



**FOO v Republic (Criminal Appeal E038 of 2023)
[2025] KEHC 15395 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E038 OF 2023
HI ONG'UDI, J
OCTOBER 29, 2025**

BETWEEN

FOO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the Judgment by Hon. K. Kibelion delivered in Nakuru Chief Magistrate's Court Sexual Offences Case No. 155 of 2018 on 22nd August, 2023)

JUDGMENT

1. FOO hereinafter referred to as the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars being that the appellant on diverse dates between 10th December, 2017 and 10th August, 2018 at [Particulars Withheld] in Nakuru West sub-county within Nakuru county intentionally and unlawfully caused his penis to penetrate the vagina of P.A.O. a child aged six (6) years. He faced an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
2. He denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses while the appellant gave an unsworn defence without calling any witness. Thereafter the appellant was convicted and sentenced to life imprisonment on 22nd August, 2023.
3. Being dissatisfied with the Judgment he filed this appeal on 31st August, 2023 based on eight (8) grounds. He later filed the following amended grounds of appeal:
 - i. That, the learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that the appellant was not given an opportunity to cross-examine PW1 who was the complainant.



- ii. That, the learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that the complainant's age was not proved as required in law.
 - iii. That, the learned trial magistrate erred in both law and fact by convicting the appellant yet failed to find that the penetration of the complainant's genitalia was not proved as required in law.
 - iv. That, the sentence imposed is both harsh and excessive and did not take into consideration the appellant's mitigation and the unique circumstances of the case.
4. A brief summary of the case is that PW1 (P.A.O) who gave unsworn evidence is a daughter of the appellant. She lived with the appellant, her three sisters and a brother at [Particulars Withheld]. It was her evidence that the appellant used to undress her and insert his penis into her vaginal area and thereafter wipe her organ using an old boxer. One day she reported to her mother what the appellant used to do to her despite his having threatened to kill her if she ever mentioned the incident to anyone. She said she hated the appellant for putting his thing into hers.
 5. PW2 JAO is the mother to P.A.O. and wife to the appellant. It was her evidence that she and appellant have five children. On 10th August, 2018 at about 6.00 pm she arrived home from her day's chores when P.A.O informed her of what the appellant had been doing to her amidst threats. She told her how he had been defiling her and thereafter wiping her private parts with a boxer. PW2 informed her sister and a report was made to the police. The appellant was later arrested. P.A.O. was taken to Nairobi Women Hospital for treatment and examination. PW2 would leave the appellant with the children for long as she went away to work.
 6. Ruku Njoroge (PW3) from Nairobi Women hospital testified that P.A. O was seen at the facility on allegations of defilement by the father. This was in August, 2018. On examination it was found that: The child's hymen was broken (old) No spermatozoa noted Trauma to the vagina Minor was defiled.
 7. No. 90924 Grace Munyanibu the investigating officer stated that she received the report on this matter on 11th August, 2018 but only met P.A.O. and PW2 on 14th August, 2018 10.00am. They presented to her a report from the hospital. She took both the appellant and P.A.O. to Nairobi Women hospital and they were examined.
 8. In cross examination she said she was not able to retrieve the inner wear nor jelly. She did not subject the minor to DNA sampling.
 9. In his unsworn defence the appellant denied the charge. He said he is a motorbike rider. On 10th August, 2018 he went to work and when he arrived home that evening he found the children asleep but his wife (PW2) was awake. She refused to talk to him. Later PW2's sister came in briefly and left only for police officers to arrive shortly thereafter. He was arrested and taken to Rhoda police station. It is there that he learnt of the defilement allegation. He was taken to Nairobi Women hospital then to court. He said he had been framed by the sister in law with whom he had disagreed. The relatives stopped the wife (PW2) from withdrawing the case.
 10. The appeal was disposed by written submissions.

Appellant's submissions

11. The appellant submitted that he was denied an opportunity to cross-examine PW1, hence a violation of his constitutional right to fair trial.



12. Secondly that PW1's age was not proved. That PW2 who had promised to avail some document never did so. In support of this ground he referred the case of:
 - i. G.O.A V Republic [2018] eKLR
 - ii. Eliud Waweru Wambui V Republic [2019] eKLR
13. Thirdly, that penetration was not proved. On this he referred to the evidence of PW1 and PW3 and the record. He further submitted that the P3 form P.EXB 1 did not assist as it was indicated in its section B that all findings were normal.
14. Finally, on sentence he submitted that the sentence was excessive. Referring to the Supreme Court decision in Republic Vs Mwangi: Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 KLR he said he is challenging the mandatory nature of the sentence passed against him. He asked the court to find section 8(2) of the Sexual Offences Act to be unconstitutional for violating a number of principles.

Respondent's submissions

15. These were filed by M/s Emma Okok principal prosecution and are dated 5th May, 2025. It is her submission that all the 3 ingredients of age, penetration and identification were proved. She submitted that the defence was a mere denial. Finally, on sentence she referred to section 8(2) of the Sexual Offences Act and the Supreme Court case of Republic V Mwangi (supra). She urged the court to confirm the sentence.

Analysis and determination

16. I have carefully considered the evidence on record, the amended grounds of appeal, submissions by both parties and the law. The main issue is whether the charge of defilement was proved against the appellant. However before delving into that I will first address ground No. 1 of the appeal, on whether failure to give the appellant an opportunity to cross examine the victim P.A.O is fatal.
17. The record is clear that P.A.O. (PW1) was taken through a voir dire examination before giving unsworn evidence. After her evidence in chief the next witness (PW2) was called to the witness box without PW1 being cross examined.
18. Section 208 of the Criminal Procedure Code Provides:
Procedure on plea of not guilty
 - a. If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).
 - b. The accused person or his advocate may put questions to each witness produced against him.
 - c. If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.
19. This section applies to all witnesses whether they have testified on oath or not. This ensures that the evidence of all the witnesses is tested for its veracity save for situations where an accused state that he/she does not have any questions for the witness. P.A.O. (PW1) was a very crucial witness in this matter since there was no eye witness to the incident. None of her siblings testified.



20. In the case of Paul Kinyanjui Kimanku Vs Republic [2016] eKLR the Court of Appeal stated this in a similar scenario:

“(23) Again, the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant’s right to a fair trial. Under Article 50(2) of *the Constitution* every accused person had a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross examination. Therefore, an accused person is entitled to cross-examine any person who testified as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross examination. Thus, there is a clear distinction between an accused person who opts under section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined”

Also see:

- (i) Gailord Yambwesa Landi V Republic [2019] eKLR.
- ii. Mbathe V Republic (Criminal Appeal 69 of 2015) [2023] KECA 676 (KLR) (9 June, 2023) (Judgment).

21. In view of the above provisions of the law, the decisions and the record it is my finding that failure to accord the appellant an opportunity to cross examine this critical witness (P.A.O PW1) amounted to a mis-trial. The conviction cannot therefore stand. In the circumstances I will not consider the rest of the grounds.

22. The next issue now, is what happens to the appellant? Does this court acquit him or order for a retrial?

23. In this matter the appellant was first arraigned in court on 29th August, 2018. There is no evidence of him having been on bond though he had been granted a cash bail of Kshs 200,000/= . The charge facing the appellant is a serious one and carries a life sentence. It is roughly seven (7) years since the case started. Considering all the circumstances of the case I find it just for the appellant to undergo a re-trial.

24. I therefore allow this appeal set aside the conviction plus the life sentence. The appellant shall be remanded at Nakuru Central Police station for fresh charges to be preferred against him. He should be presented before the Chief Magistrate Nakuru not later than 3rd November, 2025 for plea taking.

25. The case to be heard before any Magistrate besides those who handled it and are still based at Nakuru Law Courts.

26. The matter should be heard and determined within twelve (12) months. In the event of a conviction the seven (7) years the appellant has spent behind bars must be taken into account.

27. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF OCTOBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

