**Maino v Republic (Criminal Appeal E044 of 2024)**
**[2025] KEHC 11105 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11105 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITALE**

**CRIMINAL APPEAL E044 OF 2024**

**RPV WENDOH, J**

**JULY 29, 2025**

**BETWEEN**

**EMMANUEL OMONDI MAINO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. Emmanuel Omondi Maino, the appellant, was convicted for offence of defilement contrary to Section 8(1) as read with section 8(2) of *Sexual Offences Act*.

2. The particulars of the charge are that on diverse dates between 1/9/2023 and 21/9/2023, at Kiminini Sub County, in Trans Nzoia County, intentionally caused his penis to penetrate the vagina of M.N. a child aged eleven (11) years.

3. In the alternative, the appellant faced a charge of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* in that on 21/9/2023, at [particulars withheld] Village, intentionally caused his genital organ namely penis, to come into contact with the genitalia i.e., vagina of M.N., a child aged eleven (11) years.

4. The matter proceeded to full trial with the Prosecution calling a total of four witnesses to prove their case.

5. The appellant gave unsworn evidence in his defence and did not call any witness.

6. Upon conviction on the main charge, the appellant was sentenced to serve fourty years imprisonment.

7. The appellant is dissatisfied with both the conviction and sentence and preferred this appeal based on grounds found in the amended grounds filed together with submissions.

   They are as follows: -

1. That the appellants rights to a fair trial under Article 50 (2) (g) and (h) of *the Constitution* were violated;

2. That the charge sheet was defective;

3. That the sentence is harsh and excessive;

4. That the appellant's defence was not considered.

8. The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty or the court to order a retrial.

**The Prosecution Case: -**

9. PW1 HAA recalled that on 21/9/2023, about 6.00a.m., she was called by a teacher from St. [Particulars Withheld] and told that her daughter ME was unwell and had been taken to Kitale County Referral Hospital; that the appellant used to help her with home chores and before she left, she went to knock at his gate and informed him that she was going to see the sick daughter. She reached the hospital and found the girl had been treated and took her back to school and left her at the gate. On reaching at home, PW1 found that the appellant had put maize out to dry. She used the back door to enter the house and found the appellant naked lying on her daughter on the seat; that he got shocked and the daughter ran off carrying her pant, as the appellant closed his zip; PW1 said that the daughter is eleven (11) years and the appellant denied knowing what gotten into him. When PW1 interrogated the daughter, she said the appellant had forced her and that on further interrogation, she said that that was the third time that the appellant had defiled her and that he had held a knife to her. She took the child to hospital, then reported at Kitale police station. She went home with police who arrested the appellant.

10. PW2 BZ, after undergoing voire dire examination, was found to understand the meaning of oath and testified on oath. She recalled that on 21/9/2023, her mother left to go and take her sister to Hospital and about 8.00 to 9.00a.m., Omondi came and told them that he had been asked to milk the cows; that after Omondi put out the maize to dry, he went out of the house and gate to check; He came back and when PW2 was sweeping the sitting room, he pushed her on the chair and threatened to kill her if she screamed; He removed her skirt, pant, and raped her; that the mother arrived home and Omondi got off her and zipped his trouser; that she ran out holding her pant and biker; that her mother sat and started to cry; that PW1 later followed her, examined her private parts and told her not to change. PW1 took her to Hospital at Moi's Bridge then later County Referral Hospital. She said that the appellant had defiled her twice before. PW2 said that Omondi removed her clothes, removed the fly of his trouser, touched her private parts and did tabia mbaya; while in the sitting room.

11. PW3 John Koina, a Clinical Officer, produced a P3 form and treatment notes in respect of BZ aged 11 years. PW3 said that he examined the minor on 21/9/2023 who gave a history of defilement. He observed that her stomach was tender, hymen was long torn, her labia was inflamed and tender. He sent her to the laboratory for more tests. He was of the view that the injury to her labia was evidence of an activity that injured the birth canal which was evidence of defilement.

12. PW4 PC Dominic Mutinda of Simatwet Police station was the Investigating Officer in the case. He recalled that on 21/9/2023 about 10.40.am., PW1 HA reported to him that she had found her employee defiling her eleven (11) year old daughter; that the girl had been taken for treatment. PW1 went with PW4 to her house and arrested the appellant. PW4 produced the child's birth certificate as an exhibit (P.Exh.1); that the complainant informed PW4 that the appellant had defiled her twice before.

**Defence Case: -**

13. When called upon to defend himself, the appellant gave unsworn evidence; that on 19/9/2023, he received a call from PW1 asking if he had spoken to her husband but he denied. About 3.40.am., she called him again and asked him to escort her to Kitale to see her daughter at St. [Particulars Withheld] who had been taken ill. He went to her house, waited till 5.55 a.m. but they did not go. He left the house about 6.20a.m. and went to the cow shed, found tea being made, they had breakfast with PW1's mother-in-law and her three children; then he put maize out to dry with help of two other men; then while outside, Samuel entered the house carrying maize and on coming out, told him that he heard as if B was crying in her mother's bedroom. He went to the bedroom to ask why PW 1 had beaten the child but she did not answer and he got B out; that around 9.10a.m. PW1 called B and they left on a motor cycle.

14. At about 1.00p.m. while still at home, he saw two policemen arrive and asked if he was Omondi and on accepting, he was handcuffed. He was placed in cells and at 3.00p.m. saw PW1 and PW2. He was interrogated. The appellant stated that he was owed 47,000/= by PW1 which he had been demanding from her.

**Appellant's Submissions: -**

15. The appellant submitted that his rights under Article 50 (2) (g) and (h) were violated because he was not promptly informed of the said rights as is required of the court under the above provisions. He relied on JOO -v- Republic (2021) eKLR and KO -v- Republic CR.A E026/2021 where the court declared the proceedings undertaken without complying with the said provisions a nullity.

16. It was also submitted that the charge sheet was defective because it did not include the word 'unlawfully' and he relied on the case of Jason Akumu Yongo -V- Republic CRA 1/1983. It was urged that a charge is defective if it does not accord with the evidence adduced or if it gives a misdescription of the alleged offence in its particulars; that in this case, the particulars failed to include the word "unlawfully".

17. In ground 3, it was urged that the sentence did not take into account the Judiciary Sentencing Policy Guidelines 2016 inter alia of retribution, rehabilitation and restorative justice.

18. In the fourth ground, it was submitted that the court failed to consider the appellant's defence because the same created doubt in the prosecution case and the court should have given it due consideration which it did not.

**Respondent's Submissions.**

19. The appeal was opposed and the Prosecution Counsel filed submissions. The Counsel identified three issues for determination which are: -

    (1) Whether there was sufficient evidence to sustain a conviction.

    (2) Whether there were contradictions in the prosecution case.

    (3) Whether the sentence was proper and within the law.

20. As to whether the offence of defilement was proved, Counsel argued that the three ingredients to be proved in a defilement case i.e., that the complainant was a child; proof of penetration and positive identification of the culprit were all established.

21. On age of the complainant, Counsel submitted that it was proved by way of birth certificate that she was born on 10/7/2012 and at September 2023, she was eleven (11) years old. As regards the identity of the appellant, Counsel submitted that PW1 identified the appellant as a person who had worked for her for three years; that PW1 caught the appellant and the minor in the act; that from the appellants own defence it is apparent that the appellant and complainant knew each other well and that fact is not disputed. As to penetration, Counsel urged that though the hymen was found to have an old tear, there were fresh injuries to the labia which led PW4 to the conclusion that penetration had taken place.

22. On the issue of failure to consider the appellant's defence, Counsel submitted that the appellant had not disputed the offence as charged but instead went on to allege that he was framed because he was owed money and she asked him to accept the charges to save her marriage; that from the above narration, no defence was actually offered by the appellant.

**Determination: -**

23. I have considered the grounds of appeal, the evidence tendered in the trial court and the rival submissions.

24. Although none of the parties raised it, the court noted that the names of the complainant in the charge sheet are initialed as M.N yet it was clear from the testimonies of the witnesses and even the P3 form that the complainant in this case is B.Z. The error is however not fatal to the charge.

25. Although the prosecution did not address the first ground that was raised by the appellant, that his fundamental rights under Article 50 (2) (g) & (h) of *the Constitution* were violated, this court will go ahead and do it.

26. Article 50 of *the Constitution* guarantees an accused persons right to fair trial. Article 50 (2) (g) and (h) provides as follows: -

> (2) Every accused person has the right to a fair trial, which includes the right-
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

27. Both provisions are mandatory in nature that the trial court should promptly inform an accused person of the said right. In Joseph Kiema Philip -V- Republic (2018) eKLR the court held that 'promptly' means before plea is taken as soon after plea before commencement of the trial. This is to enable an accused to make up their mind in good time whether to procure Counsel or apply under *Legal Aid Act*, for Counsel to be assigned to him. Ordinarily, the court record should indicate that the said rights were explained to the accused.

28. I have perused the court record and I note that the court did not make any record that the said rights were explained to the appellant

29. In Joseph Kiema Philip (Supra) the court said: -

> " The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. The fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus, legal representation is

a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is place in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under Article 50 of *the Constitution* of Kenya 2010...it is paramount that the record of the Trial Court should demonstrate that the accused was informed of his right o legal representation...In the instance the Appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the Trial Court, the Appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice."

30. Again, in Karisa Chengo & 2 others -V- Republic (2015) e KLR the Supreme court said

> " One of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the office or the gravity of the sentence to be imposed upon conviction. The Appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years imprisonment. The charge was a very serious one, upon being found guilty the Appellant faced a minimum of twenty years in jail, and he was indeed, sentenced to that exact period. That being the case, the trial should have informed him of his right to legal representation and directed that the be provided with an advocate at state expense."

31. In Mphukwa -vs- S (CA&R 360/2004) [2012] the Supreme Court of South Africa stated;

> " ....a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place."

32. In the above decisions, the courts have emphasized the need for the court to comply with the constitutional Provisions to protect an accused's right to fair trial.

33. In the case of JOO -v- Republic (2021) eKLR, this court held that such violation by the trial court rendered the proceedings a nullity. The same view was held by J. Musyoka in K.O. -v- Republic (2021) eKLR and Justice Mrima in Chacha Mwita -V- Republic Cr.A 33/2019 (Migori) and AMR -v- Republic E006/2020. However, the Court of Appeal has taken a different view. In William Odongo Oongo -V- Republic (2022) KE CA 23 the Court of Appeal stated thus: - "it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation. *The Constitution* demands it. In the present case, the record does not show that the appellant was informed by the trial court of those rights. However, quite apart from the fact that these matters were not raised before the trial court, from the way the appellant cross examined the prosecution witnesses and from his general conduct during the trial, it is not evident an injustice, nay substantial injustice, resulted from the omission by the trial court to inform the appellant of his rights under Articles 50(2) (g) and 50(2) (h) of *the Constitution*. The failure by the trial court to inform the appellant of his rights in this case should not therefore be a basis for vitiating his trial. All in all, we are satisfied that eh conviction is well founded, and we have no basis for interfering with the same".

34. The same views have been adopted by the Court of Appeal in Herman Mwero Mwavughanga – v- Republic CRA 111/2022. The Court said that the operative circumstances that triggers the necessity for legal representation in criminal cases is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused and the incapacity and, or inability of the accused to participate in the trial.

35. It means that the court has to look at the record and determine whether the appellant herein was able to ably take part in the proceedings or his capacity was impeded by the complexity of the case. The Court of Appeal being of supervisory jurisdiction over the High Court, this court is bound by their decision in Oongo's case.

36. I have now looked at the proceedings before the trial court and note that the appellant actively took part in the proceedings, cross examined the witnesses at length and gave a lengthy defence which meant he did not have difficulty in taking part in the proceedings. He has not therefore demonstrated that he has suffered any substantial injustice for failure by the court to inform the appellant of his rights under Article 50 2(g) and (h) of *the Constitution*.

**Whether the offence of defilement was proved: -**

37. In the case of Dominic Kibet Mwareng – V- Republic (2013) eKLR the court held "The critical ingredients forming the offence of defilement are; the age of the complainant; proof if penetration and positive identification of the assailant".

38. Proof of age of complainant; In Mwalongo Chichoro Mwajembe -V- Republic CRA 24/2015 (MSA) CRA 24/2018 (Mombasa), the Court said ""…….the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as birth certificate, baptism card or by oral evidence of the child, if the is insufficiently intelligent or the evidence of the parents or guardian is medical evidence, among other credible forms of proof.

39. See also Francis Omuroni – v- Uganda CRA.2/2000 where the Court of Appeal stated that "age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

40. The age of the complainant is not in dispute. PW1 and PW2, the mother and the complainant stated that PW2 was 11 years, having been born on 10/7/2012. By September 2023 when the offence was committed, the complainant was eleven (11) years old. A birth certificate was produced as P.Exh.1 in support of the said testimony.

**Proof of Penetration: -**

41. Penetration is defined in Section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person;

42. In Mark Oiruri Mose -v- Republic (2013) eKLR, the Court of Appeal stated as follows; "so long as there is penetration whether only on the surface, the ingredients of the offence is demonstrated and penetration would not be deep inside the girl's organ".

43. In this case, the complainant clearly narrated how the appellant got hold of her while she was sweeping, he pushed her on the chair threatening her with death if she screamed, removed her skirt and pant and touched her private parts, which she pointed to the court, got on top of her and that he did 'tabia mbaya' to her. (Tabia mbaya is a phrase normally used by young people to mean sex). This incident occurred in broad daylight in PW1's house. PW2 went ahead to tell the court that infact the appellant had done that to her twice before in the mother's absence. PW2's evidence was corroborated by PW1 who said she found the appellant in the act of defiling the complainant and their evidence of what transpired is corroborated in all material particulars.

44. The complainant's testimony was further corroborated by the findings of the Clinical Officer (PW3) who found that there were fresh injuries to the labia which was evidence of penetration.

**Proof of the perpetrator's identity;**

45. PW2 testified on oath and her testimony was not dislodged in any way. PW1 told the court that the appellant had worked for her for three (3) years. He was not a stranger to PW2. She identified the appellant as the person who defiled her, not once but the last act was the third one, all done in her mother's absence. PW1's testimony that she caught PW2 and the appellant red-handed was supported by PW2's testimony. The appellant in his defence gave a long-winding story of what occurred on that day. His allegation that he was owed money by PW1 was refuted by PW1 who said she only owed him money for shelling maize. Infact PW1 praised the appellant for having been a good person save for this incident which made her to change that perspective.

46. From an evaluation of the evidence of PW1, and 2 against the testimony of the appellant, the court is satisfied that the appellant was properly identified as the assailant, having been caught in the act.

**Whether the defence was considered:-**

47. The trial court in the last paragraph of its judgement considered the appellant's defence and found it to be mere denial; that the appellant went on to narrate events of the day without responding to the evidence adduced and the court did not believe him. This court has also considered the said defence which was shallow and tried to allege that he was framed because of a debt but that was not convincing to this court. He could not have been framed for an offence committed by somebody else. The defence was properly dismissed by the trial court.

**Whether the charge was defective.**

48. The appellant complained that by omitting the word 'unlawful' from the particulars of the charge, it rendered the charge defective and the proceedings a nullity.

49. In Kaaka Masara Margeti -V- Republic (2020) eKLR the Court of Appeal stated thus; "similarly, we reject the ground that the charge sheet was defective because the words "intentionally" or "unlawful" were not included. The act of defilement in itself is unlawful. The words do not constitute any of the elements of the offence of defilement as was explained in the case of Josphat Wanjala Olbai -V- Republic (Eld) CRA.92/2015 which stated:

> 25. The offence of defilement is unlawful and the absence of the words 'intentional' and 'unlawful' in the particulars of the charge do not render the charge defective".
>
> > The words 'intentional' and 'unlawful' are not ingredients of the Offence of defilement under section 8(1) of the *Sexual Offences Act*. Defilement itself is unlawful. Those words are only elements of the charge of rape under section 3(1) and section 4 of the *Sexual Offences Act* respectively".

50. The same view was expressed by the Court of Appeal in CRA 27/2025 Marindany -V- Republic (2023) KEA 450. Taking cue from the above decisions, the offence was fully disclosed in the particulars and the charge was not defective for lack of the word 'unlawful'.

51. From the foregoing, I find that the appellant has not proved any of the grounds of appeal on conviction and I find the conviction to be well founded and I affirm it.

52. The appellant complained that the sentence of fourty (40) years is harsh and excessive. On the other hand, the Respondent sought enhancement of the sentence under section 354(3) (b) of CPC. The appellant was notified of this notice and opted to proceed with the appeal. The appellant was convicted

under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. Under section 8(2) of the *Sexual Offences Act*, where the victim is aged eleven (11) years and below, the only sentence provided is life imprisonment. The appellant took advantage of the trust that PW2's mother had placed on him as her worker and started preying on the complainant thus stealing her innocence. Had he not been found on this third encounter, he may have continued without restraint. In the recent Supreme court decision of Republic -V- Julius Kitsao Manyeso, Petition E013/2024 where the Court of Appeal had reduced life sentence to fourty (40) years in a case of defilement, the Supreme Court held that the Court of Appeal did not have jurisdiction to interfere with the sentence because the said sentence was lawful in line with section 8 of the *Sexual Offences Act*.

53. The Supreme Court decision is binding on this court. Having found as above, I hereby set aside the sentence of fourty (40) years imprisonment and substitute with a sentence of life imprisonment.

54. The appeal is hereby dismissed in its entirety.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 29TH DAY OF JULY, 2025**

**R. WENDOH**

**JUDGE**

Judgment delivered in the presence of:-

Mr. Majale for the State

Appellant – present (virtual)

Juma/Hellen – Court Assistants