



REPUBLIC OF KENYA



**Mumbe v Republic (Criminal Appeal E077 of 2022)
[2025] KECA 1632 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1632 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E077 OF 2022
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
OCTOBER 3, 2025**

BETWEEN

GEORGE OMWANDA MUMBE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kisumu
(D.S. Majanja, J) dated 10th April, 2017 in HCCRA No. 7 of 2013)*

JUDGMENT

1. The appellant George Omwanda Mumbe was charged before the Chief Magistrate's Court at Kisumu with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 1st August 2012 and 21st September 2012 at Obunga estate within Kisumu County, the appellant intentionally caused his genital organ to penetrate the genital organ of YA¹, a child aged 8 years.
2. The appellant pleaded not guilty to the charge, and a trial ensued. At the conclusion of the trial, the appellant was found guilty of the charge and sentenced to life imprisonment.
3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court at Kisumu. The High Court (Mojana, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 10th April 2017.
4. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised three (3) grounds in his self-crafted Memorandum of Appeal, all of which impugned both the conviction and sentence.
5. Briefly, the facts of the prosecution case were that on 22nd September, 2012, CA [C] the complainant's aunt, who testified as PW2, was resting on the ¹ Initials used to protect the minor's identity couch



when YA the complainant, who testified as PW1 walked in. C noticed that the complainant walked with her legs apart and she seemed to be in pain. She decided to inspect the complainant's private parts and observed that they were swollen and oozing a discharge. She informed the complainant's mother, and later went to get some medicine. On the next day she asked the complainant what had actually happened to her and she opened up to her and informed her that the appellant had sexually assaulted her when she went to wash utensils on the promise that he would give her Kshs. 5/-. The complainant's mother called the appellant and asked him about it but he denied having sexually assaulted the complainant but gave her Kshs.300/- to take her to hospital. C and the complainants' mother took her to hospital and later reported the matter to the police.

6. George Muita, PW3, a Clinical Officer at Kisumu District upon examining the complainant noted a yellowish discharge, lacerations on her private parts and her hymen was absent. A further investigation revealed that the complainant had been infected with a urinary tract infection and concluded that the complainant had been defiled.
7. Sergeant Simon Cheruiyot, PW4, the investigation officer from Obunga Police Station recorded the witness statements and later arrested and charged the appellant with defilement.
8. Placed on his defence, the appellant gave unsworn defence, denied the offence, and instead gave a narration of the events of 21st September, 2012 upto 27th September, 2012 when he was arrested.
9. At the plenary hearing of this appeal, the appellant appeared in person and relied on his written submissions to argue that he was not accorded a fair trial. He points out that both the trial court and the 1st appellate court failed to inform him of his right to legal representation. The appellant complains further that his trial was not fair as it was heard and determined before a resident magistrate who did not have jurisdiction as the matter attracted a penalty of life imprisonment.
10. The appellant faults both the trial court and the 1st appellate court for failing to properly analyse the evidence. That from the testimony of C, the complainant had health issues which were well known to the mother as she suffered from recurrent infections.
11. Regarding the missing hymen, the appellant submits that the clinical officer was wrong in concluding that there was defilement yet the hymen can be lost in different ways. Further, the lacerations noted could be as a result of the recurrent infection suffered by the complainant as such the prosecution's evidence on penetration was not conclusive.
12. On sentence, the appellant complains that the sentence of life imprisonment meted against him is harsh and excessive in the circumstances as the said sentence does not balance between the objectives of sentencing; that despite supporting the objectives of retribution and deterrence, it does not give room for rehabilitation owing to its indeterminate nature.
13. The appeal was opposed by the respondent who contends that the issue of legal representation was never raised before both the trial court and the High Court, thus not properly before this Court. From the record, the appellant chose not to cross examine C, but cross examined the clinical officer and Sergeant Cheruiyot. Further, there is no prejudice shown that the appellant suffered for lack of legal representation. Relying on the case of *Manyeso vs. Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment)* the prosecution maintains that legal representation is mandatory only where it is shown that the accused person will suffer substantial injustice. The appellant has not proved the same.
14. Regarding the complaint that the plea was taken before another court other than the one which heard and determined the case, it is submitted that what is fundamental is that the entire evidence



was recorded by one judicial officer. Section 200 of the Criminal procedure Code is applicable where matters are part heard in terms of evidence recording by different judicial officers. However, that was not the case herein.

15. In response to the allegations that the decisions were discriminatory and were anchored on falsehood and was not proved beyond reasonable doubt, the respondent submits that the issues are factual in nature being raised before the court and should not be entertained.
16. It is further submitted that no evidence was presented before the trial court to suggest that C harbored any grudge or ill will toward the appellant; that this issue was not raised during her cross-examination and remains unsupported. It is contended that C's actions, driven by concern for the complainant's well-being upon observing her in pain, cannot be construed as a witch hunt. Moreover, that the complainant's final testimony confirmed that her condition resulted from defilement and not "Orianyancha" (bacterial thrush affecting the genitalia and tongue), a fact corroborated by the expert medical evidence of the clinical officer. It is also argued that the medical opinion by the clinical officer Muita constituted expert evidence which can only be rebutted by counter-expert testimony and not by speculative claims from the appellant who lacks medical expertise.
17. Lastly, on sentence, the respondent relies on the case of Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34(KLR) (12 July 2024) (Judgment) where the Supreme Court affirmed the mandatory sentences in the [Sexual Offences Act](#) holding that for as long as section 8 of the [Sexual Offences Act](#) remains in our statutes unattended, then the mandatory sentences therein are legal. The respondent urged the court not to interfere with the sentence.
18. This being a second appeal, the scope of the Court's mandate is provided under section 361(1) of the Criminal Procedure Code, which is limited to addressing matters of law. In essence, facts are to remain as established by the two courts below unless the conclusions made are based on the wrong application of the law, or are not supported by the evidence on record. This duty was expressed by the Court in Adan Muraguri Mungara vs. Republic [2010] eKLR as follows:

“As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”
19. Having considered the record, the grounds of appeal, and the rival submissions set out above and in light of this Court's mandate, the issues of law that fall for determination are whether the prosecution proved its case to the required standards and whether the sentence was proper.
20. Was the offence proved? It is trite that to reach a finding of defilement, the prosecution must establish three main ingredients which are; the age of the victim, penetration and the proper identification of the perpetrator.
21. These ingredients are provided for under sections 8(1) and (2) of the [Sexual Offences Act](#) which stipulates;
 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”.
22. Regarding the first element of age, this Court in the case of Justin Kubasu vs. Republic [2020] eKLR cited Edwin Nyambogo Onsongo vs. Republic [2016] eKLR in which the Court cited with approval Mwolongu Chichoro Mwanyembe vs. Republic, Mombasa Criminal Appeal No. 24 of 2015, that;

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”
23. In the instant appeal, the complainant gave her age as 9 years at the time of testifying. The clinical officer confirmed that the complainant was 8 years as at the date of examination; and produced the P3 form as an exhibit. The child’s health card produced showed that she was born on 11th November 2003. This was sufficient credible evidence that proved the age of the minor complainant as 8 years at the time of sexual assault.
24. As to whether penetration was proved, penetration is defined under Section 2 of the *Sexual Offences Act* as “the partial or complete insertion of the genital organs of a person, into the genital organs of another person.” To establish the charge of defilement against the appellant, it must be proved that there was an act of penetration that is, the partial or complete insertion of male genital organs, into that of the minor complainant.
25. In *Bassita vs. Uganda S. C. Criminal Appeal No. 35 of 1995* the Supreme Court of Uganda held that:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim’s own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”
26. The complainant’s evidence was that the appellant used to call her in his house to help him with clean his utensils. After cleaning the dishes, the appellant would call the complainant to his bed, remove her clothes and his, he would place the complainant on her back, lie on her and would do what she described as bad manners. Every time this happened, the complainant felt pain. The complainant emphasized that the appellant would put “kitu yake” (his thing) in her as she pointed to her groin to the court; and confirmed that the appellant defiled her many times.
27. Her evidence was consistent with that of the clinical officer who examined her private parts and noticed that there were lacerations in her vagina; confirming that there were injuries on the minor complainant’s vagina; and that pus cells were present. The trial court found her testimony to be cogent and consistent as it was corroborated by the medical report which indicated that she had bruises on her labia minora and the hymen was absent. There was, therefore, sufficient credible evidence that penetration had taken place.



28. As regards the identity of the person who committed the offence, the appellant was identified by the minor complainant who knew him well. The complainant was categorical that the appellant was a neighbour and a husband to F. Identification was therefore by recognition.

29. This Court in *Longole & another vs. Republic* (Criminal Appeal 5 of 2016) [2024] KECA 483 (KLR) (9 May 2024) (Judgment) cited with approval the decision in *Rotich Kipsongo vs. Republic* [2008] eKLR where the Court held that:

“This Court had occasion to deal with the issue of identification by recognition in several cases, one of them being *Kenga Chea Thoya vs. Republic* Criminal Appeal No. 375 of 2006 (Unreported) where it said, 'On our own re-evaluation of the evidence, we find this to be a straightforward case in which the appellant was recognized by the witness (PW1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger see *Anjononi vs. Republic* [1980] KLR 59.”

30. Similarly, in *Waingwe vs. Republic* (Criminal Appeal 142 of 2016) [2023] KECA 401 (KLR) (31 March 2023) (Judgment) this Court held that:

“It is commonplace that recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

31. The identification was proper, thus this element was also established to the required standard. In view of the foregoing findings, the offence was proved to the required standard and the first appellate court properly reconsidered and re-evaluated the evidence and came to the correct conclusion that the charge of defilement was proved to the required standard against the appellant, and his defence was properly rejected. His conviction is safe.

32. The appellant raised the ground that touched on his right to legal representation. The issue was not raised before the trial court, nor did it form part of the grounds for appeal before the High Court. The appellant is, accordingly precluded from raising it in this appeal. In the case of *John Kariuki Gikonyo vs. Republic* [2019] eKLR this Court differently constituted cited with approval the decision in *Alfayo Gombe Okello vs. Republic* [2010] eKLR Criminal Appeal No. 203 of 2009 where it was held as follows:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

33. In regard to the appeal against sentence, Section 8(2) of the *Sexual Offences Act* provides the penalty of mandatory life imprisonment for the offence of defilement if the victim is below the age of 11 years. The appellant was sentenced to life imprisonment which he challenges it is manifestly harsh and excessive in the circumstances.

34. Section 8 (2) of the *Sexual Offences Act* provides as follows:

“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 appellant was sentenced to life imprisonment which is the mandatory sentence provided under Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*. Sentencing is a discretionary exercise by the trial court. An appellate court will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in *Bernard Kimani Gacheru vs. Republic* (2002) eKLR stated thus:

“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. The appellant was sentenced to life imprisonment which is the mandatory sentence provided under Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*. The sentence was therefore lawful.

37. In his appeal before the High Court, it is evident that the appellant did not raise any issue against his sentence nor did he challenge mandatory life sentence. The appellant is raising it before this court for the first which he is precluded from raising new grounds at the second appellate stage.

38. On mandatory sentences, the Supreme Court in the case of *Republic vs. Joshua Gichuki Mwangi* Petition No. E018 of 2023 while affirming the lawfulness of minimum/mandatory sentences in the *Sexual Offences Act* stated that:

“(57) In the *Muruatetu* case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...

(62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in *Muruatetu* which must remain binding to all courts below.”

39. Owing to the above reasons, this Court is precluded from interfering with the sentence on the ground of severity. The upshot is that the appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER, 2025.

ASIKE-MAKHANDIA



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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

