Omondi v Republic (Criminal Appeal E066 of 2024)
[2025] KEHC 13745 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E066 OF 2024

DK KEMEI, J

OCTOBER 3, 2025

BETWEEN

BRIAN OMONDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from the judgment of Hon. C.C.Maiyo (R.M) delivered on 28th March 2024 at Siaya Chief Magistrates Court in Criminal cases No. E030 of 2023)

JUDGMENT

1. The Appellant herein Brian Omondi was charged at the trial court with the offence of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 13th June 2023 at around 0300hrs in Siaya Sub County within Siaya County intentionally caused his penis to penetrate the vagina of MA a child aged 13 years.

2. The Appellant 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* No. 3 of 2006. The particulars of the offence were that on 13th June 2023 at around 0300hrs in Siaya Sub County within Siaya County intentionally touched the vagina of MA a child aged 13 years with his penis.

3. The Appellant also faced a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on 13th June 2023 at around 0300hrs in Siaya Sub County within Siaya County unlawfully assaulted MA thereby occasioning her actual bodily harm.

4. The matter proceeded to full trial in which the Respondent called seven witnesses in support of its case while the Appellant testified for himself and did not call other witnesses. The trial court later convicted

the Appellant on both counts and sentenced him to 15 years' imprisonment in count one- and 4-years' imprisonment in count two and further ordered the sentences to run concurrently.

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

   i. That the trial magistrate erred in law and fact by failing to consider that the prosecution's evidence was marred with inconsistencies, contradictions and discrepancies therefore unsafe to warrant a conviction.

   ii. That the trial magistrate erred in law and fact by failing to consider that the sentence imposed was mandatory in nature and thus unconstitutional.

   iii. That the trial magistrate erred in law and fact by failing to ascertain that the medical report tendered was not watertight thus unsafe to warrant a conviction.

   iv. That the trial magistrate erred in law and fact by failing to consider that the offender is a first offender thus ought to have been given a less severe punishment.

   v. That the trial magistrate erred in law and fact by failing to consider the mitigation adduced by the Appellant.

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

7. In determining this appeal, it must be borne in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden of proof was on the Respondent to prove the charges against the Appellant. This being a criminal case, the standard of proof is one of beyond any reasonable doubt as held in Woolmington Vs Dpp [1935] AC 462 and Sawe versus Republic [2003] Eklr.

8. The prosecution called a total of seven witnesses in support of its case.

9. The Complainant MA (PW1) testified that on the night of 12/6/2023 at about 10.00PM on her way home she was offered a lift by a boda boda rider. She accepted and that the rider first took her to a hotel and bought her ugali and beef then later took her to his rental house where he had penetrative sex with her on a chair. That in the morning of 13th June 2023, at about 0200hrs the Appellant demanded more sex and that she refused. That is when the Appellant attacked her with a sharp object cutting her on the head, lower limb and upper limb. She screamed for help and neighbours came to her rescue. That the Appellant then alleged that the she was a thief and that she managed to run away and sought help from other boda boda riders who looked for the Appellant at the bus stage and then beat him up and then escorted him to Siaya Police Station. That she too went to the police station from where she was taken to Siaya County Referral Hospital where she was treated and the injured parts stitched. That she was issued with P3 form, treatment notes and Post Rape Care Form which she identified in court. That she identified the Appellant as the man who had defiled and assaulted her.

   On cross-examination, she stated inter alia; that she did not know the name of the Appellant; that she vividly remembers the Appellant's house; that she had never met the Appellant prior to the incident.

   CAO (PW2) testified that the complainant was her daughter and that she was alerted by one of the teachers that her daughter was at the police station. That she rushed there and was referred to the hospital where she found her daughter who briefed her on what had happened the previous night.

10. The testimony of the complainant was corroborated by JO (PW3) a boda boda rider who testified that on 13/6/2023 he saw his customer E in the company of a little girl who was injured and wounded on the head, arm and leg. That he inquired about what had happened and that the customer claimed that she had met the little girl on the road. That on enquiring from the little girl, she informed him that Brian had assaulted her after taking her to his house the previous day. That the complainant took them to the house of the Appellant but he was not there. That the neighbours claimed that the house belonged to Brian. That on their way back from the Appellants house, the complainant spotted him by pointing at him and that the boda boda riders arrested him and took him to Siaya Police Station.

11. Another boda boda rider JAO (PW4) testified that he was the chairperson of boda boda riders Alego –Usonga. That he had received a report of the alleged incident from PW3. That he went to the police station and saw the Appellant who was someone he knew quite well and that the complainant who was wounded. He however stated on cross examination that he did not see the Appellant assaulting the complainant.

12. KO (PW5) testified that he is a boda boda operator and that on the material date he was at the bus stage when a certain lady came while in company of a young girl and that the girl had injuries on the head, hand and leg and who claimed that she had been assaulted by one of the boda boda operators. That she was able to identify the Appellant herein as the person who had assaulted in the night. That he together with other operators apprehended the Appellant and took him to Siaya Police Station.

13. Eunita Nyakundi (PW6) was the clinical officer in the case. She testified on behalf of her collegue Brian Chengek with whom they had worked together at Siaya County Hospital for five years and was very familiar with his handwriting and signature. She stated that the complainant was treated on the 13/6/2023 after an alleged defilement and assault by a boda boda rider whom the complainant knew physically. That the rider coerced her to his house, had penetrative sex with her then assaulted her with a panga (sharp object). That the clothing of the complainant had blood stains on the red sweater and stripped blouse. That the complainant had multiple stitched cut wounds on the head, right hand/arm and on the right lower limb. On head and neck there was a deep cut wound on the posterior part of the head. That there was a cut wound on the left anterior part of the ear. That the age of the injuries were 12 hours and that type of weapon used was a sharp object. That on examination of the genitalia, there was normal external genitalia, no lacerations, no tears, hymen was torn and old. That there was whitish PV vaginal discharge. That she concluded that there were signs of vaginal penetration. That she produced P3 form as P exhibit 1, PRC form Exhibit 2, Lab request and report as exhibit 3, X-ray request form as exhibit 4, and the outpatient treatment card as exhibit. On cross-examination, she stated that she confirmed the injuries sustained by the complainant.

14. No. 11XXXX0 PC Pamela Nambuye (PW7) from Siaya police station was the investigating officer. She testified that on 13/7/2023 the Appellant was brought to the station having been arrested by the public in company of the victim who was physically assaulted and had deep cut wounds on the head, right hand and leg. She testified having interviewed the victim, booked the case of defilement and assault against the Appellant. That the victim was then escorted to Siaya County Hospital for treatment. That a p3 form was issued and filled to that effect. She produced the birth certificate of the victim MA showing that she was born on 12/5/2010.

15. At the close of the prosecution's case, the trial court ruled that the prosecution had made out a prima facie case against the Appellant and thus placed placed him on his defence. The Appellant tendered a sworn testimony.

16. Brian Omondi (DW1) testified in his defence that on 13/7/2023 at 9.00Am a crowd came to his boda boda stage and arrested him. That he did not know why they were beating him. That he was not known to the victim.

    On cross examination he stated that he did not know about the charges and that he denied defiling the minor. That he only saw her in court. He did not bring witnesses to support his defense.

17. The appeal was canvassed by way of written submissions. Both parties duly complied. The Appellant submitted that the Respondents failed to prove the charges against him beyond reasonable doubt. He prayed that the appeal be allowed as prayed, sentence set aside and he be set free.

18. On the part of the Respondent, it submitted that it adduced enough evidence in support of the charges against the Appellant. It submitted that the appeal be dismissed.

19. I have considered the trial court proceedings plus the rival submissions on appeal. I find the issue for determination is whether the prosecution proved the charges against the Appellant beyond reasonable doubt and whether the sentences imposed was appropriate.

20. Starting with the offence in count one, it is noted that the Appellant faced a charge under section 8(1) and (3) of the *Sexual Offences Act* No. 3 of 2006 which stipulates as follows:

> 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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> (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.
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> (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.

21. The burden of proof in the matter lay with the prosecution and that it never shifted to the Appellant herein. Under Section 107 of the *Evidence Act* (Cap 80), the burden of proof lies on the person who wishes to prove the existence of certain facts. It was thus the duty of the Respondent to prove allegations contained in the charges 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. The prosecution must prove its case against an accused person 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.

22. In a charge of defilement, the prosecution must prove three ingredients namely, age of the complainant (must be a minor), penetration (partial or complete) and the identity of the perpetrator.

23. As regards the aspect of the age of the Complainant, the investigating officer (PW7) produced a birth certificate of the complainant which indicated that she was born on 12/5/2010. This thus placed her about 13 years at the time of the offence and therefore the same confirmed that the complainant was a child as she was below the age of 18 years old.

24. As regards the aspect of penetration, section 2 of the *Sexual Offences Act* states that penetration may be 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.

25. The complainant testified that the Appellant took him to his house and had sex with her on a chair. The clinical officer (PW6) who examined the complainant drew the conclusion that there were features suggestive of vaginal penetration. I find the ingredient of penetration was thus proved as the testimony of the minor remained consistent all through and was corroborated by that of the clinical officer (PW6).

26. The third aspect to be proved was the identity of the Appellant as the perpetrator. It transpired from the evidence of the complainant that she had not known the Appellant prior to the incident and that he had given her a lift and then took her to a certain hotel where he bought her some food and later took her to his house where he defiled her on a chair and that later in the night at about 2.00 AM, the Appellant woke up and demanded to have sex with her but the complainant rebuffed him and which led to the Appellant cutting with a panga on the head , hand and leg. The complainant raised alarm attracting neighbours and that the Appellant was later traced at a bus stage and apprehended and handed over to the police. Even though the complainant met the Appellant for the first time, it is not in dispute that they went to a certain hotel and had a meal and later went to his house. I find that these circumstances enabled the complainant to know the Appellant and later pointed him out at the bus stage the following morning. 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."

27. Similarly, the Court further cited its own decision in Abdala bin Wendo & Another vs Republic (1953), 20 EACA 166 where it held:

> " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

28. In the case of Reuben Taabu Anjononi & 2 others vs Republic (1980) eKLR 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..."

29. In the instant case, it is the minor's testimony that the Appellant gave him a lift at night. That he took him to a hotel and bought him ugali and meat. That he took her to his house where he had sex with her

on a chair. That at about 0200hrs, the Appellant woke up and wanted to have sex with her again but the minor refused and that is when the Appellant became aggressive and assaulted her with a panga.

30. In Crim App 140 of 00[1], Peter Mwangi Mungai -vs- Republic [2002] eKLR, the Court of Appeal referred to its own decision where it stated thus;

> " .... In Owen Kimotho Kiarie v. R. Criminal Appeal No.93 of 1983, (unreported) this Court held that dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade. The principle was re-echoed in the case of Charles O. Maitanyi v. Republic [1985] 2 KAR 75. In that case it was also held that even where the dock identification is preceded by a properly conducted identification parade the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. The court stated:
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> ..... That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade ... If one is to test the evidence with the greatest care this was the way that the Court of Appeal in England in R.v. Turnbull [1976] 3 All ER 549 saw the examination. 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..."

31. Guided by the above authorities and specifically R.v. Turnbull (supra), I believe the minor had ample time to observe the Appellant while at the restaurant when he bought her ugali and meat and even while in the house when they had sex on a chair and again during the early morning encounter when he allegedly assaulted her with a panga. I am therefore persuaded that she had enough time to observe the Appellant and which enable her to identify him the following day. Indeed, it was the complainant who led the members of public to the bus stage where the Appellant was apprehended and handed over to the police. The complainant had been a stranger to the Appellant and thus there was no possibility of a frame up or any previous differences between them or their families to suggest that the Appellant was being fixed in the case so as to settle any differences. Indeed, the learned trial magistrate properly warned herself of the danger of convicting the Appellant and thus sought guidance in section 124 of the *Evidence Act* where she warned herself appropriately. Iam satisfied that the Appellant was identified as the person who had defiled and assaulted the complainant on the material date. I find the Appellant's defence evidence did not cast doubt or shake that of the Respondent which was quite overwhelming. Hence, I find the ingredient regarding the identity of the Appellant as the assailant was proved beyond any reasonable doubt.

32. In view of the foregoing observations, i am persuaded that the offence of defilement was well proved against the Appellant and thus the conviction regarding the first count was quite sound and must be upheld.

33. Regarding the second count of assault, section 251 of the Penal Code stipulates as follows: "Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years."

34. The evidence of PW1, PW2, PW3, PW4, PW5, and Pw7 confirmed that they saw the deep cut wounds on the head, right arm and leg that had been inflicted on the complainant. The evidence was corroborated by that of the clinical officer (PW6) from Siaya County Hospital where the complainant was treated. The p3 form, treatment notes and X-ray request form confirmed that indeed the complainant had sustained injuries on her body and thus there was no doubt that the complainant suffered bodily injury/harm.

From the evidence on record, I am equally persuaded that the second count was likewise sufficiently proved by the Respondent beyond nay reasonable doubt. The defence evidence did not shake that of the Respondent in any way. Consequently, i hereby uphold the conviction arrived at by the learned trial magistrate.

35. It is noted from the Appellant's grounds of appeal that he has contended that the sentences imposed were excessive in the circumstances. It is trite that sentencing is a very crucial issue in the criminal justice system. The same lies in the discretion of the trial court as was held in the Court of Appeal case of Benard Kimani Gacheru v. Republic Criminal Appeal No. 188 of 2000 where it was stated as follows:

> " 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 position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owuor Vs 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:
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> > "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."

37. Under section 8(3) of the *Sexual Offences Act*, 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. In Petition No. 18 of 2023 R vs Joshua Gichuki Mwangi and Others [2024] eKLR, the Supreme Court held that all minimum sentences under the *Sexual Offences Act* are not unconstitutional and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences. It is noted that the trial court imposed a sentence of fifteen (15) instead of twenty (20) years' imprisonment. It is also noted that the Respondent has not filed a notice of enhancement of sentence and hence, I will not interfere with the said sentence of 15 years imprisonment for the

offence in count one. It is instructive that the Appellant took advantage of a young and vulnerable girl who has been psychologically scarred. The Appellant was expected to protect the girl but instead he turned into a predator. I find that the Appellant deserves a custodial rehabilitation before being released back to the society. As regards the sentence in count two, it is noted that the Appellant was ordered to serve four (4) years imprisonment. Under section 251 of the Penal Code, a maximum sentence of five years is provided for. I find the sentence of four years to be reasonable. It is instructive that the injuries sustained by the complainant were serious and which called for a deterrent sentence. From the above, I am persuaded that the trial court addresed its mind correctly to the facts and the law thereby reaching a correct decision and I find no reason to interfere with the same. The sentences imposed in both count one and two were not excessive as they are the minimum possible in law and which are hereby affirmed.

38. Finally, it is noted that the Appellant did not manage to post bail and thus remained in custody throughout the trial and thus the said period must be taken into account in compliance with the provisions of section 333(2) of the Criminal Procedure Code. The sentences imposed must therefore commence from the date of arrest namely 13/7/2023.

39. In the result and save only that the sentences imposed by the trial court shall commence from the date of arrest namely 13/7/2023, the Appellant's appeal lacks merit. The same is dismissed.

It is so ordered.

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

D. KEMEI

JUDGE

In the presence of:

Brian Omondi.....Appellant

M/s Mumu.....for Respondent

Okumu.....Court Assistant