



**Chirume v Republic (Criminal Appeal E043 of 2024)  
[2025] KEHC 6796 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6796 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E043 OF 2024  
WM KAGENDO., J  
MAY 16, 2025**

**BETWEEN**

**JIMMY IDI CHIRUME ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No.3 of 2006 by Hon. D. Mochache on 1/12/2017. He was sentenced to life imprisonment. He was aggrieved by the verdict and filed an appeal. The Appellate court upheld the conviction against the Appellant in *Criminal Appeal No. 51 of 2018*. This is a second appeal.

**The Law**

2. It is settled law that the duty of a first appellate court is to evaluate the evidence adduced before the trial court to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
3. If this was a first appeal, and this court would have a duty to analyse and evaluate the evidence which was adduced before the trial court and produce its own independent finding.
4. The appellant has a legitimate expectation that the evidence will be subjected to an exhaustive evaluation by the appellate court and the appellate court's own independent finding. This principle has been considered in various decisions of this court and those of the Court of Appeal.



5. The leading authority on the subject is *Okeno v Republic* (1972) EA 32. In this case the court stated-

“The duty of the first appellate court is to analyse, reevaluate the evidence which was before the trial court and itself produce its own conclusion on the evidence. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified and must leave room for that.”

6. The Court of Appeal in the case of *David Njuguna Wairimu v Republic* (2010) while citing with approval the case of *Okeno v Republic Supra*, stated as follows: -

The duty of the first appellate court is to analyse, re-evaluate the evidence which was before the trial court and itself produce its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellant court may depend on the fact and the circumstances of the case, come to the same conclusion as those of the lower court. It may reverse those conclusions.

We do not think there is anything objectionable in doing so, provided 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 decision.”

The court of appeal further stated that – “an appellant on a first appeal is entitled to expect the evidence as whole to be subjected to a fresh exhaustive examination (*Padya v Republic* 1975 EA 336) and that the appellate court’s own decision on the evidence. the appellate court must itself weigh the conflicting evidence and draw its own conclusions.

7. In doing so, it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peter’s v Sunday Post* 1978 E.A 424”.

8. In the case of *Gabriel Kamau Njoroge – v - Republic*, Criminal Appeal No.149 of 1986 [1987] eKLR Court of Appeal in Nairobi, Platt & Apaloo, JA. A. and Masime Ag. J.A reiterated. the duty of a first appellate court as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court.”

9. It is, therefore, the duty of this court in this case to re-evaluate the evidence adduced by the prosecution in support of the charges and by the defence, and to make its conclusion.

### **Analysis and Consideration**

10. However, this is not a first appeal. The first appeal was heard Honourable Justice E. Ogolla who upheld the conviction against the appellant. He, however, set aside the sentence and substituted the sentence of the trial court with one of 30 years.

11. It is therefore clear that this court cannot and does not have jurisdiction to review the decision of a court of concurrent jurisdiction. Once the High Court delivered its judgment (though differently constituted) on the murder case, it became *functus officio* over the matter herein.

12. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb is that superior courts cannot sit in



review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves.

13. The court which ought to deal with an issue arising out of the decision of this court is the Court of Appeal as it is the one with jurisdiction under Article 164(3) of the Constitution and Section 379(1) of the Criminal Procedure Code.
14. This is in appreciating the provisions of Article 50(2)(q) of the Constitution of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law. (See Daniel Otieno Oracha v Republic [2019] eKLR). As such, this Court does not have jurisdiction over the criminal appeal herein.
15. I think I have said enough to prove that the application herein is wrongly before this court. This court does not have jurisdiction over the matter. It is trite that where a court is bereft of jurisdiction, it should down its tools the moment it holds the opinion that it is without jurisdiction; jurisdiction is everything. (See the owners of Motor Vessel "Lillian S" – v - Caltex Oil (Kenya) Ltd [1989] eKLR).
16. Considering all the above, this court is bereft of jurisdiction and ought to down its tools. Conclusion Accordingly, the conviction is upheld and the sentence maintained.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 15<sup>TH</sup> DAY OF MAY, 2025**

In the presence of:

Ms Bebora, Court Assistant.

Mr. Ngiri... State Counsel.

Applicant

**SIGNED BY: HON. LADY JUSTICE WENDY MICHENI**

**THE JUDICIARY OF KENYA.**

**MOMBASA HIGH COURT HIGH COURT CRIMINAL DATE: 2025-05-15 16:05:33**

