Auto v Republic (Criminal Appeal E011 of 2024)
[2025] KEHC 10411 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E011 OF 2024

JN KAMAU, J

JULY 17, 2025

BETWEEN

JOHN AUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (PM) delivered at Vihiga in the Principal Magistrate's Court in Sexual Offence Case No 28 of 2018 on 20th November 2019)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) 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 S. O. Ongeri (SPM) convicted him of the main charge and sentenced him to twenty (20) years imprisonment.

3. Being dissatisfied with the said Judgement, on 19th February 2024, he lodged an appeal herein. His Petition of Appeal was dated 15th January 2024. He set out seven (7) Grounds of Appeal. On 28th August 2024, he filed Supplementary Grounds of Appeal dated 23rd August 2024. He set out four (4) Supplementary Grounds of Appeal.

4. His Written Submissions were dated 26th November 2024 and filed on 28th November 2024 while those of the Respondent were dated and filed on 29th January 2025. 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 Grounds of Appeal and Supplementary 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 the Trial Court erred when it allowed the amendment of the Charge Sheet without recalling prosecution witnesses;

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

    c. 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. Charge Sheet

9. Supplementary Ground of Appeal No (2) was dealt with under this head.

10. The Appellant placed reliance on several cases among them the cases of *Jason Akumu Yongo vs Court of Appeal Criminal Appeal No 1 of 1983* (eKLR citation not given) and Republic vs Francis Waweru Njuki [2006]eKLR where the common thread was that the principle laid down under Section 214 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) was that the prosecution could be allowed to amend or alter the charge by way of amendment or by substitution or addition of a new charge at any stage of the trial before the close of the case of prosecution.

11. He contended that that was to ensure that the constitutional right of the accused person was at all times safeguarded and that he had a fair trial as enshrined in Article 50 of *the Constitution* of Kenya, 2010. He added that before trial, the accused person should be informed of the charge with sufficient details to answer it, have adequate time and facilities to prepare a defence and that short of that, the accused person's constitutional rights to a fair trial stood violated rendering the whole trial null and void.

12. He asserted that once a charge was amended, the accused had to be allowed to plead to the altered charge and be given the opportunity to re-call any witness who had testified, for cross-examination. He further relied on the case of Eliud Ouma Agwara vs Republic [2016]eKLR where it was held that after the close of the prosecution case, the charge sheet could not be amended or altered even by the court.

13. He argued that the Charge Sheet showed that he was charged with defilement contrary to Section 8(1) and (4) of the *Sexual Offences Act* No 3 of 2006 but that the Trial Court altered that in its Judgment as defilement contrary to Section 8(1) and (3) of the *Sexual Offences Act* No 3 of 2006. He added that the Charge Sheet was amended on the age of the Complainant, RM (hereinafter referred to as "PW 1") to read sixteen (16) years but that the Trial Court did not give him the opportunity to re-call any

witness who had testified for cross-examination making the trial unfair. He argued that a re-trial after being acquitted would occasion him further unfairness because of its insufficient of evidence for the purpose of enabling the Prosecution fill up gaps in its evidence at the first trial.

14. On its part, the Respondent submitted that after the amended Charge Sheet was read out to the Appellant, he requested the Trial Court to have the expert who did the age assessment appear in court. It argued that it was not true that the amendment was done at the Judgment stage and that he only requested the expert be summoned and not any other witness.

15. 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"

16. A perusal of the Trial Court's proceedings herein indicated that on 24th June 2019, the Prosecution applied to amend the Charge Sheet to reflect the age of PW 1 as sixteen (16) years. After allowing the application, the Trial Court informed the Appellant that he was at liberty to recall any witness.

17. The substance of the charge was read to him in a language he understood (Kiswahili) and he replied, "Not true". He then applied that the age expert be called to confirm that PW 1 was seventeen (17) years old at the time.

18. On 17th July 2019, the age assessment expert, Charles Atore Simba (hereinafter referred to as "PW 7") testified and confirmed that indeed PW 1 was about seventeen (17) years old. The Appellant was allowed to cross-examine him. His assertions that witnesses were not re-called for cross-examination fell on the wayside as the only expert witness he called to be summoned was availed by the Trial Court.

19. Going further, this court noted that in its Judgment, the Trial Court referred to defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* and proceeded to sentence the Appellant under the said Section contrary to the Charge Sheet. This issue was dealt with later on in this decision.

20. In the premises foregoing, Supplementary Ground of Appeal No (2) was not merited and the same be and is hereby dismissed.

II. Proof Of Prosecution's Case

21. Grounds of Appeal Nos (1), (2), (3), (5) and (6) of the Petition of Appeal and Supplementary Ground of Appeal No (1) were dealt with under this head.

22. 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.

23. 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

24. The Appellant did not submit on this issue. On the other hand, the Respondent 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.

25. It contended that PW 1 testified that she was seventeen (17) years old at the time of assessment and produced the Age Assessment Report as exhibit in court. It added that in her testimony, PW 4 (sic), the Investigating Officer, stated that PW 1 was sixteen (16) years old at the time of the commission of the offence.

26. 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 could 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.

27. PW 7 tendered in evidence the Age Assessment Report dated 24th June 2019. The same showed that PW 2 was aged approximate seventeen (17) years as she had full eruption of all lower 3rd permanent teeth.

28. 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 1's age was proven using medical evidence and that she was a child at all material times.

B. Identification

29. The Appellant placed reliance on the cases of Republic vs Turnbull (1977) QB 224 and Benard Gitonga Karanu vs Republic [2019]eKLR without highlighting the holding he was relying upon.

30. He argued that PW 1 did not state under which strength of light she identified her attacker at the material night at 7.30 pm. He asserted that the attacker was a stranger to her and that she even gave the Clinical Officer, Paul Muturi (hereinafter referred to as "PW 4") a history of being sexually assaulted by a person not known to her. He asserted that PW 1 did not tell the Trial Court that she positively identified her attacker due to the long observation time but that that was the Trial Court's suggestion.

31. He further contended that the onus of proof lay on the prosecution and did not shift to the defence as was provided for under Sections 107, 108 and 109 of the *Evidence Act*, Cap 80 Laws of Kenya.

32. He submitted that although it was the Prosecution's assertion that PW 1 led Billy Aristaview Amayere (hereinafter referred to as "PW 2") and PW 4 to the house she alleged she was defiled, the attacker was not found in the house and that no evidence was led by the Prosecution to confirm that that was his house. He added that PW 2 and Boaz Wanga (hereinafter referred to as "PW 3") testified that they were told by her grandmother and the grandson that the house belonged to John but that the Prosecution failed to call them to ascertain that fact.

33. He was emphatic that PW 1 being a single identifying witness under a difficult condition, her correctness of identifying his attacker needed to be tested through a properly organised identification parade. He pointed out that dock identification was worthless and that her identification needed to be

corroborated by another direct evidence or circumstantial evidence, hence it was fatal to this case. It was his contention that this case was not proved beyond reasonable doubt.

34. On its part, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her and that on the material night they used a torch as the source of light. It asserted that PW 1 led PW 3 and PW 4 to the home of the Appellant. It pointed out that she knew the Appellant well and even identified him in court. It added that PW 1 spent some time with the Appellant and was therefore able to recognise him. It was emphatic that there was proper identification of the Appellant.

35. A perusal of the proceedings showed that PW 1 testified that on the material day of 4th June 2018 at 1930 hours, she was at (Particulars withheld) with two (2) girls, Jane and Mercy, heading to (Particulars Withheld) after collecting her clothes that she had left there in May. The Appellant emerged with a motor cycle and he requested them to board his motorcycle which they did. At Matope Stage, he said that he wanted one of them but they resisted and alighted from the motor cycle. However, he sped off with PW 1.

36. She explained how he had a knife at the gumboot and panga at his belt. When he stopped, he warned her not to make noise. He switched on his torch, ushered her into the house, removed the panga and the knife and forced her to bed. He put the knife on the table and covered her mouth and put the knife on her back (sic).

37. She tried to scream but he told her to keep quite and threatened to stab her. He removed her underpants, laid her on the bed, laid on her stomach and inserted his penis into her vagina. She said that she felt a lot of pain. When a customer called him, he left saying she should not leave as he would come back. She managed to escape and went to another homestead where they informed the Chief. She spent the night at the Chief. The following day, she led the Chief to the house where she was defiled but they did not find the Appellant. It was then that she was escorted to the Police Station.

38. Her evidence was corroborated by PW 2 and PW 3 whom he led to see the house in which she was defiled. They pointed out that they found a mother who informed them that the house belonged to John her son.

39. Having said so, this court noted that PW 1 was the only identifying witness. 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.

40. 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)."

41. 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.

42. PW 1 stated that the Appellant used a torch as source of light and that she was able to point out his house to PW 2 and PW 3. This court was persuaded to find and hold that there could not have been any possibility of a mistaken identity to require the conduct of an identification parade as the Appellant submitted. This is because the light from his torch was sufficient for PW 1 to have seen his face. They also spent some time together and he was masked. She also positively identified him, by pointing at him in the dock, as the person she met on the material night and who defiled her.

43. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition

C. Penetration

44. The Appellant did not submit on this issue. On its part, the Respondent invoked 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 own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of PW 4 corroborated that of PW 1 and that penetration was therefore proved beyond reasonable doubt.

45. PW 4 confirmed that PW 1 had bruises on her genitalia with visible genital discharge with foul smell, her hymen had raptured and she had laceration on the vaginal wall which was bleeding. He added that there was blood in urine which showed there was forcible penetration. The presence of epithelial showed that she had an infection. He concluded that there was penetration. He produced the P3 Form, Post Rape Care (PRC) Form, Psychosocial Assessment Report and treatment notes as exhibits during trial.

46. PW 1's evidence was therefore corroborated by the scientific evidence of PW 4. The evidence of PW 1 and the Appellant herein was cogent and consistent as regards the defilement.

47. In his defence, the Appellant only narrated of how he was arrested on the material date of 4th June 2018. He denied defiling PW 1. His evidence therefore did not outweigh the evidence that was adduced by the Prosecution witnesses.

48. This court thus found and held that the Prosecution had proved its case that the Appellant defiled PW 1 on the material date, beyond reasonable doubt, which was the required standard in criminal cases.

49. In the premises foregoing, Ground of Appeal Nos (1), (2), (3), (5) and (6) of the Petition of Appeal and Supplementary Ground of Appeal No (1) were therefore not merited and the same be and are hereby dismissed.

II. Sentencing

50. Grounds of Appeal No (4) and (7) of the Petition of Appeal and Supplementary Ground of Appeal No (3) and (4) were dealt with under this head.

51. The Appellant submitted that the Trial Court erred in denying him his absolute right to a least prescribed sentence pursuant to Section 8(4) of the *Sexual Offences Act* No 3 of 2006 and Articles 25 (c), 50(2)(p) and 24(i) and (e) of *the Constitution* of Kenya. He asserted that the right to a least prescribed sentence was non-derogative right to a fair trial pursuant to the said Articles. He added that the record proved that PW 1 was about sixteen (16) to seventeen (17) years old at the time of the

incident which fell under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* rendering the sentence of twenty (20) years manifestly excessive in the circumstances of the case.

52. He pointed out that he was arrested on 6th June 2018 and was sentenced on 27th November 2019 and that he was in remand during trial and his sentence was made to run from its pronouncement hence unfair trial.

53. The Respondent referred to Section 8(4) of the *Sexual Offences Act* No 3 of 2006 and Section 329 of the *Criminal Procedure Code* and submitted 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.

54. It placed reliance on the case of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) where it was held that sentence was a matter that rested in the discretion of the trial court and that an appellate court would not interfere with the sentence unless it was manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor.

55. It further 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.

56. It also cited Section 329 of the *Criminal Procedure Code* and asserted 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 added that the minimum sentence provided for under Section 8(4) of the *Sexual Offences Act* was fifteen (15) years which was the floor and not the ceiling but that the Trial Court exercised discretion and meted out twenty (20) years imprisonment. It was its contention that the Appellant had not demonstrated why this court should interfere with that sentence.

57. It was, however, not opposed to the Appellant's prayer under Section 333(2) of the *Criminal Procedure Code* Cap 75 Laws of Kenya. It relied on Section 333(2) of the *Criminal Procedure Code* and placed reliance on the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR where it was held that by dint of Section 333(2) of the *Criminal Procedure Code*, courts were obliged to take into account the period that the accused spent in custody before they were sentenced.

58. Notably, the Appellant was charged under Section 8(4) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). The said Section 8(4) of the *Sexual Offences Act* provides that:-

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

59. The Trial Court therefore faulted for having sentenced the Appellant to twenty (20) years imprisonment as the law provided for fifteen (15) years imprisonment. This court also noted that in its Judgment, it had referred to the charge as defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* instead of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* as had been indicated on the Charge Sheet.

60. Indeed, PW 7 proved that the age of PW 1 was approximately seventeen (17) at the time of assessment and which meant that she was sixteen (16) years old at the time of the commission of the offence, therefore, the offence fell under Section 8(4) of the *Sexual Offences Act*. In the premises, and bearing in mind Article 50(2)(p) of *the Constitution* of Kenya, this court found it prudent to set aside the Trial

Court's illegal sentence of twenty (20) years imprisonment and substitute it with fifteen (15) years imprisonment.

61. 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)".

62. 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."

63. 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).

64. The Charge Sheet herein showed that the Appellant herein was arrested on 6th June 2018. He was sentenced on 27th November 2019. A reading of the Trial Court's Sentence showed that it did not take into account the time that he spent in remand before his sentencing. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

65. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 15th January 2024 and filed on 19th February 2024 and his Supplementary Grounds of Appeal dated 26th November 2024 and filed on 28th November 2024 was not merited and the same be and is hereby dismissed. His conviction be and is hereby upheld as it was safe. However, his sentence of twenty (20) years be and is hereby set aside and/or vacated and replaced with a sentence of fifteen (15) years imprisonment.

66. However, for the avoidance of doubt, it is hereby ordered and directed that the period that he spent in custody between 6th June 2018 and 26th November 2019 be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

67. It is so ordered.

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

J. KAMAU

JUDGE