



REPUBLIC OF KENYA



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**Mokaya v Republic (Criminal Appeal E054 of 2023)
[2025] KEHC 10462 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E054 OF 2023
WA OKWANY, J
JULY 17, 2025**

BETWEEN

EVANS ONDARI MOKAYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. B. Okong’o – RM
Nyamira dated and delivered on 6th December 2023 at Nyamira in
the original Nyamira CMC Sexual Offence Case No. E014 of 2022)*

JUDGMENT

1. The Appellant herein, Evans Ondari Mokaya, was charged with the offence of Gang Defilement contrary to Section 10 of the *Sexual Offences Act*. The particulars of the charge were that on the night of 8th through to the morning of 9th March 2022 at [particulars withheld] Sub-location, in Manga Sub-County within Nyamira County, jointly with others not before court, wilfully and intentionally caused his penis to penetrate into the vagina of G.M.M. [particulars withheld] a girl aged 13 years.
2. The Appellant also faced the alternative count 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 the night of 8th through to the morning of 9th March 2022 at [particulars withheld] Sub-location, in Manga Sub-County within Nyamira County, jointly with others not before court, wilfully and intentionally touched the vagina of G.M.M. [particulars withheld], a girl aged 13 years, with his penis.
3. The Appellant faced a second count of grievous harm contrary to Section 234 of the *Penal Code*. The particulars of the offence were that on the night of 8th through to the morning of 9th March 2022 at [particulars withheld] Sub-location, in Manga Sub-County within Nyamira County, jointly with others not before court, unlawfully did grievous harm to G.M.M. [particulars withheld].



4. The Appellant pleaded not guilty to all the charges and a full trial was thereafter conducted in which the prosecution called a total of eight [8] witnesses.
5. The Prosecution's case involved the testimony of G.M.M. [PW1], the victim, who recounted being attacked by three men on 9th March 2022 while en route to visit her sister in Sengera. She identified one of the assailants as the accused, whom she knew from Sengera. She claimed that one of the attackers, Simon, injected her with an unknown substance thereby causing her to lose consciousness. She later woke up injured and bleeding from the vagina in a field near Ekerubo. She managed to crawl to Kemera market, where she was rescued by a relative and taken to Holsoms Hospital before being transferred to Kisii Teaching and Referral Hospital in critical condition. PW2, the victim's father, testified to finding her in a bloodied and unconscious state and confirmed that he took her to the hospitals with the assistance of the police.
6. PW3, Assistant Chief Robert Nyakeno, stated that he coordinated the arrest of the suspects after the victim confidently named and identified them. PW4 and PW5, both community policing members, confirmed arresting the accused, Evans Mokaya, on 11th March 2022 after he initially refused to cooperate.
7. PW6, Senior Clinician Daniel Nyameino, testified to examining the victim and confirmed that she suffered severe injuries consistent with sexual assault, including vaginal tearing and bleeding, requiring surgical treatment. PW7, Senior Sergeant Francis Aburi, led the investigation and testified that the accused's brother, Philip Mokaya, confirmed that the victim had been brought to their house by Simon and Evans. PW8, the Investigating Officer, PC Kelvin Ndung'u, added that the victim's sister had reported the incident and that the victim had positively identified the accused during an identification parade. Medical records and a birth notification were presented confirming the victim's age as 15 years as at the time of the attack.
8. When placed on his defense, the accused [DW1] denied the charges, stating that he was working at a shop in Motembe Sub-location on the night in question. He claimed the case was fabricated due to a land dispute involving his family and the Assistant Chief of Kemera Sub-location. He further argued that he was only identified because he lived in the same area as the victim. Despite his defense, the trial court found the prosecution had proved the charges of gang defilement and grievous harm beyond reasonable doubt. The accused was convicted and sentenced to 20 years for gang defilement and 7 years for grievous harm, with a rider that the sentences were to run consecutively.
9. Aggrieved by the trial court's said decision, the Appellant filed a homemade Petition of Appeal against both the conviction and sentence. He listed the following grounds of appeal: -
 1. That the Learned Trial Magistrate erred in law and in fact when he failed to note that no investigations were carried out.
 2. That the Learned Trial Magistrate erred both in law and facts by not analysing the whole Prosecution evidence adduced thus occasioning a miscarriage of justice.
 3. That the trial court erred in failing to reconsider and re-evaluate the whole evidence afresh as provided by law.
 4. That the trial court erred in law by failing to observe that the Prosecution had failed to prove its case to the standard required in law to prove beyond reasonable doubt.
 5. That the Learned Trial Magistrate failed in both law and facts without pronouncing the sentences to run concurrently, instead ruled out that the sentences to run consecutively.



6. That the Appellant prays to be supplied with certified court proceedings to enable him erect more groups [sic] of appeal as per Section 350 of the *Criminal Procedure Code*.
10. The Appellant subsequently filed a Supplementary Grounds of Appeal in which he listed ten grounds of appeal wherein he raised the issues of lack of evidence to support the charges; a botched identification parade that did not meet the legal standards; a claim that the trial court erred in finding that the evidence of identification was one of recognition; contradictions as to the age of the victim as stated on the charge sheet and what the witnesses stated in court and; that the sentence was extremely harsh and punitive and did not appreciate the emerging jurisprudence on the issue of minimum sentences as pronounced by superior courts.
11. The Appeal was canvassed by way of written submissions which I have considered.
12. The duty of a first appellate court was stated in the case of *Kariuki Karanja v R* [1986] KLR 190 as follows: -

“On a first appeal from a conviction by a judge or a magistrate, the appellant is entitled to have the Appellate Court's own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit.”

Analysis and Determination

13. I have carefully considered the record of appeal and the parties' respective submissions. I find that the main issues for determination are: -
 - [i] Whether the offences of gang defilement and grievous harm were proved to the required standard.
 - [ii] Whether the sentences passed by the trial court were legal and proper. Bottom of Form
 - i. Whether the offences of gang defilement and grievous harm were proven to the required standard.
14. Section 10 of the *Sexual Offences Act* [the Act] provides as follows: -

10. Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life.
15. Section 234 of the *Penal Code* spells out the offence of grievous harm while Section 4 of the *Penal Code* defines what constitutes grievous harm as follows: -

“grievous harm” means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;
16. I have considered the medical report that was presented by the Clinical Officer who testified that the victim had tenderness in her chest and lower abdomen. The other material evidence was that the victim had a tear in her vagina which required stitching and that she was injected with an unknown substance



that left her unconscious. In his judgment, the trial court held that it was satisfied that the nature of injuries occasioned on the victim were dangerous enough to harm her health and found that grievous harm had been proved.

17. I am satisfied that the nature of the injuries that the victim sustained in the attack were serious in nature. The victim testified that she was so injured that she was unable to walk, following the ordeal, and had to crawl all the way to the nearby market for assistance. I find that the trial court arrived at the correct finding that the offence of grievous harm had been established to the required standard.

Gang Defilement

18. It is trite that the ingredients of the offence of defilement are; proof of age, penetration and positive identification of the offender. The offence of gang defilement introduces the ingredient of the act of defilement committed by a group or in the company of other people participating in the offence with a common intention.

Age

19. In the case of *Hillary Nyongesa v Republic* [2010] eKLR it was held as follows: -

“Age is such a critical aspect in sexual offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment [sentence] under the *Sexual Offences Act* is determined by the age of the victim.”

20. In *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000, the Court of Appeal in Uganda outlined the manner in which the age of a victim in sexual offences can be proved and held thus: -

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense”

21. In the instant case, I note that the charge sheet indicated that the victim was 13 years old at the time of her assault while her father [PW2] testified that she was 12 years old. PW8, the Investigating Officer, stated that the victim was 15 years old. He produced her Birth Notification as [P.Exh 1] which indicates that she was born on 18th February 2008. The offence in question was committed on 8/9th March 2022. This means that the victim was 14 years old at the time of the incident.

22. I find that the minority age of the victim was proved to the required and that the discrepancy in the victim’s age, as stated by the prosecution witnesses was not material and did not to cast doubt on the evidence of age.

Penetration and Identification

23. Section 2 of the Act defines penetration as follows: -

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

24. The Prosecution submitted that the victim’s account of her ordeal and the Clinical Officer’s findings that she had a vaginal tear pointed to penetration. The Appellant, on the other hand, submitted that the conclusion that the victim was penetrated, merely because of the vaginal tear, was erroneous



because the victim did not testify that she was penetrated. It was further submitted that the clinician's conclusions were overzealous, exaggerated and misleading.

25. The victim testified as follows: -

“....Simon then injected my arm then I got confused and I didn't understand where I was. In the morning, I found myself in the field in Ekerubo and I didn't understand what had been done to me.... I saw blood coming from my vagina. Then I felt dizzy and fell down then I walked on my knees from Ekerubo until Kemera in the market,

....I felt pain in my stomach and there was blood in my vagina....I wore a pinky panty and when I woke up I found the panties were on but they had blood...”

26. The offence of gang defilement requires not only a positive identification of the perpetrators, but also clear proof that the offence was committed by more than one person or that it was committed in the company of other people with a common intention. In this case, the Prosecution's evidence of identification stems from the victim's own testimony. She stated as follows: -

“....When I came back and reached Rutuland school around Kemera central, people came on my left and my right, then I thought they were passing by. As I proceeded ahead, then one person in front pushed me then I fell down then another caught my hands then the person in front caught my legs. Then Simon removed his cap and said he had looked for me for many days when I see him, I ran away. Then the one in front I recognized him, he was wearing a yellow sweater. I normally see him in Sengera. The person in front of the screen the accused is the culprit. Simon then injected my arm.... The accused is the one who pushed me to the ground. Simon and the one on the screen are the ones I saw....”

27. On cross-examination, the victim stated that the Appellant lowered his cap and she saw him and identified him from his lips. On re-examination, the victim stated that even though she lost consciousness, she had already seen and identified the accused person and Simon.

28. I find that the prosecution's case was supported by cogent, consistent, and credible evidence. The complainant [PW1], gave a detailed and harrowing account of how she was attacked by three men on the evening of 8th March 2022. She clearly identified one of her assailants as the Appellant, whom she recognized as a person she knew from Sengera area. I note that her identification was not based on a fleeting glance or uncertain circumstances, but rather, she stated that she was familiar with the Appellant and had seen him several times before the attack. The identification was further confirmed through an identification parade conducted by the police, where PW1 positively picked out the Appellant.

29. Further corroboration came from PW6, the clinical officer, who confirmed that the complainant had sustained grievous injuries consistent with sexual assault, including a tear in the vagina, bleeding, and tenderness in the abdomen. This medical evidence fully aligned with the complainant's narrative and eliminated any doubt as to the nature of the injuries and the severity of the assault. PW7 and PW8, the police officers, also provided investigative background which confirmed that the complainant had reported the case promptly, identified her attackers, and that the Appellant was arrested based on credible leads.

30. I have considered the Appellant's defence, and the claim that he was at work selling maize on the material night and further, that there existed a land dispute between his family and the Assistant Chief which led to his being implicated in the case. I find that the Appellant's defence consisted of mere denial that did not displace the compelling evidence presented by the prosecution. I note that the Appellant's



claim of a conspiracy or false implication was not supported by any evidence, and no alibi witnesses were called to support his assertion that he was elsewhere at the time the offence was committed. Additionally, the evidence from multiple prosecution witnesses, including the arresting community officers and the Assistant Chief, showed that the Appellant was found hiding and initially refused to open the door when confronted, conduct which I find to be inconsistent with innocence.

Legality of the Sentences

31. On the second issue regarding the legality and propriety of the sentence, the trial court sentenced the Appellant to 20 years imprisonment for gang defilement and 7 years imprisonment for grievous harm, with the direction that the sentences run consecutively. Section 10 of the *Sexual Offences Act* prescribes a minimum sentence of 20 years imprisonment for gang defilement, which the court duly imposed. For the charge of grievous harm, Section 234 of the *Penal Code* prescribes the sentence of 7 years. It can therefore be said that the sentences were within the legal limits. I find that the offences committed were heinous, involving a child victim who sustained life-altering physical and psychological harm.
32. The Appellant argued that the sentences were harsh and did not take into account the mitigating circumstances and evolving jurisprudence on minimum sentencing. The Respondent, on the other hand, argued that the sentences were legal and proper.
33. In *Wanjema v Republic* [1971] EA 493 the court laid down the general principles upon which the first appellate Court may act when dealing with an appeal on sentence. The court held that an appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that, in arriving at the sentence, the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. In this regard, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with the said discretion.
34. I have carefully considered this matter and I note that the trial Court considered several parameters including the nature of the offence, the mitigation, among other relevant actors before sentencing the Appellant.
35. Sections 12 and 14 of the *Criminal Procedure Code* and Section 37 of the *Penal Code* provide for instances where sentences may run consecutively and concurrently.
36. Sections 12 and 14 of the *Criminal Procedure Code* provide as follows:-
 12. Any Court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.
 14. [1] Subject to subsection [3], when a person is convicted over one trial of two or more distinct offences, the court may sentence him for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that punishments shall run concurrently.

[2] In the case of consecutive sentences, it shall not be necessary for the Court, by the reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent impose on conviction of a single offence, to send the offender for trial before a High Court.



- [3] Except in case to which section 7 [1] applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences-
- a. of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or
 - b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.
- [4] For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

37. Section 37 of the *Penal Code* provides as follows:-

37. Sentences when cumulative:

Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph [i] of paragraph [c] of subsection [1] of section 28 or of any part thereof.

38. In *Peter Mbugua Kabui v Republic* [2016] eKLR, the Court of Appeal dealt with the legal considerations guiding the concurrent and consecutive sentences and referred to *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, *Ondieki v R* 1981 KLR 430, and *Nganga v R*, 1981 KLR 530, and held thus: -

“..... the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.”

39. In *B.M.N. v Republic Criminal Appeal No. 97 of 2013* [2014] eKLR the Court of Appeal dealt with a similar situation and pronounced itself as follows: -

“[15]As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

40. In *William Kimani Ndichu v Republic* [2015] eKLR, the Court of Appeal referred to *Rex v Saidi Nsubuga s/o Juma and Another* [1941] 8 EACA 81 and to *Nathani v R* [1965] EA 777, where the meaning of the phrase “same transaction” was defined as follows: -

“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute



one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”

41. Turning to the matter at hand, I find that there is no doubt that the offence of gang defilement was committed at the same time and in the same transaction as the offence of grievous harm. It is my finding that the trial court should have directed that the sentences for the two offences run concurrently as opposed to consecutively.
42. Consequently, while I uphold the conviction on both the charges of gang defilement and grievous harm, I set aside the decision that the sentences run consecutively and replace it with a finding that the sentences shall run concurrently.

Disposition

43. In the end, I make the following final orders: -
 - a. The appeal on conviction on both counts fails and is hereby dismissed.
 - b. The appeal on sentence succeeds, albeit only to the extent that the said sentences shall run concurrently, but with a rider that the same shall take into account the period, if any, that the Appellant spent in custody while awaiting his trial in line with the provisions of Section 333 [2] of the *Criminal Procedure Code*.
44. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF JULY 2025.

W. A. OKWANY

JUDGE

