Ochieng v Republic (Criminal Appeal E001 of 2025) [2025] KEHC 6438 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6438 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E001 OF 2025

WM MUSYOKA, J

MAY 23, 2025

BETWEEN

ALLAN HOSTEN OCHIENG .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from conviction and sentence by Hon. RO Odenyo, Senior Principal Magistrate, SPM, in Busia CMCSOC No. E014 of 2023, of 14th January 2025)

JUDGMENT

1. The appellant, Allan Hosten Ochieng, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 12th December 2022, at Nambuku Location, Samia Sub-County, within Busia County, he unlawfully and intentionally caused his penis to penetrate the vagina a girl child TN aged 6 years. The appellant denied the charges, and a trial ensued, where six witnesses testified for the prosecution and one for the defence.

2. PW1, Edwin Emodo Emo, was a clinician, to whom the complainant was presented, for the purpose of filling the P3 and PRC forms, after she had been attended and treated elsewhere, a day earlier. He noted that the vagina was reddened, the hymen was missing and was not freshly torn, there were no visible bruises, and epithelial cells were evident after vaginal swab. He concluded that penetration had happened, on account of the reddened vaginal walls and vormix.

3. PW2, TN, was the complainant. She identified the appellant by name and said that he raped her. He had removed her clothes and inserted his penis into her vagina. She informed her grandmother and was taken to hospital. During cross-examination, she stated that her mother had informed her that she would be asked questions in court, was told the sort of questions she would be asked, and how she

would respond to them. She stated that the appellant had defiled her previously, but she was not being taken to hospital, despite her reporting to her caregivers.

4. PW3, Simon Wilberforce Wayudi, was a community health worker at a local health centre. She testified that the case of PW2 was referred to the health centre, and from there they referred it to the police. PW4, NM, was the mother of PW2. She stated that PW2 was born in November 2016 and produced her certificate of birth. PW5, DS, was another minor. She was at home with PW2, when the appellant came and went away with PW2. Later PW2 informed her that the appellant had defiled her, whereupon he went and reported the same at home. PW6, No. 23xxx Police Constable Moses Mang'eni, was the investigating officer.

5. The appellant was put on his defence, vide a ruling that was delivered on 4th March 2024. He made an unsworn statement, on 31st October 2024, and called no witness. He denied the charges.

6. In its judgement, delivered on 14th January 2025, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. The appellant was sentenced to serve 20 years imprisonment.

7. He was aggrieved, and brought the instant appeal, revolving around the trial court erring in finding that the case against him had been proved to the required standard; the complainant had confessed to having been coached on what to say in court; the testimony of the complainant not being tested against other evidence; the evidence of the complainant not being corroborated; the evidence being contradictory on the time when the offence was allegedly committed; the clinician not proving for a fact that there was defilement on 12th December 2022; relying on a P3 form which was based on the treatment notes of an unknown expert who was never called; shifting the burden of proof to the appellant; disregarding the defence and the defence exhibit; and convicting against the weight of the evidence tendered.

8. The appeal was canvassed by way of written submissions, following directions that I had made in my ruling, dated 14th March 2025. Only the appellant filed written submissions. He identified five issues for determination: whether all the ingredients of the offence for which the appellant was convicted were proved beyond doubt, whether the conviction was found on uncorroborated evidence and contradictory evidence, whether the failure to reconcile the contradicting evidence was prejudicial to the appellant, whether the trial court relied on documents whose makers were not called as witnesses and whether the defence was disregarded.

9. Although the appellant has identified the issues that he would like the court to determine, his written submissions are not aligned to those issues. He submits in an eclectic manner, based on the grounds of appeal in his amended petition of appeal.

10. On the statement by PW2, that her mother had advised her on how to testify, it is submitted that ought to have cast doubt on the entire case. It is pointed out that PW2 was inconsistent on whether her grandmother was alive, for she said at one point that she was dead, and then later testified that she, PW2, made a report to her grandmother. It is argued that the grandmother never recorded a statement and was never called as a witness. Bukenya & others vs. Uganda [1972] EA 549 (Spry Ag P, Lutta Ag VP & Mustafa JA) and Donald Majiwa Achilwa & 2 others vs. Republic [2009] eKLR [2009] KECA 163 (KLR) (Bosire, Waki & Onyango Otieno, JJA) are cited, on the need for the prosecution to call all witnesses necessary to establish the truth.

11. On contradictions and inconsistencies, it is submitted that there were numerous in the case, and they went to the core, and should have created a doubt in the mind of the court and should have been resolved in favour of the appellant. On how contradictions and inconsistencies should be handled, he has cited Twehangane Alfred vs. Uganda [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ, Engwau &

Byamugisha, JJA)and MTG vs. Republic [2022] KEHC 189 (KLR) (Mativo, J). On penetration, it is submitted that there was no concrete proof, and the trial court relied on circumstantial evidence and suspicion.

12. On circumstantial evidence and suspicion, he has cited Sawe vs. Republic [2003] KLR 364 (Kwach, Lakha & O'Kubasu, JJA), Mary Wanjiku Gichira vs. Republic CRA No. 17 of 1998 and John Mutua Munyoki vs. Republic [2017] eKLR [2017] KECA 376 (KLR) (Makhandia, Ouko & Murgor, JJA). On the treatment notes, it is submitted that the mere fact that they were admitted did not mean that they were proved. Parkar & another vs. Qureshi & 2 others [2023] KECA 908 (KLR) (Okwengu, Laibuta & Mativo, JJA) is cited in support.

13. I shall determine the appeal in the order the appellant has argued his case in his written submissions.

14. The first issue is about the complainant, PW2, being coached by his mother, PW4, on how to testify. That issue arose at cross-examination. PW2 said that PW4 had informed her that she was going to court, to be asked questions, and she was informed of the questions that would be asked and how to respond to them.

15. From experience, that is a standard approach to cross-examination of children of young age whenever presented as witnesses in court. Like all witnesses, they will have been prepared for the court appearance, whether by their parents or by the investigating officer, regarding what to expect in court. It would be foolhardy to present witnesses in court without preparing them. It is part of the process of building confidence in witnesses, to obviate stage fright. By having them know that whatever will transpire in court would be nothing new. The questions likely to be asked would not be anything that they do not already know. Such preparation would be most critical for children, of tender years, who would find themselves in a completely strange environment, before and in the presence of strange adults.

16. There is nothing wrong with preparing witnesses for a court appearance, and reminding them of their case, by way of going through their statements, and speculating on some of the issues likely to be raised by the opposing side, and the possible approaches to addressing those issues, if raised. It would not amount to coaching. One way of weeding out witness-coaching, in the Kenyan practice, has been through pre-trial disclosure of evidence, in both civil and criminal processes, so that both sides are aware, ahead of the oral hearing, of the nature of evidence the witnesses would be coming to give. The argument about witnesses being coached has largely been overtaken by the adoption of these approaches.

17. I note that PW2 was not specific on any issues or areas that she was advised on. I suspect that she was not asked questions on that. She did not give details on or particulars of any specific questions that she was going to be asked, and the answers that she was advised to give in response. If she had given details on or particulars of that, then that would have been evidence that there was coaching. This was a seven-year-old who was being prepared for court, it was imperative for her to be informed of what to expect, which properly included examples of the sort of questions she was to expect, and the sort of answers that she could give. I would expect that there was a statement, that had been shared with the defence, on what PW2 was expected to say in court. I am not persuaded that, her concession that she was prepared for the trial by PW4, amounted to coaching, particularly in view of pre- trial disclosure of evidence.

18. The next issue is about her grandmother not testifying. The issue was that she testified that after her ordeal she reported to her grandmother, yet that person was not called as a witness. The concern by the appellant appears to be that, given that PW2 was a child of tender years, and the offence was defilement, there was need for corroboration. The grandmother, having been informed of that incident would have been a good witness, to corroborate the fact of the incident, and to give chronology of what transpired.

However, the first person to be informed of the incident was PW5. He testified, and that provided the corroboration that would also have come from the grandmother. Corroboration also came from other witnesses, such as PW1, PW3, PW4 and PW6. There was no absence of corroborative evidence.

19. Whilst on that, perhaps I should address the matter of contradictions, inconsistencies and discrepancies. The appellant has highlighted two. One is about the person that PW2 identified or referred to as her grandmother, the woman she was living with, and to whom she reported the incident. The appellant points out that, in her testimony, PW2 had also stated that her grandmother was dead, hence creating confusion. I see no confusion. PW2 was a child of tender years. The mother of PW2, PW4, clarified that the said woman was her own grandmother, and the great grandmother of PW2.

20. The other inconsistency or contradiction, that the appellant has referred to, is with respect to when the incident happened. There would appear to be two sets of timelines given by the witnesses. PW1 said that the history he got was that the incident had happened at 2:00 PM on 12th January 2022. PW4 testified that it was about 1:00 PM or 2:00 PM. PW3 said that he had heard that it happened between 7:00 PM and 7:30 PM. That tallies with the timelines given by PW4 and PW6. PW2, the complainant, did not talk about time, probably she was not questioned about it.

21. So, what should be made about the time? The investigator indicated that he got the time from the complainant or victim, conceded that it was the complainant who knew better. That does not help much, given that she did not, in her testimony mention the time. However, PW5 was the person who was immediately on the ground, and he was clear that it was sometime between 1:00 PM and 2:00 PM. The other witnesses were not anywhere near where it happened. PW3 and PW4 got reports about it on 12th January 2022, at about 8:00 PM. It is possible that there could have been a case of vernacular or Kiswahili causing confusion, for saa saba, in Kiswahili, translates to 1:00 o'clock in English.

22. Would that discrepancy be fatal? I do not think so. A mix-up as to the exact time when the incident happened would be critical, if the defence was raising a defence that the appellant was not at the scene at either of those times. No alibi defence was raised. Therefore, whether it was at 1:00 PM or 7:00 PM would be of little consequence. In any event, it is trite that not every discrepancy would be material, unless it goes to the heart of the matter. The appellant has argued that it does, but he has not demonstrated in what sense. I agree with the trial court; it was a minor discrepancy.

23. See Joseph Maina Mwangi vs. Republic [2000] eKLR (Tunoi, Lakha & Bosire, JJA), Twehangane Alfred vs. Uganda [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), John Cancio De SA vs. VN Amin [1934] 1 EACA 13 (Abrahams CJ&Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ) and Philip Nzaka Watu vs. Republic [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA), for the point that contradictions, inconsistencies or discrepancies are of consequence only where they are so fundamental as to cause prejudice to the appellant, or to have an effect on the conviction and sentence.

24. There is a ground about the trial court falling into error by failing to reconcile the contradictory evidence on the aspect of time, as to whether the incident was at 1:00 PM or 7:00 PM. The trial court addressed itself to that discrepancy, and, as indicated above, concluded that it was minor. I have dealt with it exhaustively above. For the comfort of the appellant, the trial court rendered itself, on that issue, as follows:

> " The issue of time different as to when the act occurred that is whether the incidence was committed at 1 and 2 pm or whether it was 7 pm is according to me, minor and does not take away any magnitude of the evidence that the accused defiled PW2."

25. The other argument is that penetration was not established or proved to the required standard. PW2 was the victim. She described what happened. She identified the appellant, by name, as the person who removed her clothes, and inserted his penis into her vagina. In her words:

> " … Allan raped me. He removed my clothes and started doing bad manners on me on the bed of my grandmother. He did it with what he uses to urinate and inserted it in my part which I use to urinate."

26. This came from the mouth of a babe, rendered in the language of a person of her age, whose vocabulary has not grown to the level of knowing the actual names for male and female genitals. Secondly, judicial notice could be taken of how sex is referred to by persons of that age, based on what they are taught, tabia mbaya or bad manners. Her testimony was graphic enough, that there was penetration, and I am not persuaded that the trial court came to the wrong conclusion, when it was convinced that there was penetration. There can be no better evidence, on penetration, than that from the victim herself. Once she stated that that was what happened, then it would be left to the court decide on what to do with that evidence. It is trite that if the court finds the complainant truthful and reliable, it can convict, even without medical evidence or corroboration. See Dennis Osoro Obiri vs. Republic [2014] KECA 598 (KLR) (K Kariuki (PCA), M'Inoti & J. Mohammed, JJA) and Paul Musembi Mutua vs. Republic [2019] KECA 172 (KLR)(Koome, Okwengu & Sichale, JJA). That was what the trial court did. In the judgement, it is recorded that "I believe her evidence and pursuant to section 124 of the *evidence Act* concede that accused defiled her."

27. In any case, there was enough corroborative and medical evidence, as I have indicated above. PW2 informed PW5 of the ordeal not long after it happened. Then she was taken to hospital, and the material presented by PW1 corroborates her stance. Firstly, from the history that was given to the clinician, and, secondly, from his own findings, as documented in the P3 and PRC forms that he filled. Information on what had transpired was also circulated to PW3 and PW4. PW6 investigated the matter, and the same narrative was made to him, and a report along similar lines had been made at Nambuku Police Post.

28. There was concrete evidence on penetration, and the case by the prosecution was, therefore, not built around circumstantial evidence or suspicion. It came from the horse's mouth, the victim spoke. She reported to PW5. There are hospital records. She interacted with PW1 and PW6, and gave a history to them of the penetration.

29. There is a submission about the medical treatment notes, and the argument that their admission as evidence, did not amount to proof. I agree. That is so. However, in criminal matters, medical evidence is tendered in the form of the P3. The material in the P3 id lifted from treatment notes. The P3 form summarises what is in the treatment notes. The treatment notes are not prepared for consumption by the court, for they are prepared for the purposes of the treatment exercise. They are meant for the medical personnel, to capture the injuries or illness, the treatment plan and the medication given. The P3 is what is tailor-made for judicial proceedings. There is no obligation to produce treatment notes, but there is for production of a P3 form. For purposes of a criminal trial, a P3 form is adequate for proof of injuries, or whatever medical issue that is sought to be established.

30. I agree that it is trite that documents are properly proved by their makers, being cross-examined on their contents. I also agree that the authorities cited properly state that legal position. PW1 made the P3 and PRC forms. He produced them, and he was properly cross-examined on their contents. As to the treatment notes, he was not obliged to produce them and to bespeak their contents. There was no need for them. However, to the extent that they were produced, they were good enough as proof that

that was where the P3 and PRC forms were generated from. Was it necessary to call the maker of the treatment notes? No. I reiterate that treatment notes are not meant for consumption by the court, but are prepared for medical personnel, as discussed above. There would be no need to call their makers, given that there would be no need, in the first place, to produce them. I reiterate, that the document designed for court purposes is the P3, and there would be no need, in criminal proceedings to produce any other medical record beyond the P3 form. Is production of the PRC form mandatory? I do not think it is. The PRC form is filled to assist in the filling of the P3 form.

31. The appellant also argues that burden of proof was shifted to him. I suppose he is talking about the legal burden, which never shifts, and stays throughout on the prosecution, to establish the guilt of the accused person beyond reasonable doubt. I have read and re-read his written submissions, I have not come across any material, in there, which points to that burden being shifted to him, at any point in the judgement of the trial court.

32. He also raises issue with his defence not being considered. I note, from the judgement, that the trial court did not ignore the unsworn statement that the appellant made in defence. The court recited or narrated that defence at page 3, where it is recorded:

> " When accused was put to his defence he gave unsworn statement and did not call any other witness. He claimed to be aged 18 years and student at [Particulars Withheld] Secondary school. He termed the evidence of the Prosecution witnesses as falsehoods."

Then, at page 4 of the judgement, the court analysed the said defence, and dismissed it, in the following terms:

> " I have considered the evidence of the accused in his defence and I find it incapable of shaking the strong and well corroborated prosecution case. I thus dismiss the defence of the accused as lacking credibility."

33. Clearly, therefore, the defence was not disregarded. It was considered, but dismissed.

34. The appellant submits that that defence raised a doubt, which should have been considered to his benefit. Did that defence raise a doubt in the prosecution case? No. It did not. It was an unsworn statement. An unsworn statement is the weakest form of evidence. It is not on the same plane with a sworn statement. It can never raise a doubt on sworn evidence, however inconsistent and discredited that sworn evidence is. Why? Because an accused person who chooses to give an unsworn statement shields himself from the scrutiny that comes with cross-examination, and the statement that he makes is not tested for its veracity, reliability and credibility. At best, it is worthless. It amounts to no defence.

35. The appellant also argues that his defence exhibit was not considered. When the appellant gave his unsworn statement on 31st October 2024, he did not produce any exhibit. In any case, there would have been no basis for him producing an exhibit once he chose to make an unsworn statement. To the extent that he could not be cross-examined on any document that he probably would have liked to produce and rely on; to accompany his unsworn statement, he could not be given an opportunity to produce any document. Any document to be produced as evidence, must be subjected to testing through cross-examination. An accused person who chooses not to give a sworn statement loses the right to rely on any document, and to have any such document placed on record as an exhibit.

36. The document that the appellant is referring to, as his defence exhibit, is the witness statement of PW5, DS. That document was not produced as an exhibit. It was marked for identification, when PW6 testified, on 22nd January 2024. However, it was not subsequently produced as an exhibit. The appellant did not call a witness who would have produced it. Its marking for identification did not

make it a defence exhibit. It was not available for consideration by the trial court in its judgement. See Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others [2005] eKLR (Visram, Mwilu & Otieno-Odek, JJA) and Finmax Community Based Group & 3 others vs. Kericho Technical Institute [2021] eKLR (Ouko P, Musinga & J Mohammed, JJA).

37. I believe I have exhausted the grounds of appeal raised and argued by the appellant, all of which turn on conviction.

38. The appellant did not file written submissions, and, therefore, I do not know whether he would have raised the issue of sentence. I raise this because I believe there is a problem with it. I sit as a first appellate court, and I am duty bound to go through the material that was before the trial court, to come up with my own conclusions. See Okeno vs. Republic (1972) EA 32 (Sir William Duffus P, Law & Lutta JJA). I suppose that would include conclusions even on issues that are not raised by the parties.

39. Article 165(6)(7) of *the Constitution* empowers me, as High Court, to scrutinise any record of a subordinate court, and to make any order or give any direction I consider appropriate, to ensure the fair administration of justice. There is also the revisional jurisdiction, under sections 364 to 367 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, which enables the High Court to review decisions of the subordinate court, which had disposed of the matter before it with finality. The High Court is required to examine the record of the trial court, for the purpose of satisfying itself of the correctness, legality or propriety of the order made, and as to the regularity of the proceedings of the trial court, and to vary the order in question, where the circumstances entitle the High Court to do so. Under both provisions, the court may act suo moto, upon any decision coming to its notice, or upon being moved.

40. The appellant herein was charged under section 8(2) of the *Sexual Offences Act*. That provision protects minors of age eleven and below against defilement. The penalty it prescribes, upon conviction, is mandatory imprisonment for life. PW2 fell within that age bracket. The charge put her age at six. At trial, her mother, said she was born in November 2016. She also produced a certificate of birth, serial number 3717303, dated 29th November 2019, which placed her date of birth on 24th October 2016. That would mean that PW2 was, as of 12th December 2022, aged 6 years 1 month 19 days.

41. in the judgement of 14th January 2025, the trial court convicted the appellant under section 8(2). It proceeded to sentence him, the same day, to twenty years imprisonment. Yet, the sentence for a conviction under section 8(2) of the *Sexual Offences Act* is life imprisonment. That sentence is mandatory, for that law 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." As that provision is mandatory, the trial court would have no jurisdiction nor discretion to impose any other sentence. The sentence which the trial court imposed is that which is prescribed under section 8(3), where 20 years is the minimum, for defilement of minors above eleven years. The sentence imposed by the trial court was, therefore, wrong or erroneous.

42. However, in view of GRD vs. Republic [2025] KECA 59 (KLR)(Kairu, Achode & Odunga), and the other decisions reviewed therein, I shall not enhance that erroneous sentence of twenty years, to correct sentence of life imprisonment. The appellant should count himself lucky, that I did not warn him of the possibility of that happening, when his appeal came up for hearing, or even when I was considering his application for bail/bond pending appeal.

43. The final order shall be that the appeal herein is dismissed, for the reasons given above. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Wycliffe Okutta, instructed by Ouma-Okutta & Associates, Advocates for the appellant.

Mr. Tony Onanda, instructed by the Director of Public Prosecutions, for the respondent.