



**Osano alias Toto v Republic (Criminal Appeal E052 of 2023)
[2025] KEHC 2357 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E052 OF 2023
WA OKWANY, J
FEBRUARY 13, 2025**

BETWEEN

JARED OSANO ALIAS TOTO APPELLANT

AND

THE REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. W. C. Waswa –
RM Nyamira dated and delivered on the 30th day of April 2019
in the original Nyamira CMC Sexual Offence Case No. 71 of 2018)*

JUDGMENT

1. The Appellant was convicted for the offence of Gang Defilement contrary to Section 10 of the [Sexual Offences Act](#) and sentenced to serve twenty (20) years imprisonment. The particulars of the offence were that on 26th December 2018 in Nyamira North Division/Sub-county in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of FK aged 13 years old.
2. Dissatisfied with the conviction and sentence, the Appellant filed the present appeal. He listed the following Grounds of Appeal in the Petition of Appeal: -
 1. That, the sentence is harsh and excessive.
 2. That, may the honourable court be pleased to consider the sentence and the mitigating factors.
 3. That, I was not accorded a fair sentencing.
 4. That, the sentence did not take into account the time spent in remand custody as required under Section 333 (2) of the [Criminal Procedure Code](#).



3. A perusal of the grounds of appeal reveals that the Appellant mainly challenges the sentence passed by the trial court, which he contends, is harsh and excessive.
4. As the first appellate, this court's duty is to re-analyze and re-evaluate the evidence presented before the trial court and to draw its conclusion while bearing in mind the fact that it neither heard nor saw the witnesses testify. In *Okeno vs. Republic* [1972] EA 32 the East Africa Court of Appeal stated as follows on the duty of the Court on a first appeal: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) 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. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). 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, see *Peters v. Sunday Post*, [1958] E. A. 424.”

5. The Appellant submitted on the constitutionality of the mandatory minimum sentences and cited the decision in *Maingi & 5 Others vs. DPP & Another* Pet. No. E017 of 2021 (2022) KEHC 13118 (KLR) where Odunga J. (as he then was) held that mandatory sentences in *sexual offences Act* are unconstitutional to the extent that they deprive the sentencing court of the opportunity to consider aggravating and extenuating factors during sentencing.
6. The Appellant also faulted the trial court for failing to consider his mitigation thereby imposing an enhanced sentence of 20 years.
7. The Respondent, on the other hand, submitted that all the ingredients of the offence of gang defilement were proved to the required standard. The Respondent implored this court to uphold both the conviction and sentence.
8. The trial court's record shows that the complainant, then aged 13 years old, was on 26th December 2018 on her way to her grandmother's house at about 7pm when she was accosted by the Appellant, who was in the company of another man. The duo grabbed her and defiled her, on the roadside, in turns before dragging her to a nearby house where they locked her up and continued to defile her every day until 30th December 2018 when she managed to escape. The complainant testified as follows: -

“...As I was heading to my grandmother's place I met the accused. I didn't know him before then. The accused was with another person whom I also didn't know at that point. They two (2) persons got hold of me and defiled me. The accused was the first one to defile me and then the other person also defiled me. The other person not in court threatened to kill me. The two (2) persons carried me with their hands and took me to a house. Again both of them defiled me. I slept in that house on that day. All of us slept in that house. They defiled me several times that night (witness crying). The next day, 27/12/2018, 28/12/2018 and 29/12/2018 I was in the house. I was locked in the house, they still defiled me on those days. Several times.

On 30/12/2018 they opened the door and left it open. It was in the evening. I was going home. I met the other person not in court. He asked me who opened the door and where I was going. He said he would cut me with a panga. I ran away. I was just walking and I was



found by N my cousin. He was looking for me. We went to Magwagwa Police Station. Then we went to Ekerenyo Hospital for examination. They defiled me day and night and during those days that they locked me in the house.”

9. On cross examination, the victim testified that: -

“I knew the accused on that day he defiled me. The first incident happened at around 7pm. It was by the road. I couldn’t scream they had tied my mouth. It was a footpath. Vehicles can’t use that road. Few houses were nearby and they were a bit far. The house belonged to the other boy not before court. The house had a window and it was closed with a padlock. The door was locked I could escape. The accused and the other person used to bring me food. I didn’t eat at times. I refused to eat. I left the house on a Saturday. It was 30/12/2018. I was kidnapped by the accused and the other person on 26/12/2018. When I was found I was alone. I was found at Ekerenyo. In Ekerenyo I was going to my aunt. I met a neighbor and I informed her what had transpired. My parents also came to Magwagwa Police Station. They came on 31/12/2018 at Ekerenyo. I am telling the truth. When they were carrying me it was at night.”

10. PW2, Cpl. John Kebenei (No. 99021603), arrested the Appellant upon receiving a report that he was involved in the kidnap and defilement of a school girl.
11. PW3, Nancy Kerubo, the Clinical Officer examined the victim and noted that her hymen was broken and that there was evidence of penetration. She produced the victim’s P3 Form, Attendance Card and PRC Form as P Exhibits 1, 2 and 3 respectively.
12. PW4, APC Joseph Karanja (No. 2017030730) investigated the case alongside PW5 PC Mary Kivole Mwathi (No. 117734). She escorted the victim to the hospital and recorded witness statements.
13. PW6, EN, the complainant’s mother testified that the victim went missing from home on 26th December 2018 and that they searched for her for several days to no avail. On 29th December 2018, she learnt that the victim had been seen around Kasusir area after which they proceeded to the Appellant’s home where the Appellant’s sister informed them that the victim was at their home but that she had since left.
14. PW6 recovered her lesso from the Appellant’s home and later received information that the Appellant had been arrested.
15. When placed on his defence, the Appellant gave an unsworn statement in which he denied committing the offence. He insisted that the charges filed against him were false.
16. The appeal was canvassed by way of written submissions, which I have considered.

Analysis and Determination

17. I have carefully considered the parties’ submissions and the Record of Appeal. I find that the main issue for determination is whether the prosecution proved the offence of gang defilement to the required standard. The court will also consider the issue of whether the sentence passed by the trial was manifestly harsh or excessive.



18. The standard of proof expected in criminal case was addressed by Lord Denning in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 where it was held thus: -

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

19. Section 10 of the *Sexual Offences Act* stipulates as follows: -

10. Gang rape

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

20. Section 10 of the *Sexual Offences Act* stipulates as follows on the elements of the offence of gang defilement: -

- a. Unlawful sexual act committed in association with another or others or;
- b. Being in the company of another or others who commit the offence with common intention of committing the offence.

21. From the above section, it is clear that a person may be found guilty of gang rape or defilement even if he did not necessarily engage in the sexual act of defilement if he was in the company of another or others who committed the offence with common intention of committing the offence.

22. In order to prove the offence of gang defilement, the prosecution is also required to prove the three (3) ingredients of defilement namely; the age of the complainant, penetration and the identification of the assailant.

Age of the Complainant

23. The case of *Francis Omuroni vs. Uganda Court of Appeal; Criminal Appeal No. 2 of 2000*, is clear on proof of age of the sexual victim that:

“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 parents or guardian and by observation and common sense...”

24. The principle that emerges from the above authority is that age may be proved through a Birth Certificate, or Age Assessment by a qualified Doctor or through credible evidence such as Baptismal Card, Notification of Birth or School Records or evidence of a parent or guardian.



25. In this case PW5 produced the victim's Birth Certificate which indicated that she was born on 19th May 2005. This means that the complainant was 13 years old at the time she was defiled. I am satisfied that the minority age of the complainant was proved beyond reasonable doubt.

Penetration

26. Section 2 of the *Sexual Offences Act* defines penetration as:
The partial or complete insertion of the genital organs of a person into the genital organ of another person.
27. In the present case, I note that PW1 narrated, in great detail, how the Appellant and his accomplice defiled her in turns on the road side before carrying her to a house where they defiled her for days on end, day and night, before she managed to escape on 30th December 2018. PW3, the Clinical Officer confirmed that the victim had been defiled.
28. I find that the testimony of the victim was vivid, candid and compelling. Her testimony was corroborated by the medical evidence of PW3 who produced her treatment records to support the finding that she had been defiled. I find that penetration was proved to the required standard.

Identification of the Assailant

29. PW1 testified that her assailants abducted her on 26th December 2018 defiled her in turns before taking her to a house where they locked her up and continued to defile her until she managed to escape four (4) days later on 30th December 2018. It is clear that the victim's defilement was not a one off affair but an act that was committed for several days. It is noteworthy that the victim was in the company of her assailants for at least 4 days, during which time, she had ample opportunity to see and identify them clearly when they defiled her in turns. I find that the evidence of PW1, on identification, was consistent and compelling. I am satisfied that the Appellant herein was positively identified as the complainant's assailant.

Common Intention

30. Section 21 of the *Penal Code* defines common intention as follows: -
21. Joint offenders in prosecution of common purpose
When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.
31. In the present case, the complainant testified that she was defiled by the Appellant and another person who was not before the court. The two accomplices acted together for the entire period that they held the complainant captive. I find that the Appellant and his accomplice, had a common intention to defile the complainant.
32. I have considered the evidence presented by the Appellant, when placed on his defence and noted that it mainly consisted of denial of the offence. I find that the Appellant's testimony did not displace the otherwise watertight evidence presented by the prosecution witnesses. It is therefore my finding that the offence of gang defilement was proved beyond reasonable doubt. Consequently, I find that the trial court's conviction was safe and I hereby uphold it.



Sentence

33. The sentence prescribed in Section 10 of the *Sexual Offences Act* No. 3 of 2006 is imprisonment for a term not less than fifteen (15) years but which may be enhanced to imprisonment for life.
34. In the instant appeal, I find that the aggravating factors weigh heavily against the Appellant's claim that the sentence is manifestly excessive. I note that the Appellant, in the company of his accomplice, not only penetrated the minors in turns upon meeting her on her way home, but also kidnapped and held her incommunicado in a locked house where they continued with their vile act of gang defilement for several days until the victim escaped 4 days later, through sheer luck when her kidnappers left the door open.
35. This court cannot begin to imagine the indescribable terror and trauma that the victim underwent during the period of her captivity and even thereafter. One can only shudder to imagine what would have befallen the victim if she did not manage to escape from her abductors, not to mention the pain, anguish and anxiety that her family must have gone through during the period when she was missing.
36. It is trite that an appellate court will not ordinarily interfere with the sentence imposed by the trial court unless it is shown that the sentence is manifestly harsh or excessive or that the trial court applied the wrong principles in arriving at the said sentence.
37. In *Mokela vs. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:
“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”
38. In the oft cited case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, the predecessor of the Court of Appeal pronounced itself on sentencing as follows:-
“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
39. In *Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated thus:-
“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka – vs- R.* (1989 KLR 306)”
40. In the present case, I note that the sentence imposed by the trial court is lawful as the trial court is granted the liberty to enhance the 15 years sentence depending on the circumstances of the case. I note that the trial court considered the Probation Officer's Pre-Sentence Report, the Judiciary Sentencing Guidelines and rendered itself as follows during sentencing: -
“The accused person is 25 years old. He is a young man who has asked for forgiveness. I believe that the accused person will reform while in custody. The accused person is a first offender.”



41. I find that the trial court properly addressed its mind to the law and the gravity of the offence that the Appellant committed before arriving at the correct verdict on sentencing. The Appellants actions were most despicable and inhuman. He showed no shred of mercy to the young victim and should not expect any leniency from this court. Needless to say, his actions have left the victim with deep emotional scars and chronic trauma that will affect her psychologically, emotionally and physically for the rest of her life. This court detests and condemns the Appellant's acts in the strongest terms possible. I find no justification in interfering with the sentence passed by the trial court which I hereby uphold save that the sentence period shall be computed to factor in the period, if any, that the Appellant spent in custody while awaiting his trial in line with the requirements of Section 333(2) of the *Criminal Procedure Code*.
42. In conclusion, I find no merit in the appeal on both conviction and sentence. I hereby dismiss the appeal.
43. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF FEBRUARY 2025.

W. A. OKWANY

JUDGE

