Kyalo v Republic (Criminal Appeal E167 of 2023)
[2025] KECA 1766 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1766 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E167 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

OCTOBER 24, 2025

BETWEEN

JOHN MUNYAO KYALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kiambu (L.N. Mutende, J.) dated 12{{^th}} September, 2019 in HCCRA No. 35 of 2019)

JUDGMENT

1. The appellant, John Munyao Kyalo, was the accused person in the trial before the Chief Magistrate's Court at Thika in Criminal Case No. 84 of 2016. He was charged 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 the 3rd day of January, 2016, in Thika Central District within Kiambu County, the appellant intentionally caused his penis to penetrate the vagina of RW, a child aged 12 years.

2. The appellant also faced 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 victim, date and place of the alternative count were the same as that in the main charge.

3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to twenty (20) years imprisonment.

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

5. The High Court (L.N. Mutende, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 12th September, 2019.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised four (4) grounds in his Amended Grounds of Appeal, which are that the High Court judge erred in law: in failing to comprehensively analyze the trial court record and come up with an independent evaluation as required; by admitting hearsay evidence; by unduly dismissing the appellant's defence; and by ratifying the trial court's sentence which was manifestly harsh and excessive in the circumstances of the case.

7. A summary of the evidence that emerged at the trial through seven (7) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.

8. The (complainant), R.A, was a mentally challenged child who, upon the application of the prosecution, was declared a vulnerable witness under section 31 of the *Sexual Offences Act*. A status report by Dr. Njeri Mungai, a Consultant Psychiatrist at Thika Level 5 Hospital, was presented to the court. The report showed that she was of below average intelligence quotient and it was also difficult to establish a rapport with her as she was generally non-responsive to her environment and of poorly developed speech. As a result, the complainant testified through an intermediary, Linah Mwangi, a Children's Officer at Thika.

9. Linah testified as PW1 and told the court that the complainant lived and schooled at Kustawi Children's Home/Watoto Wenye Nguvu. During the holidays in December, she went home where she lived with her mother and the appellant. It would seem that the appellant had a relationship with the complainant's mother. On 3rd January, 2016, the appellant volunteered to take the complainant to the Children's Home but they did not use the main road. Instead, the appellant passed by a bushy area where he removed her pair of trousers and panties. He also undressed himself and removed a "big thing that he uses to urinate" and inserted it inside her vagina. She cried after the ordeal. Afterwards, the appellant told her to dress up and they proceeded to the Children's Home. It was then that the complainant reported the incident to her "school house mother" and she was taken to hospital for a medical examination and treatment.

10. JC, the complainant's "house mother", testified as PW2. She told the court that when the complainant saw her, she cried and narrated what had happened on her way to school with the appellant. She had known the complainant for about seven years. PW2 asked the appellant where the complainant's mother was and he said that he was her neighbour. She then handed the complainant and appellant to one Elijah Munene, for investigation.

11. Elijah Munene, a social worker at the Children's Home, was PW3. He interrogated the appellant and the complainant. He noted that the appellant was aggressive and would not let the complainant answer any questions so he handed over the complainant to a caregiver. The latter examined the complainant and saw wet substance in her private parts and suspected that she had been defiled. The matter was reported to the police who went to the Children's Home and arrested the appellant. The complainant was then taken to hospital where she was examined and treated. PW4 was Ann Njeri Ngugi, the caregiver at the Children's Home who corroborated in material parts the testimony of PW2 and 3.

12. Dr. Kiprotich Ngetich of Thika Level 5 Hospital testified as PW6 on behalf of Dr. Gachane, who examined the complainant. He informed the court that the complainant told the doctor that she had been defiled by someone who was known to her mother. Upon examination, it was found that her vagina was swollen and had discharge which had a foul smell; and her hymen was broken. She tested positive for a bacterial infection and negative for HIV and STDs. He also testified that the complainant

had been previously examined at Ngoliba Health Centre after which she was referred to Thika Level 5 Hospital for further treatment. The conclusion was that she had been defiled/penetrated.

13. The last witness, CPL Geoffrey Mitei Mutai, was the investigating officer in the case. He was on duty on 3rd January, 2016, at Yatta Police Station, when an AP from Magugunu AP Post brought in the appellant on allegations that he had defiled the complainant. He took the appellant into custody; facilitated the medical examination of the complainant; and otherwise completed the investigations.

14. When he was placed on his defense, the appellant gave unsworn testimony and called no witnesses. He denied the charge against him and confirmed that while they were on their way to the Children's Home on 3rd January, 2016, the complainant's mother returned home upon realizing that she had forgotten her Identity Card and keys; and she asked him to proceed with the complainant to school. Upon arrival, he was given tea and rice to eat and immediately after, he was arrested and later charged with the offence of defilement.

15. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. O.J. Omondi, appeared for the respondent. Both parties relied on their submissions.

16. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. For purposes of this section, severity of sentence is defined as a matter of fact. In Samuel Warui Karimi v Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong v R, [1984] KLR 611."

17. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions and have addressed them hereunder.

18. In a kitchen-sink fashion, the appellant enumerated a list of many errors he thought the learned judge committed including the argument that: the charge sheet was defective; his plea was not equivocal; he was not issued with witness statements; the prosecution failed to avail three crucial witnesses namely the complainant, her mother and the doctor who examined the complainant; the birth certificate of the complainant was not certified as required; the age of the complainant in the charge sheet did not match with the one on her birth certificate; and information in the PRC form and discharge summary was incomprehensible and clashed with what was on record.

19. He argued that the learned judge failed to articulate his duty to re-evaluate the evidence on record as the first appellate court and note the various contradictions and inconsistencies on record. Thus, the judge violated Article 165(7) of *the Constitution* as read with section 362 of the Criminal Procedure Code in unceremoniously dismissing his appeal. To support his assertations, the appellant cited various cases, some of which included Jason Okumu Yongo v Republic (1987); Adan v Republic (1973) EA 45; Elijah Njihia Wakianda v Republic (2016) eKLR; Kasyoka v Republic (2003) eKLR 406; Republic v Ward (1993)2 ALL ER 557; and Thomas Patrick Cholmondeley v Republic (2008) eKLR. However, in citing the said cases, the appellant only made a blanket reference to them and did not point this Court to the specific ways they applied to his case.

20. The appellant further submitted that the prosecution did not prove its case beyond reasonable doubt as: the charge sheet stated that the complainant was 12 years old, whilst her birth certificate showed that she was about 14 and half years old at the time of the incident; and that penetration was not proved since the complainant did not testify and identify the appellant as the person who defiled her.

21. In response, the respondent submitted that the charge against the appellant was properly drafted in strict compliance with the law as it had the statement of offence, the section that was violated, the name of the appellant and the particulars thereof; which the appellant understood and pleaded to.

22. On the issue of crucial witnesses not testifying, the respondent associated itself with the judgment of the learned judge who found that the complainant's mother was not a crucial witness as she was not present when the incident occurred; and further, she was to inform the court on the age of the complainant which was proved by the production of her birth certificate. In any event, the respondent agreed with the appellant that the complainant was aged 14 years and 5 months and not 12 years old as was stated in the charge sheet.

23. As regards the P3 form, the respondent submitted that it was produced by the doctor in its original form and none of the exhibits was objected by the appellant during trial.

24. On our part, being faithful to our duty as a second appellate court and bearing in mind that the appellant was acting in person, we were able to delimit four questions for our determination: whether the learned Judge subjected the evidence to a re-evaluation as he was required to; whether it was fatal that the complainant did not testify in person but through an intermediary; whether the conviction suffered the infirmity of lacking the evidence of crucial witnesses; whether the evidence assessed as a whole supported the conviction; and, finally, whether the sentence imposed was lawful or excessive in the circumstances of the case.

25. On the first question, we have perused the trial record, the judgment of the trial court and that of the High Court Judge. Simply put, we find no merit whatsoever for the allegation that the learned Judge failed to faithfully execute his duty to re- evaluate the evidence and come up with his own conclusions as the law requires. As the other aspects of the appellant's appeal analysed below will demonstrate, the learned Judge did, in fact, subject the appeal to a conscientious and thorough examination.

26. The appellant's main complaint is that it should have been impossible to secure a conviction without the direct evidence of the complainant. This is because the complainant was declared a vulnerable witness by reason of developmental challenges and could, thus, not address the court directly. The appellant argues that without such "direct" evidence, a conviction would be impossible. In making this argument, the appellant misapprehends the law. The law, in fact, directly provides for such a situation. Section 31 of the *Sexual Offences Act* provides that:

> "(1) A court, in criminal proceedings involving alleged the commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is
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> a. the alleged victim in the proceedings pending before the court;
>
> b. a child; or
>
> c. a person with mental disabilities.
>
> 2. The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other

than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—

a. age;

b. intellectual, psychological or physical impairment;

c. trauma

....."

27. The court acted under this provision in declaring the complainant a vulnerable witness and appointing an intermediary for her. For purposes of the law, the testimony made through the intermediary is considered to be the direct testimony of the vulnerable person. We need not belabour this point.

28. There are two witnesses whose absence the appellant vehemently protests. The first is the mother of the complainant. The record shows that she appeared in court and was sworn in as PW5 but that she was stood down from testifying. Given the relationship the appellant had with the complainant's mother, we can only deduce that she was an uncooperative witness. The crucial point is that the evidence of the mother was not necessary to obtain conviction: all the ingredients of the offence were sufficiently established without her testimony.

29. The rule in criminal law is that the prosecution is required to call witnesses who will give evidence of sufficient probative value to establish its case beyond reasonable doubt. There is no requirement to call a multiplicity of witnesses in criminal trials. The rule is the opposite: the prosecution is only required to call a sufficient number of witnesses to establish a pertinent fact. Section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

30. The correct legal position respecting the failure by the prosecution to call certain witnesses has been stated by this [2006] KECA 79 (KLR) thus:

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

31. The complementary rule is the one stated in the famous Bukenya v Uganda (1972) EA 549 where the predecessor to this Court held that:

> "The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

32. The Bukenya exception (where the court will draw an adverse inference when a witness is absent), is only applicable where that witness was an essential one; and where the extant evidence is barely adequate to establish a particular fact. Neither of these conditions is present here.

33. The appellant also complains that the doctor who presented the medical report and P3 form was not the one who examined the complainant. It is true that the record shows that the doctor who examined the complainant had already left employment and could not be traced by the time the trial was being conducted. Therefore, PW6, having previously worked with him, testified on his behalf. The appellant did not raise an objection to the testimony at the time of trial. Even if he had, the objection would not have been sustained. This is because the practice is permitted under section 77 of the *Evidence Act* which provides as follows:

> "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> 2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
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> 3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

34. Turning to the evidence supporting the conviction as a whole, we have carefully looked at the evidence on record, as reevaluated by the High Court, and we have no reason to depart from the concurrent findings of the two courts below on the facts establishing the ingredients of the offence. The appellant has made heavy weather regarding the age of the complainant. Regarding this, the two courts below held that the same was proved by the complainant's birth certificate. Additionally, the learned judge held that the appellant correctly argued that the complainant's birth certificate proved that she was 14 years and 5 months old at the time of the incident and not 12 years old as was stated in the charge sheet – but that this minor discrepancy was curable under section 382 of the Criminal Procedure Code. We agree with the concurrent findings of the two court's below and have nothing useful to add.

35. Lastly, the appellant submitted that the sentence meted out was harsh in the circumstances and that the mandatory nature of sentences in the *Sexual Offences Act* has now been relaxed and courts have been given the discretion to determine sentences based on the nature and circumstances of a case.

36. The appellant was sentenced to twenty (20) years imprisonment, the mandatory minimum sentence prescribed in the *Sexual Offences Act*. The Supreme Court has, in Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), categorically held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.

37. The apex Court held thus:

> "56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions,

including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

38. The upshot is that the appeal fails in its entirety and is hereby dismissed.

39. We hereby uphold the sentence of twenty (20) years imprisonment on the appellant. By dint of section 333(2) of the Criminal Procedure Code, the sentence shall be computed to run from 3rd January, 2016, when the appellant was arrested and placed in police custody as he remained in custody during the pendency of the trial.

40. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2025.

P. O. KIAGE

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.