Aowa v Republic (Criminal Appeal E068 of 2024)
[2025] KEHC 12832 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E068 OF 2024

DK KEMEI, J

SEPTEMBER 19, 2025

BETWEEN

GABRIEL ONYANGO AOWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from the judgment of Hon. P.J.Nandi (S.P.M) delivered on 13th December 2023 at Bondo Chief Magistrates Court in Criminal case (SO) No. E057 of 2022)

JUDGMENT

1. The Appellant herein Gabriel Onyango Aowa was charged before the trial court with an offence of defilement contrary to section 8(1) as read with section 8 (4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of October 2021 and September 2022, in Nambo beach, Got Agulu sub-location, Bondo sub county within Siaya County, intentionally caused his penis to penetrate the vagina of D.N. a child aged 14 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of October 2021 and September 2022, in Nambo beach, Got Agulu sub-location, Bondo Sub County within Siaya County, intentionally touched the vagina of D.N. a child aged 14 years with his penis.

3. The matter proceeded to full trial whereupon the Appellant was convicted and sentenced to 20 years' imprisonment.

4. Aggrieved by the said conviction and sentence, the Appellant lodged his Petition of Appeal dated 10/12/2024 wherein he raised the following grounds:

i. That the trial magistrate erred in law and fact by relying on evidence that was not proved beyond reasonable doubt in convicting the Appellant.

ii. That the trial magistrate erred in law and fact by rejecting the defense of the Appellant which was cogent.

iii. That the trial magistrate erred in law and fact by finding that penetration was proved despite the flimsy and inadequate evidence by the prosecution

iv. That the trial magistrate erred in law and fact by imposing a sentence that was harsh without considering any other option of sentence.

5. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court to arrive at its independent findings and conclusion. (See Okeno vs. Republic [1972] EA 32). In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to make due allowance in that respect as was held in Ajode v. Republic [2004] KLR 81.

6. In determining this appeal also, I have to bear in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden is always 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 Vs Dpp [1935]AC 462 and Sawe versus Republic [2003] Eklr.

7. The prosecution called a total of four witnesses in support of its case while the Appellant was the only defense witness.

8. JAO (PW1) testified that she is the mother of the complainant. She stated further that the complainant is aged 14 years having been born on 16/5/2008 and that she produced her birth certificate serial number 89XXXX51 as P Exhibit 1. She went on to state that on 20/10/2022 at 10.00 Am she sent the complainant to the shop to buy sanitary pads when the complainant asked her if one should often go for her periods. That the Complainant informed her that she only had her periods once. That prompted her to take the complainant to a clinic for checkup. That the tests showed that the complainant was pregnant. That she confronted the complainant as to the identity of the person who was responsible for the pregnancy and that the complainant mentioned Gabriel who is the Appellant herein. That she reported the matter at Usenge police station from where the police escorted the complainant to Bondo Sub County hospital for further examination. That she identified the treatment notes and P3 form and also identified the Appellant in the dock as one Gaby who was a shop attendant in her area. On cross-examination, she stated that she had not known that the Appellant was the one who had impregnated the complainant.

9. D.N. (PW2) was the Complainant who testified on oath after a voire dire examination. She stated that during the period between October 2021 and September 2022, whenever her mother sent her to the shops, the Appellant would ask her to take home the items bought then return to the shop to meet him. That the Appellant was a shopkeeper in the neighborhood. That on such occasions, the Appellant would leave his father at the shop then take the complainant to his father's house which was behind the shop. That the Appellant would remove her uniform, touch her breasts, removed his trouser, lay on top of her and insert his penis into her vagina and have sexual intercourse with her. That the Appellant would then give her money such as Kshs 10/= and threaten her not to tell anyone of what had happened. It was her testimony that the same happened severally in October 2021 and severally in September 2022.

On cross examination, the Complainant stated that the Appellant defiled her behind the shop while his father was in the shop, when her mother had sent her to buy a soda and that the Appellant used to give her money.

10. No. 113885 PC Chepng'eno Irene (PW3) was the investigation officer. It was her testimony that on 20/10/2022 at 1520hrs the complainant went to report the incidence of defilement while in the company of her parents. That she booked the report and escorted the complainant to Bondo Sub County hospital for further examination where a P3 was duly filled. That the perpetrator was well known to the complainant as he was a shopkeeper at the neighborhood. That the assailant was then arrested. On cross examination, she stated that PRC form was filled at the station, HIV was positive and no HIV test was conducted on the Appellant.

11. Henry Otoge (PW4) was the clinical officer who examined the complainant at Bondo Sub County Hospital. That on examination, the hymen was broken, there was no discharge and that epithelial cells and HIV test was positive. That he concluded that there was evidence of unprotected sex. That he signed the P3 form on 21/10/2022 and produced as P exhibit 2. That the Ultra sound report showed pregnancy of 6 weeks 2 days which he produced as P Exhibit 4 while the PRC form was produced as P exhibit 5.

    On cross examination, he stated that the complainant was defiled severally. That he did not collect specimen from the Appellant he was not present. That if the victim was positive, then chances of infecting the perpetrator were 90%.

12. That marked the close of the prosecution case. The court later ruled that a prima facie case had been established by the prosecution and thus the Appellant was placed on his defense. He opted to tender an unsworn statement.

13. Gabriel Onyango Aowa (DW1) gave an unsworn statement that he was a shopkeeper at Osieko. That he knew the complainant as she was a resident of Osieko. It was his testimony that he did not defile or impregnate the complainant. That he was HIV negative while the complainant was HIV positive. That he was not the father of the complainant's unborn child. That the Complainant must have been with other men.

14. That marked the close of the defense case.

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

16. The Appellant submitted that the Respondent did not prove their case beyond reasonable doubt. That penetration was not proved. It was the learned counsel's submissions that the court ought to have recorded the reasons for believing the complainant (PW2). The Appellant relied on several cases in his submissions including but not limited to TIPM V Republic [2023] KEHC 592 (KLR) HC at Bungoma; John Mutua Munyoki v R [2017] KECA 376 (KLR) Arthur Msila Manga v R [2016] KECA 691 (KLR).

17. It was further submitted that the ingredients of the offence were not proved by the Respondent and that the trial court erred and caused a miscarriage of justice when it amended the charge sheet suo moto during the judgement thereby denying the Appellant his constitutional right as he ought to have been allowed to recall witnesses. Further, that the charge sheet was defective as the age of the complainant was indicated as 14 years while the charge preferred is under section 8(4) of the *Sexual Offences Act* which presupposes the age of 16 years old. It was thus the submission of counsel that the charge was not proved beyond the threshold of proof by the prosecution.

18. The Respondent submitted that it had proved the charge against the Appellant beyond reasonable doubt. It submitted that the sentence was not harsh but commensurate to the offence. The Respondent thus prayed that the appeal be dismissed.

19. I have considered the trial court proceedings plus the rival submissions on appeal. I find the issue for determination is whether the prosecution has proved the charge of defilement against the Appellant beyond reasonable doubt.

20. Section 8(1) and (4) of the *Sexual Offences Act* No. 3 of 2006 stipulates as follows:

> 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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> (2) 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.
>
> (3) 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.
>
> (4) A person who commits an offence of defilement with a child between the ages of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

21. The burden of proof lies on the prosecution and that it never shifts to the Appellant herein. Under Section 107 of the *Evidence Act* (Cap 80), the burden of proof is 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.

22. The prosecution must prove its case against an accused person 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 [1935] AC 462 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.

23. That position and the holding in Woolmington (supra) have 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:
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> '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.'

24. The Court of Appeal in the case of Simon Mwangi Wambui v Republic [2014] eKLR stated the duty of the prosecution in criminal cases on burden of proof following Woolmington (supra):

> 'We agree with counsel for the appellant that it is the duty of the prosecution to prove the guilt of an accused person and that if at the end of the whole case there is reasonable doubt created by the evidence given by either the prosecution or the defense as to the guilt of the accused then the prosecution has not made out the case and the accused is entitled to an acquittal. That is the principle that emerges from the House of Lords decision in Woolmington v DPP [1935] All E R 1 to which we were referred.'

25. In a charge of defilement, the prosecution must prove three ingredients namely, the age of the complainant (must be a minor), penetration (partial or complete) and the identity of the perpetrator.

26. As regards the aspect of the age of the Complainant, the mother to the complainant (PW1) produced the complainant's birth certificate which indicated that she was born on 16/5/2008. This thus placed her at 14 years old at the time of the offence. This thus confirmed that the complainant was a minor within the meaning of section 2 of the Children's Act 2001 which defines a child as any person below the age of 18 years. I find that this ingredient was duly proved by the Respondent beyond any reasonable doubt.

27. As regards the aspect of penetration, the same is defined under section 2 of the *Sexual Offences Act* as follows:

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person".

28. The complainant (PW2) in her evidence testified that:

> 'He used to remove my uniform, touch my breasts, removed his trouser, lay on top of me and inserted his penis into my vagina and had sexual intercourse with me.'

29. The clinical officer (PW4) testified that upon examination of the complainant, he noted inter alia; hymen was broken, there was no discharge, epithelial cells and HIV test was positive. He concluded that there was evidence of unprotected sex. He signed the P3 form on 21/10/2022 and produced it as P exhibit 2. That the Ultra sound report showed pregnancy of 6 weeks 2 days which he produced as P Exhibit 4, while the PRC form was produced as P exhibit 5. On cross examination, he stated that the complainant was defiled severally. That he did not collect specimen from the Appellant as he was not present. That if the victim was HIV positive, then chances of infecting the perpetrator were 90%. From the evidence of the complainant and the clinical officer, it is clear that the ingredient of penetration was proved by the Respondent beyond any reasonable doubt.

30. As regards the aspect of the identity of the perpetrator, PW2 testified that the Appellant was a shopkeeper in their neighborhood at Osieko. The same statement was affirmed and corroborated by the Appellant (DW1) who stated that he knew the complainant very well as she was a resident of Osieko. This was therefore a matter of identification by recognition. In any event, the incidences of the defilement used to take place during the day and that the complainant knew the Appellant quite well as he was not a stranger to her.

31. In Wamunga vs Republic (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

32. Similarly, the Court further cited its own decision in Abdala bin Wendo & Another vs Republic (1953), 20 EACA 166 where it held:

> " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

33. In the case of Reuben Taabu Anjononi & 2 others vs Republic (1980) Eklr by the Court of Appeal in Nairobi held that :

> " .... recognition not identification of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant..."

From the above, it is clear that the Appellant was not a stranger to the Complainant. The Complainant was able to recognize the Appellant as the person who had defiled her on the many occasions whenever she went to buy items from the Appellant's family shop in the neighbourhood.

34. Even if the case would have rested entirely on circumstantial evidence, the Appellant could still have been placed at the scene of crime. In the case of Abanga Alias Onyango –Vs- R, Criminal Appeal No. 32/1990, the court stated that circumstantial evidence should be such that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused. The complainant was categorical that it was the Appellant who had had sexual intercourse with her for a long period.

35. In his defense, the Appellant merely denied having defiled the complainant. He averred further that he was HIV negative as opposed to the complainant who was confirmed by PW4 to be HIV positive. I find that such a defence would not help the Appellant in any way since the element of penetration entails only the partial or complete insertion of the Appellant's genital organ into the genital organ of the complainant. It matters not whether the complainant later turned out to be HIV positive while the Appellant turned HIV negative. Further, the issue of pregnancy was not material in the matter as the same was for purposes of paternity if such was needed. Further, it is noted that the Appellant was not charged with an offence of deliberate transmission of HIV. Even though the Appellant denied being the father of the unborn child, the issue of his identity as the person who had defiled her is not in dispute. It is possible that the complainant got the infection from birth or from other factors but the complainant was forthright about the Appellant being the person who had defiled her severally and who used to give her money to buy her silence. It is also instructive that the medical notes of the

Appellant were not availed for the trial court's perusal and consideration. Iam satisfied by the evidence presented by the Respondent that the Appellant was squarely placed at the scene of crime and the perpetrator of the crime. I find the Appellant's defence evidence did not shake or cats doubt upon that of the Respondent in any way.

36. The Appellant has taken great issue with the trial court's suo moto amendment of the charge at the judgement stage as he was denied an opportunity to recall witnesses. Indeed, amendments of charge sheets at any stage of proceedings requires that the amended charge sheet be read over again to an accused and who is granted an opportunity to recall any witnesses. However, the circumstances in the matter herein appear different in that from the word go, the Appellant was aware that he faced a charge of defilement of a girl aged 14 years old and that he was eventually to be convicted if proved guilty and sentenced to serve the period provided for under section 8(4) of the *Sexual Offences Act*. Indeed, the Appellant would have been sentenced to a lesser sentence but for the age of the complainant. The Appellant participated in the trial and cross-examined witnesses at length and therefore he did not suffer any prejudice at all. It is noted that the issue of the age of the minor became known by the Appellant even as he went through the trial and thus the finding by the learned trial magistrate that the correct charge sheet ought to have been section 8(3) instead of section 8(4) of the *Sexual Offences Act* was quite in order. In any event, the defect in the charge sheet was curable under section 382 of the Criminal Procedure Code. I find that the Appellant did not suffer any prejudice. Consequently, the finding on conviction by the trial court was quite sound and must be upheld.

37. As regards the sentence, section 8(1) to 8(4) of the *Sexual Offences Act* No. 3 of 2006 stipulates as follows:

> 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) 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.
>
> (3) 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.
>
> (4) A person who commits an offence of defilement with a child between the ages of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

38. From the foregoing analysis, the applicable law herein is section 8(3) of the Act which stipulates thus 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.

39. The Court of Appeal in the case of Benard Kimani Gacheru v. Republic Criminal Appeal No. 188 of 2000 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."

40. The position was stated succinctly by the Court of Appeal for East Africa in the case of OGOLA s/o Owuor Vs 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 E.A.C.A 147:
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> > "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) C.C.A. 28 T.L.R. 364."

41. 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.

42. In the instant case, the trial magistrate imposed a jail term of 20 years. Guided by the principle of stare decicis from the above cases, i find that the sentence imposed by the trial magistrate legal and commensurate to the offence charged. I therefore find no justifiable reason to interfere with his discretion. The sentence is likewise upheld. It is instructive that the conduct of the Appellant in seducing and defiling a young and vulnerable child has had serious psychological effects and trauma on the complainant. This calls for a deterrent sentence. It is noted that the Appellant posted bail and remained out on bond throughout the trial and hence the application of section 333(2) of the Criminal Procedure Code does not apply.

43. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2025.

D. KEMEI

JUDGE

In the presence of:

Gabriel Onyango Aowa.....Appellant

Salim Odeny.....for Appellant

M/s Mumu.....for Respondent

Okumu.....Court Assistant