offences of abduction with intent to confine and defilement beyond reasonable doubt, including proof of age, penetration and positive identification.

5. Whether the conviction on both counts was proper in law and supported by the evidence on record.

6. Whether the sentence of twenty (20) years' imprisonment was lawful, proper and in accordance with the applicable statutory provisions.

11. This being a first appeal, this Court is duty bound to re-evaluate the entire evidence on record, subject it to a fresh and exhaustive analysis, and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. This duty was articulated by the former Court of Appeal for East Africa in Okeno v Republic [1972] EA 32 and reiterated in Kiilu & Another v Republic [2005] 1 KLR 174.

12. On the first issue concerning the effect of withdrawal under section 87(a) of the Criminal Procedure Code, the appellant in his submissions dated 20th January 2026 contended that the matter had reached the defence stage before it was withdrawn on 12th January 2022. He submitted that once he had been placed on his defence, any withdrawal could only operate under section 87(b) as an acquittal, thereby triggering the constitutional protection against double jeopardy under Article 50(2)(o) of *the Constitution*. He relied on Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR (Court of Appeal at Nairobi, Criminal Appeal No. 116 of 2007) for the principle that once an accused person has been acquitted, whether expressly or by operation of law, the State is barred from re-prosecuting him on the same facts. He further cited Republic v Attorney General & another Ex-Parte Kipng'eno Arap Ng'eny [2001] eKLR to underscore that constitutional safeguards in criminal proceedings are substantive guarantees.

13. The respondent, in its written submissions dated 28th January 2026 and expressly conceded this ground. The respondent submitted that the record showed that the prosecution had closed its case and a ruling placing the accused on his defence had been delivered before the withdrawal was made. It was submitted that in those circumstances section 87(a) could not properly apply and the legal effect of the withdrawal was an acquittal under section 87(b), thereby invoking Article 50(2)(o) of *the Constitution*.

14. Upon my own independent re-evaluation of the proceedings, I find that the prosecution case had indeed closed and the accused had been placed on his defence prior to the withdrawal recorded on 12th January 2022. Section 87(a) permits withdrawal before the accused is called upon to make his defence. Once the defence stage has been reached, withdrawal results in an acquittal. The constitutional protection under Article 50(2)(o) is categorical that no person shall be tried for an offence in respect of an act for which that person has previously been either acquitted or convicted. In the circumstances of this case, the continuation of proceedings after the withdrawal amounted to a violation of the protection against double jeopardy. On this issue, the appellant's complaint is well founded and the respondent's concession is properly made.

15. On the second issue regarding compliance with section 200(3) of the Criminal Procedure Code, the appellant submitted that when Hon. C.I. Agutu (SRM) took over the matter on 06th May 2024, the appellant was not informed of his right to have witnesses recalled and reheard. He relied on Ndegwa v Republic [1985] KLR 534 (Court of Appeal at Nairobi, Criminal Appeal No. 103 of 1984), where the Court of Appeal held that section 200 should be used sparingly and that an accused must be informed of the right to demand recall of witnesses. He further relied on Abdi Adan Mohamed v Republic [2017] KECA 517 (KLR) in which the Court emphasized that failure to comply with section 200(3) is not a mere procedural technicality where prejudice is shown.

16. The respondent, conceded that the record did not demonstrate compliance with section 200(3) of the Criminal Procedure Code. It was submitted that the omission was material and rendered the proceedings defective.

17. I have examined the proceedings following the change of magistrate. The record does not reflect that the appellant was informed of his right to have witnesses recalled and reheard. Section 200(3) is couched in mandatory terms and is intended to safeguard the fairness of a trial where a succeeding magistrate takes over a part-heard case. Given the seriousness of the charges and the severity of the sentence ultimately imposed, strict compliance was required. The omission occasioned prejudice to the appellant and further undermined the integrity of the proceedings. This ground therefore succeeds.

18. On the third issue concerning the alleged defectiveness of the charge sheet dated 07th October 2019, the appellant submitted that the particulars were inconsistent and did not disclose offences known to law. He relied on Yongo v Republic [1983] KLR 319 (Court of Appeal at Nairobi, Criminal Appeal No. 1 of 1983) for the principle that a charge must disclose an offence known in law and contain sufficient particulars to inform the accused of the nature of the accusation.

19. The respondent submitted that the charge sheet complied with section 134 of the Criminal Procedure Code in that it clearly set out the offences, cited the relevant statutory provisions and contained particulars specifying the dates, place and age of the complainant. The respondent distinguished Yongo on the basis that in the present case the appellant was fully aware of the charges and participated in the trial without demonstrating any confusion or prejudice.

20. Upon examining the charge sheet, I find that it clearly specifies the offences of abduction with intent to confine contrary to section 259 of the Penal Code and defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, together with the material particulars including the dates, place and age of the complainant. The appellant pleaded to the charges, cross-examined witnesses and mounted a defence. No prejudice arising from any alleged defect has been demonstrated. This ground fails.

21. On the fourth and fifth issues relating to proof of the ingredients of the offences and the propriety of the conviction, the appellant submitted that the prosecution failed to prove penetration in light of negative laboratory findings, that there were inconsistencies regarding how the complainant travelled and the source of money, and that identification was not free from doubt. He relied on Okeno v Republic [1972] EA 32 (Court of Appeal for East Africa, Criminal Appeal No. 37 of 1971) on the duty of a first appellate court to re-evaluate evidence, and on Sawe v Republic [2003] KLR 364 (Court of Appeal at Kisumu, Criminal Appeal No. 2 of 2002) for the proposition that suspicion, however strong, cannot found a conviction.

22. The respondent relied on George Owiti Raya v Republic [2013] eKLR (Court of Appeal at Kisumu, Criminal Appeal No. 240 of 2011) for the essential ingredients of defilement, namely proof of age, penetration and identification. It was submitted that age was proved by production of the birth

certificate; that penetration was proved by the complainant's testimony and the medical evidence of a broken hymen; and that identification was not in dispute as the complainant knew the appellant.

23. A fresh evaluation of the evidence reveals that the ingredients of the offence of defilement were substantially established. The complainant gave cogent and consistent testimony that she had sexual intercourse with the appellant on more than one occasion during the period of cohabitation. Her account was corroborated by the clinical findings of the examining officer, who confirmed that the hymen was broken, a finding consistent with penetration notwithstanding the absence of spermatozoa, the latter being neither a prerequisite for proof of penetration nor determinative of the issue. The age of the complainant was conclusively proved by the production of her birth certificate, which established that she was fourteen years old at the material time, well within the age bracket protected under section 8(3) of the *Sexual Offences Act*. The identification of the appellant as the perpetrator was equally not in serious dispute, the complainant having known him prior to the material events and having given a detailed account of her interactions with him. On the totality of the evidence, this court finds that, had the proceedings been competent, the evidence on record was sufficient to sustain a conviction on the charge of defilement. However, in light of the violation of Article 50(2)(o) of *the Constitution* and the non-compliance with section 200(3) of the Criminal Procedure Code, the proceedings are rendered a nullity, and it is therefore not open to this court to enter or affirm a conviction founded upon them.

24. On the sixth issue concerning sentence, the appellant relied on Bernard Kimani Gacheru v Republic [2002] eKLR (Court of Appeal at Nairobi, Criminal Appeal No. 188 of 2000) and submitted that the sentence was harsh and excessive. The respondent submitted that the sentence of twenty years' imprisonment was the statutory minimum prescribed under section 8(3) of the *Sexual Offences Act* and was therefore lawful.

25. It is correct that section 8(3) of the *Sexual Offences Act* prescribes a minimum sentence of twenty years' imprisonment where the child is aged between twelve and fifteen years. The sentence imposed was therefore lawful. However, once the conviction is vitiated on constitutional and procedural grounds, the sentence cannot stand.

26. Turning to the charge of abduction with intent to confine contrary to section 259 of the Penal Code, this court finds that the evidence presented raised considerable difficulty in establishing the essential ingredients of the offence. Section 259 of the Penal Code requires proof that the accused took or enticed away another person with intent to cause that person to be secretly and wrongfully confined. On the evidence on record, the complainant testified that she communicated with the appellant of her own volition, that she herself sent him money through M-Pesa prior to her travel, and that she boarded the Transline Classic bus from Nairobi to Ogembo independently. There was no evidence of any force, threat, deception or inducement deployed by the appellant to secure her movement. On the contrary, the complainant's own account disclosed a consensual arrangement, however legally impermissible such an arrangement may be having regard to her age. Further, the element of wrongful confinement was not satisfactorily established; the complainant testified that she subsequently left the appellant's house freely and relocated to the residence of one Thomas, a movement wholly inconsistent with a state of confinement. She was ultimately found by police in a public place by the roadside. In the circumstances, whilst the conduct of the appellant was morally reprehensible and attracted criminal liability under the *Sexual Offences Act*, the specific ingredients of abduction with intent to confine as charged under section 259 of the Penal Code were not proved to the required standard. Had the proceedings been competent, this court would have found that Count I was not established beyond reasonable doubt.

27. In the final analysis, the violation of the constitutional protection against double jeopardy and the failure to comply with section 200(3) of the Criminal Procedure Code are fundamental defects that

go to the root of the trial. They are not curable under section 382 of the Criminal Procedure Code. The proceedings subsequent to the withdrawal and the change of magistrate were rendered a nullity.

28. Before concluding this judgment, it is necessary to reiterate the heightened duty placed upon courts when dealing with proceedings involving children, particularly in sexual offence matters. Articles 31(c) and 53(2) of *the Constitution* of Kenya, 2010 require that the privacy of a child be protected and that the best interests of the child be treated as paramount in every matter concerning the child. The Supreme Court in CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others (Petition 13 (E015) of 2022) [2023] KESC 68 (KLR) (8 September 2023) (Judgment) affirmed that the principle of open justice does not justify disclosure of identifying particulars of minors and that courts bear a proactive obligation to safeguard children's dignity and psychological well-being. Although this appeal has now been determined, this Court draws the attention of the trial court that handled these proceedings to that binding jurisprudence and underscores the continuing responsibility, in all comparable matters, to ensure that records and judgments do not disclose identifying details and that minors are consistently referred to by their initials only.

29. Consequently, the appeal succeeds and it is hereby ordered:

    1. The conviction for Abduction with intent to confine contrary to section 259 of the Penal Code and Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* is hereby quashed.

    2. The sentence of twenty (20) years' imprisonment imposed upon the appellant is hereby set aside.

    3. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED AT NYAMIRA THIS 05TH DAY OF MARCH 2026.

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Anita

Appellant - Present

For Appellant - Ms. Shilwatso for Ms. Nyandoro for C.R.Sagwa & Co. Advocates

For the DPP - Mr. Chirchir (SADPP)