



**Onyango alias Jaringa v Republic (Criminal Appeal E125 of 2022)
[2025] KECA 1638 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1638 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E125 OF 2022
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
OCTOBER 3, 2025**

BETWEEN

STEPHEN OMONDI ONYANGO ALIAS JARINGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of High Court of Kenya at Kisumu
(Kamau, J.) dated 30th March, 2022 in HCCRA No. 76 of 2019)*

JUDGMENT

1. This is a second appeal against the judgment of the Senior Principal Magistrate's court at Winam law Courts. The appellant had been charged thereat with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences "SOA" The particulars of the offence were that the appellant unlawfully and intentionally caused his penis to penetrate the vagina of IAO, (real name withheld), a child aged nine years. An alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act was also preferred. Since the appellant was neither convicted nor sentenced on the alternative count, we need not belabor the issue.
2. The appellant denied the charges and his trial ensued. In a bid to prove its case against the appellant, the Prosecution lined up several witnesses. In essence, IAO on the material day was on her way to the shops when the appellant, who was a neighbour called her and gave her some money to buy him some mandazi. She did so but as she delivered the mandazi to him at his house, the appellant suddenly grabbed and dragged her into the house and sexually assaulted her. Because of the pain she was experiencing, IAO screamed, attracting the attention of the neighbours in the plot, among them PW4, POO, who came and stood at the door of the appellant's house. On seeing him, the appellant ran out of the house. IAO maintained that she knew the appellant as a neighbour, his real name being Stephen Omondi Onyango, with the pseudonym, Jaringa.



3. PW2, CA, (real name withheld), IAO's mother on the material day was called by one, Collins Omondi Odongo, to come home immediately. When she arrived, she found IAO in distress who immediately told her that Jaringa, had sexually assaulted her. She rushed her to Kondele Police Station where she reported the incident who in turn referred them to Jaramogi Oginga Odinga Teaching and Referral hospital

“JOO'TRH” for examination and treatment. PW3, Collins Omondi Odongo, a clinical officer attached to JOO'TRH, confirmed upon examination of IAO that she had actually been sexually assaulted. He tendered in evidence a Post Rape Care (PRC) Form confirming the Sexual assault.
4. PW4, POO, a paternal uncle to IAO had sent her to the nearby shops to buy him soap. However, she did not return immediately. When he went out to check, he heard someone crying from the appellant's house. In the company of another neighbour, David Mond, they went to the house. As they approached the house the appellant suddenly came out and fled. Upon entering the house, they found IAO naked and crying. She immediately told them what had transpired.
5. PW5, PC Samuel Osero the investigating officer, received a complaint by IAO in the company of her mother, PW2 who reported that she had been sexually assaulted by one, Jaringa. He recorded their statements and issued a P3 form. The P3 form was subsequently filled by Dr. Joy Odhiambo which was however tendered in evidence by PW6 Dr. Ombok Lucy, because she was away on further studies. The P3 confirmed the age of IAO as well as the Sexual assault. The appellant came to know that she was being investigated for the offence and subsequently presented himself to the police and was arrested and charged as aforesaid.
6. Put on his defence, the appellant raised an alibi claiming that on the day in question he worked the whole day at Dubai complex in Nyamasaria area of Kisumu County and was nowhere near the scene of crime.
7. The trial court, upon considering the evidence, found that the Prosecution had proved all the ingredients of the offence charged. The court also found that the appellant's alibi defence was outweighed by the strong Prosecution case. He was consequently convicted of the main charge and sentenced to life imprisonment in terms of Section 8(2) of the SOA.
8. Aggrieved, the appellant appealed to the High Court of Kenya at Kisumu on grounds that: the charge sheet was defective; his right to a fair trial was violated; the Prosecution failed to prove its case beyond reasonable doubt; there were contradictions and inconsistencies in the prosecution's evidence, and the sentence imposed was manifestly harsh and excessive.
9. The High Court reviewed the appeal and determined that it was bereft of merit and accordingly dismissed it in its entirety.
10. The Appellant, being dissatisfied with the High Court decision, is before this Court on second and perhaps final recourse, on the grounds that the two courts below erred in law by failing to find that: there was no penetration of IAO; the appellant's constitutional rights under Article 25(c), 50(2), of *the Constitution* and Section 214 of the Criminal Procedure Code, (“the CPC”), were violated; the life sentence imposed on him was unconstitutional and discriminatory; the appellant's defence was not considered; and the two courts below did not evaluate or reconcile contradictions and discrepancies in the prosecution case in favour of the appellant.
11. When the appeal came up for hearing, learned counsel Ms. Kokeyo appeared for the appellant whereas, Ms. Opiyo, learned Prosecution counsel appeared for the respondent. Ms. Kokeyo elected to wholly



rely on her written submissions. On the other hand, Ms. Opiyo opted to make oral submissions as he had not filed written submissions.

12. Ms. Kokeyo submitted that the medical evidence presented was contradictory, particularly regarding disparities between the PRC form completed by PW3, and the P3 form completed by PW6. Counsel maintained that the three-day gap between the two medical examinations could not reasonably account for the differences observed, especially regarding the state of IAO's hymen and the presence or absence of genital injuries. She further questioned the reliability of the prosecution witnesses, especially PW1 and PW4, pointing out inconsistencies in their narratives about who saw IAO first, her condition at the time, and whether she had reported the incident to anyone. Counsel also submitted that the appellant's fair trial rights under Articles 25(c) and 50(2) of *the Constitution*, and Section 214 of the CPC were breached. She submitted that after the charge sheet was amended to include an alias as a name of the appellant, the court failed to inform the appellant of his right to recall previous witnesses who had already testified for further cross-examination if need be; an omission she deemed was fatal to the prosecution's case. Additionally, she contended that the sentencing provision under the SOA, which led to the appellant's indeterminate life sentence, was unconstitutional and discriminatory, as it violated Article 28 of *the Constitution*.
13. Counsel relied on two persuasive High Court decisions to argue that the mandatory life sentence under Section 8(2) of the SOA was unconstitutional. In the case of *Silas Maliolo Zakayo & Others v Republic (Vihiga, HCCR Petition No. E002 of 2024)*, the court held that life and death sentences violated human dignity under Article 28 and were discriminatory where mitigating factors weren't considered, contrary to Sections 216, 329, and 333(2) of the CPC. Similarly, in the case of *Adriano Okibu Areme v Republic (Busia, Petition No. E910 of 2023)*, the court affirmed that sentencing should align with constitutional guarantees of dignity and fairness, even where Supreme Court precedent did not directly apply. In conclusion, counsel urged this Court to allow the appeal, quash the conviction and set aside sentence. However, that in the event that the conviction was to be upheld, counsel pleaded for a reduced and determinate sentence to align with contemporary constitutional standards that emphasize dignity and proportionality in sentencing.
14. Ms. Opiyo, in opposition to the appeal contended that the prosecution had proved its case beyond reasonable doubt. Counsel noted that the appellant had not demonstrated which of the three critical elements of the offence, viz; age, penetration, or identification of the perpetrator, had not been proved. It was submitted that the age of IAO was proved through the testimony of PW2, who produced a birth certificate, showing that she was nine years old at the time of the incident. Both PW3 and PW6 also testified as to the age, and in the process produced the PRC report and P3 form respectively report which documents all showed that IAO was aged nine years old at the time of the incident.
15. Penetration was proved through the evidence of PW1, the victim.

This was corroborated by medical findings by PW6, who confirmed that IAO's hymen was broken, indicating penetration. Regarding identification of the culprit, PW1 clearly identified the appellant, as she knew him very well as a neighbour. Counsel submitted that this was a case of recognition which is deemed to be more assuring and more reliable as opposed to visual identification of a stranger in difficult circumstances.
16. Addressing the alleged contradictions and inconsistencies in the prosecution's case, counsel maintained that any inconsistencies if at all were minor and did not go to the root of the prosecution's case. Further, counsel submitted that the entire case should be viewed holistically rather than dissected into isolated components. She emphasized that no two witnesses can recall events in identical terms, particularly where the complainant is a child of tender years. The fact that both PW1 and PW3



recounted the child being found naked in the appellant's house and his flight therefrom reinforced the conclusion that the appellant was the perpetrator of the offence.

17. As for the timing anomaly in the medical reports, specifically, that the P3 form was completed at 7:32 am, prior to the alleged 10:00 am incident, counsel argued that this discrepancy arose from clerical error by the medical officer, not from PW1's testimony. Therefore, it is of no consequence
18. In conclusion, counsel urged this Court to dismiss the appeal in its entirety.
19. This being a second appeal, the jurisdiction of the court is circumscribed. In *David Njoroge Macharia v Republic* [2011] eKLR, this jurisdiction was set out as follows:

“A second appeal must be confined to matters of law only. We also state that where possible the Court should not interfere with concurrent findings of fact by the two lower courts unless there are compelling reasons to do so.”
20. Bearing in mind the foregoing caution and upon reviewing the record, submissions by respective counsel, and applicable law, the legal issues that we frame for determination are whether: the offence of defilement was proved beyond reasonable doubt; the appellant's constitutional rights to a fair trial were violated; contradictions in the prosecution's case rendered the conviction unsafe; and whether the sentence of life imprisonment was unconstitutional and/or discriminatory.
21. On the first issue, the prosecution bore the burden of proving all the elements of the offence of defilement beyond reasonable doubt. These elements are the age of the victim, penetration of the genital organ of the victim and the perpetrator of the offence. IAO, a child of tender years, testified that it was the appellant who was known to her that had sexually assaulted her. This was clearly therefore a case of recognition as opposed to visual identification of a stranger. And as correctly observed by counsel for the respondent, recognition is deemed to be more assuring and more reliable as opposed to identification of a stranger in difficult circumstances. See *Anjononi and others v Republic* [1980] KECA 23 (KLR). Besides PW3 a neighbour in the plot that they both resided literally found him in the act before he dashed out of his house past the witness at the door step. All these happened in broad daylight. There can be therefore no doubt as to the culprit.
22. IAO's age was established through her own evidence, that of her mother, PW2 who went on to tender in evidence her birth certificate confirming that she was nine years old at the time of the offence. Medical evidence by PW3 and PW6 also cemented this evidence. In any event, this was an issue that was largely not in dispute.
23. Regarding penetration, the evidence of IAO herself, PW3 and PW6 laid bare this aspect. The PRC report and P3 form were tendered in evidence which documents all confirmed that IAO had been sexually assaulted. Although minor inconsistencies existed between the PRC and P3 forms, the trial and first appellate courts rightly held, on the basis of the case of *George Opondo Olunga v Republic* [2016] eKLR that proof of defilement rests on three key pillars: age, penetration, and identity; all of which were established to the required standard in the circumstances of this case. The alleged inconsistencies if at all were therefore minor, inconsequential and did not go to the root of the prosecution case.
24. On the second issue, counsel maintained that the charge sheet was amended to include the alias or pseudonym of the appellant, Jaringa without according the appellant the right to recall the witnesses who had testified prior to the amendment for purposes of further cross-examination. The record reflects that the court fully complied with the requirements of Section 214(1) of the CPC by informing the appellant of the amendment and affording him an opportunity to respond. Although the appellant



did not expressly request the recall of witnesses, the court’s compliance with the statutory requirement is evident from the proceedings.

25. In our view, the trial court demonstrated procedural fidelity, and the 1st appellate court correctly found that no prejudice was occasioned to the appellant in any event. The evidence of PW1 and PW2, which informed the conviction, was the subject of intense cross-examination by the appellant and who was not hindered at all in mounting his defence. Accordingly, there was no violation of the right to a fair trial.
26. On the inconsistencies particularly between the medical evidence tendered, we appreciate that while differences in phrasing and level of detail exist, the evidence should be evaluated holistically as emphasized by counsel for the respondent and as was held in the case of *Twehangane Alfred v Uganda* [2003] UGCA 6, where the Court observed that not all contradictions are fatal unless they go to the root of the prosecution case. In the present appeal, the prosecution’s case was not materially discredited by those slight discrepancies.
27. On the constitutionality of the life sentence imposed on the appellant under Section 8(2) of the SOA, we note that counsel relied on the cases of *Silas Maliolo Zakayo & Others v Republic* (supra) and *Adriano Okibu Areme v Republic* (supra), where the High Court in both cases found that mandatory life and death sentences violated Article 28 of *the Constitution* by failing to take into account individual mitigating circumstances. However, these are mere persuasive authorities and not binding on this Court. The binding precedent however remains the Supreme Court’s decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, as clarified in *Murutetu (Directions)* [2021] KESC 31 (KLR), where the Court held that the unconstitutionality of mandatory death sentences applies strictly to murder cases only under Sections 203 as read with Section 204 of the Penal Code.
28. The Supreme Court expressly excluded the application of its decision to other offences, including those under the SOA, unless and until such issues are properly raised and determined before the appropriate forum. Accordingly, the sentence of life imprisonment imposed on the appellant was in accordance with the law. The trial court acted within the statutory framework, and the sentence does not contravene *the Constitution* or the binding jurisprudence of the Supreme Court.
29. All said and done, we are satisfied that both the trial and first appellate courts properly evaluated the evidence and applied the law. There is nothing in the record therefore to warrant our interference with the concurrent findings of those two courts below. Accordingly, the appeal 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

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original



DEPUTY REGISTRAR

