Amudavagwa v Republic (Criminal Appeal E010 of 2023)
[2025] KEHC 10477 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E010 OF 2023

JN KAMAU, J

JULY 17, 2025

BETWEEN

HENRY AMUDAVAGWA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of Hon G. A. Mmasi (PM) delivered by Hon. B. N. Ireri (SRM) at Vihiga in the Principal Magistrate's Court in Criminal Case No 624 of 2012 on 21st December 2012)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The Learned Trial Magistrate, Hon G. A. Mmasi (PM) convicted him of both the main charge and alternative charge and sentenced him to life imprisonment.

3. Being dissatisfied with the said Judgement, on 28th April 2023, he lodged an appeal herein. His Petition of Appeal was dated 4th April 2023. He set out five (5) grounds of appeal. On 12th September 2024, he filed undated Amended Grounds of Appeal. He set out thirteen (13) Amended Grounds of Appeal.

4. His Written Submissions were dated 9th September 2024 and filed on 12th September 2024 while those of the Respondent were dated 27th November 2024 and filed on 28th November 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

7. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Appellant was accorded a fair trial;

    b. Whether or not the Charge Sheet was incurably defective;

    c. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Fair Trial

9. Amended Grounds of Appeal Nos (1), (2), (3) and (11) were dealt with under this head.

10. The Appellant submitted that the Trial Court failed to warn him at the first instance of the consequences of the offence he faced thus caused him substantial injustice and prejudice.

11. He invoked Article 50(2)(g) and (h) of *the Constitution* of Kenya, 2010 and submitted that he struggled in cross-examining the Prosecution witnesses as he was a layman. In this regard, he relied on the case of Pett vs Greyhound Racing Association (1968) 2 All ER 595 and another where it was held that not every man had the ability to defend himself on his own and that if justice was to be done, he sought to have the help of someone to speak for him and who was better than a lawyer who had been trained for that task.

12. He was categorical that substantial injustice had been occasioned as a result of the failure to inform him of his right to legal representation by an advocate.

13. He further cited Article 2(c), 50(2)(c) and (j) of *the Constitution* of Kenya and submitted that he was not supplied with certified statements of the prosecution witnesses and was not given adequate time and facilities to prepare for his defence. To buttress his point, he relied on the case of Ndegwa vs Republic (1985) KLR 534 where it was held that no rule of natural justice is to be sacrificed, violated and abandoned when it comes to protecting the liberty of the subject who was the most sacrosanct individual in the system of our legal administration.

14. He further added that Section 211 of the *Criminal Procedure Code* was not explicitly explained to him in a language he understood hence prejudiced.

15. On its part, the Respondent submitted that the right to legal representation was upon the Trial Court to consider what would meet the interest of justice and establish whether public justice would suffer if legal representation was not provided. It contended that no prejudice was occasioned since the Appellant actively engaged in the case by cross-examining witnesses and therefore understood the proceedings.

16. Article 50(1) of *the Constitution* of Kenya, 2010 states that:-

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

17. Article 50(2)(h) of *the Constitution* of Kenya further provides as follows:-

> " 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."

18. Article 50(2)(j) of Constitution of Kenya states that:-

> " Every accused person has the right to a fair trial which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

19. Section 211 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides as follows:-

    1. At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently torequire him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

    2. If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

20. A perusal of the proceedings of the lower court showed that the Appellant proceeded with the case on several occasions by cross-examining the Prosecution witnesses. He took plea on 9th July 2012 and the matter was set down for hearing. On 6th August 2012, the Trial Court on its own motion ordered that he be supplied with witness statements. The matter was mentioned on several dates before hearing began on 10th October 2012.

21. On the said date, the Appellant proceeded with the hearing without mentioning that he had not been supplied with witnesses' statements or that he was in need of legal representation. The Trial Court proceeded to hear the case and he cross-examined the Prosecution witnesses.

22. When the Trial Court found him to have a case to answer and put him on defence on 3rd December 2012, the court complied with Section 211 of the *Criminal Procedure Code* as recorded and he said that he would give an unsworn statement with no witness. At no point in the proceedings did he request for counsel or for time to instruct a counsel to represent him during trial. His assertion that the Trial Court did not comply with Section 211 of the *Criminal Procedure Code* was therefore rendered moot.

23. Be that as it may, this court found and held that the Trial Court was under an obligation to have informed him of his right to be represented by counsel as was mandated by Article 50(2)(g) of *the Constitution* of Kenya, 2010.

24. Notably, Article 50(2)(g) of *the Constitution* of Kenya provides as follows:-

> " Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly."

25. Failure by the Trial Court to have informed the Appellant of this right was a great omission. Having said so, it was not always that such omission had to cause an accused person injustice as it could be remedied by way of a retrial if such accused person had completely been prejudiced.

26. In this particular case, the Appellant proceeded with the trial without ever having asked the Trial Court to give him time to instruct counsel to represent him during trial. Provision of legal representation at the State expense was a progressive right which was currently accorded to persons who had been charged with capital offences only.

27. This court thus came to the firm conclusion that his constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform him of his right of legal representation under Article 50(2)(g) of *the Constitution* of Kenya.

28. In view of the delays that would be occasioned by recalling witnesses due to failure by trial courts to promptly inform accused persons of their right to choose and be represented by an advocate and to be informed of this right promptly under Article 50(2)(g) of *the Constitution* of Kenya and the right to have an advocate assigned to the accused person by the State and at State expense and bearing in mind substantial injustice that would otherwise result as provided in Article 50(2)(h) of *the Constitution* of Kenya, trial courts were called upon to comply with these provisions of the law when an accused person was first presented to court and before taking the plea as this was indeed the best practice besides being mandated by the law.

29. In the absence of proof of violation of the Appellant's right to fair trial, this court was not persuaded that it should find that the trial was rendered a nullity necessitating a retrial.

30. In the premises foregoing, Amended Grounds of Appeal No (1), (2), (3) and (11) were not merited and the same be and are hereby dismissed.

II. Charge Sheet

31. Amended Ground of Appeal No (4) was dealt with under this head.

32. The Appellant submitted that the Charge Sheet was incurably defective and fatal to the Prosecution as no amendment was done as to correct his name and that of the Complainant, FM (hereinafter referred to as "PW 2"). He argued that whereas PW 2 indicated that her name was FM, RL (hereinafter referred to as "PW 3"), George Agesa Zimango (hereinafter referred to as "PW 4") and No xxx CPL Gitonga Cyprian (hereinafter referred to as "PW 5") referred to her as FM in their testimonies.

33. He further contended that he had faced the charge herein emanating from the name "Motego" yet his name was Henry Amudavagwa. He was emphatic that as no amendment was done on the Charge Sheet under Section 214 of the *Criminal Procedure Code*, then the Trial Court's decision was a nullity.

34. He placed reliance on the case of Martin Oduor Lango & 2 Others vs Republic[2014]eKLR where the appellant was set at liberty due to the mentioning of two (2) different names which the court held that they referred to two (2) different people.

    1. Notably, the said Section 214 (1)(i) of *Criminal Procedure Code* Cap 75 (Laws of Kenya) stipulates that:-

        > "Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:
        >
        > Provided that where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge"

36. Notably, a perusal of the proceedings herein indicated that the Charge Sheet was missing from the record as it was proceeding on the basis of a skeleton file, the original file not having been traced. This court was therefore not in a position to determine the issues raised substantively pertaining the said Charge Sheet.

37. Be that as it may, a spelling mistake as depicted between M and M being PW 1's surname could not have affected the Trial Court's decision as the contents of the Charge Sheet were detailed, clear and unambiguous. In respect to his name, this court noted that PW 1 referred to him as Motego but later clarified to her grandmother, PW 3, by pointing at the Appellant as the person that defiled her. There were, therefore, no uncertainties as to who was the person who defiled PW 1 as she identified him as her perpetrator on the material date.

38. In the premises, Amended Ground of Appeal No (4) was not merited and the same be and is hereby dismissed.

III. Proof of Prosecution's Case

39. Amended Ground of Appeal No (5), (6), (7), (8), (9), (10), (12 and (13) were dealt with under this head.

40. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

41. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

42. The Appellant did not submit on this issue. On the other hand, the Respondent submitted that the Charge Sheet indicated that PW 2 was nine (9) years of age. It contended that PW 2 testified that she

was born on 23rd November 2003 meaning she was nine (9) years at the time of the commission of the offence. It added that PW 5 confirmed that PW 2 was nine (9) years and produced her Age Assessment Report as exhibit in court.

43. It relied on the case of Musyoki Mwakavi vs Republic[2014]eKLR where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim's parents and/or guardians, observation or common sense.

44. This court had due regard to the case of Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It can also be proved by the victim's parents or guardian and observation or common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR.

45. PW 5 tendered in evidence the Age Assessment Report which showed that PW 2 was aged between nine (9) and ten (10) years old. As the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 2's age was proven using medical evidence and that she was a child at all material times.

B. Identification

46. The Appellant submitted that the Prosecution's case was marred with tangible discrepancies, contradictions and inconsistencies. He pointed out that PW 2 informed PW 3 that she had been defiled by somebody whom she later said was one Montego. He pointed out that PW 3 stated that PW 2 told her it was one of Jeniffer's workers who had defiled her. He blamed the Investigating Officer for not having interrogated the said Jeniffer to inquire if she had a worker called Montego or not.

47. In that regard, he placed reliance among others, the cases of Richard Aspella vs Republic Criminal Appeal No 45 of 1981 (eKLR citation not given) where it was held that two (2) contradicting statements could not be admitted in court of law and Ndungu Kimani vs Republic (1979)eKLR where it was held that the witness upon whose evidence was proposed to be relied on should not create an impression in the mind of the court that he was not a straight forward person.

48. He faulted the Prosecution for failing to prove its case to the required standard by failing to summon the vital crucial witnesses to testify occasioning a substantial injustice hence prejudiced. He relied on the case of Bukenya & Another vs Uganda (1972) EA 549 where it was held that the prosecution may elect not to call their vital or material witnesses to testify but they do so at risk of their case and the evidence of the uncalled witness if called would have been adverse to their own case.

49. He further faulted the Trial Court for believing the evidence of PW 2 as a single witness and not recording if she was telling the truth. In this regard, he cited the case of Mohammed vs Republic (2008) KLR where it was held that the court must believe and be satisfied that the victim was telling the truth and must record the reasons for such belief.

50. On its part, the Respondent submitted that PW 2 testified that it was the Appellant who defiled her and that she identified him as Montego and knew him as her grandmother's neighbour. It contended that the Appellant was therefore someone well known to PW 1 and could not have been mistaken as to his identity. It pointed out that that was evidence of recognition which was held by courts to be more reliable and weightier than that of identification of a stranger as was held in the case of Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568. It was emphatic that there was proper identification as there was prior knowledge of the Appellant.

51. It submitted that the Trial Court convicted the Appellant based on the evidence of PW 1 as corroborated by the evidence of the Clinical Officer, Emmanuel Odanga (hereinafter referred to as "PW 1"). In this regard, it cited the case of Stephen Nguki Mulili vs Republic[2014]eKLR where it was held that as per Section 124 of the *Evidence Act*, an accused person could not be liable to be convicted on the basis of the evidence of the victim unless such evidence was corroborated .

52. A perusal of the proceedings showed that PW 2 testified that on the material day she was coming from school when the Appellant followed her while pushing a wheel barrow which had a panga. She said that he told her to go and take mandazi. He then held her hand and told her that if she cried he would kill her.

53. It was her evidence that the Appellant took her to the maize plantation, removed her clothes and pant, strip off his pair of trousers and defiled her. She said that he took his penis and penetrated her vagina while telling her not to cry. She informed the Trial Court that she felt pain and when he finished, he left her at the scene. She said that she left the scene and went home but had difficulties in walking.

54. Her further evidence was that when she got home, PW 3 who asked her what was amiss and she said that Motego had defiled her. She was emphatic that that the Appellant was the one who had defiled her.

55. It was evident that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

56. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

57. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

58. PW 2 positively identified the Appellant who was a neighbor when she told PW 3 who it was. The incident occurred during the day when lighting conditions were favourable for positive identification. There could not therefore have been any possibility of a mistaken identity. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition and that the Appellant herein was positively identified as the perpetrator of the offence he was charged with.

C. Penetration

59. The Appellant did not submit on this issue. On its part, the Respondent cited Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed vs Republic[2020]eKLR where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of PW 1 corroborated that of PW 2 and that penetration was therefore proved.

60. PW 1 confirmed that PW 2's labia majora was reddish, the hymen was broken and she had whitish discharge from her vagina. He confirmed that she had been penetrated. He produced the P3 Form and treatment chit as exhibits during trial.

61. In his defence, the Appellant testified that he was on duty, herding cows when he was arrested. He stated that he was incriminated as he never defiled PW 2. Notably, his defence was a mere denial. It did not outweigh the inference of guilt on his part as laid out by the Prosecution witnesses.

62. This court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 2 on the material date as there was proof of defilement as PW 1 testified.

63. In the premises foregoing, Amended Ground of Appeal No (5), (6), (7), (8), (9), (10), (12 and (13) were therefore not merited and the same be and are hereby dismissed.

II. Sentencing

64. The Appellant did not raise any ground challenging his sentence but submitted on it. Thus, this court in its wisdom determined the same to save the court's time and for completeness of record.

65. He submitted that his sentence was harsh and excessive, inhuman and degrading as it denied him the right to fair trial as it was mandatory. He pointed out that the fact that sentencing was within the discretion of the trial court was not in doubt. He placed reliance on the case of Julius Kitsao Manyeso vs Republic[2023]eKLR where it was held that life sentence was unconstitutional. He further relied on several cases among them the case of Evans Nyamari Ayako vs Republic[2023]eKLR where life sentence was substituted to thirty (30) years imprisonment.

66. He invoked Section 333(2) of the *Criminal Procedure Code*, Section 38 of the *Penal Code* and placed reliance on the case of Ahmed Abolfathi Mohammed & Another vs Republic [2018]eKLR where courts were obliged to take into account the period the accused spent in custody. He urged this court to consider the period he spent in custody since 15th February 2012 when he was arrested to date.

67. Notably, in its Written Submissions, the Respondent referred to Section 8(2) of the *Sexual Offences Act* and placed reliance on the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament and not judiciary that set the parameters of sentencing for each crime. It added that the Supreme Court also differentiated between mandatory sentences and minimum sentences and stated that mandatory sentences left no discretion to the judicial officer whereas minimum sentences set the floor rather than the ceiling of such sentences.

68. It contended that the minimum sentence provided under Section 8(2) of the *Sexual Offences Act* was lawful. It invoked Section 329 of the *Criminal Procedure Code* and pointed out that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving

at the appropriate sentence. It was emphatic that the sentence meted on the Appellant was both lawful and befitting of the offence committed.

69. Notably, the Appellant was convicted and sentenced under Section 8(2) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). The said Section 8(2) of the *Sexual Offences Act* 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."

70. This court could therefore not fault the Trial Court for having sentenced the Appellant to life imprisonment as that was lawful.

71. Notably, on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR to the effect that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. In its said decision, the Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

72. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

73. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code*. The said Section 333(2) of the *Criminal Procedure Code* stipulates that:

> " Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court)".

74. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is provided that: -

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

75. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another vs Republic(Supra).

76. As the Charge Sheet was missing this court resorted to the date when the Appellant was first arraigned in court. A perusal of the proceedings showed that he was arraigned in court on 9th July 2012. Although he was granted bond, he did not seem to have posted the same. He was sentenced to life imprisonment on 21st December 2012. As he was serving a life imprisonment which was indeterminate, the period that he spent in remand when his trial was ongoing could not be granted.

Disposition

77. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated Amended Grounds of Appeal filed on 12th September 2024 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

78. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 17TH DAY OF JULY 2025

J. KAMAU

JUDGE