Olubero v Republic (Criminal Appeal E020 of 2024)
[2025] KEHC 10306 (KLR) (15 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E020 OF 2024

JN KAMAU, J

JULY 15, 2025

BETWEEN

JACKTONE MBETA OLUBERO ..... 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 E047 of 2022 on 23rd August 2023)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) 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. In the handwritten proceedings, she sentenced him to twenty one (21) years imprisonment. However, in the typed proceedings and the committal warrants, the sentence was indicated as twenty (20) years.

3. Being dissatisfied with the said Judgement, on 9th April 2025, he lodged an appeal herein. His Petition of Appeal was dated 4th April 2024. He set out five (5) grounds of appeal.

4. His Written Submissions were dated 30th September 2024 and filed on 28th November 2024 while those of the Respondent were dated and filed on 6th 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 v 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 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. Ground of Appeal No (1), (4) and (5) 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 v Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Appellant did not submit on this issue. On the other hand, the Respondent submitted that the Complainant, PA (hereinafter referred to as "PW 1") testified that she was twelve (12) years old and that the Clinical Officer, Kelvin Kadenge Amadalo (hereinafter referred to as "PW 3") produced a Medical Examination Report which indicated that she was twelve (12) years old. It pointed out that the production of the said Report was not objected to and hence, the ingredient of age was proved.

13. It relied on the case of Musyoki Mwakavi v 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.

14. Notably, this court noted that both the Trial Court and the Prosecution relied on the P3 Form that the Respondent referred to as the "Medical Examination Report" that was produced by PW 3 which indicated that PW 1 was twelve (12) years old at the material time. However, No 101487 PCW Hellen Okumu (hereinafter referred to as "PW 4") produced PW 1's Birth Certificate as an exhibit in this case which showed that PW 1 was born on 24th July 2011. The incident took place on diverse dates between

24th July 2022 and 26th July 2022, which meant that PW 1 was in fact eleven (11) years at the material time as PW 4 told the Trial Court and not twelve (12) years as had been stated by both the Respondent and the Trial Court.

15. Notably, as the Appellant did not challenge the production of the aforesaid Birth Certificate and/or the P3 Form 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 the medical evidence beyond reasonable doubt and that she was a child at all material times.

B. Identification

16. The Appellant did not submit on this issue. On its part, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her and that she identified him as her grandfather. It added that she stated that the act was committed on several occasions and because the Appellant was someone she knew, she could not have been mistaken as to his identity. It pointed out that that was evidence of recognition which was held by courts to be more reliable and weightier than that of identification of a stranger as was held in the case of Anjononi & Others v Republic (1976-80) 1 KLR 1566, 1568. It was emphatic that there was proper identification as there was prior knowledge of the Appellant.

17. PW 1 positively identified the Appellant who was her grandfather and stayed behind their house. In his defence, the Appellant admitted that PW 1 was indeed his grandchild. There could not therefore have been any possibility of a mistaken identity.This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

18. The Appellant submitted that PW 1 had been couched on what to say during trial and not the truth. He argued that PW 3 narrated how he saw the whitish discharge but failed to convince the court whether the same belonged to him. He pointed out that the said issue prompted the Trial Court to order for a DNA test but that the same was not done to ascertain his culpability.

19. He asserted that a reading of the Trial Court's holding on the issue of DNA indicated that he did not commit the offence. He contended that the Trial Magistrate relied on suspicion. He argued that in a case of this nature, suspicion could be strong but that that was a game of facts with clear settlement of rules of engagement. He urged this court to allow his appeal.

20. On its part, the Respondent invoked Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed v 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 PW 3 corroborated that of PW 1 and that penetration was therefore proved.

21. It placed reliance on the case of Charles Wamukoya Karani v Republic Criminal Appeal No 72 of 2013 (eKLR citation not given) where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant. It was emphatic that all the ingredients of the charge of defilement were proved beyond reasonable doubt.

22. It pointed out that in his defence, the Appellant did not rebut the evidence of the Prosecution but denied the offence and claimed that he had been incriminated. 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 v Republic[2018]eKLR which cited the Tanzanian case of Dickson Elia Nsamba Shapwata & Another v The Republic Criminal App No 92 of 2007.

23. A perusal of the proceedings showed that PW 1 testified that on the material day of 24th July 2022, her sister, Vivian Zainabu (hereinafter referred to as "PW 2"), cooked ugali and asked her to take it to the Appellant who stayed behind their house. She said that it was around 8.00p.m. He opened the door and told her to put the food on the table. He then told her to sleep on the bed, removed his clothes and asked her to remove her dress and pant. She removed her pant and raised her dress up. She said that the Appellant then put the thing he used to urinate into hers. PW 2 started calling her and he told her that if she told anyone what had happened, he would beat her. Her further evidence was that he gave her Kshs 20/= for shaving her hair.

24. On the second day, she took food to him again and he repeated the same act after telling her to remove her clothes and him removing his clothes and when he was done, he told her to go home as PW 2 was calling her. He then gave her Kshs 50/=.

25. On the third day, she again took food to his house but she did not find him. She located him at her grandfather's house and he told her to wait for him in his house. It was her evidence that the Appellant followed and defiled her after asking her to remove her clothes and him removing his.

26. She informed the Trial Court that when she went home, PW 2 saw that her dress was wet and took her to her aunt to check on the discharge. She said that they met the Appellant on their way to the aunt's place and he commented, "mambo iishe" (Issue to get finished). Her aunt took her to Coptic Hospital and reported the matter to the Police.

27. PW 3 confirmed that PW 1's hymen was broken, her labias were inflamed and her vagina and cervices had lacerations with whitish discharge. He pointed out that the weapon was human body part, penis, and concluded that there was defilement. He produced the P3 Form and Post Rape Care (PRC) Form as exhibits during trial.

28. In his defence, the Appellant testified that on 24th July 2022, he travelled from Siaya to Ebusakami ,Vihiga County for a burial and harambee (sic). He stated that he went and stayed at his brother's home and met his brother and two (2) daughters. At 7.30p.m, the children prepared food and brought it on his table and that later, a brother to PW 1, one Reagan Odwero, called him from outside and asked what he had heard he had done and walked away.

29. It was his evidence that he was arrested on 27th July 2022 at 11.30p.m by Police Officers from Luanda Police Station and that was when he knew he had been arrested for defilement. He told the Trial Court that he had a good relation with the whole family and would visit them occasionally. He denied defiling PW 1. He added that DNA test was not done on his part.

30. Notably, the court had power to order DNA testing under Section 36 of the *Sexual Offences Act* Cap 63A (Laws of Kenya). However, the exercise of that power was not couched in mandatory terms. Rather, that power was discretionary.

31. This position had been settled by many cases amongst them the case of Evans Wamalwa Simiyu v Republic [2016] eKLR wherein the court cited the case of AML v 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.

32. As was held in the case of Mohammed Omar Mohammed v 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.

33. 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.

34. 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)."

35. 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.

36. Although PW 1 was the sole identifying witness, her evidence was corroborated by that of PW 2 and the scientific findings of PW 3. In that respect, the Appellant's defence was a mere denial. It did not outweigh the evidence that was adduced by the Prosecution witnesses.

37. In the premises foregoing, this court found and held that the Prosecution had proved that the Appellant defiled PW 1 on the material date as PW 3 testified, which was proof beyond reasonable doubt, the required standard in criminal cases.

38. In the premises foregoing, Ground of Appeal No (1), (4) and (5) of the Petition of Appeal were therefore not merited and the same be and are hereby dismissed.

II. Sentencing

39. Grounds of Appeal No (2) and (3) of the Petition of Appeal were dealt with under this head.

40. The Appellant placed reliance on the case of Julius Kitsao Manyeso v Republic[2023]eKLR where the court settled the issue of average age of people in Kenya as 66.7 years old. He pointed out that as he was sixty-nine (69) years old and that the circumstances surrounding the case herein could not lead to a sentence of twenty (20) years imprisonment. He submitted that before drawing the inference of the accused's guilt from circumstantial evidence, the court had to be sure that there were no co-existing circumstances or actors which would weaken or destroy that inference.

41. He argued that his sentence was harsh and excessive in the circumstances. He pleaded with court to consider the pre-sentence report and exercise leniency on his part.

42. On its part, the Respondent cited 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.

43. It placed reliance on the case of Benard Kimani Gacheru v 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.

44. It also referred to the case of Republic v 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.

45. It was emphatic that the sentence meted out to the Appellant by the Trial Court was lawful and that he had not demonstrated to this court why it should interfere with it.

46. Notably, the Appellant was convicted and sentenced under Section 8(3) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). The said Section 8(3) of the *Sexual Offences Act* provides that:-

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

47. Although the Trial Court sentenced the Appellant to twenty one (21) years imprisonment which was indicated in the typed proceedings and the Warrant of conviction as twenty years (20) years, this was way below the prescribed sentence where a child was below eleven (11) years. As PW 1 was aged eleven (11) years at the material time, the Appellant ought to have been sentenced to life imprisonment. Indeed, Section 8(2) of the *Sexual Offences Act* provides as follows:-

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

48. As the Appellant was related to PW 1 by virtue of her being his granddaughter, he could also have been charged under Section 20(1) of the *Sexual Offences Act* that provides as follows:-

> " Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter (emphasis court), sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person (emphasis court).

49. Previously, there had been emerging jurisprudence to sentence accused persons to lower sentences that had been prescribed in the *Sexual Offences Act*. The Trial Court could not, therefore, have been faulted for having sentenced him to twenty one (21) years.

50. However, on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi v Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake v 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.

51. 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 out against him undisturbed.

52. This court was not persuaded to enhance the said sentence as the Respondent did not put the Appellant on notice that it would be seeking an enhancement of the sentence which would have allowed him to make an informed decision as to whether he would have wished to proceed with his application or if he would have wished to abandon the same. Enhancing his sentence without giving him the chance to respond would be contrary to the principles of fair trial provided in Article 50 of *the Constitution* of Kenya, 2010.

53. 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)".

54. 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."

55. 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 v Republic[2018]eKLR.

56. The Charge Sheet herein showed that the Appellant herein was arrested on 27th July 2022. He was released on bond on 22nd September 2022. He was remanded on 23rd August 2023 when Judgement was delivered. He was sentenced on 13th September 2023.

57. 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.

58. In the premises, Grounds of Appeal No (2) and (3) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

Disposition

59. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 4th April 2024 and filed on 9th April 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.

60. It is hereby ordered and directed that the period between 27th July 2022 and 22nd September 2022 and between 23rd August 2023 and 12th September 2023 be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). For the avoidance of doubt, the committal warrants be and are hereby corrected to reflect that the Appellant herein was sentenced to twenty- one (21) years and not twenty (20) years as was indicated in the typed proceedings and committal warrants..

61. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 15TH DAY OF JULY 2025.

J. KAMAU

JUDGE