TOO v Republic (Criminal Appeal E014 of 2023)
[2025] KEHC 10545 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E014 OF 2023

DK KEMEI, J

JULY 18, 2025

BETWEEN

TOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Lester Simiyu (PM) dated 6/4/2023 in Siaya Chief Magistrate's Sexual Offence Case No. E005 of 2022)

JUDGMENT

1. The Appellant herein TOO has lodged the present appeal against his conviction and sentence of Hon. Lester Simiyu [PM] in Siaya Chief Magistrates Court Sexual Offence Case No. E005/2022 dated 6th April 2023 wherein he was ordered to serve a sentence of ten [10] years imprisonment on count one and further serve twenty [20] years imprisonment on Count two which were to run consecutively from 31st January 2022.

2. Aggrieved by the said conviction and sentence, the Appellant lodged his petition of appeal on 19/4/2023 wherein he raised the following grounds of appeal:

   i. That the trial court failed to consider his alibi defence.

   ii. That the trial court erred in law and fact when passing the sentences which are excessive and harsh.

   The Appellant therefore prayed that the conviction be quashed and the sentences set aside.

3. This being the first appellate court, its duty is spelt out namely to evaluate and analyze the evidence tendered before the trial court and come to its own independent conclusion on whether or not to uphold the decision of the trial court. this court must also take into account the fact that it neither saw

nor heard the witnesses while testifying and has to make an allowance for that. See *Okeno v Republic* [1972] EA 32.

4. The Appellant herein had been charged with two counts of defilement and two alternative counts of committing an indecent act with a child.

   On count one, the charge is defilement contrary to Section 8[1] as read with Section 8[4] of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 2020 and 19/1/2022 in [particulars withheld] in Siaya Sub County within Siaya County, intentionally caused his penis to penetrate the vagina of VAO a child aged sixteen [16] years.

   The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11[1] of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse date between 2020 and 19/1/2022 at [particulars withheld] in Siaya Sub County within Siaya County intentionally touched the vagina of VAO a child aged 16 years with his penis.

   The Appellant also faced a 2nd Count of defilement contrary to Section 8[1] as read with Section 8[2] of the *Sexual Offences Act*. The particulars were that on diverse dates between 21st and 27th January 2022 in [particulars withheld] in Siaya Sub County within Siaya County intentionally caused his penis to penetrate the vagina of FRA a child aged eight [8] years. The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11[1] of the *Sexual Offences Act* No. 3 of 2006 with the particulars being that on diverse dates between 21st and 27th January 2022 in [particulars withheld] in Siaya Subcounty within Siaya County, intentionally touched the vagina of FRA a child aged eight years with his penis.

5. The Respondent called six witnesses in support of its case. The to complainants herein were biological children of the Appellant. It was the evidence of the complainants [PW1 and PW2] that they usually slept at their neighbour's kitchen at night since they did not have a place to sleep as their parents only have one house wherein the Appellant who is their father and their mother slept. It was their case that the Appellant usually sneaked out of his house allegedly under the guise or excuse that he was going to check on the children and which seemed not to cause any alarm or suspicion from his wife. Apparently, the Appellant's intention was to go and defile the complainants. It was the evidence of the 1st Complainant PW1 that she and her elder sister [PW2] were defiled by the Appellant who is their father on alternate nights on continuous basis. That the Appellant would knock and order the children to open it and if there was resistance he would forcefully open the door or enter through an opening in the window. That each time the Appellant defiled them, he would threaten them to cause harm and further order them not to reveal the ordeal to anybody. They further stated that they feared informing their mother about the incidences as their mother was harsh and would not believe them and hence they persevered the ordeals. That when they could not persevere anymore, they informed their teacher RAO [PW4] who swung into action upon learning that the two minors had been molested and violated, escorted them to Muer Police Post where the incident was reported and were referred to Siaya Police Station from where they were issued with P3 forms and escorted to Siaya County Referral Hospital for examination. The two minors were examined by Brian Chembek Chemengo [PW6] who confirmed that there was vaginal penetration on the two complainants. The said Clinical Officer produced the P3 forms, PRC forms and Lab request forms. The investigating officer No. xxx PC Pamela Nambuye [PW5] visited the scene and conducted the investigations and thereafter he arrested the Appellant to whom he later preferred charges against.

6. The trial court later established that the Respondent had made out a prima facie case against the Appellant to require him to tender his defence. The Appellant opted to tender sworn evidence.

7. TOO [DW1] testified that he was at his workplace [*boda boda* stage] when two people approached him and poised as customers to be ferried to Boro Chief's Camp. He complied and on arrival he was placed under arrest and escorted him to Siaya Police Station from where he was charged. He denied the charges and maintained that the children had been coached to lie against him. That had the children been defiled they would not have managed to walk to school four kilometres away without the other children noticing anything unusual. That the prosecution forced his wife to testify against him yet she was his witness whom he intended to call. That the mother of the children did not notice any issue with the children. He finally maintained that the whole issue is about land dispute which emanated in 2019. That after the death of his first wife, his in laws wanted to give him another girl to come and marry him and this angered his wife who has now taken sides.

8. The appeal was canvassed by way of written submissions. Both parties complied.

9. I have considered the evidence presented before the lower court as well as the submissions filed. I find the issues for determination are firstly whether the Respondent proved its case against the Appellant beyond reasonable doubt and secondly whether the sentences imposed were appropriate.

10. It is noted that the Appellant was charged under Section 8[1] as read with Section 8[4] of the *Sexual Offences Act* as well as Section 8[1] as read with Section 8[2] of the said Act as the main counts. The trial court convicted the Appellant on the said two main counts and sentenced him accordingly. The two offences relate to defilement of girls below the age of eighteen years. The same provides as follows:

    Section 8[1] - A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    Section 8[2] - A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.

    Section 8[4] - 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.

11. As the offences which the Appellant faced related to defilement, the Respondent was under obligation to prove certain essential ingredients namely age of the complainant, penetration and identity of the perpetrator. It is trite law that in criminal cases, the burden of proof lies squarely on the prosecution to discharge. See the case of *Woolmington v DPP* [1935] AC 462. The burden of proof lies on the prosecution in all criminal cases and never shifts to the person who has been charged. Under Section 107 of the *Evidence Act* [Cap 80], the burden of proof was on the prosecution to prove the allegations levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt as held in *Woolmington v Dpp* [1935] AC 462 and *Sawe v Republic* [2003] eKLR. The prosecution must prove its case against an accused person [appellant herein] beyond a reasonable doubt, and if there is a doubt it must be resolved in favor of the accused. This was the holding by the House of Lords in the leading Judgment in that area in the case of *Woolmington v Director of Public Prosecutions* [*supra*] where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant's guilt beyond any reasonable doubt. That position has been accepted and applied by our Courts for many years. For instance, in the case of *Moses Nato Raphael v Republic* [2015] eKLR, the Court of Appeal referred to the speech by their Lordships in the said case and stated:

    > " The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This principle

is well captured in the time honored English case of *Woolmington v DPP* [1935] AC 462 where the Court stated:

> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to the qualification involving the defense of insanity and to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The prosecution was therefore under obligation to prove the above essential ingredients of the charges to warrant conviction against the Appellant. The proof must be one of beyond any reasonable doubt.

12. As regards the aspect of age of the complainants, the Investigating Officer [PW5] produced age assessment reports which indicated the 1st Complainant [VAO] as aged sixteen [16] years old while the 2nd Complainant [FRA] as aged eight [8] years old. It is therefore quite clear that the Complainants were minors as they were aged below eighteen [18] years. The ingredient of age is a critical component in these kind of offences as the subsequent sentences to be imposed upon conviction will heavily rely on it. The Court of Appeal in *Kaingu Elias Kasomo v Republic* Malindi Criminal Appeal No. 504 of 2010 [UR] held as follows:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

As the complainants' ages fell within the age bracket of 8 -16 years old, I find that they were minors as they were below eighteen years of age. I find that the Respondent proved the ingredient beyond any reasonable doubt.

13. As regards the aspect of penetration, As regards the aspect of penetration, section 2 of the *Sexual Offences Act* defines the same as the partial or complete insertion of the genital organs of a person into the genital organs of another person. In the case of *Mark Oiruri Mose v Republic* Criminal Appeal No. 295 of 2012 [2018] eKLR, the Court of Appeal held that the law does not require the proof of spermatozoa in the genital organ of the victim and that as long as there is penetration whether on the surface, the ingredient of the offence is demonstrated and that the penetration need not be deep inside the girl's organ. The 1st Complainant [PW1] stated in her evidence that the Appellant who was her father removed his penis and inserted into her vagina and ordered her to remain silent and also not to report to her mum. The 2nd Complainant [PW2] stated that her father forcefully entered their room and did bad manners to her and that she felt pain in her vagina which is the area where urine passes. The two complainants were later assisted to hospital for examination after they raised the complaints with their school teacher. The clinical officer [PW6] examined the two complainants. As regards the first complainant, he noted bruised vaginal wall, torn hymen scar and that lab tests revealed pus cells and epithelial cells. As regards the 2nd complainant, he noted redness and inflammation of the vagina, partly torn hymen and that lab tests revealed pus cells. He confirmed that the Complainants had been defiled as there was evidence of vaginal penetration. He produced the P3 forms, PRC forms, lab tests as exhibits. I find the evidence of the complainants and the clinical officer left no doubt that the

Complainants had been defiled and hence the Respondent proved the ingredient beyond reasonable doubt.

14. As regards the aspect of identity of the Appellant as the perpetrator, the two complainants were forthright in their testimonies that the person who defiled them was none other than the Appellant herein who was their biological father. The two complainants gave a vivid account of how their father used to sneak into the room where they slept and molest them. The two complainants also stated that the Appellant ordered them not to report the incidents to their mother. The 1st Complainant on being cross examined by the Appellant maintained that it was the Appellant who is her father and the one who had sex with her. The Appellant in his defence evidence maintained that he had been framed. However, I find it was highly unlikely for his wife to use her two vulnerable daughters as victims of defilement so as to settle any grudge with the Appellant. It is instructive that the Appellant's wife testified for the prosecution as PW3 and that even though she was at one point declared as hostile, she later agreed to cooperate with the prosecutor and presented her evidence and produced the birth certificates of the two minors as exhibits. She further stated that the Appellant who is her husband used to leave her in the house at night while claiming that he was going to check on the children. She further added that the two complainants were not liars. From the totality of the evidence of the Respondent's witnesses, it is clear that the Appellant was identified by the complainants as the person who had defiled them. The two complainants could not have mistaken their own biological father for someone else yet the Appellant had been living with them since they were born. I find this ingredient was proved beyond reasonable doubt.

15. As regards the sentence as regards sentence, the Court of Appeal in the case of Benard Kimani Gacheru v Republic Criminal Appeal No. 188 of 2000, the Court stated:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

16. The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owuor v Regina* [1954] 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.*, [1950] 18 EACA 147:
>
> "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
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> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. v Sher Shewky*, [1912] CCA. 28 TLR. 364."

Ogola s/o Owuor's case has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to date."

17. The trial court sentenced the Appellant to ten years imprisonment on the first count and twenty years imprisonment on the second count and further ordered that the sentences were to run consecutively as from 31/1/2022. The Appellant has contended that the sentences are excessive and harsh and seeks this court to interfere with the same. It is instructive to note that the provisions of the *Sexual Offences Act* provide for a minimum sentence of fifteen years on the first count while a sentence of life imprisonment on the second count. It is also instructive that the Respondent's counsel has not filed a notice of enhancement of sentence. Learned counsel for the Respondent in her submissions dated 10th February 2025 has urged the court to maintain the sentences as they are fair and reasonable in the circumstances. This court must take note of the fact that the actions of the Appellant in molesting his own children is detestable as he has psychologically messed their lives. A deterrent sentence is called for in the circumstances. I am inclined not to interfere with the sentences as the same are not excessive or harsh. Further, the court notes that the trial court ordered the sentences to run consecutively. Indeed the trial magistrate exercised her discretion in sentencing the Appellant. However, it turned out that the Appellant was a first offender and that the incidences happened almost around the same time as captured in the charge sheet. I find that an order that the two sentences to run concurrently is appropriate in the circumstances.

18. In view of the foregoing observations, it is my finding that the Appellant's appeal on conviction lacks merit and is dismissed. The Appellants appeal on sentence only succeeds to the extent that the two sentences shall run concurrently from the date of arrest namely 29/1/2022.

DATED AND DELIVERED AT SIAYA THIS 18TH DAY OF JULY, 2025.

D. KEMEI

JUDGE

In the presence of:

TOO - Appellant.

M/s Kerubo - Respondent.

Okumu - Court Assistant.