Otieno v Republic (Criminal Appeal E253 of 2022)
[2025] KECA 1640 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1640 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E253 OF 2022

MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA

OCTOBER 3, 2025

BETWEEN

KEVIN OMONDI OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Homa-Bay, (Kiarie Waweru Kiarie, J.) dated 17{{^th}} March, 2022 in HCCRA No. E011 OF 2020)

JUDGMENT

1. This is a second appeal from the judgment of the principal Magistrate's Court at Oyugis, which was upheld by the High Court of Kenya at Homa Bay. In the Principal Magistrate's Court, ("the trial court"), the appellant had been charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* ("SOA"). It was alleged that on the 4th December 2019, in Kamwania sub-location, Rachuonyo North Sub-County, Homa Bay County, a child aged ten years, going by the pseudonym TAN, ("the complainant"), was Sexually assaulted overnight by a man who turned out to be the appellant by inserting his male genital organ, namely the penis into the genital organ of TAN, namely her Vagina. In the alternative the appellant was charged with indecent act with a child contrary to Section 11(1) of the SOA, by causing his penis to rub on the complainant's vagina. Though he pleaded not guilty to both charges, he was nonetheless tried and convicted on the main count. Upon conviction the appellant was sentenced to life imprisonment. There was no finding on the alternative count as required by law.

2. Aggrieved, the appellant lodged an appeal against the said judgment in the High Court of Kenya at Homa Bay on grounds that there: were contradictions in the prosecution's case; was failure to call key witnesses; was no proper identification of the appellant, was lack of medical examination of the appellant; and harsh and excessive sentence.

3. In discharging its role as a first appellate court, the High Court re- evaluated the evidence afresh in line with the principles set out in the case of Okeno v Republic [1972] EA 32 and determined that: the offence had been proved to the required standard as the complainant's age was proved by her child health card tendered in evidence, which indicated that she was aged ten years old at the time of the offence;

   medical evidence presented confirmed that there was penetration, as there were injuries consistent with penetration; and that the appellant was the perpetrator of the crime, who the complainant knew very well and who had introduced himself to her as "Man Janeko," a name by which the appellant was commonly known in the neighbourhood. That though the prosecution did not call certain witnesses, nonetheless their absence was not fatal to the prosecution case, as the evidence on record was found credible and sufficient. The appellant's alibi defence was rejected as vague and unsubstantiated. Ultimately, the first appellate court held that the conviction was safe and the sentence lawful. The appeal was accordingly dismissed in its entirety.

4. Undeterred, the appellant is now before this Court on a second and perhaps last appeal against the said Judgment. Through the memorandum of appeal, the appellant attacks the decisions by the two courts below on the grounds that both courts erred in law by: failing to note and consider that his constitutional right to legal representation under Article 50(2)(g) and (h) of *the Constitution* as read with Section 43(1)(a) and (h) of the *Legal Aid Act*, was violated during the trial;; making a finding that the ingredients for the offence of defilement were conclusively proved; failing to deal with the contradictions,inconsistencies and discrepancies in the prosecution case; not calling crucial witnesses to testify; shifting the burden of proof to the appellant; not giving due consideration to the defence mounted by the appellant and by failing to find that the imposition of a mandatory life sentence, which is indeterminate in nature, was unconstitutional.

5. To contextualize this appeal, there is need to revisit the facts and evidence presented before the trial court albeit in an abridged version. On the material day, the complainant had an altercation with her mother, C.A. (real name withheld) (PW2) prompting her to storm out of the house not to be seen again until early the following morning. On her meanderings she was accosted by the appellant who introduced himself to her as "Man Janeko meaning he "who kills people". The appellant then lured her to his house, where he sexually assaulted her overnight. The following morning, he ordered her to return to her home. On her way out, she encountered bystanders and disclosed to them what had happened to her overnight. PW2 who was promptly contacted came and took her home, before proceeding to hospital for medical examination. At the hospital, the clinical officer, Kennedy Otieno Adier (PW5), upon examining her, noticed bruising and lacerations to the labia and a broken hymen which signs were indicative of recent sexual activity. Having positively identified the appellant as the offender, the complainant took PW2 and the investigating officer, PC Kambuni Kareso (PW4) to the appellant's house from whence he was arrested and subsequently charged with the two counts. PW2 during the trial also produced the complainant's health card showing that she was aged 10years at the time of the incident.

6. Put on his defence, the appellant in his sworn statement advanced an alibi defence claiming that he had on the material day travelled to attend a funeral in Ndhiwa with his siblings and was therefore nowhere near the scene of crime. The trial court, nonetheless found that the prosecution had proved the offence and as already stated convicted him and sentenced him to life imprisonment.

7. The appeal was heard by way of written submissions only. When called out, the appellant appeared in person on our virtual platform from Kibos prison, while Ms. Kanyita, learned Prosecution counsel appeared for the respondent.

8. In his submissions, the appellant stated that his constitutional right to legal representation was violated, as the trial court failed to inform him of this right in breach of Article 50(2)(g) and (h) of *the Constitution* and Section 43(1)(a) and (b) of the *Legal Aid Act*. Relying on the cases of Republic v Karisa Chengo & 2 Others [2017] eKLR and Albanus Mwasia Mutua v Republic Cr. Appeal No. 120 of 2014, he argued that such a breach warranted an acquittal. He further challenged the proof of the complainant's age, citing inconsistencies between oral and documentary evidence. Invoking the cases of Kaingu Elias Kasomo v Republic Malindi Criminal. Appeal No. 504 of 2010, Alfayo Gombe Okello v Republic (2010) eKLR, and Hillary Nyongesa v Republic (2010) eKLR, the appellant underscored that age of the victim of defilement must be established by credible and consistent evidence for a conviction to be entered against such an accused.

9. On identification, he submitted that the circumstances obtaining during the alleged commission of the offence were not conducive to the positive identification of the appellant, citing the cases of Suleiman Juma alias Tom v Republic Cr. Appeal No. 181 of 2002, Weeder v Republic Cr. Appeal No. 228 of 1980, Robert Gitau v Republic [1990] eKLR, and Jaribu Abdallah v Republic Cr. Appeal No. 220 of 1994 in support thereof. The appellant contended that medical evidence adduced failed to prove penetration. He referred to the case of PKW v Republic [2012] eKLR, to posit that since the evidence of the prosecution witnesses was riddled with contradictions and inconsistencies, it was incredible and ought not to have been believed, more so as regards penetration. He also faulted the non-calling of crucial witnesses, such as one of the bystanders to whom the complainant first reported the incident to. He cited the case of Bukenya v Uganda [1972] EA 549, in which it was held that failure to call material witnesses may entitle the court to draw the inference against the prosecution that their evidence would have been adverse to the prosecution case. On alibi defence, the appellant relied on the case of Victor Mulinge v Republic [2014] eKLR in asserting that failure by investigators to follow up on his alibi raised reasonable doubt in the prosecution's case. Finally, challenging the constitutionality of the mandatory life sentence, the appellant cited the cases of James Waweru v Republic Cr. Appeal No. 316 of 2018 and Julius Kitsao Manyeso v Republic [2023] KECA 279 (KLR), which condemned indeterminate life sentences as inhuman and degrading and the need therefore for a determinate sentence.

10. The respondent's counsel in opposing the appeal submitted that the appellant's conviction and sentence were sound and should be upheld. Counsel argued that the trial court properly considered the evidence and applied the requisite legal principles in finding that the offence of defilement was proved beyond reasonable doubt. Counsel emphasized that the complainant was a credible witness and her testimony, when considered alongside the medical evidence, was sufficient to establish penetration and identify the appellant as the perpetrator. Counsel further contended that the prosecution was not obligated to call every witness to prove its case. He relied on the case of Bukenya v Uganda (supra) to assert that the evidence of the uncalled witnesses was not necessary in the determination of guilt or otherwise of the appellant.

11. On the appellant's alibi defence, counsel submitted that it was weak and unsubstantiated, and was properly dismissed by the trial court and which dismissal was soundly upheld by the first appellate court. Regarding the mandatory life sentence, counsel maintained that Section 8(2) of the SOA provides for it in clear terms where the victim is below the age of eleven years, and the courts are bound to apply the law as it is. Counsel in the ultimate urged the court to dismiss the appeal for want of merit.

12. This is a second appeal. The jurisdiction of this Court in such an appeal is circumscribed by Section 361(1)(a) of the Criminal Procedure Code and this Court's decision in the case of Adan Muraguri Mungara v Republic [2011] eKLR, which in general terms is that:

> " a second appeal to this Court must be confined to matters of law only."

13. As reiterated in the case of David Njuguna Wairimu v Republic [2010] eKLR, this Court does not as well interfere with concurrent findings of fact by the trial and first appellate courts unless it is shown that the findings were based on no evidence, or on a misapprehension of the evidence, or that the said courts plainly acted on wrong principles.

14. Having considered the record before us, the issues of law we discern for our determination are whether: the appellant's constitutional rights were violated; the conviction and sentence imposed were sound in law.

15. Turning on the first issue, we acknowledge the inviolability of the right to a fair trial. Indeed, this Court in the case of David Macharia Njoroge v Republic [2011] eKLR, stressed that failure to inform an accused person of his right to legal representation may amount to a violation of the right to a fair trial in certain circumstances.

16. However, whether such a violation alone invalidates the proceedings depends on whether the violation occasioned prejudice to the appellant. In the case of Joseph Ndungu Kagiri v Republic [2016] eKLR, the Court held that where an accused person participates in the proceedings without protest and does not demonstrate how lack of legal counsel occasioned a miscarriage of justice, the trial would not automatically be voided or rendered unconstitutional. In the present case, while the record is silent as to whether the appellant was informed of his right to counsel, neither did he raise the issue with the trial court nor in the first appellate court. Indeed, it is being raised for the first time in this appeal which is not permissible. That notwithstanding, the proceedings demonstrate active participation by the appellant, and no material prejudice has been demonstrated arising from the omission.

17. On the second issue, the appellant challenged the reliability of the prosecution's evidence, disputing the complainant's age, identification, and the medical evidence, and further contended that the trial and first appellate courts failed to address contradictions and non-availability of key witnesses.

18. On the element of age, the concurrent findings of both courts below demonstrated that the complainant's child health card, which was produced in evidence indicated that she was 10 years old at the time of the offence. In the case of Fappyton Mutuku Ngui v Republic [2014] eKLR, it was underscored that age may be proved by production of official documents such as birth certificates, hospital or church records or any other credible oral evidence. To our mind what was tendered in evidence was an official document thereof whose contents could be believed and acted upon. That notwithstanding, there was the evidence of the complainant herself and PW2, placing her age at 10 years. Then there were the concurrent findings of the two courts below on the issue. We do not see any basis to impugn such conclusion.

19. As to penetration, the trial court found and the first appellate court confirmed that the complainant's testimony on this aspect of penetration was consistent, credible, and supported by medical findings by PW5. That evidence confirmed genital injuries consistent with defilement. This Court in the case of Mark Oiruri Mose v Republic [2013] eKLR, held that the evidence of a single witness may suffice for a conviction, particularly in sexual offences, if the court finds the testimony to be truthful and reliable. This was of course in reference to the proviso to section 124 of the *Evidence Act*.

20. The identification of the appellant as the perpetrator of the crime was by recognition, as the appellant was well known to the complainant. In light of the holding in the case of Anjononi & Others v Republic [1980] eKLR, that identification by recognition is more reliable than identification of a stranger in difficult circumstances, there can be no doubt at all that it is the appellant who committed the crime. Again, there was concurrent finding on this aspect by the two courts below.

21. On the failure to call certain witnesses, both lower courts applied the principles set out in the case of Bukenya v Uganda (supra), and rightly held that the evidence presented was not barely adequate and the absence of the evidence of any of the bystanders was not fatal, particularly since there was sufficient medical and oral evidence. The alibi defence raised by the appellant was considered and properly dismissed as being vague and unsubstantiated, in line with the cases of Kiarie v Republic [1984] KLR 739 and Victor Mwendwa Mulinge v Republic [2014] eKLR, which reaffirmed the principle that whenever an alibi defence is raised, the focus does not shift to an accused to prove it but is to be evaluated against the entire of the prosecution's case. As correctly observed by the trial court, the alibi was but an afterthought, as he could not point out who had died at the home he allegedly visited for a funeral. We also note that the defence was raised too late in the day, during the defence hearing, thereby according the prosecution no time at all to investigate it as required.

22. On sentencing, Section 8(2) of the SOA imposes a mandatory life sentence for offenders who defile children aged 11 or below. While the appellant urged for reconsideration of his sentence, this Court has affirmed in the case of Christopher Ochieng v Republic [2019] eKLR, that mandatory minimum sentences under Section 8 of the *Sexual Offences Act* remain constitutionally valid and should be imposed.

    Indeed, the Supreme Court in the recent case of Republic v Mwangi:

    Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 KLR reiterated that sentences under SOA be they minimum or maximum are legal and not unconstitutional and should be imposed without fear or favour until such time as there shall be legislative or indeed any other intervention to the contrary. See also Republic v Joshua Gichuki Mwangi [2024] KESC 34 KLR.

23. In view of all the foregoing, we find no error in law committed by the two courts below warranting our intervention. The appeal is accordingly dismissed in its entirety.

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

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H.A. OMONDI

JUDGE OF APPEAL

.....

A.O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR