



**Odoki v Republic (Criminal Appeal 47 of 2019)
[2025] KEHC 7157 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL 47 OF 2019
WM MUSYOKA, J
MAY 23, 2025**

BETWEEN

FREDRICK OUMA ODOKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. MA Nanzushi, Senior Resident Magistrate, SRM, in Busia CMCSOC No. 62 of 2017, of 12th July 2019 and 15th July 2019, respectively)

JUDGMENT

1. The appellant, Fredrick Ouma Odoki, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(4) 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 13th June 2017, at [particulars withheld] village, Burinda Sub-Location, Butula Sub-County, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of JA, a girl aged seventeen years.
2. He pleaded not guilty to the charge, on 15th June 2017. A trial was conducted, where five witnesses testified. He was convicted, on 12th July 2019, on both counts, and was sentenced, on 15th July 2019, to serve fifteen years in prison for defilement and ten years in prison on the alternative count. The two sentences were to run concurrently.
3. He was aggrieved, and brought the instant appeal, vide the petition of appeal, dated 19th December 2019, against conviction and sentence, with the grounds of appeal revolving around the evidence being conflicting and amounting to hearsay; the medical evidence lacking probative value; relying on evidence that had been irregularly adduced; disregarding the entire defence, defence evidence and mitigation; and disregarding gross violation, infringement and denial of constitutional rights to fair trial.



4. Directions were given, on 22nd September 2023, for canvassing of the appeal by way of written submissions. There has been compliance, by the appellant, but not the respondent. The appellant filed both written submissions and amended grounds of appeal.
5. In the amended grounds of appeal, the appellant anchors his appeal only on sentence, on grounds that the trial court failed to consider the current jurisprudence on sentencing; imposed the mandatory minimum sentence, implying that mitigating circumstances were not considered; and that the minimum sentence implied that the discretion of the court in sentencing was not exercised.
6. The written submissions are aligned to the new grounds of appeal, around the sentence, largely on mitigating circumstances not being considered, and the court not exercising discretion in sentencing. That meant that the trial court did not consider sections 219, 329 and 333(2) of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya. He cites *Evans Wanjala Wanyonyi v Republic* [2019] eKLR (Makhandia, Kiage & Otieno-Odek, JJA), *Fatuma Hassan Salo v Republic* [2006] eKLR [2006] KEHC 981 (Makhandia, J), *Yawa Nyale v Republic* [2018] KEHC 4441 (KLR) (Odunga, J), *Regan Muriithi v Republic* [2021] KEHC 3816 (KLR)(PJ Otieno, J), *James Waweru Mwangi v Republic* [2022] KEHC 2102 (KLR) (Kimondo, J) and *Jasee Gathiomi Mbutu v Republic*.
7. The main charge against the appellant was founded on section 8(4) of the [Sexual Offences Act](#), which covers child victims in the age bracket of sixteen and seventeen. The defilement of minors in that bracket attracts a minimum sentence of fifteen years. Upon conviction, the appellant herein was sentenced to fifteen years imprisonment, which is the minimum allowed, under the provision of the [Sexual Offences Act](#) under which he was charged. The alternative charge was founded on section 11(1) of the [Sexual Offences Act](#), which attracts a sentence of not less than ten years imprisonment. Upon conviction, under that provision, the appellant was sentenced to ten years, the statutory minimum under that provision.
8. At about the time the appellant was being convicted and sentenced, the only jurisprudential development of note in sentencing was *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where the Supreme Court appeared to make the point that mandatory sentences were unconstitutional. Statutory minimum sentences were considered by many to be mandatory, but the Supreme Court has since, in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), argued that that should not be so. The trial court did not follow *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), and it imposed the sentences prescribed in the [Sexual Offences Act](#).
9. It would appear that the trial court was on the right side of history, for the Supreme Court was to later clarify, in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), that its decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), was not of universal application, as it was only limited to murder, and did not apply to other offences, including those created under the [Sexual Offences Act](#).
10. Other developments came after *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), as if to take cue from it. Two decisions of note, in the realm of offences under the [Sexual Offences Act](#), are *Wachira & 12 others* [2022] KEHC 12795 (KLR) (Mativo, J) and *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J), which



declared minimum sentences, prescribed by the *Sexual Offences Act*, unconstitutional, for taking away the discretion of the court in sentencing.

11. As fate would have it, these two decisions have since been declared to be bad law by the Supreme Court, in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), which has asserted that the sentences, prescribed in the *Sexual Offences Act*, inclusive of the minimum sentences, are lawful and constitutional. The appellant, cannot, therefore, benefit from the discretion proposed in *Wachira & 12 others* [2022] KEHC 12795 (KLR) (Mativo, J) and *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J).
12. I note that the appellant, in his written submissions, cites section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, and argues that that provision should have been considered in sentencing. That provision states that the duration of every sentence of imprisonment should be calculated or reckoned from the date the sentence is pronounced. It carries a proviso to effect that where the convict had spent some time in custody, prior to sentence, the period spent in custody should be considered. The provision is in mandatory terms, and a convict is entitled to benefit from it. It is not a matter for the discretion of the court.
13. I note that when sentence was pronounced, on 15th July 2023, the trial court did not apply section 333(2) of the *Criminal Procedure Code*. The period that the appellant had spent in custody was not considered or mentioned or factored in the sentence. The sentence order did not refer to that period, nor indicate when the sentences were to start running.
14. According to the charge sheet, the appellant was arrested on 13th June 2017 and was arraigned in court on 15th June 2017. He was granted bond on 16th July 2017, and his surety was approved on 27th November 2017, when, I presume, he was released from remand custody. He was, therefore, in pre-arraignment and pre-trial detention between 13th June 2017 and 27th November 2017. I see, from the trial record, that on 23rd April 2018 it was ordered that warrants of arrest be issued, after the appellant skipped a court appearance. His surety was discharged on 13th November 2018, but I have not seen an order cancelling the bond and committing the appellant to remand custody for the remainder of the trial. I presume that he remained on bond thereafter in the circumstances. The period, running from 13th June 2017 and 27th November 2017, ought to have been considered, in computing the fifteen-year period that he is to spend in prison custody.
15. He mentions sections 216 and 329 of the *Criminal Procedure Code*, both of which are about receipt of evidence, to guide the court in sentencing. The trial court did not call for a pre-sentence report from the probation office, to assist it in assessing sentence. I believe that that is what the appellant has in mind. However, the two provisions are in permissive terms. Calling for such evidence is not mandatory, for it is at the discretion of the court. What is more, since the hands of the court are tied, when it comes to statutory minimum sentences, for the court cannot consider any other or alternative sentences, it would make little sense to call for such evidence. The trial court cannot be faulted, for not calling for such evidence, in the circumstances.
16. Although the appellant amended his grounds of appeal, to limit his appeal to the three grounds recited in paragraph 5 hereabove, I have noted a glaring mistake by the trial court in sentencing, although the same does not fall within the three grounds. I would have jurisdiction, by dint of the revisional powers granted by sections 362 to 364 of the *Criminal Procedure Code*, and the supervisory jurisdiction granted by Article 165(6)(7) of *the Constitution*, to correct that error.



17. It relates to convictions on alternative counts. Where an accused person faces a main count and an alternative count, he cannot and should not be convicted on both. See *Ebei Lorot Lokonya & another v Republic* [2019] KEHC 8390 (KLR) (Wakiaga, J). Where the court convicts on the main count, it should not make a finding on the alternative; and where it finds that no offence is disclosed under the main count, but is convinced that the evidence discloses the offence in the alternative count, it should convict on the alternative count only. One is an alternative to the other. See *Patrick Gitonga v Republic* [2020] KEHC 993 (KLR) (Waweru, J). The alternative count is not a second count. See *Joseph Okumu v Republic* [2017] KEHC 2358 (KLR) (Kiarie, J). Neither is an addition to the main count. See *George Mwangi Macharia v Republic* [2017] KEHC 859 (KLR) (Waweru, J). It is also not an independent count, for it is sort of hangs on the main count. It was, in *MMM v Republic* [2022] KEHC 15012 (KLR)(S. Githinji, J) compared to a spare tyre. The offence in the alternative is usually cognate to the offence in the main count, and a conviction on both counts could raise the spectre of double jeopardy.
18. In the instant case, the trial court convicted on both the main and alternative counts, and sentenced the appellant on both, with the sentences running concurrently. That was in error. The conviction should have been only on the main count.
19. The appeal herein succeeds to the limited extent stated in paragraphs 14, 17 and 18, hereabove. I hereby order that the sentence of fifteen years imprisonment, pronounced on 15th July 2019, by the trial court, shall be calculated or computed, considering the period that the appellant spent in pre-arraignment and pre-trial custody, between 13th June 2017 and 27th November 2017, both dates inclusive; and that the conviction of the appellant, on the alternative count, on committing an indecent act with a child, is hereby quashed, and the sentence imposed, with respect to it, vacated. The appeal is disposed of in those terms. 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.

Mr. Fredrick Ouma Odoki, the appellant, in person.

Advocates

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

