Aginga v Republic (Criminal Appeal E019 of 2024)
[2025] KEHC 10389 (KLR) (15 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10389 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E019 OF 2024

JN KAMAU, J

JULY 15, 2025

BETWEEN

GEORGE OREDO AGINGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of Hon R. M. Ndombi (PM) delivered at Vihiga in the Principal Magistrate's Court in Sexual Offence Case No 58 of 2022 on 25th August 2023)

JUDGMENT

Introduction.

1. The Appellant herein was charged on count I 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*. He was further charged on Count II with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.

2. The Learned Trial Magistrate, Hon R. M. Ndombi (PM) convicted him on the charge of defilement and sentenced him to life imprisonment.

3. Being dissatisfied with the said Judgement, on 5th April 2024, he lodged an appeal herein. His Petition of Appeal was dated 4th April 2024. He set out four (4) grounds of appeal. On 8th November 2024, he filed Amended Grounds of Appeal dated 7th November 2024. He set out six (6) Amended Grounds of Appeal.

4. His Written Submissions were dated 7th November 2024 and filed on 8th November 2024 while those of the Respondent were dated 30th December 2024 and filed on 7th 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 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 Prosecution proved its case beyond reasonable doubt; and

    b. 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. Proof Of Prosecution's Case.

9. Amended Ground of Appeal No (1), (2), (3), (4) and (5) were dealt with under this head.

10. 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.

11. 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.

12. The Appellant invoked the *Sexual Offences Act* (Rules of court) in 2014 which came into force on 11th July 2014 under legal notice No 101, and submitted that under Rule 4 thereof, the age of the complainant could be determined by way of a birth certificate, any school documents, a baptismal card or any other similar document. He pointed out that although it was alleged that the Complainant, JK (hereinafter referred to as "PW 1") was eight (8) years old at the time the offence was committed, no one was called to confirm the Age Assessment Report.

13. He further argued that despite the Age Assessment Report being produced in court by dint of Section 77(3) of the *Evidence Act*, nobody was cross-examined over the same because no one owned it. He contended that he Trial Court, therefore, erred in law and fact when it considered PW 1's age without considering other evidence.

14. He submitted that notwithstanding that documents were produced to assist the court to evaluate complex matter, the said evidence was not compelling on its own as was held in the case of Kimatu

Mbuvi t/a Kimatu Mbuvi & Bros CS Augustine Munyao Kioko Civil Appeal No 23 OF 2001 (eKLR citation not given).

15. He contended that in a case of defilement, age was a very important aspect that required to be proved for sentence to be meted and that the court was bound by law not to consider evidence from exhibits that were not produced in court . He was emphatic that PW 1's age was not proved to the required standard, which in criminal cases, was proof beyond reasonable doubt.

16. 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.

17. It contended that Christine Nyakoa (hereinafter referred to as "PW 2") testified that PW 1 was born in the year 2014 and that No 101487 PC Hellen Okumu (hereinafter referred to as "PW 4") produced the Clinic book that PW 1 was eight (8) years at the material time of the incident.

18. 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, observation or common sense as was held in the case of Musyoki Mwakavi vs Republic (Supra).

19. Notably, PW 4 produced PW 1's Clinic Book which indicated that PW 1 was born on 16th March 2014. The incident took place in September 2022 which meant that PW 1 was eight (8) years old at the material time. As the Appellant did not challenge the production of the aforesaid Clinic Book and/or rebut the said evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven by medical evidence and that she was a child at all material times.

20. The Appellant's assertions that the Prosecution produced an Age Assessment Report that was not subject of cross-examination was therefore rendered moot.

B. Identification.

21. The Appellant submitted that he told the Trial Court that he did not commit the offence and that he never knew PW 1 and that because no one witnessed the offence, it was PW 1's evidence against his. He was emphatic that the evidence of a single witness should be taken with a lot of caution. He added that PW 1 had to be beaten by her mother for her to mention him

22. On its part, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her and that she knew him as George and they were neighbours. It added that the offence was also committed more than once and happened during the day at the home of the Appellant. It contended that as the Appellant was someone PW 1 knew well, she 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.

23. A perusal of the proceedings showed that PW 1 testified that she knew the Appellant as George and he was their neighbour. She stated that on a day she could not remember, her father sent her to buy vegetables from the Appellant and when she went, she found the Appellant alone in his home. The Appellant told her to wait for him in his sitting room as he went to get the vegetables from the farm.

24. It was her evidence that he left and returned with the vegetables which he kept them on the table and told her to go to the bedroom. When they went to the bedroom, the Appellant told her to remove her

pant which she did and he removed his black trouser which he lowered to his feet. He then sat on the bed and ordered her to sit on the thing he used to urinate which she did.

25. Her further evidence was that the thing pierced her thing that she used to urinate but refused to penetrate. She said that she felt pain and he stopped. He then inserted it in her anus and when he finished, he removed his thing, put on his trouser and asked her to put on her pant. She said that he gave her Kshs 15/= and vegetables and told her not to tell anyone.

26. She further testified that on another date, she went to look for firewood and found the Appellant picking charcoal at his place. She went to a tree near his home and he asked her to go to his sitting room to wait for him as he finished picking charcoal. When he came, he asked her to go with him to the bedroom where he asked her to remove her pant and he removed his short and licked her vagina and asked her to lick his thing for urinating which she did and he told her to go home. She told the Trial Court that the Appellant did not give her any money this time.

27. This court noted that PW 1 was the only identifying witness as submitted by the Appellant. 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.

28. 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)."

29. 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.

30. PW 1 positively identified the Appellant who was their neighbor as the perpetrator of the offence. PW 2 also confirmed that the Appellant was their neighbour. 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

C. Penetration.

31. The Appellant invoked Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mark Oiruri Mose vs Republic [2013]eKLR where it was held that many times the attacker does not fully complete the sexual act during the commission of the offence and that was the main reason why the law did not require that the evidence of spermatozoa be availed so long as there was penetration. He questioned why the examination of PW 1 was done in a private hospital and why her anus was not examined.

32. He pointed out that courts had held several times that a broken hymen was not conclusive evidence of penetration as was held in the case of Joseph Machoka Mwamwambo vs Republic Criminal Appeal No 126 of 2023 (eKLR citation not given). He also cited Section 137(a), (c) and (f) of the *Criminal Procedure Code* and Section 8(1) of the *Sexual Offences Act* and argued that the Charge Sheet was defective with regard to the organ of the body that was penetrated as PW 1 had mentioned the anus. He asserted that there was no corroboration between PW 1's evidence and the medical report but that the Trial Court claimed to have used both types of evidence to convict him.

33. He asserted that the evidence should be well corroborated to make it believable and meet the threshold of proof beyond reasonable doubt. He further relied on the Tanzanian case of Dickson Alia Nsamba of Shipwata & Another vs Republic Criminal Appeal No 92 of 2007 where it was held that in evaluating discrepancies and contradictions, it was undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements.

34. He asserted that the evidence should be well corroborated to make it believable and meet the threshold of proof beyond reasonable doubt. He further relied on the Tanzanian case of Dickson Alia Nsamba of Shipwata & Another vs Republic Criminal Appeal No 92 of 2007 where it was held that in evaluating discrepancies and contradictions, it was undesirable for a court to pick out sentence and consider them in isolation from the rest of the statements.

35. He asserted that the Trial Court ought to have considered circumstantial evidence and that even if his defence was weak, it did not base the conviction (sic).

36. He pointed out that there were glaring contradicting evidence by the Prosecution witnesses, PW 1, PW 2 and the Clinical Officer, Paul Muturi (hereinafter referred to as "PW 5"). In this regard, he placed reliance on the case of Ramerishna Denkerai Pandya vs Republic Appeal No 06 of 1990 EAACA where it was held that where there were contradictions in the evidence, it was difficult to distinguish the truth from untruth and to say who was telling the truth and who was lying.

37. He added that the Prosecution failed to call crucial witnesses like Innocent, PW 1's sister, whom she informed that the Appellant defiled her, Jessica, the woman who informed PW 2 about the incident, the Assistant Chief and the group of children who told PW 2 about the incident. In this regard, he placed reliance on the cases of King Ole Yengo vs Republic 1121 (1921) and Bukenya vs Uganda (1972) EA 549 where the common thread was that failure to call crucial witnesses by the prosecution entitled the court to make an adverse conclusion against the Prosecution and acquit the accused person.

38. He invoked Article 50(4) of *the Constitution* of Kenya, 2010 and sought the court's protection of his rights. He was categorical that Article 27(1) and (2) of *the Constitution* of Kenya should be exercised in favour and benefit of all.

39. He further relied on the case of Republic vs University of Cambridge (1723) 93 All ER 698 where it was held that even God himself did not sentence Adam before He called upon him to make his defence. He submitted that the Trial Court failed to consider his defence. He averred that he was framed due to family disputes/grudges but instead, the Trial Court considered shallow investigations to convict him.

40. He argued that the inconsistencies and contradictions went to the root of the case and that a close scrutiny of the same could overturn the prosecution case if analysed adequately. He added that penetration was not proved hence conviction was unsafe. He relied on Section 107 of the *Evidence Act* and placed reliance on the case of Absolom Ambaka Okila vs Republic[2020]eKLR where it was held that the circumstances under which an offence was alleged to have been committed could not be ignored. To buttress his point, he relied on the case of JOO vs Republic[2015]eKLR where it was held that it was better to acquit ten guilty persons than to convict one innocent person.

41. The Respondent also referred to 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 5 corroborated that of PW 1 and that penetration was therefore proved.

42. It placed reliance on the case of Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013 (eKLR citation was not given) where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant. It was emphatic that all the ingredients of the charge of defilement were proved beyond reasonable doubt. It contended that pursuant to Section 211 of the *Criminal Procedure Code*, the Appellant chose to give an unsworn statement and did not call any witnesses. It added that the Trial Court dismissed his defence as a mere denial since he did not call any witness to substantiate the allegations that he owed PW 1's father money for sale of napier grass. It was emphatic that the Appellant did not rebut the evidence of the Prosecution rendering his assertion that the Trial Court did not consider his defence was without merit.

43. It asserted that the inconsistencies and contradictions did not go into the core of the case and that the variance in itself did not in any manner distort or dislodge the commission of the offense as was held in the case of S.O.O vs Republic[2018]eKLR which cited the Tanzanian case of Dickson Elia Nsamba Shapwata & Another vs The Republic Criminal App No 92 of 2007.

44. It further submitted that in Sexual Offences there was no other witness to the defilement except the victim herself hence it availed the key witnesses and the crucial evidence before the Trial Court.

45. Notably, PW 5 confirmed that PW 1's labia majora and minora were inflamed with some lacerations, hymen was broken and that she had vaginal and cervical lacerations. He added that the probable type of weapon was penis. On his cross-examination, he stated that the examination showed there was penetration by penis. He produced the P3 Form and Post Rape Care (PRC) Form as exhibits during trial.

46. In his defence, the Appellant narrated the events that took place between 23rd September 2022 and 29th September 2022 when he was arrested. He stated that he did not know why he was arrested until when he was told that he had been arrested for having defiled a child. He denied knowing PW 1 and that he only saw her at the Police Station. He denied defiling her.

47. Notably, PW 1's evidence was corroborated by the scientific evidence of PW 5. The Appellant's defence was simply a denial. His evidence was not watertight enough to displace the Prosecution's inference of guilt on his part. His argument that the case was full of contradictions or that he was framed thus fell by the wayside. Any contradictions or inconsistency were insignificant and did not affect the inference of guilt on his part. The witnesses that were called by Prosecution were indeed sufficient to establish the charge.

48. In the premises foregoing, 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 1 on the material diverse dates as there was proof of defilement as PW 5 testified.

49. In the premises foregoing, Amended Ground of Appeal No (1), (2), (3), (4) and (5) were therefore not merited and the same be and are hereby dismissed.

II. Sentence.

50. Amended Ground of Appeal No (6) was dealt with under this head.

51. The Appellant submitted that this court had the power to reduce the sentence imposed to a least form of punishment pursuant to Section 26(2) of the *Penal Code* and Article 50(2)(q) and (p) of *the Constitution* of Kenya, 2010. He cited Sections 216 and 329 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) and submitted that mitigation was part of the trial process and that the court had to consider the evidence, the nature of the offence and circumstances.

52. He placed reliance on the case of James Kariuki Waganga vs Republic[2018]eKLR where it was held that the court had the power to impose any sentence other than mandatory sentence, by considering the circumstances of the case. He also relied on the case of Maingi & 5 Others vs DPP & Another [2022]eKLR where it was held that the mandatory nature of the sentences in *Sexual Offences Act* was unconstitutional.

53. He pointed out that he was the breadwinner of his family and had reformed through various theological courses. He sought for a non-custodial sentence but in case of sentence reduction, he urged the court to consider Section 333(2) of the *Criminal Procedure Code*. In this regard, he placed reliance on the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR where the court considered the period spent in custody.

54. The Respondent cited 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.

55. It further relied on the case of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) where it was held that sentencing was essentially an exercise of the trial court and that for a court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied.

56. It cited 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 contended that the minimum sentence provided under Section 8(2) of the *Sexual Offences Act* was lawful.

57. 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."

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

59. 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.

60. 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 life sentence that was meted against the Appellant herein undisturbed.

61. In the premises, Amended Ground of Appeal No (6) was not merited and the same be and is hereby dismissed.

Disposition.

62. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Amended Grounds of Appeal dated 7th November 2024 and filed on 8th November 2024 was not merited and the same be and are hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

63. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 15TH DAY OF JULY 2025

J. KAMAU

JUDGE