



REPUBLIC OF KENYA



KENYA LAW
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**Oweimbalo v Republic (Criminal Appeal 29 of 2023)
[2025] KEHC 4887 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 29 OF 2023
FN MUCHEMI, J
APRIL 24, 2025**

BETWEEN

MOSES MALIKO OWEIMBALO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence in the Senior Principal Magistrate Court in Ruiru by Honourable C. A. Otieno-Omondi (SPM), in Criminal Sexual Offence Case No. 26 of 2019 on 31st August 2021)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Principal Magistrate Ruiru where he was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. He was convicted and sentenced to life imprisonment.
2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 6 grounds which are summarised as thus: -
 - a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof;
 - b. The learned trial magistrate erred both in law and in fact by sentencing the appellant on a minimum mandatory sentence which is harsh, degrading and unconstitutional.
3. Parties disposed of the appeal by written submissions.



The Appellant's Submissions

4. The appellant relies on the case of *GMW v R* [2019] eKLR and submits that he was arrested eight days after the alleged offence yet he lived in the same homestead with the complainant.
5. The appellant further relies on Article 50 of *the Constitution* and the cases of *Albanus Muasya Mutua v R* Cr. App No. 120 of 2004; *Joseph Kiema Philip v R*. [2019] eKLR and *Vincent Muchera Isalano v R* [2019] eKLR and submits that he was not informed of his constitutional rights and his right to legal representation at the expense of the state. The appellant submits that an advocate was availed to him by his family however, two crucial witnesses had already testified thus prejudicing him amounting to a miscarriage of justice. To support his contentions, the appellant relies on the cases of *Cr. App. No. 314 of 2018 Evans Wanjala Siibi v R* and *Zahir Habibullah Sheikh & Another v State of Gujarat*. The appellant submits that he was a layman in matters of law and he did not know the court procedures especially during his defence and sentencing.
6. The appellant submits that the failure to seal and number the annexures is a procedural technicality that cannot be saved by the provisions of Article 159(2)(d) of *the Constitution*. The appellant submits that the prosecution produced a copy of the birth certificate of the minor which was not certified contrary to Section 66 of the *Evidence Act*.
7. The appellant relies on the case of *Cr. Appeal No. 66 of 2000 Bernard Omondi Odullo v Republic* and submits that a chain of custody is crucial because if it is not properly established, it can raise serious doubts about the integrity of the evidence potentially leading to the exclusion of that evidence from the case or even the dismissal of the charges.
8. The appellant submits that the prosecution failed to call crucial witnesses in the matter namely, PW1's uncle, PW1's cousin, D, B and K, his sons who were at the crime scene. The appellant argues that their non production has a great adverse effect to the prosecution's case as they would have shed more light for the court to be in a position to determine the matter in a just manner. To support his contentions, the appellant relies on Section 143 of the *Evidence Act* and the case of *Keter v Republic* [2007] 1 EA135.
9. The appellant argues that from the evidence of PW3, she was not the doctor who examined the victim yet she testified without the prosecution indicating why the original doctor was not present to give evidence.
10. The appellant argues that the prosecution did not prove the element of penetration as the medical evidence did not corroborate that of PW1 and the complainant went to hospital four days after the alleged incident. The appellant further submits that PW1's testimony was uncorroborated and untrustworthy and she did not understand the sanctity of the oath. The appellant argues that being a sexual offence, the trial court ought to have warned itself that it was not safe to convict him on the uncorroborated evidence of PW1. To support his contentions, the appellant relies on the cases of *Chila v R* [1967] EA 722 and *Criminal Appeal No. 128 of 2018 Amos Kirinya v R*.
11. The appellant submits that PW3 never attested to corroborating that PW1 was bleeding and in pain as she never took PW1's panties to the government chemist to confirm the same. The appellant further submits that there was lack of evidence that linked him to the commission of the offence.
12. The appellant submits that PW1 and PW2 testified that they went for medical examination before they reported the matter at Ruiru Police Station whereas PW4 testified that they reported the matter immediately at the police station on 23/11/2019 before going for the medical examination. Thus, the appellant argues that the evidence of PW1, PW2 and PW4 is not credible. Furthermore, it is not



clear between PW1 and PW2 on who washed the blooded clothes which goes to the credibility of the witnesses.

13. The appellant relies on the case of Petition No. 15 & 16 of 2015 Francis Muruatetu v Republic and submits that the court had previously annulled the mandatory nature of the death sentence in capital offences of murder and robbery with violence cases but the same was to extend to offences under the *Penal Code* and the *Sexual Offences Act*. The appellant further relies on the cases of Criminal Appeal No. 22 of 2018; Evans Nyamari v R [2023] eKLR; Dismas Wafula Kilwake v R [2019] eKLR and Criminal Appeal No. 263 of 2019 and submits that the life sentence meted against him is excessive and harsh.

The Respondent's Submissions

14. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent refers to Section 8(1) and 8(2) of the *Sexual Offences Act* and the case of Kyalo Kioko v Republic (2016) eKLR and submits that it proved the ingredients of the offence of defilement. The respondent submits that PW1, the complainant, stated that she was 11 years old during the voire dire examination. PW2 confirmed that the minor was born on 27th December 2008. PW4 corroborated the evidence of PW1 and PW2 and produced a copy of PW1's birth certificate which showed that she was born on 27th December 2019. Thus at the time of the offence, the complainant was 10 years old and therefore in the bracket defined by Section 8(2) of the *Sexual Offences Act*. The respondent relies on the case of Mwalango Chichoro Mwanjembe v Republic (2016) eKLR and submits that the prosecution proved the age of the complainant.
15. Relying on Section 2 of the *Sexual Offences Act* and the case of Mark Oiruri Mose v Republic [2013] eKLR, the respondent submits that PW1 testified that on 19th November 2019 she went for tuition at the appellant's house. The appellant showed her pornographic videos on the phone and then touched her breasts. The appellant's children were outside at the time. The complainant testified that she went for tuition with her cousin D who was outside playing. The appellant told the victim to go to the bed and his wife arrived and told the children to go and cook following which they cooked rice and githeri. The appellant then told his children to go outside and play after they had eaten. The appellant was on his bed when his wife was also outside and the complainant stated that she asked the appellant to allow her to go to the toilet but he told her that she could go later. The appellant then removed his trouser on one leg and kissed the complainant on the mouth. The appellant then pushed his trousers to his knees and inserted his penis into her vagina.
16. The respondent submits that PW3 adduced medical evidence which proved penetration. The doctor stated that the complainant's external genitalia showed whitish discharge and there was bruising on the genitals, redness on the vulva and tenderness. The impression made at the time was defilement. The respondent further submits that high vaginal swab revealed puss cells and a urinalysis showed puss cells more than 5 per high power field. Thus, the respondent submits that the element of penetration was proven.
17. The respondent submits that proof of participation of an accused person is crucial as it enables one to determine who to attach criminal responsibility to. The respondent submits that PW1 testified that she knew the appellant very well. PW1 was categorical that it was the appellant whom she knew by name who defiled her on 19th November 2019. PW2 testified that the appellant and his family were neighbours before they moved to their current house. The respondent thus submits that the appellant was therefore well known to the complainant and the identification of the appellant was by recognition which was more reliable form of identification. The appellant did not challenge that evidence at all.



The respondent submits that from the evidence that was adduced at trial, it is clear that the appellant is the person who defiled the victim and there was no possibility of mistaken identity.

18. The respondent submits that all the prosecution witnesses were consistent and corroborated each other.
19. The respondent argues that the appellant did not request for legal representation. Furthermore, the appellant seemed to have understood the charges levelled up against him and he cross examined the witnesses at length. The appellant also defended himself and even called a witness. Thus he was not prejudiced at all. On the issue of arrest, the respondent submits that the appellant did not demonstrate what exactly was breached. Further, he did not raise anything to do with his arrest or detention during the trial and cannot bring it up now as that would be termed as an afterthought.
20. The respondent submits that all the witnesses called and testified gave sufficient and corroborative evidence which proved the prosecution case and no other witnesses were required. Regarding the issue of disclosure, on 9th December 2019, all witness statements and documentary evidence were supplied to the appellant who confirmed receipt. Thus, the constitutional rights of the appellant were adhered to during his trial
21. The respondent relies on the cases of Abdalla v Republic KECA 1054 (KLR) and Supreme Court Petition No. E108 of 2023 Republic v Joshua Gichuki Mwangi and submits that the sentence was legal and in line with Section 8(2) of the [Sexual Offences Act](#).

Issues for determination

22. The appellant has cited 6 grounds of appeal which can be compressed into two main issues:-
 - a) Whether the prosecution proved its case beyond any reasonable doubt;
 - b) Whether the sentence meted out against the appellant is justified.

The Law

23. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

24. Similarly in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“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 Republic [1957] EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R [1957] EA 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 finding and 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]EA 424." This was also set out in the case of *Kiilu & Another v Republic* [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

25. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:
- a. Whether there was conclusive evidence of all the ingredients of defilement;
 - b. Whether the appellant's rights under Article 50(2)(h) of *the Constitution* were violated;
 - c. Whether the prosecution case was consisted of contradictions and inconsistencies;
 - d. Whether the prosecution called all the crucial witnesses.

Whether there was conclusive evidence of all the ingredients of defilement.

26. Relying on the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where it was stated that:-

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

27. On the age of the victim, the court of Appeal in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

"...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 a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

28. PW1 testified that she was 11 years old and that her birthday was on 27th December, at the time of giving the testimony. PW2, the complainant's mother testified that PW1 was born on 27th December 2008. PW4, the investigating officer testified that the minor was born on 27th December 2008 and was ten years old at the time of the offence. The investigating officer produced the minor's birth certificate as an exhibit. I have perused the birth certificate which indicated that the minor was born on 27th December 2008. Therefore on 19th November 2019 when the offence occurred, the minor was ten years old and eleven months. It is therefore my considered view that the prosecution proved the age of the minor.

29. Section 2(1) 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."

30. On the element of penetration, PW1 testified that on 19th November 2019 she went for tuition at the appellant's house. The appellant showed her pornographic videos on his phone and touched her breasts. At the time, the children were outside. PW1 testified that she used to go for tuition with her



cousin David and he was outside playing at the time. The appellant then told PW1 to go to the bed. However the appellant's wife arrived and told the children to go and cook. The children cooked rice and githeri and after they ate, the appellant told his children to go outside. The complainant testified that the appellant put her on his bed while his wife was outside. The complainant asked the appellant to allow her to go to the toilet but he told her that she could go later. The appellant then removed her trouser on one leg and kissed her on the mouth. The complainant testified that the appellant pushed his trousers to his knees and inserted his penis into her vagina. The appellant's children entered the house and the appellant told the victim to wear her clothes. PW1 testified that she threatened to tell the appellant's wife. She further testified that she tried to scream during the ordeal but the appellant held his mouth. The appellant gave her Kshs. 20/- and warned her not to tell anyone what had happened or he would not teach her again.

31. Dr. Wangechi Irungu, a doctor at Ruiru Hospital, PW3 testified that the minor was examined on 23rd November 2019 and the Post Care Rape Form filled. The P3 Form was filled on 26th November 2019. The doctor testified that the minor reported that she was sexually assaulted on 19th November 2019 by a man who tutions her and he showed her pornographic videos on his phone and then began touching her private parts and removed all her clothing and forced his manhood into her genitals. The witness testified that PW1 on examination there was bruising on her genitals, redness on the vulva and tenderness. The doctor further testified that the impression made at the time was defilement. She further testified that a high vaginal swab revealed puss cells and the urinalysis showed puss cells more than 5 per high power field. PW3 produced the Post Rape Care Form, the P3 Form and treatment notes as exhibits.
32. To prove penetration, the key evidence is crucial. The complainant's testimony is usually corroborated by the medical evidence produced by the medical officer. In accordance with Section 124 of the Evidence Act. PW3 pointed out that the examination done on PW1 revealed that there was bruising on her genitals, redness on the vulva and tenderness which indicated penetration of the penile. Thus the inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration did occur.
33. On the issue of identification, PW1 and PW2 testified that the appellant used to tutor the minor. Furthermore, PW2 testified that the appellant used to her neighbour before they shifted to another plot. PW2 testified that they were family friends with the appellant's family. Thus the appellant was well known to the complainant. This was a case of recognition and not simple identification. The appellant further testified that he was a tutor and used to provide tuition lessons for PW1. He further confirmed that he used to be neighbours with PW2 before he moved to another plot. DW2, the appellant's wife also confirmed that the appellant used to tuition children PW1 amongst them. She further testified that she knew the parents of the complainant. I have perused the court record and noted that the testimony of PW1 and PW2 identifies the appellant as the perpetrator. Furthermore, the appellant and DW2 have admitted in their own evidence that PW1 and PW2 were well known to them. It is thus my considered view that the appellant was positively identified as the perpetrator. As such, I accordingly find that the prosecution did prove the element of identification.
34. The appellant has complained that the medical evidence did not implicate him and no tests were carried out which were necessary. As the Court of Appeal noted in *Geoffrey Kioji v Republic Nyeri Criminal Appeal No. 270 of 2010 (UR)*:-

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was



- perpetrated by the accused person. Indeed, under the proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.
35. The appellant argues that he was not conversant with the law and ought to have been offered legal representation at the expense of the state and thus his constitutional right under Article 50 (2) (h) was violated.
36. Article 50 (2) (h) of *the Constitution* stipulates:-
Every accused person has the right to a fair trial, which includes the right-
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.
37. A closer reading of Article 50 (2)(h) of *the Constitution* denotes that the right to legal representation is not an absolute right but qualified. Legal representation at the expense of the state is thus only available where there is a likelihood of substantial injustice to occur to the detriment of an unrepresented accused person. The Court of Appeal in the case of *Macharia v Republic* stated as follows:-
Article 50 of *the Constitution* sets out a right to a fair hearing which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at the state expense.
38. In the instant appeal, the appellant was charged with the offence of defilement and sentenced to life imprisonment. The record of the court below does not show whether or not the appellant was informed of his rights under Article 50(2)(h) of *the Constitution*. However, upon perusal of the court record, it is noted that the appellant was supplied with witness statements at the onset of the trial and he carried out cross examination on the prosecution witnesses. Furthermore, the appellant was represented by a counsel one Mr. Mukungu after PW2 had testified until the end of the hearing. Neither did counsel for the appellant or the appellant apply to the trial court to have the witnesses recalled. Additionally, on appeal, the appellant has represented himself and put down his submissions. Thus it is my considered view that there was no risk of an injustice occurring and no substantial injustice occurred during the whole trial.
39. The appellant further argues that the prosecution's case was filled with material inconsistencies and contradictions thus causing doubt on the alleged offence. Relying on the case in the Court of Appeal Tanzania of *Dickson Elia Nsamba Shapwata & Another v The Republic* Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-
“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”
40. The complainant gave a consistent testimony on the incident. She said she went to the appellant's house for tuition where he defiled her while his wife and children were outside the house. The appellant



alleges that he could not have defiled her when his wife and children were outside and further that she could not have enough time to put on her clothes. The appellant further argues that PW1, PW2 and PW4's testimonies contradict each other as to when they went to report the matter in the police station and when PW1 underwent a medical examination. These allegations by the appellant do not go to the root of the matter. The complainant was very consistent in giving her evidence as to how the appellant defiled her and describing the occurrence in detail. According to the magistrate, the complainant's evidence was credible, consistent and was not shaken during cross examination.

41. The appellant argues that the prosecution did not call crucial witnesses to prove its case. He states that the prosecution ought to have called PW1's uncle and cousin David and the appellant's children to prove the allegations that PW1 was defiled.
42. It is trite law that the prosecution is required to avail to the court all relevant evidence to enable the court make an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact. Section 143 of the *Evidence Act* (Cap 80) Laws of Kenya provides:-

No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.
43. In the case of *Bukenya & Others v Uganda* [1972]EA 549 the court addressed itself thus:-
 - a. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
 - b. That the Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.
44. Similarly in *Keter v Republic* [2007] 1 EA 135 the court held inter alia thus:-

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”
45. It is evident here that the prosecution did in fact call the material witnesses whose evidence was found sufficient to prove the offence. It is noted that the uncle and cousin of PW1 did not witness the incident. As such, there was no prejudice occasioned to the appellant by failure to call the said witnesses. Additionally, the appellant was at liberty to call his witnesses to testify in his defence which he failed to do. It is therefore my considered opinion that the prosecution being an independent entity called the witnesses they thought fit to support their case.
46. It is my considered view that in support of the trial court's findings, PW1 gave a very comprehensive testimony of what happened on the fateful day and that her evidence was consistent and cogent. Accordingly, I opine that the prosecution proved its case beyond reasonable doubt.

Whether the sentence is harsh and excessive

47. The Court of Appeal, on its part in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:-

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence, unless that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor, or took into account some wrong material,



or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

48. Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 provides that:-

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

49. The Supreme Court decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)* held that:-

“Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regards to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence.

The judgment of the Court of Appeal delivered on October 7, 2022 was one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remained lawful as long as Section 8 of the *Sexual Offences Act* remained valid. The court of Appeal had no jurisdiction to interfere with that sentence.

50. In that regard, taking into consideration the nature and circumstances of the offence, the mitigation given by the appellant and the ramifications of the appellant’s actions on the child’s future, it is my considered opinion that the sentence of life imprisonment was legal and befitting in the circumstances where an adult was tutoring a minor decided to take advantage of her, thereby traumatising her for life.

51. Consequently, I find that the conviction was based on cogent evidence and it is hereby upheld. The sentence was lawful and will not be disturbed.

52. I find no merit in the appeal and it is hereby dismissed.

53. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE

