

KENYA / JUDGMENT

Charo v Republic [2026] KEHC 13602 (KLR)

[2026] KEHC 13602 (KLR)

COURT

High Court

CASE / FILE NUMBER

Criminal Appeal E013 of 2026

Source: new.kenyalaw.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT MALINDI CRIMINAL APPEAL NO. E013 OF 2026 JUSTIN KAZUNGU CHARO..... APPELLANT VERSUS REPUBLIC..... RESPONDENT (Being an appeal against the conviction and sentence by Hon. D. Wasike (PM) in Kilifi Chief Magistrates Court (SO) Case No. E070 of 2023)

JUDGEMENT

1. The appellant herein, Justine Kazungu Charo, was convicted and sentenced to life imprisonment by the Chief Magistrate's Court, Kilifi for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence are that on 14th December 2022 at Kiwandani area within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of Z.S a child aged 9 years old. The appellant faced an alternative charge of committing an indecent act contrary to Section 11 (1) of the Sexual Offences Act for intentionally and unlawfully touching the vagina of Z.S a child aged 9 years with his penis. Having been convicted on the primary offence, no finding was made on the alternative charge.
2. The background of the matter is that on 18 July 2023, the appellant was charged with the offence of defilement which he denied prompting the trial. He was admitted to bail and the case set down for hearing on 22 November 2023. However, come that day, the trial magistrate was away on official duty and hearing was rescheduled to 29 November 2023. On 29 November 2023, the appellant was present but the prosecution sought for an adjournment which was granted and the case set down for hearing on 21 March 2024. Come that day, the case did not proceed since the trial magistrate was away on official duties and hearing was rescheduled to 2 May 2024. Criminal Appeal No. E013 of 2026 1
3. On 2 May 2024, the appellant was present but the prosecution applied for an adjournment on grounds that the investigating officer was away on leave and the witnesses had not been bonded. The application was allowed and the case fixed for hearing on 9 May 2024. On 9 May 2024, the appellant was absent and the prosecution sought for a warrant of arrest. Despite the appellant's absence, hearing commenced where two witnesses testified before the trial was adjourned to 2 October 2024. On that day, hearing did not proceed since the trial magistrate was away on leave. The matter was rescheduled to 18 June 2025 where PW3 and

PW4 testified in the absence of the appellant. Thereafter, the prosecution closed its case, the appellant was placed in his defence in absentia with defence hearing set for 12 November

2025. Again on that day, the appellant was absent and the court reserved the matter for judgement on 17 December 2025 whereby the appellant was found guilty, convicted in absentia and sentenced to life imprisonment on 14 January 2026, leading to his arrest on 29 January 2026.
4. Aggrieved, the appellant filed the present appeal where he raised the following grounds contained in his amended grounds of appeal; i. The trial court erred in law and fact by proceeding with the trial in his absentia in violation of his rights to fair trial under under 50 (2) (a) and (k) of the Constitution. ii. The trial court erred in law and fact by failing to comply with Sections 211, 216 and 329 of the Criminal Procedure Code.
 5. The appeal was heard through written submissions and both parties were directed to file their written submissions. The appellant appeared in person while the respondent was represented by M/s Mutua learned counsel. However, only the appellant complied and filed written submission which he relied upon. M/s Mutua informed the court that the respondent opposed the appeal, relied on the record but were unable to file written submission on time due to pressure of work. Criminal Appeal No. E013 of 2026 2

Analysis and determination

6. This being the first appeal, the court has a duty to re-evaluate and examine the evidence adduced before the trial court and arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that this court did not have the advantage of seeing or hearing the witnesses. See *Okeno vs Republic* (1972) EA 32, *Oiruri Mose vs Republic* (2013) eKLR.
7. The Court of Appeal, in *Kiilu & Another vs Republic* (2005)1 KLR 174, stated thus; “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. 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 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.”
8. In analyzing the evidence adduced before the trial court, the court is minded of the fact that unlike the trial court, it did not have the benefit of taking evidence from the witnesses first hand and observe their demeanor for which due allowance shall be given.

9. Having perused and considered the record of appeal together with submissions by the appellant, the court finds the following issues for determination: - i. Whether the appellant's right to fair trial under Article 50 (2) (f) and (k) of the Constitution was violated, and if so, what is the appropriate remedy. Criminal Appeal No. E013 of 2026 3 ii. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt. Whether the appellant's right to fair trial under Article 50 (2) (f) & (k) of the Constitution was violated, and if so, what is the appropriate remedy.
10. The appellant submitted that by dint of Article 19 (3) (a) and Article 20 (1) and (2) of the Constitution, he was entitled to and enjoyed all fundamental rights and freedoms contained in the Bill of Rights, including the right to access justice under Article 48 and the right to fair trial under Article 50. Noting that pursuant to Article 25 of the Constitution, his right to fair trial under Article 50 is non-derogable and cannot be limited, he contended that the right involves affording both parties to a dispute an opportunity to present their case, arguing that by hearing the matter in his absence, the trial court violated his said right, more specifically, an opportunity to challenge evidence, adduce evidence in his favour and be present and participate in proceedings against him.
11. The appellant further submitted that he was denied an opportunity to defend himself which went contrary to provisions of Section 211 of the Criminal Procedure Code as well as an opportunity to mitigate before sentenced in violation of section 216 and 329 of the said Act, which in his view, are central to the right to fair trial. He argued that he was not afforded equality of arms and similar opportunities to attend court as that afforded to the prosecution which denied him the right to be heard. He urged the court to find in his favour, set aside the conviction and acquit him.
12. Article 50 (1) and (2) of the Constitution guarantees the right to fair hearing which embodies the right to fair trial that is non-derogable and cannot be limited by dint of Article 25 of the Constitution. This right embodies several aspects that include the right to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed, and the right to adduce and challenge evidence, under Article 50 (2) (f) and (k) which are central to any criminal trial and guarantees access to justice. Criminal Appeal No. E013 of 2026 4
13. Further, Article 27 guarantees every person equality before the law, providing that every person is equal before the law and has the right to equal protection and equal benefit of the law. These provisions are ingrained in every trial and bind courts to ensure fairness, equality and equal treatment of both parties to a dispute. They are foundational concepts that underpin the rule of law and protect the sanctity of every judicial process.
14. Violation of Article 50 (2) of the Constitution would lead to quashing a conviction, invalidation of proceedings, exclusion of any tainted evidence or a retrial where the breach compromised the entire process. See *John vs Republic* (Cr App No. E036 of 2025) 2022 KEHC 410 (KLR).

15. The main contention by the appellant was he was not given an opportunity to be present during trial, he was denied an opportunity to challenge and adduce evidence in his defence, and that he was denied an opportunity to mitigate before sentencing in violation of both the Constitution and Criminal Procedure Code.
16. The record of proceedings before the trial court shows that indeed the trial proceeded in the absence of the appellant. PW1 and PW2 testified on 2 October 2024 whereas PW3 and PW4 testified on 18 June 2025. Defence hearing did not take place due to absence of the appellant and judgement was rendered on 17 December 2025 while sentencing to place on 14 January 2026 in the absence of the appellant.
17. The issue before this court is whether the conduct of the trial in the absence of the appellant was justified. The law provides that in certain circumstances, a criminal trial can proceed notwithstanding the absence of an accused. Article 50 (2) (k) of the Constitution provides that an accused has the right to be present when being tried, unless his conduct makes it impossible for the trial to proceed. Section 206 of the Criminal Procedure Code provides the procedure to be followed in the event of non-appearance of parties in a criminal trial. The said section provides; “ 206 (1) If, at the time or place to which the hearing or further hearing is adjourned, Criminal Appeal No. E013 of 2026 5 the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.
 - (2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.
 - (3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.
 - (4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.”
18. Under the said section, where an accused is charged with a felony as is the case herein, the court shall, pursuant to Section 206 (1) and (4), adjournment the matter, issue a warrant of arrest and cause him to be brought before the court. The second scenario, which is provided for under Section 206 (2), would only apply where the accused in charged with a misdemeanor and even in such a case where the accused has been convicted in absentia, the court is enjoined to inquire into the reasons for the absence of the accused and may set aside the conviction for reasonable cause. Criminal Appeal No. E013 of 2026 6

19. The record shows that the appellant who was released on bond, attended court on 22/11/2023, 29/11/2023, 21/3/2024 and 2/5/2024 for hearing. In all these occasions, hearing was adjourned either on the application by the prosecution or at the instance of the court. He did not attend court on 9/5/2024 where a warrant of arrest was issued and the matter set down for hearing. Unfortunately, trial court proceeded with hearing on that day in the absence of the accused and without inquiring into the reasons for his absence.
20. Article 50 (2) (k) of the Constitution provides for the exclusion of the accused where his conduct makes it impossible for the trial proceed. Exclusion of an accused has serious consequences and effectively impedes an accused from participating in a trial thereby limiting his right to adduce and challenge evidence under Article 50 (2) (k). Such an action is to be undertaken where the conduct of an accused is clearly intended to disrupt proceedings and even so, an accused is to be excluded for the minimum duration possible. The absence of an accused does not warrant his exclusion from subsequent proceedings unless upon inquiry, it becomes apparent that his absence was deliberate and meant to disrupt proceedings. See Republic vs B M and 3 others (2018) KEHC 5208 (KLR) and Mutisya vs Republic (Criminal Appeal E096 of 2023) 2025 KEHC 3483(KLR).
21. No inquiry was undertaken to ascertain the reasons why the appellant had absconded. The court, suo motto, ruled that it was difficult to secure the attendance of the complainant. No application for such an order had been made by the prosecution and the record before that did not depict the appellant as a person who intended to abscond. The court finds that the trial court did not comply with provisions of Section 206 (1) and (4) of the CPC and that the exclusion of the appellant was not justified and constituted an violation of his right to fair trial under Article 50 (2) (f) and (k) of the Constitution.
22. Article 2 (4) of the Constitution provides that any act or omission done in contravention of the Constitution is invalid. Consequently, the trial, having been conducted in violation of Article 50 of the Constitution is a nullity and I hereby declare so. Having found so, the court will now consider the appropriate remedy. I note that the error was procedural and on the part of the trial court and not the prosecution. The offence of defilement is a serious offence and Criminal Appeal No. E013 of 2026 7 it is in the interest of justice and the rule of law that a proper inquiry into the allegations is undertaken. Acquitting the appellant without trial would occasion substantial injustice and violate the very constitutional principles that this court seek to protect and uphold. I note that the witnesses are still available, the facts are still fresh and evidence is available.
23. Having found so, in the interest of the justice, the court will not consider or make a finding on whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
24. Pursuant to section 354 (3) (a) (i) of the Criminal Procedure Code, the court declares a mistrial and orders a retrial. Accordingly, the court makes the following orders:-

- a) The appellant shall be released from prison custody, forthwith, and handed over to the police, so that he can be presented before the magistrate's court, at the soonest time possible, for the purpose of a retrial.
 - b) The retrial shall be conducted at Kilifi Chief Magistrate's Court where the offence was allegedly committed.
 - c) The retrial shall be undertaken by a different magistrate other than the one who handled the previous trial in compliance with the Constitution and law.
25. It is so ordered. Dated, Signed and Delivered Virtually at Nairobi on this 17th September 2026 JOSEPH KIPKOECH BIOMDO JUDGE Criminal Appeal No. E013 of 2026 8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://new.kenyalaw.org/akn/ke/judgment/kehc/2026/13602>

CASE PAGE <https://chat.esheria.ai/case-law/kenya/justin-kazungu-charo-v-republic-2026>

Prepared on 27 October 2026 · Esheria