Obanda v Republic (Criminal Appeal E013 of 2024)
[2025] KEHC 10308 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E013 OF 2024

JN KAMAU, J

JULY 16, 2025

BETWEEN

JOHN OBANDA .... 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 69 of 2020 on 9th November 2021)

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 R. M. Ndombi (PM) convicted him of the main charge and sentenced him to fifteen (15) years imprisonment.

3. Being dissatisfied with the said Judgement, on 21st February 2024, he lodged an appeal herein. His Petition of Appeal was dated 14th February 2024. He set out six (6) grounds of appeal.

4. His undated Written Submissions were filed on 26th November 2024 while those of the Respondent were dated 14th February 2025 and filed on 15th February 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, 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 failure to conduct a voir dire examination was fatal to the Prosecution's case;

   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. Voir Dire Examination

9. Ground of Appeal No (4) of the Petition of Appeal was dealt with under this head.

10. The Appellant submitted that the Complainant, JO (hereinafter referred to as "PW 1") testified when she was three (3) months shy of eighteen (18) years of age and that the Trial Court allowing her to swear without a voir dire examination was a breach of the law as the court never ascertained whether she understood the meaning and the nature of the oath, her intelligence and ability to tell the truth hence a miscarriage of justice.

11. On its part, the Respondent submitted that the purpose of voir dire was to ensure that the minor understands the solemnity of oath and if not at the very least the importance of telling the truth as held in the case of Johnson Muiruri vs Republic[1983]KLR 445.

12. It invoked Section 125(1) of the *Evidence Act* and argued that PW 1 was aged seventeen (17) years at the time of the commission of the offence and was therefore not a child of tender years. In this regard, it placed reliance on the case of Kibangeny Arap Korir vs Republic, EA 92 where it was held that a child of tender years referred to a child under the age of fourteen (14) years. It asserted that the Trial Court did not need to conduct voir dire examination as PW 1 was not of tender years.

13. Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 (Laws of Kenya) stipulates as follows:-

> "Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands

the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

14. In addressing what age would be appropriate for a trial court to conduct a voir dire examination, this court had due regard to the case of Maripett Loonkomok vs Republic[2016]eKLR where the Court of Appeal found and held that children under the age of fourteen (14) ought to be taken through a voir dire examination. It rendered itself as follows:-

> " ...the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;
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> "In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

15. Notably, the age at which a voir dire examination ought to be conducted depends on the circumstances of a particular case and was not cast on stone. Indeed, a court was obligated to enquire into the mental incapacity of a child irrespective of his or her age with a view to conducting a voir dire examination to determine if he or she should adduce sworn or unsworn evidence. Indeed, a child could be aged seventeen (17) years but have the mental capacity of a two (2) year child due to many health complications.

16. The ascertainment of whether such a witness understood the meaning of taking an oath could not therefore be taken lightly as an accused person could be convicted on the basis of sworn evidence of such a witness.

17. Bearing in mind the holding in the case of Maripett Loonkomok vs Republic (Supra), this court found and held that the Trial Court could not therefore have been faulted for having not conducted a voir dire examination for the reason that according to the Birth Certificate in respect of PW 1 put her age at seventeen (17) years at the material time.

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

II. Proof Of Prosecution's Case

19. Ground of Appeal No (1), (2), (5) and (6) of the Petition of Appeal were dealt with under this head.

20. 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.

21. 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

22. The Appellant did not submit on this issue. On the other hand, the Respondent submitted that PW 2 (sic) testified that she was born on 24th September 2003 meaning she was seventeen (17) years at the time of the commission of the offence. It added that No xxx PC Hellen Okumu (hereinafter referred to as "PW 4") also testified that PW 1 was aged seventeen (17) years and produced her Birth Certificate as exhibit in court.

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

24. Notably, PW 4 produced PW 1's Birth Certificate as exhibit in this case and which indicated that PW 1 was born on 24th September 2003. The incident took place on diverse dates between August 2020 and 9th November 2020, which meant that PW 1 was seventeen (17) years at the material time

25. Notably, as the Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut the said evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven by Birth Certificate beyond reasonable doubt and that she was a child at all material times.

B. Identification

26. The Appellant submitted that there were inconsistencies and contradictions between the evidence of PW 1 and NM (hereinafter referred to as "PW 3"). He argued that while PW 1 stated that on her way to the Appellant's house, PW 3 followed her, PW 3 stated that she started looking for PW 1 when she went missing. He added that whereas PW 3 indicated that PW 1 told her that she was from Benjamin's house, PW 1 stated that she told PW 3 that she was from Ebuyangu.

27. He blamed the Prosecution for failing to find who Benjamin was and why it was only after interrogations and being threatened to be beaten that she mentioned his name. He asserted that PW 1 was coerced to mention his name. He argued that the said Benjamin who was mentioned seemed to be PW 1's boyfriend and that she had chosen to protect him and implicate him.

28. He was categorical that he was not the perpetrator of the offence and that was why PW 1 wanted to protect the said Benjamin when she stated that she did not want to do this case. He cited Vihiga CRC No 17 of 2020 Republic vs Patrick Idris in which PW 1 was also a complainant in the said case and wondered how many partners PW 1 had.

29. On its part, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her. It added that PW 1 stated that she had had sexual intercourse with him several times and he was well known to her.

30. It contended that the Appellant was therefore someone well known to her and could not have been mistaken as to his identity. It pointed out in the case of Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568, it had been held that the recognition evidence had been held by courts to have been more reliable and weightier than identification by strangers. It was emphatic that there was proper identification as there was prior knowledge of the Appellant.

31. A perusal of the proceedings showed that PW 1 testified that on the material day of August 2020, she was at home when the Appellant, who lived a short, distance from their home called her. She informed the Trial Court that her mother, PW 3 was cooking and that she ran away from home. She said that

she went to his house because she wanted to have sexual intercourse with him. She stated that she did not find him and she waited for him inside the house.

32. She further averred that PW 3 followed her and met the Appellant who he asked if he had seen her and left. When she got to the Appellant's house, he told her that her mum was looking for her and he welcome her into his house so that they could talk about them. They then went to bed and she removed all her clothes. He told her that PW 3 would bring problems but she reassured him that she would not. He then removed his clothes and they had sexual intercourse. She said that she slept until morning and went to Ebuyangu at a relative because she feared going home. She pointed out that she would go to the Appellant's house and they would have sexual intercourse.

33. PW 3 testified that on 9th November 2020 at 9.00p.m, she was cooking when she heard a phone beeping and PW 1 went outside and did not return. She went out to look for her and met the Appellant when she was returning. She asked him whether he had seen PW 1 as she had heard that he was the one disturbing her daughter not to go to school but he denied having been with her. She then left on a motor cycle.

34. It was her evidence that PW 1 did not return and she reported the matter to the Chief where she was asked to be patient. She stated that PW 1 returned home at 7.00 pm and when she asked her where she was coming from, she replied that she was from Benjamin's house. She informed the Trial Court that she took PW 1 to the Sub-Chief who interrogated her and she confessed to have slept at the Appellant's house. She confirmed knowing the Appellant as he was their neighbour herein as worked at Illugu area.

35. Notably, PW 1 was very categorical in her testimony that the Appellant was her boyfriend and it was not the first time they had had sexual intercourse. The issue of PW 1 mentioning of one Benjamin was cleared when PW 3 stated that after PW 1 was interrogated by the Sub-Chief, she said that she had slept at the Appellant's house.

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

37. 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)."

38. 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.

39. PW 1 positively identified the Appellant who was their neighbour and her boyfriend. In his defense, the Appellant admitted that he knew PW 1 who was a neighbour. There could not therefore have been any possibility of a mistaken identity.

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

C. Penetration

41. The Appellant submitted that a broken hymen was not proof of penetration. In this regard, he placed reliance on the Canadian case of the Queen vs Manual Vincent Quintanilla, 1999 ABQB 769 without highlighting the holding he was relying on. He added that it was also alleged that he had impregnated PW 1 thus a DNA test ought to have been done to determine whether he was responsible for the same.

42. 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 the Clinical Officer, Michael Ochieng Otieno (hereinafter referred to as "PW 2") corroborated that of PW 1 and that penetration was therefore proved.

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. PW 2 confirmed that PW 1's hymen was loose with whitish substance which was confirmed to have been semen and the epidural cells which both proved that there was penetration hence defilement. He added that the probable type of weapon was penis. He produced the P3 Form, Post Rape Care (PRC) form and treatment notes as exhibits during trial.

45. In his defence, the Appellant testified that on 11th August 2020, he was at work when police officers arrested him claiming that PW 1 was at his place as she had been missing since 9th November 2020 (sic). He denied having stayed with her and was emphatic that he stayed alone.

46. Notably, the court had power to order DNA testing under Section 36 of the *Sexual Offences Act*. However, the exercise of that power was not couched in mandatory terms. Rather, that power was discretionary.

47. This position has been settled by many cases amongst them the case of Evans Wamalwa Simiyu vs Republic [2016] eKLR wherein the court cited the case of AML vs Republic [2012] eKLR where it was held that the fact of rape or defilement was not proved by a DNA test but by way of evidence.

48. As was held in the case of Mohammed Omar Mohammed vs Republic(Supra), the key evidence relied on by the court in rape cases and defilement in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report.

49. Although PW 1 was a single witness, her evidence was corroborated by the medical evidence and observations of PW 2 which confirmed that there had been penetration. It was therefore clear that the Appellant's defence was a mere denial. It did not outweigh the inference of guilt on his part as laid out by the Prosecution witnesses.

50. This court, therefore, 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 2 testified.

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

Ii. Sentencing

52. Ground of Appeal No (3) of the Petition of Appeal was dealt with under this head.

53. 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)(p) of *the Constitution* of Kenya, 2010. He argued that in a case such as this where PW 1 in her own accord said to have visited the boyfriend's house and consented to sex, he should be set free or his sentence reduced.

54. The Respondent relied on Section 8(4) of the *Sexual Offences Act* and 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 contended that the minimum sentence provided under Section 8(4) of the *Sexual Offences Act* was lawful. It pointed out that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at the appropriate sentence. It was emphatic that the sentence meted on the Appellant was both lawful and befitting of the offence committed.

56. Notably, the Appellant was convicted and sentenced 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."

57. This court could therefore not fault the Trial Court for having sentenced the Appellant to fifteen (15) years imprisonment as that was lawful.

58. 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.

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

60. In the premises, Ground of Appeal No (3) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

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[2018]eKLR.

64. The Charge Sheet herein showed that the Appellant herein was arrested on 11th November 2020. He was released on bond on 27th January 2021. He was remanded on 9th September 2021 when he was convicted. He was sentenced on 26th November 2021.

65. 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

66. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 14th February 2024 and filed on 21st February 2024 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as they were both safe.

67. It is hereby ordered and directed that the period that he spent in custody between 11th November 2020 and 27th January 2021 and between 9th September 2021 and 25th November 2021 be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

68. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 16TH DAY OF JULY 2025

J. KAMAU

JUDGE