Orisai v Republic (Criminal Appeal E052 of 2024) [2025] KEHC 9855 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E052 OF 2024

WM MUSYOKA, J

JULY 4, 2025

BETWEEN

JOSEPH ORISAI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from conviction and sentence by Hon. AZ Ogange, Resident Magistrate, RM, in Malaba SPMCSOC No. E004 of 2024, of 3rd October 2024 and 25th November 2024, respectively)

JUDGMENT

1. The appellant, Joseph Orisai, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(4) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. He was alleged to have had intentionally caused his penis to penetrate the vagina of a girl of sixteen. There was an alternative charge, of committing an indecent act with a child.

2. A trial was conducted. Four witnesses testified for the prosecution, while two testified for the defence. The trial court found that the offence charged had been established, convicted the appellant and sentenced him to fifteen years imprisonment.

3. PW1, the complainant victim, testified that she had consensual sex with the appellant, on 22nd March 2023. She had left the door to her father's house open, so that the appellant could come in at night, for the rendezvous, and that was what happened. She conceived and gave birth to a child on 6th December 2023. Her father, PW2, testified that the appellant was their neighbour, and that he used to see him and PW1 visit each other frequently. PW3, was a clinician, who saw PW1 after she had delivered. PW4 investigated the matter.

4. Upon being put on his defence, the appellant testified as DW1. He denied being anywhere near where PW1 was, on 22nd March 2023, when the defilement happened, as he was visiting his uncle, DW2. DW2 testified that DW1 was with him at the material time of the commission of the alleged defilement.

5. The appellant was aggrieved, and brought the instant appeal, revolving around sufficiency of evidence to convict; lack of concrete evidence on the age of PW1; the defence of alibi being disregarded; disregard of the evidence that the appellant was an adult at the material time; PW1 presenting herself as an adult at the material time; and the fact of the defilement not being established.

6. Directions were given, on 29th April 2025, for canvassing of the appeal by way of written submissions. Only the appellant filed written submissions.

7. The appellant argues around proof of the age of PW1; the medical evidence not supporting the charge; the evidence being irrelevant, inconsistent, contradictory and uncorroborated; the sentence being harsh; and whether the sentence and conviction ought to be set aside.

8. On proof of the age of PW1, she testified that her certificate of birth indicated that she was born in 2007. Her father, PW2, testified that she was born on 12th August 2007. Her certificate of birth was produced by PW4, being serial number 02XXXX, which indicated that she was born on 12th August 2007. I note, though, that the certificate was obtained on 21st November 2024, during the pendency of the criminal proceedings. However, that, of itself, should not create doubt on its authenticity. Nothing can trump the oral testimony of a parent, on the date of the birth of their child. I would not fault the trial court for finding that the age of PW1 had been established to be sixteen years. In fact, she was fifteen years six months and twenty-two days old as of 22nd March 2023.

9. Related to that is the submission that the trial court did not consider that PW1 had passed herself off as an adult at the material time. I have been unable to find basis for this submission. There was nothing in the testimony of PW1, which suggested that. When he testified as DW1, the appellant denied any relationship with PW1 and asserted that he was nowhere near where she was, on the eventful evening of 22nd March 2023, going into the night of 24th March 2023. So, if there was no relationship between him and her at any point, at what stage did PW1 pose to the appellant as an adult?

10. On the alibi defence, that the appellant was nowhere near the home of PW1 on 22nd March 2023, as he was at the home of DW2, which was fifteen kilometres away, not being considered, I have perused the trial record. The trial court, in the judgement of 3rd October 2024, narrated the testimonies of DW1 and DW2, where the alibi was raised. I note that the trial court discussed that alibi defence in paragraphs 35, 36, 37, 38, 39 and 40 of the judgement. It was dismissed, on the ground that it was never raised prior to the defence hearing, contrary to the prevailing judicial pronouncements, which require prior disclosure of an alibi defence to the prosecution, to afford opportunity for the police to investigate it. There is, therefore, no foundation to the argument that the alibi defence was not considered. It was considered and dismissed.

11. The issue that the appellant should, perhaps, have raised, regarding the alibi defence, should be whether it was properly dismissed. It should be about the grounds for its dismissal or disregard, particularly on whether the case law relied upon by the trial court to dismiss it reflected the current legal or judicial position. That is whether the trial court properly identified the applicable law and properly applied it to the defence raised.

12. On the medical evidence not supporting the charge, the starting point should be with stating that medical evidence is not the only basis for proof of sexual offences. The primary source of proof of sexual offences is the victim herself or himself. The medical evidence is meant to corroborate that primary

evidence. The current legal position is that corroboration is not mandatory for proof of sexual offences. The court may still convict, in the absence of corroboration, where it finds the testimony of the victim to be truthful and believable. The mere absence of medical evidence, or its insufficiency, should not be fatal.

13. In this case, there was no medical evidence. The case was not founded on any medical evidence. A clinician testified, but the mere fact that he was presented as a witness did not mean that he provided or presented medical evidence. He testified that he saw PW1 after she had delivered, which meant that he saw her long after the incident on 22nd March 2023. He in fact saw her in December 2023. No medical or forensic evidence could be gathered or collected from her, nine months or so after the alleged defilement, and more so after she had delivered. He did produce a P3 form, but it had no forensic findings. He said as much. The trial court also said as much, at paragraph 32 of its judgement. PW3 did not even examine the genitalia of PW1. It would have been a pointless and futile exercise. The conviction was not founded on medical evidence, and, therefore, there cannot be any basis for this ground of appeal.

14. On the evidence being inconsistent, irrelevant, contradictory and uncorroborated, I note that the appellant raises only one issue with respect to that. That is that PW1 had claimed that the defilement happened in the presence of four other children, who were not called as witnesses. That would not be a matter of irrelevance, inconsistency or contradiction. There could be a case for raising the issue of corroboration, though, on the basis that testimonies from those children could have provided corroboration to the narrative by PW1. However, I reiterate that corroboration is no longer so critical in proof of sexual offences. The primary thing would be the truthfulness and believability of the testimony given by the victim. PW1 testified that these other children were sleeping. There was no evidence that they were awake at any stage of the defilement, or witnessed what was going on, to require the prosecution to present them as eyewitnesses to the commission of the offence, to corroborate the narrative given by PW1.

15. Related to that is the issue of deoxyribonucleic acid (DNA). The victim got pregnant, allegedly from that defilement on 22nd March 2023. She delivered, safely, from what I see from the record. DNA testing of samples from that infant, PW1 and the appellant could have gone some way towards establishing paternity. However, the case was not hinged on that pregnancy. The DNA results would have been of corroborative value. However, the primary evidence would have remained the testimony of PW1, so that where the trial court believed the narrative to be true, no need would arise for forensic evidence.

16. The appellant argues that he urged for the DNA testing but was ignored by the trial court. I have very scrupulously looked through the trial record, on the proceedings conducted prior to the prosecution closing its case, and I have not come across any minute showing the appellant requesting for a DNA test to be conducted. The record is also silent on whether any such request was made after the appellant was put on his defence, and before he testified. He only mentioned DNA testing when he was being cross-examined. Even then, after that, he did not make any application for a test to be carried out.

17. Should a DNA test have been ordered by the trial court? None of the parties applied for it. The case belonged to the parties, and not the court. The trial court was not obliged to collect evidence on behalf of the parties. The party that desired DNA evidence to prove or support their case ought to have moved the court for it. The prosecution did not wish to rely on it; hence it did not seek to take that route. If the appellant required it for his defence, he should have applied for it. In any case, DNA testing is invasive into the privacy of the individuals involved, and the trial court should not have been expected to venture into that without the invitation of the parties.

18. The trial court found PW1 to have been telling the truth, and the conviction was based on that. As indicated above, the medical evidence and forensics from DNA analysis were not mandatory and are no longer the only basis for a conviction. It has not been demonstrated that the trial court was mistaken in its findings and holdings, to warrant overturning its conclusions on that score. That court had the benefit of seeing and hearing the witnesses testify, and it was best situated to assess the truthfulness and reliability of the material that those witnesses presented. I cannot interfere with its findings unless a proper case is made out for that.

19. On the sentence being harsh, the appellant raises the matter of his young age, of twenty years. The sentence imposed was fifteen years, and not the twenty-five years reflected in the written submissions. For a young person of twenty, considering that he was in the same age bracket with PW1, seeing that they were in the same high school, the sentence of fifteen years would be harsh. A young person, of the age of the appellant, merited a lesser sentence, perhaps a non-custodial one. He was still in the process of being formed, mentally and physically, and, therefore, deserving of treatment, not punishment. Although, he was a year above teenage, he was still in high school, together with teenagers, and he must have been of the same attitude and mindset as them. He should have been treated as one.

20. However, the hands of the trial court were tied. The prescribed sentence is a statutory minimum. With statutory minimums, the sentencing court would have little discretion to impose sentences other than those prescribed. Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), provided some relief, but that came to an end with Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), which provided that Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), was only available in murder cases.

21. Then came Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others v Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), which extended the discretion, with respect to statutory minimum sentences under the *Sexual Offences Act*. However, that was short-lived. Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ&P, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), Republic v Manyeso [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) and Republic v Ayako [2025] KESC 20 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) decreed that the sentences prescribed under the *Sexual Offences Act* were constitutional and legal, and that the sentencing courts were bound to deal with them as such. The situation the appellant finds himself in cannot be helped, for the Supreme Court has authoritatively spoken on these issues.

22. Overall, I find no merit in the appeal herein, and I hereby dismiss the same. The conviction of the appellant is hereby affirmed, and the sentence confirmed. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA,

THIS 4TH DAY OF JULY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Rodgers Obimba, instructed by BM Ouma & Company, Advocates for the appellant.

Mr. Tony Onanda, instructed by the Director of Public Prosecutions, for the respondent.