



**Okondo & another v Republic (Criminal Appeal E70 of 2025)
[2025] KEHC 11365 (KLR) (16 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E70 OF 2025**

J WAKIAGA, J

JULY 16, 2025

BETWEEN

NEWTON IKENYE OKONDO 1ST APPELLANT

MOSES NGANGA NJERI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in SO
Case no 85 of 2016 of the Chief Magistrates Court at Makadara)*

JUDGMENT

1. The appellants were charged with the offence of gang defilement contrary to section 10 of the [Sexual Offences Act](#) No 3 of 2016, the particulars of which were that Moses Nganga Njeri on 3rd day of July 2016 at Mariro Park Mwiki in Kasarani Division within Nairobi County in association with Newton Okenye Okondo intentionally caused his genital organs to penetrate the genital organs of CKM a child aged 14 years.
2. They faced a second count of committing an indecent act with a child contrary to section 11(2) of the [Sexual Offences Act](#), the particulars of which were that they jointly intentionally touched the genital organs of CKM a child aged 14 years.
3. They both pleaded not guilty to the charges and were tried, convicted and sentenced to fifteen years imprisonment on the first count of gang rape and being dissatisfied with the said conviction and sentence, they each filed individual appeals which were duly consolidated for purposes of trial and determination and raised the following summarized grounds of appeal:
 - a. The trial court failed to consider the appellants strong defence under section 8(5) of the [Sexual Offences Act](#)



- b. The prosecution evidence was at variance with the charge sheet.
 - c. The trial court shifted the burden of proof to the appellants
 - d. The prosecution case was based on the evidence which was contradictory insufficient and untruthful
 - e. The appellant's rights under Article 50(2) (k) of the Constitution were violated
 - f. That the evidence of the minor was uncorroborated and thus unsafe to sustain a conviction
 - g. The sentence imposed was illegal and harsh on the basis that the court was bound by mandatory sentence.
4. For record purposes and judicial accountability, these appeals were originally filed at the High Court Criminal registry at Milimani as criminal appeal no E 304 of 2023 and E 297 of 2023 where directions on their disposal by way of written submissions were issued before being transferred to this Criminal Registry.

Submissions.

5. On behalf of the 1st appellant (Newton Okenye Okondo) , it was of section 134 of the Criminal Procedure Code and stated in Peter Ngure Mwangi v r [2014]e KLR , in that the evidence presented against the 1st appellant showed no nexus with the charge as PW testified that as she was sleeping the 1st appellant came to bed undressed her , put on condom and raped her and after he left the house, the 2nd appellant came and raped her again, only to later change tact that she was defiled by one man. This was confirmed by the evidence of PW4.
6. It was submitted that the appellant was not positively identified as the complainant was not truthful on whether she was defiled by one or two men. The evidence of PW2 brought up the possibility of the charges having been trumped up as he had tried to solicit for payment to the tune of one million in order to do away with the charges and that the investigation thereon ordered by the court were never complied with, in support of this contention reference was made to the case of Eliud Waweru Wambui v republic [2019] e KLR where the court stated that this raised the question as to whether the prosecution was for the proper purpose of enforcing the law or settling scores.
7. It was contended that the prosecution case was not corroborated and that the court failed to comply with section 124 of the Evidence Act as PW1 failed totally to show that she was telling the truth and was therefore not a credible witness having lied about her apparent age to show that she was a grown up and thus could engage in sex as she pleased. Reference was made to John Mutua Munyoki v R [2017] eKLR and Ahmed Muhsin v R [2016] e KLR where the court stated that section 124 of the Evidence Act allows the court to convict so long as the court believes the evidence of a single witness.
8. It was contended that the medical report was produced without complying with the provisions of section 50 of the Evidence Act and that no evidence was produced to show that the prosecution took due diligence to secure the attendance of the maker of the report as was stated in James Bari Munyoris v republic [2010] eKLR.
9. It was submitted that the prosecution was full of inherent contradictions and inconsistencies in that the complainant changed her testimony on how she was defiled, PW5 evidence was contradicted by that of PW6 which were so fundamental as to cause prejudice to the appellants as was stated in Joseph Maina Mwangi v R



10. On behalf of the 2nd appellant, it was submitted that initially the appellants were charged with gang defilement which was amended to gang rape, the court should have convicted him of the lesser offence of promoting child prostitution as contemplated in section 15(f) of the *sexual offences Act* as the magistrate only associated the 2nd appellant with the offence in question for the act took place in his house. It was contended that for gang rape or defilement to succeed there must be proof of common intent as was stated in *Elly Otieno Aloyce versus Republic* [20219] eKLR.
11. On the age of the complainant it was contended that the same stated and was recorded as 18 years while according to her birth certificate produced in court she was born on 3/7/ 2016. On penetration, it was contended that the complainant's evidence was that it is only the 1st appellant who spent the night with her which was also reflected in the first report made to PW5 and PW4 who stated that PW1 stated that she was violated by one man the 1st appellant which was also reflected in the PRC and P3 forms and that PW7 indicated that the offence was defilement and not gang defilement.
12. On identification it was submitted that the only evidence on record was that the complainant was defiled by the first appellant in whose house the 2nd appellant had taken the same whom she identified as the owner of the house. In support thereof, reference was made to *Akumu versus Republic* [1954] 21 EACA where the court stated that evidence of the report provides a good test of which the truth and accuracy of the subsequent statements may be gauged and provides a safe guard against later establishment or deliberately made up case.
13. On behalf of the respondent, it was submitted that penetration was proved by the evidence of PW1 and that PW4 confirmed that there were fresh bruises on the victim's genitalia and hymen had fresh tears. The age was not challenged at 14 years and that the element of gang rape was proved that it was committed in association with two persons and that they met the victim who did sleep over in the house of the 1st appellant, so identification was positive.
14. On the appellants defence it was submitted that the same were mere denials as the 2nd appellant denied having sexual intercourse with the victim and stated that it was the 1st appellant

Proceedings

15. This being a first appeal, the appellants are entitled to re-evaluation of the evidence tendered before the trial court while giving allowance to the fact that unlike the trial court, this court did not have the advantage of seeing and hearing witnesses as was stated in *Gitobu Imanyara v r*.
16. PW1 stated that she was 15 years old and was in form one at C girls Secondary School. On the material day she met the 2nd appellant who asked for her telephone number which she declined to give out, he then asked her to go with him to his friend's house who left with another girl and in the house the 2nd appellant forced her to have sex with him without using a condom. At around 7.00pm the 2nd appellant, left and later on the 1st appellant who had offered to sleep on the couch while she slept on the bed, came to the bed and forced her to have sex with him while wearing a condom.
17. In the morning she went to her aunt place and reported to her, she then alerted her parents who took her to mama Lucy hospital. It was her evidence that the 1st appellant raped her once while the 2nd appellant raped her twice that night. In cross examination, she stated that the 1st appellant asked her how old she was and she told him that she was 18 years old and that when he asked her for her parent's telephone number, she declined he then told her to go and sleep in the bad room and later on came to the bed and raped her. The 2nd appellant was not in the house at that time.



18. In cross examination by the 2nd appellant she stated that she cheated that she was 18 years and a student at [Particulars Withheld] and that she was afraid that her parents would beat her if she went home late. By the time the 1st appellant recorded her age, the 1st appellant had already raped her and that she was confused since she had not had sex before.
19. PW 2 NMT, stated that the complainant was aged 17 years and that at the material time she was in class eight. She had left home for church and did not return which was unusual, he therefore reported to the police at 9.00 pm, the next day a family friend called him and told him that pw1 was at her place and when they went for her she started crying and narrated how she had been forced to have sex with two men. She later took the police to the house of the 1st appellant whom she identified as the defiler, who then led them to the 2nd appellant whom she also identified.
20. PW3 CNN stated that PW1 was born on 4th February 2002 and produced her birth certificate, she corroborated the evidence of PW2. In cross examination she stated that pw1 narrated to them how the 2nd appellant took her to the house of the 1st appellant where they defiled her. PW5 Eunice Njeri Kamau stated that Pw1 went to her house on 4th at 10.00 am and when she asked her why she was not in school, she told her that she was unwell and she started crying. She then told her how she met a man who took her to a house and another man had sex with her. In cross examination, she stated that she told her that she met a man by name Moses and that it is not Moses who defiled her.
21. PW4 Jacinta Gatungu saw the complainant on 4th July 2016 who was a victim of sexual violence by two men on 3rd, she had fresh bruises on the posterior forcel and vestibule and hymen had fresh tears in cross examination she stated that she reported that one man had sex with her. PW6 PC Yvonne Wesonga received the report on the case of gang rape and referred the victim to the hospital. She recorded her statement how she met the 2nd appellant who went with her to his friend's house since she had missed her aunt and had no option as it was late and left her with the 1st appellant who asked her why she was not going home, to which responded that she was afraid of her parents. After supper and watching movie, he allowed her to sleep on his bed only to later on join her and defiled her using protection. Later the 2nd appellant joined and defiled her too.
22. In cross examination she stated that pw1 stated that it is only the 1st appellant who spent the night with her and that she was in the company of the 2nd appellant when she went to the 1st appellant's house. She stated that she was not aware that the complainant's parents demanded money and that there was an order for its investigation. PW7 Dr Kamau Mariga produced the P3 form signed by Dr Shaku who had left the service and Dr Maundu who had died.
23. When put on their defence, the 1st appellant stated that his girl friend had visited him on the material date and they had sex. At 4.00pm the 2nd appellant called him and said he would come with his girlfriend to have sex. The complainant introduced herself as having completed high school at [Particulars Withheld] and was set to join Daystar. It was his evidence that they were all adults in the house and after watching movie, his girl friend left and he left the 2nd appellant with the complainant and when he came back from escorting his girlfriend, the 2nd appellant told him that the complainant wanted a sleep over as she had differed with her mother, which idea he did not buy.
24. He then asked her where she was staying and her age, to which she stated that she was 18 years and lived in Mwiki which he recorded and when he asked for her mother's telephone number, she declined to give it out. The 2nd appellant went to bring food from his house but did not come with food. He later entered into the bedroom with the complainant until morning when he washed the bed sheet they were using, he then went to class the whole week until he was arrested on Saturday and when he



- told the police that the complainant was a girl friend of the 2nd appellant , she insisted that he is the one who had defiled her.
25. When he showed the police the recording he had made, he was promised assistance if he called the 2nd appellant and that the father of the complainant demanded one million to enable him drop the case and that he did not know the compliant before the said date.
 26. DW2 William Okando Nyangau the father of the received information on the arrest of the appellant who told him that he was being framed and when he met with the father of PW1 , he asked for one million which he could not raise and that he kept on asking him for the money as the case was going on .
 27. The 2nd appellant stated that he was a student at technical university Mombasa and that he met PW1 at the railway line crying and when he asked her what the problem was she told him that she had been chased from home by her parents. She said that she was called JW and since the area was insecure , he told her to go with him to thje house of the 1st appellant. On the way they met a lady called Mama bahati who was working with the Ministry of Children whom she gave the same information and that she declined to spend the night at the said lady's place, she told her to go the house of the 1st appellant.
 28. He later came back to the house of the 1st appellant at midnight to find out about the girl , and he told him that the girl was ok , so they spent the night in the sitting room. In the morning the girl said she was ok and could go home. He was later on arrested when the 1st appellant called him. He denied having slept in the bed room with the girl and was the bedsheets in the morning having left the 1st appellant with her in the evidence
 29. DW1 Jane Njeri Gichuhi , the mother of the 2nd appellant was called by the police with information on his arrest and he told her that he had been arrest over a girl ha had helped and taken to his friends' house. Later on, the parents of the complainant called her asking for payment of one million.

Determination

30. This is yet another sexual offence involving two young university student who at the time of this judgement have been in custody for almost two years having been convicted and sentenced to 15 years on 27th October 2023. Their trial took a record of seven years, in the hands of four magistrates and in convicting the appellants the trial court had this to say “ from the evidence and the defence fronted by the accused persons, the 1st accused denied having sex with the complainant. However, such denial had not rebutted the overwhelming evidence adduced by the prosecution that the 1st accused had sex with the complainant . On part of the 2nd accused, it is his defence that it is the 1st accused who had sexual intercourse with the complainant. The act took place in his house. It may be true that the 2nd accused did not have sexual intercourse with the complainant but this is an offence of gang defilement. It is therefore incumbent for the prosecution to prove that the act of defilement was committed in association with others or in the company of another or others. The act of defilement took place in the 2nd accused house . whether the 2nd accused actually defiled the complainant or not , it is clear that he knew of the intention of the 1st accused and assisted and abetted the same “
31. The issue for determination in this appeal has been identified by this court as follows :
 - A. Whether the prosecution case against the appellants was proved to the required degree
 - B. Whether the defence under section 8(5) of the Act was available to the appellant and properly considered by the trial court
 - C. What order should this court make.



32. I will start this analysis and determination by looking at the defence under Section 8 (5) of the [Sexual Offences Act](#) provides thus:-

“It is a defence to a charge under this Section if ...a .It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence: and b.The accused reasonably believed that the child was over the age of eighteen years .c.The belief referred to in subsection 5 (b) is to be determined having regard to all circumstances, including any steps the accused person took to ascertain the age of the complainant.”

33. In this cause there is contradictory evidence on how the 2nd appellant met the complainant and as to whether they had known each other before the said date. The undisputed evidenced is that they both ended in the house of the 1st appellant where according to her evidence he forced her to have sex with him without using condom and left her to the 1st appellant who later on in the night having told her to bath and allowed her to sleep in his bed joined her in bed undressed her , put on condom and forced her to have sex with him, thereafter the 2nd appellant went for a second serving.
34. However there is a very vital piece of evidence which the trial court failed to consider as against the 1st appellants defence ,he asked the complainant how old she was and she introduced herself as C who had completed High School from Alliance and wanted to join Daystar University , to him they were all adults in the house so they watched movie and talked , thereafter the 2nd appellant told him that the complainant whom he identified as his girlfriend had differed with her mother and wanted sleepover, she gave her age as 18 years which information he recorded on his phone.
35. It is the introduction of this evidence at the trial which in my view led to miscarriage of justice in this case. The prosecution objected to the production thereof on the basis that the extract from the phone was supposed to be done by cyber crime officers and must have certificate. The appellants advocate on record instead of responding to the objection left it to court in in a ruling thereon the court had this to say: “ I have listened to the objection raised by the prosecution on production of an extract from the phone. From the response of the said objection by the defence counsel, it appears that he is not opposes to the objection noting that it raises serious question on production of electronic evidence under which must be accompanied by a certificate .

In the absence of the certificate , I uphold the objection by the prosecution “.

36. The court misinterpreted the provision of section 106 of the [Evidence Act](#) which provides as follows: “106B(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible” [emphasis mine]

What this provision therefore means is that any information stored in a computer (such as the phone herein) which is then printed or copied to optical media (such as a CD) shall be treated just like documentary evidence and will be admissible as evidence without production of the original. Thus the record made from the same is prima facie admissible evidence, without the original phone . However



S. 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied. S. 106B(4) provides –

“ 106B(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following –

- (a) identifying the electronic record containing the Statement and describing the manner in which it was produced

37. In this case the appellant wanted to produce the actual recordings from his phone as opposed to the copy of an extract from the same wherein the requirement of a certificate would have been mandatory and therefore the same fell into error as the appellant was only required to confirm that the phone was his and that he is the one who recorded the complainant.
38. The issue for the court’s determination is whether the trial court was right in locking the defence from producing a piece of evidence which was vital for his defence ?, for if there was proof that the complainant made the appellants to believe that she was 18 years then the charge herein could not stand .
39. In the case of Meshack Nyongesa v Republic [2016] eKLR, the Court of appeal had occasion to consider the defence under Section 8(5) of the SOA and stated:10. Section 8(5) of the [Sexual Offences Act](#) provides a complete defence to a charge of defilement if it is shown that the accused believed that the child was 18 years or above. The learned Judges went on to state:11. We take judicial notice of the fact that these days, children, especially females, appear older than they actually are. In the circumstances, given the fact that this is a defence which few non-lawyers know about, it is our considered view that where a young man is charged with defiling a girl child above the age of 16 years, the trial court should ascertain whether he had reason to believe that the girl was 18 years or above.
38. In Wambui versus Republic [2019] KECA 906(KLR) the court stated “We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.
36. We find merit in the appellant’s contention that in all the circumstances of the case he reasonably believed that the complainant was over the age of 18 years. The burden of proving that deception or belief fell upon the appellant, but the burden is on a balance of probabilities and is to be assessed on the basis of the appellant’s subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It is also germane to point out that a child need not deceive by way of actively telling a lie that she is over the age of 18 years. We would give the term deceive the ordinary dictionary meaning which is to; “Deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to.”(Per the Concise Oxford English Dictionary, 12th Edn 2011).
37. So understood, we would think that had the two courts below properly directed their minds to the appellant’s defence and the totality of the circumstances of this case, they would in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.”
40. Had the court allowed the appellant to introduce this evidence and considered the same she would not have likely convicted the appellants herein for while analysing this defence she missed the point of the defence to be that the complainant evidence could not be believed for the reason that she lied to the



appellants that she was 18 years and dismissed the said defence on the basis of the provisions of section 124 of the Evidence Act, which was in error .

41. I therefore find and hold that the trial court erred in not considering the appellants defence and therefore their conviction was not safe in view of the provisions of Article 50 of the Constitution, the unreliability of the evidence tendered at the trial as was stated in the case of Ndungu Kimanyi v Republic [1979] KLR 282; "The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unrealisable witness which makes it unsafe to accept his evidence.
42. Having therefore found and held that the conviction was not safe on the basis that the appellants were denied the opportunity to advance their defence and having noted the evidence of the complainant before the trial court, the fact that there was an allegation of the demand of monetary compensation by the parents of the victim and that this trial took a record seven years , this is a matter which a retrial would not be in the best interest of justice to the appellants and to the victim.
43. Having disposed this appeal on the basis of the trial courts denial of the appellant's opportunity to offer the defence under section 8(5) of the Act, the other grounds of appeal are immaterial to the final determination thereof.
44. I would therefore allow the appeal herein , set aside the conviction and quash the sentence herein, while like the Court of Appeal raise my voice of the injustice caused by the provisions of the Sexual Offences Act on the Boy Child, more so those like the appellants, who were university student as at the time of the alleged commission of the offence and who while enjoying the freedom away from the watching eyes of the parents are prone to do that which the law outlaws as their agemates finds them unattractive compared to the Sugar daddies now called " Wababa" but are hot cake to the high school girls who are willing to throw away their virginity at them as if to award them gold for having successfully scaled the academic mount Kenya and the few courageous sugar mummies .
45. The appellant should act as a warning to the boy child that having a high school girlfriend can be the gate way to a life behind bar for such a long time as the Supreme Court has now reinstated the Mandatory sentences under the Act, the same having been tamed briefly by the High Court and Court of Appeal.

DATED SIGNED AND DELIVERED THIS 16th DAY OF JULY 2025

J. WAKIAGA

JUDGE

In the presence of

