Olunya v Republic (Criminal Appeal E054 of 2024)
[2025] KEHC 13788 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13788 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E054 OF 2024

DK KEMEI, J

OCTOBER 3, 2025

BETWEEN

JACTONE OMONDI OLUNYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from the judgment of Hon. C.C.Maiyo (R.M) delivered on 24th September 2024 at Siaya Chief Magistrates Court in Case No. MCSO/30/2022)

JUDGMENT

1. The Appellant herein, Jactone Omondi Olunya, had been charged with several offences namely, defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006, attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act* and two alternative counts of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the first count were that on diverse dates between 4th to 18th June 2022 at night at [Particulars Withheld], Kodiere sublocation, Siaya Sub-County within Siaya County, intentionally caused his penis to penetrate the vagina of E.A.O. a child aged 13 years.

2. The particulars regarding the alternative charge in count one were that on diverse dates between 4th to 18th June 2022 at night at [Particulars Withheld], Kodiere sub location, Siaya sub-county within Siaya County, intentionally touched the vagina of E.A.O. a child aged 13 years, with his penis.

3. The particulars on count two were that on diverse dates between 4th to 18th June 2022 at night at [Particulars Withheld], Kodiere sub location, Siaya Sub County within Siaya County, intentionally attempted to cause his penis to penetrate the vagina of M.A.O. a child aged 13 years.

4. The particulars to the second alternative charge were that on diverse dates between 4th to 18th June 2022 at night at [Particulars Withheld], Kodiere sublocation, Siaya Sub County within Siaya County, intentionally touched the vagina of M.A.O. a child aged 13 years with his penis.

5. The matter proceeded to a full trial whereupon the Appellant was convicted on count one and the alternative charge to count two where upon he was sentenced to 25 years' imprisonment and 15 years' imprisonment respectively. The sentences were ordered to run concurrently.

6. Aggrieved by the aforesaid conviction and the sentence, the Appellant has since appealed to this court on the following grounds of appeal:

    i. The trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt.

    ii. The trial magistrate erred by convicting the Appellant based on contradictory, inconsistent and unreliable evidence.

    iii. The trial magistrate failed to adequately consider or evaluate the defense case and expert medical evidence.

    iv. The trial magistrate erred in law and in fact by failing to formulate points for determination as required by law.

    v. The trial magistrate considered extraneous matters in arriving at her decision

    vi. The conviction is against the weight of evidence on record.

7. 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 v. 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 give due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.

8. In determining this appeal also, I have to bear in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden was on the prosecution to prove the allegations levelled against the Appellant. This being a criminal case, the standard of proof is one of beyond any reasonable doubt. See *Woolmington v Dpp* [1935] AC 462 and *Sawe versus Republic* [2003] eKLR.

9. The prosecution called a total of nine witnesses in support of its case.

10. In summary, it was the evidence of EAO (PW1) who claimed to have been defiled together with her younger sister MAO (PW2) by the Appellant four times. That the said defilement is said to have occurred in the house of the Appellant's mother where the minors used to sleep. That the offence was discovered when PW1, a grade 6 pupil started having a pungent smell at school causing other pupils to avoid her. That the class teacher interviewed her and discovered that she had had sex with the Appellant who is a relative, a neighbor and a friend to her father. PW1's testimony was corroborated by that of PW2 who added that the Appellant had forced himself into the house where they slept and defiled them severally.

11. PON (PW3) testified that he was the father of the complainants and that he learnt after the incident that the Appellant had been having sex with the minors. He added that the Appellant was his relative with whom he had no differences.

12. SO (PW4) testified that she was the mother of the complainants. That she had left to live with her parents and that her husband stayed with the children. That she knew the accused as a relative and that they had lived together in the past without any problems.

13. RAO (PW5) testified that she was a teacher at the school where the complainants attended and that she also served as a health, guidance and counselling teacher. That she established from the complainants that they used to sleep in a house belonging to the Appellant and who used to defile them in turns. That she also established that the minors feared informing their father as he was friends with the Appellant. That she together with other teachers took the minors to hospital and later to Mwer Police Station. That she had known the Appellant who had been a parent at the said school.

14. COS (PW6) testified that he was a teacher at [Particulars Withheld] primary school and that he was on duty at the time when the issue of the complainants cropped up. That he teamed up with the health and counselling teacher to escort the minors to hospital and later at Mwer Police Station.

15. WAO (PW7) testified that he was then a teacher at Unyolo Primary School and that he had teamed up with his colleagues and escorted the victims to hospital where they were examined and that they later went to Mwer Police Station, where the matter was reported.

16. No. 236937 PC Collins Mbeche (PW8) was the investigating officer. He testified that the report was made by three teachers in the company of the two minors. That he recorded statements, escorted the minors to Siaya county hospital, requested for an age assessment report which indicated that PW1 was 13 years while PW2 was 10 years. He stated further that upon visiting the scene of crime, the house where the minors were defiled was about 10-20 metres from their father's house. That the house did not have a door and a lock from inside. That he did not order for a DNA to be conducted as the minors knew the perpetrator quite well and had already positively identified him as a relative and a friend to their father. That he arranged for the minors to be taken to her mother for their safety. He identified the P3 form, Post Rape Care form, treatment notes, age assessment, X-ray request and film as the documents issued to the complainants.

17. Eunita Nyakundi (PW9) testified that she was a clinical officer having worked at Siaya County Hospital for over six years. That she had worked with his colleague Isaac Mbwaga for three years and was familiar with his handwriting and signature. She therefore testified and produced documents that had been prepared by her colleague on 23/6/2022 on his behalf. That as regards Elizabeth Auma Omondi, she stated that she was brought to hospital in the company of teachers, police officer and younger sister with a history of defilement by a person known to her severally with the last being on 18/06/2022 at 2100hrs at [Particulars Withheld] area of Siaya County. That the age assessment report showed the minor was 13 years. That on examination of the genitalia, there was bruised labia and broken hymen scar. That she opined that there was forceful penetration. That the girl was treated with antibiotics. The following documents were produced in favor of Elizabeth Auma Omondi: Medical care form – (Exhibit 1), Copy of receipt of ksh 700/= as P (exhibit 2), Siaya Referral Hospital attendance card –P (Exhibit 3), Age assessment report (Exhibit 4), Lab request and report form as P (exhibit 5), P3 form as P (Exhibit 6), PRC form as P (exhibit 7), and X ray request form P (exhibit 8).

    That the other minor MAO (PW2) was likewise examined. That the allegation was the same as that of her sister that she had been defiled by a person known to her (the Appellant herein). That the age of the injuries was four days. That the examination of the genitalia showed reddening of urethral opening and intact hymen. As regards the intact hymen, she opined that there was no forceful complete penetration. That the second victim was treated with antibiotics. That the following documents were produced for MAO: Medical care form from Mwer dispensary as P (exhibit 9), age assessment form p (exhibit 10), P3 form as P (exhibit 11), PRC form as P (exhibit 12), Siaya Referral Hospital attendance card –

P (Exhibit 13), copy of receipt P (exhibit 14), Lab request form P (exhibit 15), two copies of compact disks of Elizabeth Auma and Mercy Auma Omondi as P (exhibit 16 (a) and (b).

18. At the end of the prosecution's case, the trial court established that a prima facie case had been made out by the prosecution and thus placed the Appellant on his defense. The Appellant opted to tender a sworn testimony and called one witness.

19. Jactone Omondi Olunya (DW1) the Appellant, stated that he did not defile the minor. That he has been the chairman of the school and a former civil servant. That his grandson B, is the one who informed him that he saw O's daughters leave the school in the company of teachers. That he had allowed the minors to stay at his mother's house which house is five metres from O's house, the father of the minors. That the minors testified that the person at the door claimed that he was Jackstone, meaning it was someone who wanted to set him up. Finally, he stated that his house is about 400 metres from where his mother's house is and culturally he could not sleep in his mother's house as he now has his own home as it is an abomination. That his family had welcomed the complainants' father into the area and had remained as relatives and thus he could not do anything harmful to the minors. That it was unusual for the minors to be defiled and they fail to inform their father or the school teachers. That the police did not take any DNA samples from him and the minors so as to prove the alleged defilement. On cross-examination he stated inter alia; that he had keys to his mother's house where the minors slept; that the girls were the only ones sleeping at his late mother's house and used to cook for themselves in the evening; that he knew the minors quite well and who could even recognize him from far and could recognize his voice; that the minors' father used to work for him; that he had been to his mother's house on several occasions; that he was aware that one of the minors at one time was unwell and he had to give her two painkillers; that the allegation that he had defiled the minors was a lie.

20. Clement Oduor Omondi (DW2) testified that he had been requested by the Appellant to accompany him to Anyiko primary school over allegations that the father to the girls had been defiling them. That he learnt that the family had agreed to handle the issue at family level but was surprised afterwards to learn that the Appellant had been arrested over an issue of defilement. On cross-examination, he stated inter alia; that the Appellant is a former classmate and also a neighbour.

21. The appeal was canvassed by way of written submissions. Both parties duly complied. The Appellant submitted that the prosecution did not prove the case against him beyond reasonable doubt. He submitted that the court should allow the appeal and set him free.

22. The Respondent submitted that it proved the charges against the Appellant beyond reasonable doubt and that the appeal should be dismissed. It was also submitted that the Respondent had proved all the essential ingredients of the offences and that the sentences imposed are not excessive at all and ought to be affirmed.

23. I have considered the proceedings of the trial court, the rival submissions on appeal and the authorities therein. I find that the issue for determination is whether the charges against the Appellant were proved beyond a reasonable doubt by the Respondent.

24. It is noted that the Appellant was convicted for the offence of defilement in count one under section 8(1) as read with section 8(3) of the *Sexual Offences Act* as well as the second alternative charge of committing an indecent act on a child under section 11(1) of the said *Act*. The relevant provisions are 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.

11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

25. The burden of proof lay on the Respondent and that it never shifted to the Appellant herein. Under Section 107 of the *Evidence Act* (Cap 80), the burden of proof is on the person who wishes the court to believe the existence of certain facts which he must prove. In the present case, the Respondent was under obligation to prove beyond any reasonable doubt that the Appellant committed the offences levelled against him. The prosecution must prove its case against an accused person beyond any 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.

26. This appeal will revolve around the question whether the Respondent proved the charge of defilement under section 8(1) and 8(3) of the *Sexual Offences Act* as well as the second alternative count of committing an indecent act on a child under section 11(1) of the said Act. As regards the offence in count one, 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 Appellant as the perpetrator.

27. As regards the aspect of age, the complainant (PW1) was taken to hospital and that an age assessment was carried out as directed by the investigating officer (PW8). The same was produced by the clinical officer (PW9) as P exhibit 4 which confirmed that the first complainant (PW1) was aged 13 years while the second complainant was assessed at 10 years as per P exhibit at the time of the alleged offences. The said ages were below 18 years and thus the complainants were minors as per the description provided by section 2 of the *Children's Act* 2001. The Appellant in his defence confirmed that he knew the two complainants as young children who were attending Anyiko primary school and thus I find that he did not dispute the age of the minors. I find that the ingredient of age was proved by the Respondent beyond any reasonable doubt.

28. As regards the aspect of penetration, the same is provided under Section 2 of the *Sexual Offences Act* which defines it as partial or complete. Section 2 of the *Sexual Offences Act*: "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

29. It was the evidence of PW1 that when they had gone to sleep at Mama Jacktone's house and that they opened the door and found Jactone inside the house. That they went to sleep and Jactone removed his clothes and inserted his penis inside her vagina and proceeded to have sex with her. It was also the evidence of PW2 that the Appellant had sex with PW1 four times on several occasions while he had sex with her (PW2) on two occasions. It was the evidence of both PW1and PW2 that the Appellant penetrated their sexual organs. The two minors were escorted to hospital where they were examined and given treatment. The clinical officer (PW9) testified that on examination of PW1's genitalia, there was bruised labia and a broken hymen scar. The medic opined that there was forceful penetration. The

clinical officer further opined that upon examining PW2, she noted that the genitalia showed reddening of urethral opening and an intact hymen which meant that there was no forceful complete penetration. This therefore confirmed that penetration was thus proved as regards the first complainant (PW1) and not proved on the second complainant (PW2). I find that the Respondent proved the ingredient of penetration regarding the offence in count one beyond any reasonable doubt.

30. As regards proof of the identity of the assailant, it emerged from the evidence of the two complainants that the Appellant was someone they had known and who was a friend and relative of their father. Indeed, the incidences used to take place during the night and hence the issue of identity of the perpetrator must be thoroughly established. In *Wamunga v 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 favorable and free from possibility of error before it can safely make it the basis of a conviction."

31. Likewise, the Court of Appeal in England in *R.v. Turnbull* [1976] 3 All ER 549 stated that identification at night must be treated with great care. The Judge ...examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g., by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, did he have any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance..."

32. In the instant case, PW1 stated that on 04/06/2022 and 18/06/2022, when they had gone to sleep at Mama Jacktone's house, they opened the door and found Jactone inside. PW2 testified that on 04/06/2022 and 17/06/2022 as they went to sleep at night, they found Jacktone seated. That Jactone told her to put off the koroboi light but that they did not put off. That her sister spread the beddings, then they told Jactone to leave, but he refused. It was the evidence of the two minors that the Appellant was well known to them since the house they slept in belonged to his mother and that the Appellant was a friend of their father. Indeed, the Appellant in his defence evidence on cross-examination admitted that both complainants knew him quite well and who could even recognize him from afar and could also recognize his voice. It is therefore clear that the identification of the Appellant was by recognition as opposed to identification of a stranger. Even though the Appellant in his defence sought to deflect the light in his direction by suggesting that someone else could have masqueraded as him and thus he had been framed, it is instructive that the Appellant did confirm on cross-examination that he also had keys to his late mother's house where the complainants used to sleep and therefore I find that he was squarely placed at the scene of crime and that the person who had molested the complainants was none other than the Appellant herein.

33. In the case of *Reuben Taabu Anjononi & 2 others v 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..."

34. Applying the above authorities to the facts of this case, it is clear that the minors knew the Appellant so well and that on that day when they found him in the house where they slept, they were not surprised as that was the house of the Appellant's late mother. Even though the source of lighting mentioned is a koroboi light, the same was sufficient to identify a person well known to the complainants. I am therefore persuaded that the minors indeed recognized the Appellant.

35. From the foregoing observations and the evidence of the two complainants, it is clear that the offence in the second alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* was proved by the Respondent beyond any reasonable doubt. The evidence of PW2 is that the Appellant also had sexual intercourse with the Appellant on two occasions while he had sex with her sister (PW1) four times. The said PW2 was examined by the clinical officer (PW90 who established that the hymen was still intact and hence the alleged sexual intercourse amounted to an attempted defilement which was proved by the Respondent. Hence, the finding on conviction by the learned trial magistrate was sound and must be upheld.

36. On the issue of sentencing, the same is usually at the discretion of the trial court. 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."

37. The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owuor v 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:
>
> "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
>
> 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."

38. It is noted that the trial court imposed a sentence of twenty five years' imprisonment for the offence in count one. It is noted that under section 8(3) of the *Sexual Offences Act* a person convicted thereof is liable to be imprisoned to twenty years imprisonment. It transpired that the Appellant was a first offender and merited a sentence of twenty years imprisonment and thus the twenty five years imprisonment is excessive. It is also noted that the Respondent did not seek for an enhancement of sentence. Further, the sentence on the alternative charge of committing an indecent act is 15 years' imprisonment instead of ten years imprisonment. Even though the trial court had discretion to increase the sentence, it is noted that the Appellant was a first offender and thus deserved the minimum sentence

possible in law. Even though the Appellant is entitled to the minimum sentence, it must be noted that his actions were quite abhorrent as he took advantage of the vulnerable girls and defiled them in turns yet he was an adult with a family and who was expected to protect them. His actions have psychologically scarred the victims for the rest of their lives and which calls for a deterrent sentence. The Appellant who turned out to be a sexual predator deserves to be kept away from the society and only to be released upon comprehensive custodial rehabilitation. Iam of the considered view that the sentence ought to have been twenty years and ten years respectively which were to run concurrently. It is also noted that the Appellant posted bail and thus did not remain in custody during his trial and hence the application of section 333(2) of the *Criminal Procedure Code* does not apply. The Appellant's appeal on sentences imposed by the trial court succeeds only to that extent.

39. In the result, the Appellant's appeal on conviction lacks merit and is dismissed. The appeal on sentence succeeds only to the extent the sentences of twenty five years and fifteen years imposed by the trial court are hereby set aside and substituted with sentences of twenty years and ten years, respectively and which shall run concurrently.

Orders accordingly.

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

D. KEMEI

JUDGE.

In the presence of:

Jacktone Omondi Olunya.....Appellant

Ogada for Onyata.....for Appellant

M/s Mumu.....for Respondent

Okumu.....Court Assistant