



REPUBLIC OF KENYA



KENYA LAW
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**Rono v Republic (Criminal Appeal E009 of 2024)
[2025] KEHC 11538 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL E009 OF 2024**

**RB NGETICH, J
JULY 31, 2025**

BETWEEN

JAMES BIRIR RONO ALIAS ASKARI BONOKO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both conviction and sentence in S.O No. E022 of 2020 at Eldama Ravine Principal Magistrate's court by the Hon. Towett (SPM) delivered on the 9th day of September, 2024)

JUDGMENT

1. The Appellant James Birir Rono alias Askari Bonoko was charged in count I with the offence of Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars were that the accused persons on the 17th day of May, 2018 in Koibatek Sub-County within Baringo County, while armed with offensive weapon namely a knife robbed BCB of her mobile phone make Tecno S1 IMEI no. XXX valued at Kshs.5,000/= and immediately before and after the said robbery wounded the said BCB.
2. The Appellant faced count II of Defilement contrary to section 8(1) as read with section 8(4) of the sexual offences Act No.3 of 2006. The particulars of the offence is that the Appellant on the 17th day of May, 2018 in Koibatek Sub- County within Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of BCB a child aged 17 years.
3. Alternative charge to count II is the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars were that the accused persons on the 17th day of May, 2018 in Koibatek Sub- County within Baringo County, intentionally and unlawfully caused his penis to come in contact with the vagina of BCB a child aged 17 years.



4. The appellant denied all counts of offences hence the matter was set down for full trial. The prosecution availed 4 witnesses in support of their case and at the close of the prosecution's case, the Appellant was placed on his defence.
5. By judgment delivered on 5th September, 2024, the trial court found the Appellant guilty as charged and convicted him of Count 1 and Count II under Section 215 of the *Penal Code*. The trial court subsequently sentenced the accused to 30 years imprisonment on the 1st count of Robbery with violence and a further 15 years for the 2nd count of Defilement. Sentences to run concurrently. The trial court ordered that the time spent in remand will be deducted from the sentences.
6. Dissatisfied with the decision of the trial court, the Appellant has now appealed to this court on the following grounds namely:-
 - i. The Learned trial Magistrate erred in in law and in facts when she relied on evidence adduced before the trial court by the prosecution which was not corroborated.
 - ii. The Learned Trial Magistrate erred in both law and fact by when she convicted the appellant without identification parade to support the allegations before the court.
 - iii. That the learned trial magistrate erred in law and in facts during the trial of this case when she failed to note that the medical examination was not proved beyond reasonable doubt.
 - iv. That the learned trial magistrate erred in law and facts during the trial by failing to consider that the investigations were poorly conducted and there was no direct to implicate the accused with the alleged offence.
 - v. That the learned trial magistrate erred in law and facts during the trial when she rejected the accused's defence without cogent reasons according to the trial court procedure.
7. The appellant prays that his appeal be allowed, conviction quashed and the sentence be set aside and the Appellant set at liberty. The appeal was canvassed by way of both written and oral submissions.
8. The Appellant filed amended grounds of appeal together with the submissions, the Appellant raises the following grounds of appeal:-
 - i. That, the learned trial magistrate erred in both law and facts by convicting the appellant in the present case yet failed to appreciate that the charge sheet was fatally defective in respect to Count I.
 - ii. That, the learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that the alleged stolen mobile phone make TECNO S1 of IMEI No xxx was not the property of BCB.
 - iii. That, the learned trial magistrate erred in both law and facts by convicting the appellant in the present case yet failed to appreciate that his identification was not positive and thus cannot sustain a conviction.
 - iv. That, the learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that PW2 was never re-called for cross-examination by the appellant despite there being orders that he be recalled.
 - v. That, the learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to appreciate that there was a crucial witness (Anthony) who was mentioned but never availed by the prosecution.



- vi. That, the learned trial magistrate erred in both law and facts by convicting the appellant in the present case yet failed to find that penetration as defined by Section 2 of the *Sexual Offences Act* was not proved.
 - vii. That, the learned trial magistrate erred in both law and facts by convicting the appellant in the present case yet failed to adequately consider the appellant's defence hence causing him great prejudice.
9. The appellant prays for the total success of this appeal, conviction quashed, sentence set aside and the appellant set at liberty.

Appellant's Submissions

10. The Appellant submits that the charge in regards to count I for the offence of robbery with violence was defective. That particulars of the charge state that;
- “James Birir alias Askari Bonoko: on the 17th day of May 2018 at Narasha Forest in Koibatek sub county within Baringo county, while armed with offensive weapon namely a knife robbed BCB of her mobile phone make TECNO S1 IMEI no xxx valued at Ksh. 5,000/= and immediately before and after the said robbery wounded the said BCB.”
11. That from the evidence adduced in the trial, there was no mention that the said mobile phone make TECNO S1 IMEI no xxx belonged to BCB (PW1) neither did the complainant identify the said mobile phone as belonging to her nor produce any document in court to prove possession.
12. That PW1's evidence in-chief in respect of the phone as at page 19 lines 12-22 of the record of appeal is that; “...He asked whether I had any monies on me. He searched my pockets. I had Duncan's phone...After a while Duncan's phone rang, Accused ordered me to pick the call and informed the caller that I was okey. I did as ordered. Accused told me that I go get him Kshs 1000 in exchange of Duncan's phone”
13. The Appellant submitted that the Supreme Court explained the particulars that a charge should disclose in *Isaac Omambia v R* [1995] eKLR and submit that the charge sheet in respect of Count I was defective because the property allegedly stolen was inconsistent with the Prosecution's evidence and in particular the fact the alleged mobile phone was not the property of BCB. The appellant places reliance on the case of *Idah Nziza Kikubi & Another v Republic*, Criminal Appeal No.30 and 31 of 2021, where Odunga J. cited the case of *Fappyton Mutuku Ngui v Republic* [2020] eKLR where the court held that a charge sheet should specify the offence in a clear and unambiguous manner and should be accurate since technical defects would entitle an accused to acquittal upon appeal. In the instant case, the Appellant's rights to a fair trial were violated because he was subjected to a trial and conviction founded on a defective charge sheet.
14. The Appellant submits that the appellant's identification was not positive. That positive identification requires a court to be convinced beyond a reasonable doubt that the accused is the perpetrator, especially when relying solely on one witness and submit that the evidence of PW1 as regards her assailant on page 19 lines 6-9 of the record of appeal was that ,” PW1 further stated in her evidence in chief that the Police officers from Eldama Ravine police station were called to the scene and re-arrested accused”, and submit that the evidence establishes that PW1 did know the appellant prior to the incident.
15. He submits that the evidence tendered does not give an assurance that the appellant's identification was positive and free from error. That a court cannot convict an accused person based solely on



identification evidence unless it is certain that the identification is proven beyond any reasonable doubt and relied on the case of Francis Kariuki Njiru & 7 others vs Republic (2001) eKLR.

16. Further that PW1 testified on 30.11.2021 while the alleged offence was said to have been committed on 17.05.2018, a span of about three (3) years and the evidence of identification by PW1 was not tested through an identification parade to test the correctness of her identification. That the court should also take note of the fact that none of the forest officers who allegedly conducted the identification of the appellant were called to testify neither was PW2 recalled for cross-examination in as directed by the court. That the veracity of PW2 was thus not tested and thus the totality of the identification evidence as given by PW1 was not corroborated.
17. The appellant submit that the right to cross-examine witnesses is a fundamental aspect of a fair trial, allowing the defence to challenge the credibility and reliability of the prosecution's evidence and if a witness is not recalled as ordered by the court, the defence may be denied the opportunity to fully test the witness's testimony, potentially leading to a miscarriage of justice and relied on the case of Samwel v Republic (Miscellaneous Criminal Application E024 of 2023) [2023] KEHC 25512(KLR), where the court emphasized the importance of the accused's right to cross-examine witnesses and the court's obligation to ensure a fair trial.
18. The Appellant submits that in respect to count II, penetration was not proved beyond reasonable doubt. That the evidence of PW1 as regards the commission of the offence was that; "Accused forcefully removed my trouser. He also removed his trousers and proceeded to rape me. He did not let go of the knife as he raped..."
19. That the medical evidence adduced by PW3, Timothy Amage Chesang, the clinical officer who examined PW1 did not provide corroboration that indeed there was penetration of PW1's genital organs by the genital organ of the appellant. That it is noteworthy that PW3 examined PW1 six hours after the offence. That PW3's evidence was that; "We saw the patient at our facility six hours after the offence. The complainant had not had a change of clothe nor taken a bath at the time she visited the facility.
20. That the Complainant's evidence did not prove penetration which is an essential ingredient requiring proof beyond reasonable doubt and she failed to provide further evidence and details as to what exactly happened in the act of the alleged "rape". He places reliance in the case of Julius Kioko Kivuva =Vs=Republic-Machakos Hccra No.60 Of 2014 and in the case of Republic vs. Stephen Kiprotich Leting & 3 others Criminal case 34 of 2008[2009] eKLR.
21. The appellant urges this court to come to the conclusion that the prosecution did not prove its case against the Appellant beyond reasonable doubt and find that the evidence adduced before the trial court was insufficient as it failed to prove the element of penetration, which is an essential ingredient of the offence of defilement.
22. In respect to accused's defence, the appellant argues that the core principle of a fair trial is that an accused is presumed innocent until proven guilty and the burden to prove is therefore on prosecution and every accused person has the right to a fair trial, which includes the right to present a defense and have it considered by the court. He submits that the trial court failed to conclusively consider his appellant's defence which was corroborated by No. 101400 P. C. Kimuma who told the court that; "Accused had been badly beaten by members of the public"



23. That while delivering the judgement, the trial court held that:-

“Looking at the defence prospected by accused herein I wonder why he did not avail an alibi to buttress his defence that he was ferrying pillion passengers on the fateful day...I ask myself why accused could not call even one of his colleagues as a defence witness to strengthen his assertion.”

24. The appellant submit that the trial court fell into error by asserting that the appellant's defence could not be believed because he did not call witnesses in support of his defence as an accused person is not obligated to call witnesses in support of their defense, and they have the right to remain silent.

25. That a court's failure to consider an accused person's defense is a serious legal error that can lead to an unfair trial and a miscarriage of justice.

Respondent's Submissions

26. The Respondent submitted orally that the accused was charged with 2 counts of offences being Robbery with violence and defilement with alternative count of committing indecent act with a child. That the prosecution was able to prove its case to the required standard from the evidence adduced and the documents produced and the Tecno phone make SI produced as exhibit in court. That the phone was recovered from the accused at the time of arrest. That the complainant who testified as PW 1 as well as PW 2 were present at the time the offence occurred and they identified the phone and even though PW 2 was not availed for cross examination by the accused, the prosecution availed PW 1 and PW3 and the fact that PW 2 was not availed for cross examination was not fatal to the prosecutions case. That failure by the accused to cross examine PW2 was due to the conduct of the accused since PW 2 was availed for cross examination but the accused refused to cross examine and it was unfortunate that he was not availed later but it was not fatal to the prosecution's case.

27. The prosecution further submit the appellant was identified by the complainant at the time of arrest and at the time of testifying in court. That at the time of arrest, the appellant was found with a phone taken from the complainant (PW1) though it was for PW 2 and through use of the phone, the accused was arrested.

28. On the second count of defilement, the prosecution counsel submit that Pw1 gave a detailed account in her testimony as to how she was threatened by the accused and defiled. That her testimony was corroborated by the testimony of the doctor and also through P3 forms produced as Exhibit 2(a). They submit that the prosecution's case was proved to the required standard.

Analysis and Determination

29. The duty of the first appellate court was explained by the court of appeal in the case of *Okeno vs Republic* [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the



witnesses, see *Peters vs Sunday Post* [1958] EA 424.” This was also set out in the case of *Kiilu & Another vs Republic* [2005] KLR 174.

30. In view of the above, I have reevaluated evidence adduced before the trial court together with submissions by the parties herein and consider the following as issues for determination:-
- a. Whether the charge against accused was defective
 - b. Whether the appellant was positively identified
 - c. Whether penetration was proved
 - d. whether the appellant’s defence was considered.

(i) Whether the charge against accused was defective

31. Section 134 of the *Criminal Procedure Code* provides for what the components/ingredients of the charge sheet constitute as follows: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

32. The Court of Appeal in *Peter Ngure Mwangi vs. Republic* [2014] eKLR, quoted the *Isaac Omambia* case with approval and further stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archibold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [198] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- (ii) when for such reason it does not accord with the evidence given at the trial.”

33. The Court of Appeal in the *Peter Ngure* case was further guided by the case of *Peter Sabem Leitu v R*, Cr. App No. 482 of 2007 (UR) where the Court held thus:-

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date



of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

34. In the case of *Obedi Kilonzo Kevevo vs. Republic* [2015] the Court of Appeal stated that:

“The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants’ conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of *JMA v. Republic* (2009) KLR 671, it was held inter alia that:

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

35. In view of the above, I have considered rival arguments hearing and perused the record and note that the mobile phone was positively identified by PW 1 and PW 2 and which was in possession of PW 1 at the time of the offence. The appellant had the phone in his possession at the time of his arrest. The mobile phone belonged to pw3 who testified and confirmed the position. In my view the error on ownership of phone cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under Section 382 of the *Criminal Procedure Code* which provides;

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

36. The above statutory curative position is also replicated in Section 214(2) of CPC which provides that:

“...variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.”

(ii) whether the ingredients for the two offences were proved beyond reasonable doubt

37. The ingredients of Robbery with Violence under section 296(2) of the penal code are.....

38. From evidence adduced, there is no doubt that the ingredients for the offence of Robbery with violence have been proved beyond reasonable doubt.

39. In respect to count II the appellant argued that penetration was not proved. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:-

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”



40. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.
41. The complainant in this case testified that the Appellant undressed her, removed his trouser and defiled her and immediately after defiling her informed her that he was H.I.V positive and that she should go for medication.
42. Pw 3 to testify was Timothy Amge, a clinical officer in Eldama Ravine sub-county Hospital who said that the complainant was brought to the facility on the 17th May,2018 and on examination, they noticed spermatozoa and the hymen was not intact. That the presence of the spermatozoa in her vagina is a clear indication of recent sexual intercourse. He was convinced beyond reasonable doubt that the complainant was defiled. He produced the treatment notes as exhibits and the P3 Form.
43. This Court is therefore required to review all evidence that is availed before it in order to establish if indeed penetration did occur. In this case, the minor narrated how the Appellant defiled her, the clinical officer produced the P3 Form which indicated that the minor had been defiled. The victim was candid on how the appellant defiled her. I have already found based on the evidence of the victim and the evidence of PW 3 that there was penetration. I conclude therefore that penetration was adequately proven.
44. The other ingredient of the offence of defilement is proof of the identity of the assailant. PW1's testimony is that she was defiled by the Appellant. She was able to identify the accused person during the arrest. The complainant, was able to recognize the accused since the offence occurred in broad daylight and there was therefore no possibility of mistaken identity. PW 2 who was with the complainant at the time of the ordeal identified the appellant. The appellant was arrested within the vicinity of the offence being Ndarasha forest. I do hereby find that the accused was positively identified.
45. From the foregoing it is therefore plausible that the victim was able to not only identify him but to recognize him as the person who committed the act. That from the foregoing it is conclusive therefore that the offence of defilement was proved beyond reasonable doubt.
46. The appellant argues that his defence was not considered. That this was a misdirection on the part of the trial court since it was good practice to analyze the appellant's defence and give reasons why the defence was not admissible.
47. I have perused the trial court's judgement and find that the trial magistrate did give due consideration to the appellant's defence which he found to be unworthy and subsequently dismissed. I am satisfied that the appellant was properly convicted and I do hereby dismiss his appeal against conviction.

Final Orders:-

48. Appeal on conviction and sentence is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 31ST DAY OF JULY 2025.

.....

RACHEL NGETICH

JUDGE



In the presence of:

CA Elvis.

Ms. Omari for state.

Appellant Present.

