



REPUBLIC OF KENYA



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**Otieno v Republic (Criminal Appeal E010 of 2024)  
[2025] KEHC 10476 (KLR) (15 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E010 OF 2024**

**JN KAMAU, J**

**JULY 15, 2025**

**BETWEEN**

**MOSES OTIENO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon S. O. Onger (SPM) delivered at Vihiga in the Senior Principal Magistrate's Court in Sexual Offence Case No 51 of 2019 on 10th July 2021)*

**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 S. O. Onger [SPM] convicted him of the main charge and sentenced him to fifteen [15] years imprisonment.
3. Being dissatisfied with the said Judgment, on 13<sup>th</sup> February 2024, he lodged an appeal herein. His Petition of Appeal was dated 8<sup>th</sup> February 2024. He set out seven [7] grounds of appeal.
4. His undated Written Submissions were filed on 26<sup>th</sup> November 2024 while those of the Respondent were dated 7<sup>th</sup> February 2025 and filed on 10<sup>th</sup> 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 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 parties only submitted on the issue of sentencing. Be that as it may, this court found it prudent to also determine the appeal on conviction for completion of the record and to save the court's time as it was not clear if the Appellant had abandoned the grounds of appeal challenging his conviction. It, therefore, appeared to this court 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.

## II. Proof Of Prosecution's Case

9. Ground of Appeal No [1] 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. Both parties did not submit on this issue. Notably, the Complainant, J.N. [hereinafter referred to as "PW 2"] testified that he was born in September, 2005. His father T.E.N. [hereinafter referred to as "PW 3"] said that PW 2 was born on 5<sup>th</sup> September 2005. No xxxxx C PL, Rael Ambere [hereinafter referred to as "PW 4"] produced a Clinic Card which indicated that PW 2 was born on 4<sup>th</sup> September 2005. As the incident took place on 5<sup>th</sup> September 2019, PW 2 was fourteen [14] years old at the material time.
13. This court had due regard to the case of *Musyoki Mwakavi v Republic* [2014] eKLR where it was held that in a charge of defilement, age of a minor could be proved by medical evidence, baptism card, school leaving certificate, by the victim's parents and/or guardians, observation and common sense.



14. The contradiction of the date when PW 2 was born, which he indicated as 5<sup>th</sup> September 2005 and said to have been 4<sup>th</sup> September 2005 by PW 4 was not a material contradiction that could influenced this court's finding of PW 2's age at the material time.
15. As the Appellant did not challenge the production of the aforesaid Clinical Card and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 2's age was proven by medical evidence beyond reasonable doubt and that he was a child at all material times.

## **B. Identification**

16. None of the parties submitted on this issue. A perusal of the proceedings showed that that on the material day of 5<sup>th</sup> September 2019, at 4.00p.m, PW 2 had gone to pick doves from his friend, but he did not find him. The said Dan came later at around 6.00p.m and gave him the doves. As it was late, they walked to the Appellant's house, where Dan's friend, Mxxx, lived. They decided to sleep over at his house as PW 2 feared that dogs would bite him. When Mxxx came, they went and slept on the Appellant's bed.
17. PW 2's evidence was that that at 11.00 pm, the Appellant asked him if he would get annoyed if he told him something and he responded that he would. The Appellant asked him if he could use his buttocks and he declined. He stated that the Appellant then held him by force, removed his trouser, covered his mouth with his hands and sodomised him by inserting his penis in his anus. At 1.00 am, the Appellant left him and went and sat in the sitting room and later went to sleep.
  1. This court noted that PW 2 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.
  2. 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].”
20. 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.
21. PW 2 said that he did not know the Appellant before but that he knew Mxxx who was his friend since 2016. He averred that it was the first time he went to that house but that he usually passed by there while going to the Bus Stage. Although the incident took place at night, PW 2 was emphatic that the



lights were on before they went to sleep. He positively identified the Appellant by pointing at him in the dock during trial. There could not therefore have been any possibility of a mistaken identity.

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

### C. Penetration

23. Both parties did not also submit on this issue. The Clinical Officer Tacy Waturu Musera [hereinafter referred to as “PW 1”], confirmed that on examining PW 2, there was tenderness around the anal area and bruises on the skin at the end anal area. On cross-examination, he stated that PW 2 had pain during examination and skin had peeled off around the anal area. He concluded that he was sodomised. She produced the P3 Form, Post Rape Care [PRC] Form and treatment notes as exhibits during trial.

24. The Appellant raised alibi evidence. In his defence, he stated that he was a houseboy and that on the material day of 5<sup>th</sup> September 2019, he was at his place of duty and not at home. He denied having defiled PW 2.

25. This court had due regard to the definition of “alibi” in the Black’s Law Dictionary, 10<sup>th</sup> Edition. It was defined as:-

“A defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime at the relevant time”.

26. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR.

27. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the *Criminal Procedure Code* Cap 75 [Laws of Kenya] that provides that:-

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

28. Be that as it may, this court found and held that although PW 2 was the single identifying witness, his evidence was collaborated by PW 1’s testimony who confirmed that he had been sodomised. In addition, the Appellant did not call any witnesses to confirm his alibi. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant’s alibi evidence to have been watertight enough to have weakened the inference of guilt on his part.

29. This court thus found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt.

30. In the premises foregoing, Ground of Appeal No [1] and [5] of the Petition of Appeal were therefore not merited and the same be and are hereby dismissed.

### II. Sentencing

31. Grounds of Appeal No [2], [3], [4], [6] and [7] of the Petition of Appeal were dealt with under this head.



32. The Appellant pleaded with the court to consider that he was a first offender and remorseful for having committed the offence. He sought the court's leniency and for a second chance to start a family and help his parents. He further pleaded with court to consider that he had felt the wrath of law and had learnt his lesson through the period of time he had spent in prison.
33. He explained that he was reformed, transformed and rehabilitated and was ready to be re-integrated back into the society. He pointed out that he had enrolled in various educational and theological training programmes and had been awarded certificates and Diploma. He added that he had also undergone training in painting and decoration with a Grade III Certificate.
34. He urged the court to consider the time he spent in custody prior to his sentence pursuant to Section 333[2] of the *Criminal Procedure Code*. He urged the court to review his sentence or grant him a probation order.
35. In its Written Submissions, the Respondent cited Section 8[3] 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 and called for a Pre-Sentence Report in arriving at the appropriate sentence.
36. 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 had overlooked some material factor.
37. 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.
38. It further placed reliance on the case of Supreme Court Petition No E018 of 2023 *Republic v 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.
39. It contended that the sentence that was meted upon the Appellant was proper for the offence committed and that it was in fact lenient because the *Sexual Offences Act* provided for a minimum sentence of not less than twenty [20] years. It urged the court not to interfere with the same.
40. It opposed the Appellant's prayer pursuant to Section 333[2] of the *Criminal Procedure Code*. It cited the case of *Ahamad Abolfathi Mohammed & Another v Republic*[2018]eKLR where it was held that courts must take into account the period that the accused persons spent in custody before they were sentenced and submitted that as the Appellant was already benefiting from an illegal sentence, it was mischievous to seek the benefit of Section 333[2] of the *Criminal Procedure Code*.
41. 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.”
42. The Trial Court was therefore lenient to have sentenced him to fifteen [15] years imprisonment instead of twenty [20] years imprisonment as provided by law.



43. Notably, on 12<sup>th</sup> 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.
44. 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.
45. 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.
46. 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]”.
47. 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.”
48. 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*[Supra].
49. The Charge Sheet herein showed that the Appellant herein was arrested on 9<sup>th</sup> September 2019. He was released on bond on 14<sup>th</sup> October 2019. He was remanded on 10<sup>th</sup> July 2021 when Judgement was delivered. He was sentenced on 25<sup>th</sup> August 2021.



50. 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. Indeed, at the time the sentence was being meted upon the Appellant herein, the sentence was not illegal as courts were exercising discretion in sentencing persons who had been convicted of the offence of defilement. This court therefore rejected the Respondent's argument that the Respondent ought not to benefit from the period that he spent in prison being taken into account on the ground that he was serving an illegal sentence.
51. In the premises, Grounds of Appeal No [2], [3], [4], [6] of the Petition of Appeal were not merited and the same be and are hereby dismissed. However, Ground of Appeal No [7] of the Petition of Appeal was merited and the same be and is hereby allowed.

### **Disposition**

52. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 8<sup>th</sup> February 2024 and filed on 13<sup>th</sup> February 2024 was not merited save for his prayer that was brought pursuant to Section 333[2] of the *Criminal Procedure Code* Cap 75 [Laws of Kenya]. The Appellant's conviction and sentence be and are hereby upheld as they were both safe.
53. It is hereby ordered and directed that the period that the Appellant spent in custody between 9<sup>th</sup> September 2019 and 14<sup>th</sup> October 2019 and between 16<sup>th</sup> July 2021 and 24<sup>th</sup> August 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].
54. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 15<sup>TH</sup> DAY OF JULY 2025**

**J. KAMAU**

**JUDGE**

