



REPUBLIC OF KENYA



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**Koonyo v Republic (Criminal Appeal E042 of 2024)
[2025] KEHC 11821 (KLR) (6 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E042 OF 2024
HI ONG'UDI, J
AUGUST 6, 2025**

BETWEEN

MOSES KABAMET KOONYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment delivered by Hon. J Ndengeri (PM) in
Naivasha CMCCR (S.O) Case No. E003 of 2021 on 27th November 2024)*

JUDGMENT

1. Moses Kabamet Koonyo hereinafter referred to as the appellant was 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 the appellant on 19th July, 2020 at [Particulars Withheld] village in Gilgil sub-county within Nakuru county, intentionally and unlawfully caused the penetration of his male organ (penis) into the female genital organ (vagina) of Z.W.K a child aged 14 years.
2. He faced an alternative count of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. He denied the charges and the matter proceeded to full hearing. The prosecution called four (4) witnesses while the appellant gave a sworn defence and called two witnesses. Thereafter the trial court rendered its judgement on 6th November, 2024 convicting the appellant on the main court. He was sentenced to 15 years imprisonment on 27th November, 2024.
3. The appellant being aggrieved with the conviction and sentence filed this appeal on the following amended grounds dated 12th June 2025:
 - i. That the learned trial magistrate faulted in law and fact when she unlawfully failed to observe that the ingredient of the offence in the instant case was not proved beyond all reasonable doubt as required by law in sexual offences. The medical report was not produced in court by the



maker of the said document in total violation of section 33 or 77 (1) (3) of the Evidence Act Cap 80;

- ii. That the learned trial magistrate erred in law by failing to find and hold that the appellant's defence of alibi was watertight and acquit the appellant herein.
 - iii. The evidence for identification was not supported by the initial report to the police.
 - iv. That the Learned Magistrate erred in law and fact in failing to call for the police 0B No. 61 of 20/72020 to ascertain if indeed the appellant's name was recorded as the perpetrator of the crime.
 - v. That the Learned Magistrate erred in law and fact in failing to scrutinize the note written by the complainant to her mother PW2 which contents did not implicate or specifically mention the appellant as the perpetrator of the crime.
 - vi. That the trial court further erred in law and fact when rejecting the appellants defence of alibi without giving any cogent reason for so doing as is provided under Section 1 69(1) of the Criminal Procedure Code.
 - vii. That the learned trial magistrate misapprehended the facts and applied the wrong legal principles to the prejudice of the appellant;
 - viii. That the learned trial magistrate grossly erred in law and facts in convicting the appellant against the weight of the evidence;
4. A background of the case is as follows: PW1 (Z.W.K) aged 14 years was taken through the voire dire examination and the court found her not fit to give sworn evidence. In her testimony she said she was far away from home on 19th July 2020 at about 6.00pm. She was in the forest getting firewood when the appellant came to her and told her to go where there was a bush. He then asked her to lie down and remove her clothes (dress, skin tight and jacket). She refused and he forcefully removed them plus her inner wear and defiled her by putting his penis in her vagina. It took just about 3 minutes and he pulled up his clothes and left. He warned her not to tell anyone. She wore her clothes, tied the firewood and left for home.
 5. Her mother came home but out of fear she never told her. The next day she did a note (PEXB2) to her mother (PW2) and placed it where she could see. She saw it at 2.00pm and inquired what was going on. It was then that she explained to her, and also told her dad. They went to the police station then to the hospital. Statements were thereafter recorded. A P3 form (PEXB I) was filled for her.
 6. PW2 – MNK is PW1's mother. She testified how on 20th July, 2020 upon her return home she found a note where she stores matchboxes. The note was from PW1 who was not at home. The note said "mum there is a person who has raped me". She looked for PW1 and found she had gone to the appellant's house. She followed her there and she confirmed she is the one who had written the note (PEXB 2).
 7. She said the appellant has been a neighbor for years. She talked to the appellant's brother and mother, and told them what had happened. Together with her husband and PW1 they went and reported the matter at Gilgil police station where they recorded statements and the child was taken to hospital. It was confirmed she had been defiled and a P3 form (PRXB 1) was filled same to the PRC form (PEXB 3). The appellant was later arrested. She said the daughter (PW1) was born on 12th July, 2006.
 8. In cross examination she said she did not find the appellant at his home on 20th July, 2020.



9. PW3 Dr. David Kuria Samson produced the P3 form (PEXB 1) on behalf of Dr. Mangowa who had left Gilgil sub-county hospital. It is noted that the appellant had objected to its production by the said witness. He also produced the PRC form (PEXB 3). The two reports showed that PW1's hymen was freshly broken she had injuries signifying use of force, bruises on the back of neck, and inner right thigh moderate epithelia cells due to friction force. She also had foul smelling discharge vagina. Conclusion was that the child had been defiled.
10. In cross-examination he said there were no blood cells nor semen found. That the injuries were caused by blunt force.
11. PW4 No. XXX Inspector Sudan Masai of Gilgil police station testified that PW1 and father came to the station and reported that on 19th July, 2020 the former had been forcefully defiled by the appellant as she collected firewood near home. He produced the note by PW1 to PW2 as PEXB 4) showing she was born on 12th July, 2006.
12. In cross examination he said the appellant was arrested on 12th January, 2021.
13. The appellant testified as DW1 upon being sworn. He stated that he is an Enforcement Officer. On 19th July, 2020 he brought sheep to the slaughter house at Gilgil and returned at 12 noon. He later went to Oljorai in the company of Chariston Mpesi (DW2) and Wilson Lereyoun. They spent the night there and returned the next day. On 20th July, 2020 he travelled to Narok where he stayed until November 2020. He was called on 20th July, 2020 and was shocked at the news, he was given. He denied committing the offence, and said he was never examined by the doctor in regard to the case.
14. In cross examination he said he was living at Gilgil at the time of the alleged offence and he knew PW1 who lived about 1km away as a neighbor for over 5 years. They were good neighbours. He was arrested two (2) months after his return though he had nothing to show he was in Oljorai.
15. DW2 – Chariston Pessie said the appellant is his nephew. He said him and appellant left for Oljorai on 19th July, 2020 after the appellant arrived from the slaughter house. In Oljorai they were visiting his aunt where they spent, the night. He later came to Gilgil at 7.00am. On 20th July, 2020 at 8.00am he brought the appellant to the highway from where he boarded a vehicle to Narok and returned in November, 2020.
16. In cross examination he said he was a security officer at Marula, and was not on duty as it was a Saturday. He had no proof that he was off duty. He said his aunt is called Hellen. That the appellant went to the slaughter house alone. He further said they met in the afternoon as they went to Oljorai.
17. DW2 Hellen Siuntai Oleitor stated that the appellant is her brother. She added that on 19th July, 2020 between 3.00 – 4.00pm the appellant, DW2 and Gishero came to her house, using Gishero's motor cycle. They spent the night there, and left the next morning.
18. In cross examination she said the appellant lives in Narok but came from Gilgil on that day. She had no further proof that the appellant came to her house. They had also gone to see their parents during the visit.
19. The appeal was canvassed by written submissions.

Appellant's submissions

20. These were filed by Kamwaro & company advocates and are dated 15th June, 2025. Counsel submitted that the ingredients of defilement were not proved. He started with the P3 form and PRC form (P. EXB 1 & 3) which were not produced by the makers of the same. He argued that this violated section



77(1) of the Evidence Act. Counsel further submitted that these were crucial documents yet no effort was made to procure the attendance of Dr. Mangawa who had prepared the said reports.

21. He referred to the objection raised by the appellant on the production of the reports and the ruling by the trial Magistrate. He noted that the appellant was not represented. He contended that the appellant was highly prejudiced by this action. He referred to Section 77 of the Evidence Act in support of this submission.
22. Counsel further submitted that no basis was laid for the production of the reports by none other than the makers as required under section 33 of the Evidence Act. Secondly that the lucidity and rationale are that where the maker of the document attends the trial, the document and its contents and conditions are subjected to cross examination hence testing the veracity thereof.
23. Refence was made to the cases of:
 - i. Chaol Rotil Angela V Republic [2001] eKLR
 - ii. Sibbo Makovo V Republic [1997] eKLR

In Okumu V Republic (Cr. Appeal No. 178 of 2018) the court stated thus:

From the chain of events as highlighted above, we do not find any evidence of compliance with section 33 of the Evidence Act. The rules of procedure including those guiding the taking of evidence are there to aid in the delivery of justice. The argument by the respondent that the exhibits were produced with the consent of the appellant cannot hold for two reasons. First, no basis was laid for the production of the documents by PW3 as is required under section 33 of the Evidence Act; second, the appellant was acting in person and did not have the benefit of understanding the legal nuggets of the rules of evidence. The trial court, in the least ought to have taken judicial notice of this fact and ensured the right procedure was adopted. In our view, PW3 who was trained as a police officer was not in a position to answer any questions that may have been put to her by the appellant. Looked at from the constitutional perspective, the appellant's right to a fair trial was violated as he was denied right guaranteed to every accused person by article 50(2)(k) of the Constitution to adduce and challenge evidence.

...In the circumstances, we reach the conclusion that the P3 form and age assessment report were irregularly produced. Further, that the procedure adopted for the production of the exhibits was prejudicial to the appellant.

Therefore, the exhibits had no probative value in the case".

24. Counsel further submitted that upon discrediting the medical reports the only evidence left is that of PW1. That it was stand alone evidence and can't be sufficient to uphold a conviction. He referred to PW1's note to PW2 and points out that the said note (PEXB 3) does not contain the appellant's name as the person who defiled her.
25. Counsel submitted that section 200(3) of the Criminal Procedure Code was not complied with. It provides thus:

"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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right".



He referred to the record where Hon. Njora took over the matter after 2 witnesses had testified. That there was no explanation as to how S200(3) Criminal Procedure Code was complied with. He relied on Joseph Gituku Wangai & 5 others V Republic [2005] eKLR where the court dealt with a similar scenario. Also see Ndegwa V Republic 1981 KLR 535.

26. Counsel further submitted that the appellant in his defence explained where he was on 19th July, 2020 and availed DW2 and DW3 who corroborated his evidence. He cited the case of Charles Anjare Mwamusi V Republic Criminal Appeal No. 226 of 2002 where the Court of Appeal stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25. ”

27. Additionally, counsel extracted the initial report from the O.B which was as follows

“OB No. 61 of 20/7/2020 at 1 7:34 hrs reads: RAPE REPORT: To the station is ZW in the company of her father (dad) JK Tel. No. 0705 XXXX C/O G-K who reports that a young man well known to them has defiled/raped her daughter mentioned above aged 15 years, a Form One student at [Particulars Withheld] Secondary School. It happened that on 19/7/2020 at around 1900 hrs, as she was from fetching firewood, she met the man who forced her to sleep with him and threatened to kill her if she reports. She kept quiet until today evening. She disclosed it to her parents. She is now referred to hospital for treatment then back for further police action. Signed by PC(W) Wambui”.

28. He thus argued that in the said report there is no mention of the appellant; the note (PEXB 3) does not bear the appellant’s name. Further that if indeed the appellant had defiled PW1 she would not have gone to that homestead. On the element of a complainant giving some form of description counsel referred to the cases of:

- i. Maitanyi V Republic [1986] KLR 198
- ii. Simiyu & another V Republic – [2005] I KLR 192

29. In Duncan Muchiri V Republic [2013] eKLR the Court of Appeal held”

We are of the view that the earliest opportunity the complainants could have indicated that they had recognized the appellant during the robbery was in their initial report to the police.we find that failure to mention the appellant in the initial report to the police PW6 casts doubt on the evidence of identification. Whereas PW6 insisted that he mentioned the appellant’s name to the police, we draw an inference that either his statement to the police is not accurate or that his testimony on oath is not true. Whichever way, failure to mention and give description of the appellant to the police at the earliest opportunity reduces the weight of the identification testimony”.

30. Counsel stressed the need to give crucial evidence in the first reports to persons in authority. See: Dahale Tarasi V Republic [2003] eKLR, Hassan Abdala Mohamed V Republic [2017] eKLR, and Wamunga V Republic (1989) KLR 42.



Respondent's submission

31. These were filed by Mueni Mutua prosecution counsel and are dated 26th May, 2025. The respondent opposed the appeal submitting that on 6th September, 2023 the prosecution applied to have PW3 (Dr. Kuria) produce P Exb 1 & 3 since Dr. Mangowa was no longer in their facility. That this was thus in compliance with sections 33 & 77 of the Evidence Act since the whereabouts of Dr. Mangowa were unknown. Further that Dr. Kuria understood his handwriting and signature having worked with him for a year. That the appellant cross-examined PW3 and never made any application to recall him for further cross examination.
32. Secondly that the law is that persons wishing to rely on alibi evidence must notify the prosecution for them to prepare a rebuttal. Reference was made to *Mwendwa Mulinge V Republic* [2014] eKLR. That the appellant may have spent the night in Narok but what time did they leave for Narok? Referring to the evidence of DW1, DW2 and DW3 counsel submitted that the witnesses did not give an account of the appellant's actions while in Narok. It is counsel's submission that the defence does not displace PW1's evidence.
33. It is counsel's further submission that PW1 knew the appellant well and that he is the one who defiled her in the forest. He referred to *Wamunga V Republic* [1989] KLR 424 where the court observed:
- “Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction”.
34. Counsel further submitted that the evidence of PW1 and PW3 confirmed she had been defiled. He referred to the case of *FOD V. Republic* [2014] eKLR, where Majanja J expressed himself as follows:
- “In order to secure a conviction for the offence of defilement under section 8(1) of the sexual offences act, the prosecution must prove that the person has committed an act which causes penetration with a child. "Penetration" under section 2 of the Act means the "partial or complete insertion of the genital organs of another person"
35. Finally, on inconsistencies and contradictions in the prosecution case counsel submitted that there were none. That the trial court, relied on the prosecution evidence as a whole. Reference was made to the cases of *Richard Munene V Republic* [2018] eKLR and *Benard Kebiba V Republic* [2000] eKLR in support

Analysis and Determination

36. This is a first appeal and this court is called upon to re-evaluate and re-assess the evidence on record and come to its own independent conclusion. It must also bear in mind that unlike the trial court it did not have the opportunity to hear or see the witnesses testify and so should give an allowance for that. See *Okeno V Republic* 1972 E.A 32; In *Kiilu & another V Republic* [2005], KLR 174 the Court of Appeal held thus:
- (2) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.



- (3) 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 courts' findings and conclusions; it must make its own findings and draw its own 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.
37. I have carefully considered the record of appeal, grounds of appeal, submissions by both parties, cited authorities and the law. The issues I find falling for determination are as follows:
- i. Whether the P3 form and PCR form (PExb 1 & 3) were admitted in accordance with the law.
 - ii. Whether S200(3) Criminal Procedure Code was complied with.
 - iii. Whether the offence of defilement was proved against the appellant.

Issue No. (i) Whether the P3 form and PCR form (PExb 1 & 3) were admitted in accordance with the law.

38. There is no dispute that the appellant was unrepresented throughout the hearing of the prosecution case. It is also not disputed that P.Exb 1 & 3 which were crucial documents were produced by Dr. David Kuria (PW3) who was not the maker. It is further not disputed that the appellant opposed their production by PW3.
39. The record at page 14 of the record of appeal shows that this happened on 6th September, 2023. This is what PW3 stated after introducing himself

I wish to produce the P3 prepared by Dr. Mangowa who was working with us but left in 2021. I do not know where he works now”.

Mr. Ndiema (prosecutor):

We apply to have the witness produce P3 on behalf of the medic who has since left,

Accused:

The doctor to be looked for.

Ruling

The medical report is a report by an expert. The content does not change irrespective of whoever produces it. the witness is allowed to produce”.

40. Section 33 of the *Evidence Act* provides as follows:

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

- (a) relating to cause of death
- (b) made in the course of business
- (c) against the interest of maker when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose



him or would have exposed him to a criminal prosecution or to a suit for damages;

- (d) an opinion as to public right or custom
- (e) relating to existence of relationship
- (f) relating to family affairs
- (g) relating to a transaction creating or asserting, etc., a custom
- (h) made by several persons and expressing feelings

Section 77 of the [Evidence Act](#) provides:

Reports by Government analysts and geologists.

- (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
- (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it
- (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

41. From the record it is clear that the submissions by the respondent on this issue do not resonate with the record. It is nowhere indicated for how long PW3 had worked with Dr. Mangowa, whether he was familiar with his handwriting or signature. The prosecution never explained the efforts they had made to trace the said doctor. All this was very critical following the objection raised by the appellant. Infact what the appellant said in response to the prosecution's request is very simple.

“The doctor to be looked for”.

42. The ruling by the court is a bit casual infact following the appellant's response, the court should have asked the prosecution to explain why Dr. Mangowa was not before the court, and the efforts made to have him testify. The content of the report is important and the maker who did the actual examination is a critical witness and nothing should be taken casually, as the trial court did.

43. The cases of *Okumu V Republic* (supra) and *Sibo Makovo v Republic* (supra) speak very loudly to this. The Court of Appeal in *Sibo Makovo V Republic* [1997] eKLR stated as follows:

“The P3 form which was filled in by the Medical Officer, Naivasha District was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature



of the maker and in terms as laid down in section 33 of the *Evidence Act* (cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in court is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called”

44. All in all, I find that there was never any foundation laid to convince the court that Dr. Mongowa was not available to give the required evidence. Leaving the facility was not sufficient reason for PW3 to come and testify on his behalf especially where the appellant had raised an objection. My finding is that PEXB1 and 3 were not procedurally produced by the prosecution.

Issue No. (ii) Whether Section 200(3) Criminal Procedure Code was complied with:

45. Section 200 of the Criminal Procedure provides:

- (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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

The record shows that the first trial magistrate Hon Sarapai only took the evidence of PW1 and PW2. On 14th October, 2021 Hon Njora took over the matter and this is what transpired:

Prosecutor: Matter is partly heard.

Accused: We can continue

Court: Directions under section 200 Criminal Procedure Code, we shall proceed from where former court 2 left off.

46. Hon. Njora did not proceed to hear this case. The same was taken over by Hon. Ndengeri who rode on the “Directions” taken by Hon. Njora and just proceeded to take the evidence of PW3.
47. Going back to the proceedings of 14th October, 2021 can anyone really say the provisions of section 200(3) Criminal Procedure Code were complied with? When the appellant responded to the prosecutor, the court had not explained to him anything about section 200(3) Criminal Procedure Code. It is from the explanation of these provisions that an accused will indicate to the court and the same must be recorded the he/she will want any witness/s recalled or not.
48. From the record its clear section 200(3) Criminal Procedure Code was not complied with. Therefore, when the prosecution counsel submits in this Appeal saying the appellant did not make any application to recall the witness for further cross examination one wonders when he could have done that when the court never explained that to him. The defence counsel only came on record after the prosecution had closed its case and the matter was awaiting Ruling. So, at what point was he to request for recall of the witness/witnesses? Section 200(3) of the Criminal Procedure Code is crucial for ensuing a fair trial. The succeeding Magistrate had a duty to inform the appellant his/her right to recall any witnesses who previously testified for further cross-examination.
49. The charges facing the appellant are serious charges. He was unrepresented when crucial witnesses testified. Whether an accused person is represented or not, Section 200(3) Criminal Procedure Code must be explained to him/her by the court. See Paul Ochieng Omollo V Republic [2018] eKLR. Again, on this issue I find that the omission by the trial court to comply with section 200(3) of the Criminal Procedure Code vitiated the appellant’s right to a fair trial as enshrined under the *Constitution* under Article 50 of the *Constitution*.



50. After finding fault on the trial court on the two issues stated above, the net effect is to render the entire trial a mis-trial. This court does not therefore deem it necessary to deal with the rest of the appeal on its merit. There is no need of going beyond this to consider the rest of the evidence on record to make a conclusion, as the trial was a nullity

Issue No (iii) Whether to order for a retrial or quash the conviction

51. Section 200(4) of the Criminal Procedure code provides”

Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

This section empowers the appellate court to order for a retrial where it is of the view that the accused person had been materially prejudiced in a trial through non-compliance with section 200(3) of the Criminal Procedure Code.

52. In the case of Samuel Wahini Ngugi V Republic [2012] eKLR the court of Appeal gave guidance on this:

“Each case must depend on the particular circumstances of the 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”

Also see:

- i. FWN V Republic [2017] eKLR
- ii. Mwangi V Republic [1983] KLR 522

53. I have considered the period this case has taken. Had it only been the issue of non-compliance with section 200(3) Criminal Procedure code this court would have ordered for a retrial. The other issue is non-compliance with section 33 and 77 of the *Evidence Act* by unprocedurally admitting crucial documents. All this put together leads the court to the finding that it should not order for a retrial as that would be an injustice to the appellant.

54. In view of the foregoing this court makes the following orders:

- i. This appeal is allowed.
- ii. The conviction is hereby quashed on the basis of non-compliance with sections 33 and 77 of the *Evidence Act*, and Section 200(3) of the Criminal Procedure Code
- iii. Sentence imposed is also set aside.
- iv. Appellant shall be released unless otherwise lawfully held under a separate warrant.

Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

