Ombajo v Republic (Criminal Appeal E012 of 2024)
[2025] KEHC 10412 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E012 OF 2024

JN KAMAU, J

JULY 16, 2025

BETWEEN

WILSON OMULOYA OMBAJO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (SPM) delivered at Vihiga in the Principal Magistrate's Court in Sexual Offence Case No 38 of 2018 on 23rd November 2022)

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 S. O. Ongeri (SPM) 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 19th February 2024. He set out two (2) grounds of appeal. Later on 28th November 2024, he filed Amended Grounds of Appeal dated 26th November 2024. He set out three (3) Amended Grounds of Appeal.

4. His Written Submissions were dated 26th November 2024 and filed on 28th November 2024 while those of the Respondent were dated 30th December 2024 and filed on 7th January 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

7. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Amended Ground of Appeal No (1) and (2) of the Petition of Appeal were dealt with under this head.

10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Respondent did not submit on this issue. The Appellant submitted that the Complainant, SMM (hereinafter referred to as "PW 1") was presented as of sixteen (16) years of age. However, her evidence and that of her parents were a gamble on fixing her age hence should not be relied on. He pointed out that the Trial Court relied on PW 1's Birth Certificate which was not authentic as it showed PW 1 had been registered before being born. He argued that whereas it indicated that PW 1 was born on 30th September 2001, the Birth Certificate was registered on 31st January 2001 and issued on 22nd June 2016. He asserted that it could have been fair if the maker of the document was called to testify.

13. He was emphatic that the said Birth Certificate did not prove the age of PW 1. He relied on the case of Francis Muthee Mwangi vs Republic [2016]eKLR where it was held that in defilement cases medical evidence was paramount in determining the age of the victim and the doctor was the only person who could professionally determine the age of the victim in the absence of any other evidence. He added that in the said Judgment the court held that although the accused person disputed the birth certificate what was relevant was the date of birth.

14. He blamed the fact that no age assessment was done. He asserted that the absence of the age assessment report was fatal to the dispensation of justice and prejudiced the Appellant's right to fair trial as granted under Articles 24 and 27(1), (2) and (3) of *the Constitution* of Kenya, 2010 as equality before the law and freedom from discrimination were ignored.

15. He pointed out that he believed that PW 1 was an adult as she had a mobile phone. He invoked Article 157(4) of *the Constitution* of Kenya and argued that forensic audit ought to have been carried out on the said mobile phone and line to find out whether or not PW 1 was the registered owner. He asserted that only adults owned sim cards. He was emphatic that PW 1's physique and emotional maturity together with her actions unveiled the notion that made him believe that she was an adult.

16. This court noted that indeed PW 1 and her parents, MM (hereinafter referred to as "PW 2") and AMV (hereinafter referred to as "PW 3") were not clear about the actual date when PW 1 was born.

17. Be that as it may, No 102xxx PC Onesmas Mbidi (hereinafter referred to as "PW 4") testified that PW 1 was sixteen (16) years of age and produced her Birth Certificate as exhibit which indicated that PW 1 was born on 30th September 2001. The incident took place on 19th August 2018 which meant that PW 1 was sixteen (16) years at the material time.

18. A Birth Certificate was a conclusive proof of age in Kenya, this court could therefore not fault the Trial Court for having relied on the same to prove PW 1's age. It was immaterial that it was registered and/or issued in the year 2016 whereas PW 1 was born in the year 2001 as birth certificates were normally issued after a child was born.

19. The Clinical Officer, Sammy Chelule (hereinafter referred to as "PW 5") also testified that the estimated age of PW 1 was sixteen (16) years. As the Appellant did not challenge the production of the aforesaid Birth Certificate and/or the Medical records 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 and medical reports beyond reasonable doubt and that she was a child at all material times.

B. Identification

20. Neither of the parties submitted on this issue. A perusal of the proceedings showed that PW 1 testified that on the material day of 19th August 2018 at 1400 hours she went for a walk at xxxxx and when she reached Chavayo, the Appellant came with a motor cycle from xxxxx and gave her a lift. He took her to a hotel and bought ugali and meat for her as he took tea and chapati.

21. It was her further evidence that it was late at 8.00p.m and the Appellant took her to a shop and escorted her to a house. She stated that the house was two-roomed and had sofa set, bed and bags. She said that the Appellant removed her clothes (trouser, underpant, t-shirt and sweater), removed his clothes (trouser, t-shirt and underwear) and on the bed, he lay on her stomach and inserted his penis into her vagina. She stated that she felt pain but at 10.00pm he defiled her again. At 5.00am, the Appellant slept on her again but she struggled and he left her.

22. 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.

23. 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)."

24. 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.

25. PW 1 positively identified the Appellant whom she met on the material day. She referred to him by name as Willy. In his defence, the Appellant admitted that he knew PW 1 when they met. He did not deny knowing her. There could not therefore have been any possibility of a mistaken identity.

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

C. Penetration

27. The Appellant submitted that this case was a model that valued the rule of Section 36 of the *Sexual Offences Act* No 3 of 2006 that was used to clear doubts and clearly establish the paternity of the infant and raise the standard of proof of DNA data. The Respondent did not submit on this issue.

28. PW 5 confirmed that PW 1's hymen was freshly torn and that there was tenderness and visible reddening around the hymen. He stated that the labia majora was torn and swollen with visible reddening and she had brownish whitish colour of vaginal discharge with a foul smell. He concluded that there was forcible penetration which resulted to vaginal harm and that PW 1 was defiled. He produced the P3 form, Post Rape Care (PRC) form and treatment notes as exhibits during trial.

29. The Government Chemist, Polycap Luji Kweyu (hereinafter referred to as "PW 6") testified that on 22nd July 2021, CPL David Nyagon presented the Appellant, PW 1 and an infant, one GM, to determine the parentage of the said minor. After his examination, he concluded that half (½) of the DNA profile of the said minor was with PW 1 and the other half (½) of it was with the Appellant. He confirmed that there was 99.99+ 1 more chances that the minor was the biological child of PW 1 and the Appellant.

30. In his defence, the Appellant's testimony corroborated that of PW 1. On cross-examination, he admitted having had sexual intercourse with PW 1 and stated that PW 1 told him that she had an identity card.

31. His evidence therefore did not outweigh the inference of guilt on his part as laid out by the Prosecution witnesses. He seemed to have admitted having committed the offence and his ignorance of whether or not PW 1 was a child or not was not a defence in law.

32. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material diverse dates as there was proof of defilement as PW 5 testified and proof of a child born out of the said offence as proved by PW 6.

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

II. Sentencing

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

35. The Appellant invoked Section 333(2) of the *Criminal Procedure Code* and blamed the Trial Court for not ordering that his sentence do run from the date of his arrest. He placed reliance on the case of Paul Omondi Odipo & 4 Others vs Republic Misc Application No E049 of 2021 (eKLR citation not given) where it was held that the sentence of imprisonment ought to run from the day of arrest.

36. Notably, in its Written Submissions, the Respondent invoked Section 8(4) of the *Sexual Offences Act* No 3 of 2006 and Section 329 of the *Criminal Procedure Code* and submitted 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.

37. It placed reliance on the case of Benard Kimani Gacheru vs Republic[2002]eKLR where it was held that sentence was a matter that rested in the discretion of the trial court and that an appellate court would not interfere with the sentence unless it was manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor.

38. It also cited the case of Republic vs Jagani & Another (2001) KLR 590 where it was held that the purpose of sentence was usually deterrence, rehabilitation and reparation for harm done to victims in particular and to society in general.

39. It further placed reliance on the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament and not judiciary that set the parameters of sentencing for each crime. It added that the Supreme Court also differentiated between mandatory sentences and minimum sentences and stated that mandatory sentences left no discretion to the judicial officer whereas minimum sentences set the floor rather than the ceiling of such sentences.

40. It contended that the sentence meted on the Appellant was lawful and that he had not demonstrated to this court as to why it should interfere with that sentence.

41. It invoked Section 333(2) of the *Criminal Procedure Code* and placed reliance on the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR where it was held that by dint of Section 333(2) of the *Criminal Procedure Code*, courts were obliged to take into account the period that the accused spent in custody before they were sentenced.

42. Notably, the Appellant was convicted and sentenced under Section 8(4) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya).

43. 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."

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

45. 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.

46. 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.

47. 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)".

48. 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."

49. 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(Supra).

50. The Charge Sheet herein showed that the Appellant herein was arrested on 20th August 2018. He was released on bond on 27th August 2018. He was arrested, bond cancelled and remanded on 15th July 2019. He was sentenced on 16th December 2022.

51. 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

52. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Amended Grounds of Appeal dated 26th November 2024 and filed on 28th November 2024 was not merited save

for his prayer pursuant to Section 333(2) of the *Criminal Procedure Code*. His conviction and sentence be and is hereby upheld as it was safe.

53. It is hereby ordered and directed that the period that he spent in custody between 20th August 2018 and 27th August 2018 and between 15th July 2019 and 15th December 2022 before he was sentenced be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

54. It is so ordered.

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

J. KAMAU

JUDGE