



**W v Republic (Criminal Appeal 35 of 2021)
[2025] KECA 2299 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2299 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 35 OF 2021
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
DECEMBER 19, 2025**

BETWEEN

EW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, (Achode.J) dated 31st October, 2018 in HCCRA No. 45 of 2015)

JUDGMENT

1. This is a second appeal against the conviction and sentence of Erick Wangila, “the appellant“, by the Principal Magistrate’s Court at Sirisia in Criminal Case No. 405 of 2014 which was affirmed on first appeal in Criminal Appeal No. 45 of 2015 by the High Court of Kenya at Bungoma. The appellant was in the trial court charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars were that on 25th April 2014, at Bungoma County, the appellant intentionally and unlawfully caused penetration of a minor aged 10 years, L.N., (real name redacted) by inserting his male genital organ, namely the penis into her female genital organ namely the vagina. An alternative count of committing an indecent act with a child contrary to Section 11(1) of the same Act was also preferred based on the same facts.
2. The appellant pleaded not guilty to the charges and his trial ensued soon thereafter. LN testified that whilst at home with her siblings, the appellant who was her stepfather, sent the other siblings away to fetch firewood and thereafter lured her into the house, undressed her, and sexually assaulted her. Her mother (PW1) arrived during the act and found the appellant atop LN. She raised an alarm, prompting the intervention by the area Assistant Chief. She then took LN for medical examination at Sirisia Sub-District Hospital the following day, where medical findings confirmed that indeed LN had been defiled.



3. Placed on his defence the appellant in unsworn statement raised an alibi, claiming that he was at Sirisia Market from 6 a.m. to 6 p.m. at the time of the alleged commission of the offence. He further alleged that the charges stemmed from a domestic dispute with his wife.
4. The trial court, upon evaluating the totality of the evidence presented, found that the prosecution had proved the charge of defilement against the appellant beyond reasonable doubt. The trial court established that LN was a minor aged 10 years, and had given a clear and consistent account of the events, describing how the appellant sexually assaulted her. Her testimony was corroborated by her mother (PW1), who found the appellant in the act, and by medical evidence from Sirisia Sub-District Hospital confirming bruising, a swollen urethra, and a missing hymen, which findings were consistent with penetration. The appellant's alibi defence, was not raised during cross-examination of the prosecution witnesses and was therefore an afterthought. The trial court held that the appellant was positively recognized by LN with no possibility of mistaken identity. Consequently, the appellant was convicted on the main count and sentenced to life imprisonment. The trial court made no finding on the alternative count and rightly so.
5. On first appeal to the High Court of Kenya at Bungoma, the court after conducting a fresh and exhaustive re-evaluation of the evidence, dismissed the appeal in its entirety.
6. The appellant, being aggrieved by the judgments of the two courts below, has submitted this second and perhaps last appeal on grounds that the two courts below erred in: not holding that the trial violated his constitutional rights under Articles 50(2)(c), (g), (h) (j) and (k); failing to summon a critical witness; overlooking material contradictions in the prosecution's evidence and lastly, the appellant asserted that the cumulative effect of all these procedural and constitutional breaches resulted in an unfair trial, contrary to the principles of justice enshrined in *the Constitution* of Kenya.
7. When the appeal was called out for plenary hearing, the appellant appeared in person from Kibos maximum prison while Ms. Mwaniki, learned Assistant Director of Public Prosecutions appeared for the respondent. Parties opted to entirely rely on their respective written submissions that they had filed and exchanged.
8. The appellant submitted that the trial and first appellate courts' proceedings violated *the constitution* and were procedurally unfair. That both courts failed to inform him of his rights under Article 50(2) (g), (h), and (m) of *the Constitution*, including the right to legal representation. The plea was in the circumstances improperly taken. That the trial court failed to conduct a pre-trial session and did not ensure advance disclosure of the prosecution's evidence, contrary to Article 50(2)(j) and (k). This omission, he argued, denied him a reasonable opportunity to prepare his defence. He faulted the first appellate court for failing to cure these defects under its constitutional mandate pursuant to Article 165(3)(b) and (7) of *the Constitution*. He also cited the case of John Mutisya Mbeetu v Republic - Cr. App. No. 14 of 2017 in support of the proposition.
9. The appellant also challenged the admission of Dr. Sivachi's medical report without summoning him for cross-examination, in breach of Section 150 of the Criminal Procedure Code and Article 50(2) (k) of *the Constitution*. He cited *TNM v Republic HCCR App. No. 10 of 2015 (Naivasha)*, *Akhuya v Republic Cr. App. No. 42 of 2002 (Kisumu)*, and *Dean v Republic [1966] EA 27* to underscore the legal requirement for direct testimony in criminal trials. The appellant went on to submit that the prosecution's case was marred by contradictions, particularly from PW5, whose evidence on LN's injuries was inconsistent. He argued that such discrepancies rendered the witness unreliable and incapable of supporting a conviction.



10. He relied on *Abel Monari Nyambura & Others v Republic* [1996] eKLR, *Alowo v Republic* [1972] EA 324, and *Coles v Coles* [1968] LR IP & D 70 in support of the proposition. He also highlighted inconsistencies in PW4's account of the arrest, further undermining the prosecution's narrative. In conclusion, the appellant urged this Court to find that the cumulative procedural violations and evidentiary defects rendered his conviction unsafe, and allow the appeal in full.
11. In opposing the appeal, counsel for the respondent submitted that the trial and first appellate courts properly evaluated the evidence and applied the law in convicting and sentencing the appellant. She maintained that the plea was taken in accordance with legal requirements and that the appellant understood the nature of the charge, thereby disapproving claims of a defective plea. Counsel further argued that the trial was conducted fairly, with the appellant being accorded adequate opportunity to cross-examine witnesses and present his defence.
12. On pre-trial disclosure, counsel asserted that the prosecution complied with procedural obligations and that any alleged omissions did not occasion prejudice to the appellant sufficient to vitiate the proceedings. She emphasized that the medical evidence was properly admitted and corroborated LN's account; and that the absence of the doctor who examined LN did not materially affect the integrity of the case, as the report was introduced through a competent witness. As regards the alleged contradictions, counsel submitted that the trial court correctly assessed the credibility of witnesses and found the evidence sufficient to sustain a conviction. She contended that any inconsistencies were minor and did not go to the root of the prosecution case. In conclusion, counsel urged the Court to uphold the findings of the two lower courts as legally sound and dismiss the appeal in its entirety.
13. We have carefully considered the record of appeal alongside respective written submissions, the authorities cited and the law. Being a second appeal, our jurisdiction is circumscribed to consideration of matters of law only, pursuant to Section 361(1)(a) of the Criminal Procedure Code. Where the trial court and the first appellate court have made concurrent findings of fact, this Court is bound to uphold those findings unless it is demonstrated that they are unsupported by the evidence or result from a misapprehension or distortion of the evidence. See *Karingo v Republic* [1982] KLR 213 and *M'Riungu v. Republic* [1983] KLR 455.
14. In our view this appeal raises four legal issues for determination.

First, whether the appellant's constitutional right to a fair trial under Article 50 of *the Constitution* was violated, particularly with respect to the manner in which the plea was taken; the absence of legal representation; and the alleged failure by the prosecution and trial court to ensure pre-trial disclosure of evidence. Second, whether the admission of medical evidence without summoning the maker contravened the appellant's right to a fair hearing, thereby undermining the integrity of the trial process. Third, whether the prosecution's evidence was materially contradictory and therefore unreliable, and whether the first appellate Court properly discharged its appellate mandate in affirming both the conviction and sentence imposed by the trial court.
15. On the first issue, the record indicates that the plea was taken in accordance with the procedure outlined in *Adan v Republic* [1973] EA

445. . The charge was read and explained, and the appellant responded appropriately. There is no indication of ambiguity or confusion. Allegations of non-disclosure of language or rights under Article 50(2)(g), (h), and (m) were not substantiated by evidence of prejudice. The trial court's record reflects procedural compliance, and the High Court correctly found no defect in the manner the plea was taken.



16. Regarding pre-trial disclosure, the appellant did not demonstrate that he requested but was denied access to the prosecution's evidence. The trial proceeded with the appellant cross-examining witnesses and presenting his defence. In *Joseph Maina Mwangi v Republic* [2000] eKLR, the Court held that failure to raise objections during trial undermines claims of unfairness on appeal. The High Court rightly concluded that the trial was conducted fairly and in accordance with Article 50(2)(j) and (k).
17. On failure to inform him of his constitutional right to counsel, we note that this issue is being raised for the first in this second appeal. Ordinarily we would not entertain it. Be that as it may, the right to legal representation at the State's expense is a fundamental human right and essential to the realization of a fair trial. However, this right is not absolute and is contingent upon the potential for substantial injustice; neither does it provide that in all instances that a person be provided with legal aid. As we understand it, the position is that an accused person is only entitled to legal representation provided by the State where he can demonstrate, in the unique circumstances of the case, that he cannot afford an advocate, and that he would suffer substantial injustice if he is not so represented. There are therefore instances where such provision may not be invoked. In such circumstances, it cannot be said that the ensuing proceedings are impugnable on that account. See *Ikoka v Republic* [2025] KECA 614(KLR). This was one such case.
18. On the medical report, we note that it was introduced through PW5, and admitted under Section 77 of the *Evidence Act*. The trial court was entitled to rely on the report, and the appellant had the opportunity to cross-examine PW5 who was in any event, a competent witness. In *Kibangeny Arap Kolil v Republic* [1959] EA 92, it was held that medical evidence may be admitted through competent witnesses other than the author, provided the report is properly authenticated. We also note that, the appellant did not object in the manner that the evidence was tendered. The first appellate court did not err in affirming its admissibility thereof.
19. On the alleged inconsistencies in the prosecution's case, the first appellate court found them immaterial. Minor discrepancies in witness testimonies do not vitiate a conviction unless they go to the root of the case. In *Tinega v Republic* [2014] eKLR, this Court reiterated that contradictions must be material to affect credibility. The evidence of L.N. was consistent and corroborated by medical findings. The trial court's assessment of credibility was sound, and the first appellate court correctly upheld it.
20. In sum and having considered the grounds of appeal, the record, and the applicable law, we find no merit in the appeal. Both the trial court and the High Court made concurrent findings of fact that were supported by credible and consistent evidence. There is no demonstration that either court misapprehended the law or acted on no evidence. The trial was conducted in accordance with constitutional and statutory safeguards, and the conviction was properly entered. The sentence imposed was lawful under Section 8(2) of the *Sexual Offences Act*. Accordingly, the appeal is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL



L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

