



**Matamolu v Republic (Criminal Appeal E004 of 2025)
[2025] KEHC 11327 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL APPEAL E004 OF 2025
SC CHIRCHIR, J
JULY 30, 2025**

BETWEEN

ALI MATAMOLU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of E. Tsimonjero delivered on 14/9/2023
in sexual offence case No. 9 of 2020 at the Chief Magistrates Court at Isiolo)*

JUDGMENT

1. Ali Matamolu, (The Appellant), was charged with the offence of defilement contrary to Section 8 (1) as read with section 8 (2) (sic) of the [Sexual Offence Act](#). (The Act).
2. The particulars of the charge are that on diverse dates between 27th November 2019 and 30th December 2019 in Isiolo County, intentionally caused his penis to penetrate the vagina of IAA a girl aged 13 years.
3. He faced an alternative charge of committing an indecent Act with a child, contrary to Section 11 (1) of the same [Act](#).
4. The particulars of the charge are that on diverse dates between 27th November 2019 and 30th December 2019 in Isiolo County, intentionally and unlawfully touched private parts of IAA a girl aged 13 years.
5. The prosecution called 5 witnesses, while the Appellant gave a sworn statement and called 3 witnesses. At the conclusion of the trial, the Appellant was convicted and sentenced to 10 years imprisonment.
6. He was aggrieved by the decision, and filed this Appeal . The grounds of Appeal as amended on 21/9/2023 are as follows;



1. That the Learned Trial Court erred in both facts and law by failing to note that the age of the child was not ascertained to the required standard of prove beyond reasonable doubt
 2. That the Learned Magistrate erred in both matters of law and facts by failing to conduct an informative *voire-dire* examination free from error and with direct convincing facts.
 3. That the Learned Magistrate erred in both matters of law and facts by failing to conform to the tenets of the law as envisaged under section 200 (3) of the [Criminal Procedure Code](#) by not directly and personally informing the appellant of his right to re-summon witnesses and not through the advocate
 4. That the Trial Court failed in both matters of law and fact to give the benefit of Section 8 (5) of the [Sexual Offences Act](#) to the Appellant.
 5. That the prosecution did not prove their case beyond any iota of doubt to align with the standards of fair trial
7. The Appeal proceeded by way of written submissions.

Appellant's Submissions

8. The Appellant's first Submission is that the complainant's age was not proved beyond reasonable doubt ; that while the complainant alleged that she was 13 years of age, the first age assessment placed her age at 20 years while the second assessment arrived at 15 years of age. He argues that in the circumstances, there was reasonable doubt over the actual age of the complainant at the time of the commission of the offence. That the onus on the prosecution to clear such doubts.
9. The Appellant further submits that even the trial court seemed to have appreciated that the complainant was an Adult based on the trial magistrate remarks:

“female Adult sworn in Kiswahili translated in Borana”

appearing on lines 15-16 of page 18 of the proceedings.
10. It is further submitted that the trial court failed to comply with the tenets of Section 200 (3) of the [Criminal Procedure Code](#) by failing to address the appellant on the question of whether he wanted the proceedings to proceed from where the previous Magistrate had reached. He submits that the question was addressed to his Advocate and the response was also from his Advocate , which was irregular. In this regard he has relied on the finding of the court in the case of [David Kimani Njuguna v Republic](#) [2015] KECA 2 (KLR).
11. It is the Appellant's final submissions that the case herein was designed to benefit the complainant's father who concealed the age of the complainant. That it is in the interest of justice that this court finds that the prosecution did not prove its case beyond reasonable doubt and that the trial court did not accord the appellant a fair trial.

Respondent's Submissions.

12. The prosecution argues that in the face of two contradictory reports, the age of the complainant was not proved. On the *voire-dire* examination, the Respondent submits that conducting *voire-dire* examination on an Adult was not fatal to the prosecution's case.
13. The respondent readily concedes that the provisions of section 200(3) was not complied with, and further that this constituted an infringement of the Accused's right to fair trial.



14. On the defence of section 8(5) of the *Sexual Offences Act*, it is the respondent's Submissions that there was neither evidence that the complainant deceived the Appellant nor any steps taken by the Appellant to ascertain the age of the complainant.
15. In conclusion, the respondents concede to the Appeal and prays for a retrial conceded to the appeal and prayed for a re-trial.

Analysis and determination

16. This Appeal being the first, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (see *Okeno v Republic* [1972] EA 32) .
17. I have considered the appeal and submissions by both parties. I have also gone through the record and impugned Judgment. In my view, the issues that arise for determination are as follows;
 - a). Whether the age of the complainant was proved.
 - b). Whether the Appellant was informed of his rights under section 200(3) of the *Criminal Procedure Code*.
 - c). What appropriate orders should this court make?

The Age of the Complainant.

18. The requirement to prove the age of the child under section 8 of the *Act* is mandatory, and therefore lack of prove of age is fatal to the prosecution's case. The mandatory requirement arises from the fact that the age of the child has a bearing on the applicable sentence, in the event of conviction of the Accused person.
19. It is both the Appellant's and Respondent's argument that the age of the complainant was not proved. On prove of age, I wish to rely on the decision of *Francis Omuron vs Uganda* (Cr. Appeal No. 2 of 2000) as cited by the Court of Appeal in as cited by the Court of Appeal on *SNK v Republic* [2024] KECA 1526 (KLR) where the Court of Appeal of Uganda stated

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian, and by observation and common sense.”(Emphasis added)

20. In the present case t,he trial Magistrate made an observation:

“Female Child of Apparent age 14-16 years old....” .

Needless to point out , that was common sense. The complainant also told the court that she was 15 years at the time of trial, and was 13 years at the time of the alleged incident. That was as per the testimony of the victim. Two medical assessments gave varied estimates. while Dr. Gatiri Wachira placed the complainant's age at 15 years , Daudi Dabaso placed the age at 17 – 21 years. Thus , in my consideration , the available evidence on the age of the Complainant was oral testimony, medical evidence and observation by the court.



21. The trial Magistrate went by the medical reports and accepted Dr. Gatiri's assessment. On Mr. Daudi Dabaso, the trial court reasoned that unlike Dr. Gatiri which contained details on how he arrived at his assessment, Dabaso had none.
22. On this issue of age, I disagree with the Appellant's and Respondent's submissions, and entirely agree with the trial magistrate that the age of the complainant was proved, and this is why;- Dr. Gatiri detailed in his report how he arrived at his assessment, Mr. Dabaso did not. Although orally Dabaso explained how he did the assessment, it appears to me that the explanation was merely an afterthought. In this regard, I agree with the observation of the trial court that medical reports should speak for themselves, even without the benefit of an explanation by the maker of the document. Secondly Dr. Gatiri told the court that he is a Medical Doctor, with a Bachelor's Degree in Medicine while Mr. Dabaso is a Clinical Officer. Even though Dabaso did not provide the particulars of his medical training I take judicial notice, as a matter of common notoriety, that a Medical Doctor possess higher training than a Clinical Officer and his evidence thus carry more weight than that of a Clinical Officer.
23. I have also made another observation, and that is the fact that Dr. Gatiri's testimony is consistent with the complainant's testimony that she was 15 years at the time of trial, and thus was 13 years, in the year 2019, when the incident happened.
24. To conclude on this issue of age, am satisfied that the evidence of Dr. Gatiri and the testimony of the complainant sufficiently proved that the complainant was about 13 years at the time of defilement.

Whether There was Compliance With Section 200(3) of the Criminal Procedure Code

25. Section 200 (3) of the [Criminal Procedure Code](#) provides as follows:

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”
26. In [Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others](#) [2015] eKLR, the Judge stated:

“Section 200 (3) of the [Criminal Procedure Code](#) is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanour of the witnesses to enable the Court make a just decision. It should be noted Section 200(3) of [CPC](#) gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for the succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again.Section 200(3) of [CPC](#) entrenches the accused rights to a fair trial as constituted under Article 50(1) of the [Constitution](#) of Kenya 2010.”
27. The Appellant complaint is that section 200(3) of the [Criminal Procedure Code](#) was not complied with, as the inquiry on whether the case should start afresh was only directed at his Advocate. A perusal of the proceedings shows that when the new Magistrate took over, his counsel is the one who told the



court that the hearing could proceed from where it last stopped. The record does not indicate whether the same question was put to the Appellant. This ground of Appeal is therefore merited

28. The inquiry is supposed to be directed at the Accused person even if he is represented by an Advocate. In the case of *Henry Kailutha Nkarichia & another v Republic* [2015] KECA 111 (KLR), the Court of Appeal had this to say about the manner of complying with section 200(c) and the fate of the affected proceedings in the event of failure to comply: The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person's right to a fair trial. We need do no more than reiterate what we recently stated in *David Kimani Njuguna -vs- Republic*, Nakuru Criminal Appeal No. 294 of 2010 after a review of several decisions of this Court on the subject;

“All of these decisions declare that the provisions of Section 200 (3) [of the *Criminal Procedure Code*] are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity”.

29. Consequently it is my finding that, for failure to fully comply with the provisions of section 200(3) of the *Criminal Procedure Code*, the trial of the Appellant herein became a nullity.

Whether a Retrial Should be Ordered?

30. Section 200 (4) of the *CPC* gives this court the discretion to order for a new trial whenever a trial is nullified for non-compliance with section 200(3) aforesaid and there are factors that ought to be considered before a retrial can be ordered. In *Samuel Wahini Ngugi v Republic* [2012] KECA 180 (KLR) the Court of Appeal stated as follows:

“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Abmed Sumar v R* [1964] EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.”

.....

“We are also referred to the judgment in *Pascal Crement Braganza vs. R* [1951] EA 152. In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”



31. In *Muiruri versus Republik* (2005) KECA 171 (KLR) the court stated:

“Generally whether a retrial Should be Ordered or not depend on the circumstances of the case. It will only be made where the interest of justice require it and it is unlikely to cause injustice to the appellant other factors include illegalities or defeats in the original trial, length of time having lapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s.”

32. In the present case , the fault was solely was on the part of the court; am also of the view that interest of justice demand that the victim is also given her day in court; and although the case has been on since 2020, the Appellant was out on bond for the larger part of trial. I have also considered the evidence that had been presented , and am of the view that a conviction may be viable. Am therefore convinced that in the circumstances of this case, a retrial is necessary.

33. Consequently:

- a. The Appellant’s conviction by the trial court is hereby quashed and sentence set aside
- b. The Appellant shall be retried at the Chief Magistrate’s Court at Isiolo
- c. The trial dates to be allocated on priority basis and once it commences, the hearing to proceed on day- to- day basis unless for reasons to be recorded, the hearing in the manner directed is not practical, at any given time .
- d. The Appellant to be presented before the Magistrate’s court at Isiolo , on 7th August 2025 , to take plea.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 30TH DAY OF JULY 2025.

S. CHIRCHIR

JUDGE

In the presence of :

Roba Katelo - Court Assistant

Ali Mataholu - the Appellant.

Mr. Ngetich for the Respondent.

