



**Were v Republic (Criminal Appeal E044 of 2023)
[2025] KEHC 12883 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E044 OF 2023
DK KEMEL, J
SEPTEMBER 19, 2025**

BETWEEN

MORRIS OBONDO WERE APPELLANT

AND

REPUBLIC RESPONDENT

(Arising from the judgment of Hon. Limo B. Benjamin (P.M) delivered on 15th September 2023 at Siaya Chief Magistrates Court in Criminal Case (S.O) No. E017 of 2022)

JUDGMENT

1. The Appellant herein Morris Obondo Were alias Jakano Japolo was charged with an offence of defilement contrary to Section 8(1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 20th February 2022 at [Particulars Withheld] Nyamninia sub location, within Gem Sub County of Siaya County in the Republic of Kenya intentionally and unlawfully caused his penis to penetrate the vagina of AAM a child aged 9 years.
2. He was likewise charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on the 20th February 2022 [Particulars Withheld] Nyamninia sub location, within Gem sub County of Siaya County in the Republic of Kenya intentionally touched the vagina of AAM a child aged 9 years with his penis.
3. The appellant denied the charges and the matter proceeded to full trial whereupon he was convicted and sentenced to 40 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant has appealed to this court and raised the following grounds of appeal:



- i. That the trial magistrate erred in law and fact by failing to observe that the prosecution failed to prove its case beyond reasonable doubt and thus the conviction went against the evidence adduced.
- ii. That the trial magistrate erred in law and fact by basing the conviction on contradictory evidence of the prosecution witnesses.
- iii. That the trial magistrate erred in law and in fact by imposing a sentence which is unconstitutional due to its mandatory nature.
- iv. That the trial magistrate failed to consider the Appellant's sworn statement of defense.

The Appellant thus prays that the appeal be allowed, the conviction be quashed and the sentence set aside.

5. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court so as 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, I have to bear in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden of proof 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 the case of *Woolmington Vs Dpp* [1935] AC 462 as well as in *Sawe versus Republic* [2003] eKLR.
7. The prosecution called six witnesses in support of its case whose evidence is as follows.
8. AAM (PW1), the complainant herein, testified on oath that on the material day namely 20th February 2022, she was on her way to [Particulars Withheld] shopping center having been sent to pick her school uniforms. That on her way, she met the Appellant who was well known to her and who offered her a lift on his motor bike to which she agreed and boarded it. It was her testimony that upon reaching Sirembe shopping centre the Appellant went past the trading centre and took her to a bush where he removed her clothes and removed his clothes as well. That the Appellant then took his penis and inserted it into her vagina while he was on top of her. That she felt pain and she bled from her vagina. That she raised alarm and that people came to her rescue while the Appellant ran away. She stated that she knew the Appellant as Japolo. That she identified her birth certificate which was produced as exhibit 2.
On cross examination, she stated that the Appellant took her to Sirembe during morning hours.
9. RAO (PW2) testified that she was the grandmother to the complainant and that she had sent her to Sirembe shopping centre and when she did not return home, she reported to the area chief. That on 21/2/2022 while at her home, the chief went to inform her that the minor had been found at Yala centre by the chief. That the minor was brought home and who informed her that the Appellant had defiled her. She took the complainant to hospital where the minor was examined and x-ray done. Later, she reported to Sirembe police post and later to Yala police station. She identified the P3 form, x-ray films, treatment notes and PRC form filled at the hospital.
On cross examination, she confirmed knowing the Appellant so well as a friend to her brother-in-law.
10. Victor Hosea (PW3) a nurse from Sirembe dispensary testified that he is the one who attended to the complainant and signed the P3 form. He stated that upon arrival at the facility, she had changed clothes. Upon examination, there were injuries on the pelvic region. The injuries were about seven days old. That the incident happened at a far place and that there was no treatment given prior to that day.



On examination of the genitalia, there were bruises on the labia majora, labia minora and clitoris and the vagina. That the hymen was absent and that there was a fresh healing hymen. He formed the opinion that the minor had been defiled. That he treated her with some medication then referred her to Siaya County Referral Hospital. That the assailant was not presented for examination. The P3 form dated 1/3/2022 was produced as P. exhibit 1, PRC form dated 28/2/2022 produced as P. exhibit 2, treatment notes produced as P. exhibit 3, copy of ultra sound produced as P. exhibit 4 and x-ray request form as P. exhibit 5.

On cross examination, he stated that there was penetration of the vagina by an adult. That the vagina had discharge with blood from the injuries.

11. No. 11xxx PC (W) Mary Njoki (PW4), attached to Sirembe police post, was the investigation officer in the matter. She testified that on 28/2/2022, the matter was reported to the station to the effect that the complainant had been defiled by a person well known to her after being given a ride. That the complainant was later rescued by some people and taken to the village elder, where she spent two nights before her people were found. She was then escorted to the chief's office, where her Aunt came and picked her, having been sent by the minor's grandmother. That the minor was taken to her grandmother's home on 26/2/2022 and later on 28/2/2022 escorted to a dispensary for examination and treatment. That she booked the report and issued a P3 form, which the clinical officer duly filled. That she traced the accused at his home and that the complainant identified him because he was well known to her and who was arrested and charged.
12. Beatrice Amolo (PW5) testified that she was the Assistant chief of Nyamninia sub-location. It was her testimony that she received a call from a village elder in Miranda area that a minor from [Particulars Withheld] village had been taken there by boda boda men. She contacted the assistant chief Sirembe village who traced the grandmother of the minor. That the grandmother then sent her daughter who is an aunt to the minor and who picked her from her (PW5's) home.
13. George Okoth (PW6) testified that he was a village elder. It was his testimony that on 20/2/2022 at 7.00 PM, he reached home and found a minor who had been rescued by boda boda riders. He interviewed her and he called the area chief. That her parents (grandmother) was then traced and she was handed over to her.
14. That marked the close of the prosecution case. The trial court later ruled that the Respondent had established a prima facie case and thus placed the Appellant on his defence and that the Appellant elected to tender a sworn testimony.
15. Morris Obondo (DW1) testified that on that material day on 20/2/2022, he went to his mining site until 28/2/2022 when he returned when he was arrested by the area assistant chief. He still denied the charges and insisted that they were a fabrication.
16. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied. the appellant submitted that the sentence meted out was harsh and excessive in the circumstances and that the said sentence ought to run from the date of arrest.
17. The appellant submitted that the evidence presented by the prosecution was full of contradictions and that the charge was not proved against him beyond any reasonable doubt. It was further submitted that the sentence imposed was harsh and excessive in the circumstances and that the said sentence ought to run from the date of arrest.
18. I have considered the record, the proceedings as well as the submissions filed and find that the issue for determination is whether the Respondent proved its case against the Appellant.



19. The burden of proof lies on the prosecution; 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 as held in *Woolmington Vs Dpp* [1935]AC 462 and *Sawe versus Republic* [2003] Eklr.
20. 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* [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 a reasonable doubt.
21. 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:

'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.'

22. In the case of *Charles Wamukoya Karani vs. Republic*, Criminal case No. 72 of 2013 the court held that:

“the critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant.”

23. On the issue of age, PW1 produced a birth certificate as exhibit 2 which showed her date of birth as 20/12/2012. This means that at the time of the incident in February 2022, the complainant was 9 years 2 months. This ingredient was therefore sufficient proved by the Respondent beyond reasonable doubt.

24. In *Kaingu alias Kasomo vs Republic* Criminal Appeal No. 54 of 2010 the Court of Appeal sitting in Malindi held as follows:

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



25. The second ingredient to be proved is penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as follows:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;’

In the instant case, the complainant (PW1) testified that:

“...he took me to a bush. He got hold of my hand. He removed my clothes. I had a panty and a dress. It is the accused who removed my clothes. The accused also removed his clothes. From there, the accused removed his penis and inserted it into my vagina while lying on top of me...” (page 8 line17- 21 of the proceedings).

PW3 the clinical officer also had this to say:

“...the genitalia had injuries of bruises on labia majora, labia minora, and clitoris...The hymen was absent. There was a fresh healing of the hymen. It was broken. There was penetration.”

(page 21, lines 1-4 of the proceedings).

On cross-examination, PW3 stated:

“...There was penetration of the vagina by an adult...The vagina had a discharge with blood.” (page 21, line 21; and page 22, line 2 of the proceedings).

26. Given the above, i am satisfied that the element of penetration was sufficiently proved by the Respondent.

27. The other ingredient is about the identity of the perpetrator. PW1 testified thus:

“I know the accused well. All children at school know him. He is called Japolo...” (page 8, lines 22-23 of the proceedings)

On cross-examination, PW1 stated:

“On 20/2/2022, we met. You defiled me. I know you...You took me to Sirembe at morning hours” (page 9, line 19; and page 10, line 2 of the proceedings)

28. 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.”

29. 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...”



30. From the evidence on record, i find that the perpetrator was known to the complainant and thus recognized him and who was later arrested. The incident likewise happened during the day which made it possible for the complainant to clearly see and recognize her assailant. The Appellant did not dispute the issue of recognition by PW1 and that his alibi did not dislodge the evidence presented by the Respondent.
31. Even though there was no eye witness in this matter, the testimony of the complainant was so clear and flawless. She innocently accepted to be given a lift to Sirembe shopping centre unknown to her that the Appellant had ulterior motives. Despite the fact that she was taken far away from her village, she was able to explain herself to her rescuers who managed to take her back to her home. All along she was aware of her surroundings. I therefore do not doubt her balance of mind and fair judgment at the time for knowing the person whom she had met and who defiled her in a bush far away from her home.
32. In *J.W.A. vs. Republic (2014)eKLR* the Court of Appeal observed that :
- “We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act* clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High court in concurring with the findings of the trial magistrate”
33. From the foregoing analysis, i find the evidence of the complainant credible and reliable in the circumstances and which was corroborated by the rest of the witnesses. The Appellant’s alibi did not shake the evidence of the Respondent which was overwhelming against him. Hence, the finding on conviction by the trial court was quite sound and must be upheld.
34. As regards sentence, section 8(1)(2) of the *Sexual Offences Act* stipulates thus: 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.
35. 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.”



36. In the Republic v. Joshua Gichuki Mwangi, Supreme Court Petition No. E018 of 2023 [2024] KESC 34 KLR, the Court explicitly set out the difference between mandatory sentences and minimum sentences as follows:

‘Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentences is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences.’

37. Guided by the above precedents, I find that the law under section 8(2) of the *Sexual Offences Act* provides for a mandatory sentence termed as ‘imprisonment for life’. In the instant case, the trial court imposed a jail term of 40 years’ imprisonment. It is noted that the Respondent did not seek to enhance the sentence by issuing the requisite notice. I am therefore inclined not to interfere with the sentence. It is instructive that the Appellant had waylaid the complainant while on her way to Siremba trading centre to collect her uniform and then defiled her and which not only caused her physical pain but also psychological trauma. The Appellant deserves a deterrent sentence so as to deter other would be offenders. It is noted that the Appellant did not post bail during the trial and hence the period spent in custody must be factored in the sentence pursuant to the dictates of section 333(2) of the Criminal Procedure Code. It is noted that the Appellant was arrested on 28/2/2022 and hence the sentence of forty years’ imprisonment shall commence from the said date of arrest namely 28/2/2022.

38. In view of the foregoing analysis, it is my finding that the Appellant’s appeal on conviction lacks merit and is dismissed. The appeal on sentence only succeeds to the extent that the sentence of forty years’ imprisonment shall commence from the date of arrest namely 28/2/2022.

It is so ordered

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

D.KEMEI

JUDGE

In the presence of:

Morris Obondo Were.....Appellant

M/s Mumu.....for Respondent

Okumu.....Court Assistant

