



**Ochieng v Republic (Criminal Appeal E036 of 2024)
[2025] KEHC 5001 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E036 OF 2024**

**A MABEYA, J
APRIL 23, 2025**

BETWEEN

VINCENT ONYANGO OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. D. Ogal PM delivered on the 17/1/2024 in Winam Criminal Case No. E054 of 2022, Republic v Vincent Onyango Ochieng)

JUDGMENT

1. This appeal emanates from the judgement, conviction and sentence of Hon. D. Ogal, PM delivered on the 17/1/2024 in Winam Criminal Case No. E054 of 2022.
2. The appellant was charged with the offence of defilement contrary to section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.
3. The particulars of the charge were that on the 10/8/2022 in Kisumu Central within Kisumu County, the accused intentionally caused his penis to penetrate the vagina of XYZ, a child aged 6 years old.
4. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
5. The appellant pleaded not guilty. The prosecution case was founded on the evidence of five (5) witnesses. The defence evidence was based on the appellant's sworn testimony. After trial, the appellant was found guilty, convicted of the offence and sentenced to 30 years imprisonment.
6. There are seven grounds of appeal presented by the appellant vide his petition of appeal dated the 22/5/2024. The said grounds of appeal are as follows: -



- a. That the learned trial magistrate erred in both law and in facts in rejecting my defence without proper evaluation and shifting the burden of proof to the appellant.
 - b. That the learned trial magistrate erred in law and in fact in holding a trial that did not meet the threshold of a fair trial as contemplated under Article 50 (2) (g) (h) and (j).
 - c. That the mandatory nature of the sentence meted upon is unconstitutional hence unwarranted on plea.
 - d. That the trial magistrate grossly erred in both law and facts in convicting on the basis of doubtful, inconsistency and fabricated evidence that lacked corroboration.
 - e. That the trial magistrate erred in both law and in fact by relying on the evidence based on suspicion and afterthought.
 - f. That the trial learned magistrate erred in both law and in fact by failing to consider that the ingredients forming the offence were not proved.
 - g. That more grounds to be adduced after receipt and perusal of the trial Court proceedings.
7. The appellant relied on his written submissions while the state opted not to file any submissions. The Court has considered the entire record.
 8. This being the first appellate Court, it's this Court's duty to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach its own findings and independent conclusion. (See *Okeno v Republic* [1972] EA 32)
 9. PW1 was the complainant's mother. She testified that on the 15/5/2022, while at the saloon, her sister S informed her that her child had been defiled at a Hotel in Kona Mbaya where the appellant worked. PW1 identified the appellant as Ismail in Court and stated that he was known as Alois.
 10. She testified that she then took the complainant to hospital at JOOTRH. She stated that the complainant was 6 years old having been born on the 16/2/2016 as evidenced by the Birth Certificate produced as PExh1. She however admitted in cross-examination that she did not see the appellant defile the child.
 11. The complainant testified as PW2 and gave an unsworn testimony. It was her testimony that she knew the appellant and saw him on the Wednesday of 10/8/2022 when she was playing with one Travay. She stated that the appellant called her, took her to a hotel, locked the door, removed her panty and did "tabia mbaya" in the hotel by putting his "dudu" in hers. The complainant identified the appellant as the one who did those acts.
 12. PW3 Austin Ouma, a clinical officer at JOOTRH produced the complainant's PRC report as PExh3. It was his testimony that the genital examination of the complainant revealed that her hymen was broken and that there was laceration on the vagina. That the complainant's yellow pant was torn with faeces and that the laboratory examination with the High Vaginal Swab revealed Red Blood Cells, lacerations and epithelial cells that pointed towards penetration. In cross-examination he stated that he did not examine the appellant.
 13. PW4 No. 76xxx P.C. Godfrey Mwangi testified that on 10/8/2022, he received a phone call from Kosawo Chief's Office where someone had been arrested for defiling a minor so they took him to Kondele Police Station and charged him. He testified that they took the appellant to hospital since he had injuries as a result of being beaten by members of the public.



14. PW5 Alloice Oduori testified that he knew the appellant well as the appellant was working in a hotel next to his own work place. That on the material day, the appellant called the complainant to the hotel and that he, Pw5 followed them. That when he entered the hotel, he found the appellant had placed the complainant on a table with her legs wide apart. That the complainant's panty was besides her.
15. That he saw the appellant's penis outside the trouser. That the appellant ran away and was chased by a mob who caught up with him at Kona Mbaya and took him to the chief. In cross-examination PW5 reiterated his testimony and denied assaulting the appellant.
16. The appellant gave sworn testimony. It was his testimony that on the 10/8/2022, he left his house at 6am for work and that at 10am, PW5 came and hit him on the head with a stick that he fell down. He was arrested and subsequently charged with defilement. In cross-examination, he denied knowing the complainant or committing the offence.
17. The trial court found the appellant guilty, convicted and sentenced him to 30 years' imprisonment.
18. I have considered the grounds of appeal and the entire record. The grounds can be collapsed into 3 as follows: -
 - a. Whether the prosecution proved its case beyond reasonable doubt.
 - b. Whether the trial was in breach of Article 50 of *the Constitution* of Kenya.
 - c. Whether the sentence passed was unconstitutional, manifestly harsh and/or excessive.
19. The offence of defilement is rooted on three main ingredients; the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.
20. In Edwin Nyambogo Onsongo v Republic (2016) eKLR, the Court of Appeal: -

“... 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.” (emphasis added)
21. In the present case, PW1, the complainant's mother testified that the complainant was born on the 16/2/2016 and she produced her Birth Certificate as PExh1.
22. From the evidence on record, it is clear that it was proved that the complainant was 6years old and therefore a minor.
23. The appellant was however charged under section 8(3) of the *Sexual Offences Act* which provides that: -

“Any person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years ...”
24. A proper framing of the charge should have made reference to the proper sections. Due to the age of the complainant, the appellant should have been charged with defilement contrary to section 8(1) as read with section 8(2) of the *sexual Offences Act*.



25. Of-course an accused person must fully understand the nature of the offence he is facing so that he pleads to it with full knowledge. Would this defect vitiate the proceedings and the conviction entered against the appellant? The answer lies as to whether the defect occasioned a failure of justice and thereby prejudiced the appellant. This test is provided for under section 382 of the [Criminal Procedure Code](#); which states inter-alia: -

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

26. Going through the entire proceedings, there is no doubt at all that the appellant was well aware of the offence confronting him. During the plea, the particulars of the offence were read and explained to him in the language of his choice which had all the elements of the offence of defilement as contemplated by section 8(1) of the [Sexual Offences Act](#). He pleaded not guilty and during the trial, he cross-examined at length all the witnesses proffered by the State.

27. Accordingly, the Court finds that the first ingredient of the offence of defilement was proved to the required standard.

28. The second ingredient that should be proved is penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as: -

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

29. The complainant testified that the appellant did “tabia mbaya” in the hotel by putting his “dudu” in hers. Pw5 testified that when he followed the appellant and complainant to the hotel, he found the complainant already placed on a table with her legs apart and her panty at the side. However, it was his testimony that he could not tell if the appellant had defiled the child by the time he arrived at the scene.

30. The complainant’s testimony was corroborated by the testimony of Pw3, the clinical officer who examined the complainant. He testified that on examination, he noted that the complainant’s hymen was broken; that she had lacerations on her vagina with epithelial cells and red blood cells all pointing towards penetration.

31. From the said evidence which was consistent and unshaken, there is no doubt in the Court’s mind that the element of penetration was proved.

32. The third and last element is identification. In this case there was recognition. Pw1, Pw2 (the complainant) and Pw5 all testified that they knew the appellant. Pw1 the complainant’s mother testified that she knew the appellant while the complainant identified the appellant as the individual who defiled her and that he was known to her.



33. On his part, Pw5 testified that he knew the appellant and further that it was the appellant whom he saw enter the hotel with complainant. Further that he the appellant in the hotel having laid the complainant on a table with her legs wide open.
34. In *James Murigu Karumba v Republic* [2016] eKLR, it was held by the Court of Appeal based, on *Suleiman Juma alias Tom – v- R* (2003) eKLR; (2003) KLR 386 that: -
- “Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value.”
35. I find that the offence of defilement was therefore adequately proven in this case.
36. The appellant impugned his conviction and sentence on the grounds that the evidence presented was not sufficient to sustain his conviction and sentence. However, from the evidence on record, that complaint has no basis.
37. The other ground of appeal was that the trial did not meet the threshold of a fair trial contemplated under Article 50 (2), (g), (h), and (j). The appellant submitted that the trial court violated his constitutional right as provided under Article 50 (2) (a) by failing to presume him innocent thus shifting the burden of proof beyond reasonable doubt from the prosecution to him. To this extent the appellant submitted that the trial court was not impartial and that the evidence presented against him was unreliable and inadmissible.
38. Article 50 (2) (a) provides that every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved. The said Article goes on to provide the specific rights that constitute a fair trial.
39. The Court has carefully considered the record. There is no evidence that the trial court was biased against the appellant. The trial court accorded the appellant all the opportunity necessary to defend the case that faced him. There is nothing on record to show that the trial court shifted the burden of proof from the prosecution to the accused as alleged.
40. In the circumstances, the Court finds no violation of the appellant’s constitutional right as alleged. That limb of the appeal thus fails.
41. Finally, turning to the issue of the appellant’s sentence. The appellant impugned the trial court’s sentence of 30 years’ imprisonment due to its mandatory nature.
42. In this case, the complainant was of the age of 6 years at the time of the offence. Thus, the appropriate penalty clause as already stated should have been section 8(2) of the Act which provides: -
- “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.”
43. The appellant was sentenced to 30 years’ imprisonment which is way below the mandatory sentence provided for in section 8 (2) of the *Sexual Offences Act*.
44. In this regard, it is worthy to note that sentencing is in the exercise of the discretion by the trial court. That discretion should not be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors. Further, it will only be



- interfered with if the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo v R., and Wilson Waitegei v Republic [2021] eKLR).
45. In the present case, the victim was a child of 6 years. She suffered physical injuries. Further, the manner of commission of the offence was cruel and the traumatic experience will linger in her life forever.
 46. Previously, the principle laid down by the Supreme Court Francis Karioko Muruatetu & Another v Republic [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with *the Constitution*.
 47. The Court of Appeal on its part has stated that pursuant to the Supreme Court's decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which are a mandatory minimum should also be considered unconstitutional on the same basis. See Jared Injiri Koita v Republic [2019] eKLR.
 48. However, the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR clarified the position and stated, inter-alia, that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution* but that the said decision only applied in respect of sentences of murder under sections 203 and 204 of the *Penal Code*, which was the case before the Supreme Court.
 49. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8 (2) of the *Sexual Offences Act* is lawful but not necessarily mandatory,
 50. In his mitigation, the appellant was not remorseful but merely denied committing the offence and only sought for the court's assistance. Taking into consideration the circumstances of this case, the age of the appellant and the contents of the pre-sentence report dated 4/4/2024, the Court takes the view that there is no reason to interfere with the sentence.
 51. The upshot is that the appeal is without merit and is dismissed in its entirety.
It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF APRIL, 2025.

A. MABEYA, FCI Arb

JUDGE

