



REPUBLIC OF KENYA



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**Ogutu v Republic (Criminal Appeal E038 of 2023)
[2025] KEHC 10479 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E038 OF 2023**

**DK KEMEL, J
JULY 18, 2025**

BETWEEN

ANTONY OKOTH OGUTU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by Hon. S.W. Mathenge (S.R.M) in Bondo Chief Magistrate's Court Sexual Offence Case No.E050 of 2022 delivered on 28th July 2023)

JUDGMENT

1. The Appellant herein Antony Okoth Ogutu in association with another before court were charged with the offence of gang defilement contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on the night of 3rd October 2022 in Usenge sub location, Bondo Sub County within Siaya County, having a common intention in association with each other, intentionally and unlawfully caused his penis to penetrate the vagina of EVA. a child aged 15 years.
2. The Appellant was likewise charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars were that on the night of 3rd October 2022 in Usenge sub location, Bondo Sub County within Siaya County, having a common intention in association with another, intentionally touched the vagina of EVA a child of 15 years with his penis.
3. The Appellant denied the charges and the matter proceeded to full trial whereupon the trial court convicted and sentenced him to serve 13 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant has appealed to this court vide his Petition of Appeal filed on 7/9/2023 wherein he raised the following grounds of appeal:
 - i. That the trial magistrate failed to observe that nothing linked him to the alleged offence.



- ii. That the trial magistrate failed to observe that the sentence imposed was against the evidence adduced.
- iii. That the trial magistrate failed to observe that the prosecution did not prove penetration.
- iv. That the trial magistrate failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.
- v. That the trial magistrate failed to observe that the prosecution's case was full of contradictions hence unsafe to base a conviction thereon.

The appellant thus prayed that the appeal be allowed, conviction be quashed, and sentence be set aside.

- 5. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court to arrive at its independent findings and conclusion. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
- 6. In determining this appeal also, I have to bear in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden is always on the prosecution to prove the allegations levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt as held in *Woolmington Vs DPP* [1935] AC 462 and *Sawe Vs Republic* [2003] eKLR.
- 7. The prosecution called three witnesses whose evidence is as follows.
- 8. EVA (PW1) testified that on 03/10/2022 at around 10.00 pm, she had gone to [Particulars Withheld] where her grandmother stays. That she met Tony on the way and who offered to carry her on a motorcycle and that she agreed. That he took her to a certain house which she later realized belonged to one Tobias. That they both raped/defiled her. That she spent the night there. That the following day on a Wednesday, both perpetrators left and asked her to go home. She was scared of going home. That a certain lady from a hotel took her to Usenge police Station where she was interrogated and then she led the police to the house of Tobias. Thereafter, she was taken to the hospital and treated. She identified both the first and second accused in court.

On cross examination, she stated that it was Tony who carried her on the motor cycle and who took her to the house of Tobias. That she was not taken to the house of Tony but to the house of Tobias. That Tony was also in that house.

- 9. John Okidi (PW2) testified that he is a clinical officer service number xxx from Bondo Sub County Hospital and with eight years of experience. That he had a P 3 form of EVA, of about 15 years of age, who was seen at the facility on 8/10/2022. That when she arrived at the facility, she had a dirty pink shirt and dirty trouser. That the complainant reported having been defiled by two people well known to her in Usenge on 3/10/2022 at about 2200hrs.

That on examination of the genitalia, her hymen was freshly broken, labia majora was intact, had a foul smelling discharge from her genital area. He added that her hymen was freshly broken due to forced trauma entry, and that due to this trauma there was discharge from the vaginal wall.

From her lab results, urinalysis showed red blood cells, and the pregnancy test was negative. High Vaginal Swab (HVS) showed epithelial cells, indicating proliferation of the vagina. She was treated with antibiotics, emergency contraception, and PEP. That he concluded that she had indeed been defiled. He signed the P3 form on 8/10/2022 and stamped it on 11/10/2022 when the office keeping the stamp



was open. He also signed the PRC form on 8/10/2022, and it was stamped on 11/10/2022. The P3 Form is produced as P exhibit 1, the PRC Form as exhibit 2, and the treatment notes as exhibit 3.

10. No. xxx Pc Onyango (PW3) of Usenge police Station, testified that he was the investigating officer in the instant case. He recalled that on 6/10/2022 he was given a female aged 15 years namely EVA by one lady called Scholastica as a child in need of care and protection after she was found soliciting for food and money in the area. Upon interrogating the young girl, she claimed that she hailed from Osieko and that she was from Asembo at her grandmother's home. On 7/10/2022, he escorted her to Osieko where they found her mother and who claimed that the girl had been missing since 29/9/2022. That the Complainant disclosed further upon interrogation that on 3/10/2022 on her way home she met a boda boda operator by the name of Antony at a place called Dogoye, who offered her a lift. That the said Antony took her to a house in Usenge where they found another man inside the house. That the said Antony defiled her in the presence of the other man. That the said Antony then ordered her to go to the bed where the other man was and that the second man also defiled her. That they warned her not to reveal what had transpired. That on 8/10/2022, he was accompanied by his colleagues and the complainant to the scene of the crime which was a single room divided by a curtain with a bed inside. That they found one occupant by the name Tobias Owino whom the Complainant pointed with a finger as the one who defiled her on the bed. That he interrogated Tobias who disclosed that Antony had gone fishing. That Tobias, the Complainant and the officers went to the fishing area where they found people fishing. That the complainant pointed out the Appellant by touching him and claimed that he was the Antony who defiled her. That both Tobias and Antony were arrested. That they then went to Got Agulu then to Bondo Sub County Hospital where the complainant was treated. That he issued the complainant with a P3 form which was duly filled at Bondo Sub County Hospital. That the mother to the complainant gave him a birth certificate of the complainant which indicated that she was born on 18/12/2007. He produced the birth certificate as P Exhibit 4. He later charged the suspects as per the charge sheet. He added that they also did an age assessment report on Antony upon claiming to be a minor and determined that he was 19 years old. Age assessment report was produced as exhibit 5. That he duly identified the Appellant and his co-accused in court.

On cross examination, he stated that the complainant was brought to the station by a good Samaritan who was a lady. That his evidence connected the two as the perpetrators of the offence. Further, that the P3 form likewise showed that the act of defilement was proven.

11. That marked the close of the prosecution's case and that the trial court later ruled that a prima facie case had been proved against the Appellant and who was put on his defense. He opted to tender a sworn testimony.
12. Antony Okoth (DW1) testified that on 7/10/2022 he was arrested on allegation that one Scholastica had filed a complaint against him. That he had loaned her Kshs 8000/= which she only refunded him Kshs 1000/=. That he is only aware of the debt owed to him by one Scholastica who is the mother of the complainant.

On cross examination, he stated that he received the medical documents and the medical officer testified but he did not challenge his testimony. The same was for the investigation officer because he knew nothing about the gang defilement that is why he did not challenge the officer.

That marked the close of the defense case on the part of the Appellant.

13. The appeal was canvassed by way of written submissions. The Appellant submitted that nothing linked him to the offence. He also submitted that the mandatory sentence was unconstitutional and that the sentence ought to run from date of arrest.
14. The Respondent's counsel did not file submissions.



15. I have considered the record of appeal as well as the submissions filed. I find the issues for determination are firstly, whether the Respondent proved the charge of gang defilement beyond reasonable doubt against the Appellant and secondly, whether the sentence imposed is appropriate.
16. It is noted that the Appellant had been charged under section 10 of the *Sexual Offences Act*. Section 10 of the *Sexual Offences Act* No. 3 of 2006 provides as follows:

“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 fifteen years but which may be enhanced to imprisonment for life.’
17. The burden of proof in all criminal cases lies on the prosecution and it never shifts to an accused or the Appellant herein. Under Section 107 of the *Evidence Act* (Cap 80), the burden of proof is on the prosecution to prove the allegations levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt as held in *Sawe Vs Republic* [2003] eKLR and *Woolmington Vs Dpp* [1935] AC 462.
18. The prosecution must prove its case against an accused person beyond any reasonable doubt, and if there is a doubt, then it must be resolved in favor of the accused. This was the holding by the House of Lords in the leading Judgment in that area in the case of *Woolmington v Director of Public Prosecutions* [1935] AC 462 where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant’s guilt beyond any reasonable doubt.
19. That position and the holding in *Woolmington* (supra) have been accepted and applied by our Courts for many years. For instance, in the case of *Moses Nato Raphael v Republic* [2015] eKLR, the Court of Appeal referred to the speech by their Lordships in the said case and stated:

“The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This principle is well captured in the time honored English case of *Woolmington v DPP* (1935) AC 462 where the Court stated:

‘Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt, subject to the qualification involving the defense of insanity and to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’
20. In a case of defilement, the prosecution must prove three ingredients being the age of the complainant, penetration and the identity of the perpetrator.



21. In *Onesmus Karithi Kaberi & 2 Others v. Republic* [2021] eKLR the court held that:

“In a charge of gang defilement, therefore, the prosecution is required to prove that the offence of defilement was committed in association with another or others. It is instructive that where a person did not do the actual act of penetration within the meaning of defilement but was in the company of others who did the actual act of penetration, he too will be liable for the offence. The definitive parts of the section are found in the terms ‘in association with another or others, or any person who, with common intention, is in the company of another who commits the offence. In addition to establishing the ingredients for the offence of defilement, the Court is thus required to establish whether the accused persons were in association of one another or had a common intention to commit the offence.’”

22. Age, as an ingredient of the offence of defilement is very important as it determines the nature of sentence the perpetrator will eventually get to serve upon conviction. The investigating officer in this matter produced a birth certificate as exhibit 5. The same indicated that the complainant was born on 18/12/2007, which meant that the complainant was 15 years 10 months at the time of the incident, thus a minor under the law as she was still below the age of 18 years. I find that this ingredient was sufficiently proved by the Respondent beyond any reasonable doubt.

23. As regards the aspect of penetration, it is noted that the *Sexual Offences Act* No. 3 of 2006 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.

In the instant case, the Complainant stated:

“Tony took me to a place which had a place to sleep. I realized he had taken me to Tobias. They both started raping me.” (page 3 lines 17 to 18 of the proceedings).

The clinical officer (PW2) likewise testified as follows:

“On examination, her hymen was broken, labia majora intact...her hymen was freshly broken. It was due to forced trauma entry....the conclusion was defilement based on history, lab results and examination.” (page 7 lines 20 to 28 of the proceedings)

The complainant stated that the Appellant and another defiled her in turns throughout the night until the following day when they ordered her to go to her home. From the foregoing excerpts, I am satisfied that the ingredient of penetration was sufficiently proved by the Respondent.

24. As regards the aspect of the identity of the perpetrator, the complainant stated that Tony took her to a house which she realized belonged to Tobias and that they both defiled her throughout the night. The investigating officer likewise testified that on 8/10/2022 he was accompanied by his colleagues and the complainant and went to the scene of the crime which was a single room divided by a curtain with a bed inside. That they found one occupant by the name Tobias Owino whom the complainant pointed with a finger as the one who defiled her on the bed. That he interrogated Tobias who disclosed that Antony had gone fishing. That Tobias, the complainant and the police officers went to the fishing area where they found people fishing. That the complainant pointed out the Appellant herein by touching him and claiming that he was the Antony who had defiled her. That both Tobias and Antony were arrested and later charged. It is instructive that the Appellant herein is the Tony who had earlier carried the complainant in his motor cycle to Usenge area and later waylaid her and took her to a house belonging



to Tobias who is the Appellant's co accused in the case and that they both defiled her throughout the night.

I am satisfied that the perpetrators were well identified by the complainant and that the Appellant was squarely placed at the scene of crime. I find this ingredient was proved beyond reasonable doubt.

25. In *Onesmus Karithi Kaberi & 2 others v. Republic* (supra) the court held that in a charge of gang defilement, the Court has to establish whether the accused persons were in association of one another or had a common intention to commit the offence. In her testimony, the complainant stated that Tony took her to the house of Tobias and they both defiled her. This showed a common intention, and that the crime of defilement was done in association of the two culprits. The Appellant's defence evidence did not shake that of the Respondent which was quite overwhelming against him. It is highly unlikely that the mother of the complainant could use her young and vulnerable daughter as a victim of rape so as to avoid paying a debt owed to the Appellant. The complainant's evidence clearly placed the Appellant at the scene of crime. The trial court's rejection of the Appellant's defence was quite proper. I am thus satisfied that the offence of gang defilement was well articulated and proved beyond reasonable doubt. Consequently, the finding on conviction of the Appellant by the trial court was sound and must be upheld.
25. As regards the sentence, the trial court imposed a sentence of 13 years' imprisonment. Section 10 of the *Sexual Offences Act* provides: "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 than fifteen years but which may be enhanced to imprisonment for life."
25. The Court of Appeal in the case of *Benard Kimani Gacheru v. Republic* Criminal Appeal No. 188 of 2000 stated:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."
25. The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owuor Vs Regina* (1954) 21 270 as follows: -

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James V R.*, (1950) 18 E.A.C.A 147:
"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."



To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher Shewky, (1912) C.C.A. 28 T.L.R. 364."

Ogola s/o Owuor's case has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to date.

25. In the recent case of Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) SC Petition No. E018 of 2023; [2024] KESC 34 (KLR), the Respondent was convicted of the offence of defilement of a 15-year old girl and sentenced to 20 years' imprisonment. The High Court upheld the conviction and sentence. However, the Court of Appeal set aside the sentence and substituted it with a 15-year sentence. In making its determination, the Supreme Court noted that the Court of Appeal had erroneously applied the ratio decidendi in the Muruatetu Case, to the mandatory sentences under the Sexual Offences Act. Whilst reiterating the Muruatetu Case, the Court held that the Court of Appeal had offended the doctrine of stare decisis by arrogating jurisdiction to itself since the issue of the constitutionality of the minimum sentence was not an issue before it.

The Court then proceeded to explicitly set out the difference between mandatory sentences and minimum sentences as follows: 'Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentences is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences.'

In that respect thereof, a mandatory sentence and a minimum sentence cannot be used interchangeably nor in similar circumstances. Neither can the courts apply the phrase "mandatory minimum sentences" in the Kenyan context.

25. In the Judiciary Criminal Procedure Bench Book, the guidelines on sentencing are quite clear that when an offence specifies a minimum sentence, the court ought not impose any sentence below that minimum.
25. In the instant case, the Sexual Offences Act provides the minimum sentence as fifteen years' imprisonment upon conviction. The trial magistrate imposed a sentence of 13 years' imprisonment. It is noted that the trial magistrate considered the period the Appellant spent in custody and settled for the 13 years' imprisonment. I find the sentence was the possible minimum in law and thus there is no reason to interfere with it.
25. In the result, it is my finding that the Appellant's appeal is devoid of merit. The same is dismissed. The conviction and sentence is upheld.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 18TH DAY OF JULY 2025.

D. KEMEI

JUDGE

In the presence of

Antony Okoth Ogutu.....Appellant

M/s Kerubo.....for Respondent

Okumu.....Court Assistant

