**Ochieng v Republic (Criminal Appeal E028 of 2022)**
**[2025] KECA 1791 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1791 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL E028 OF 2022**

**MA WARSAME, JM MATIVO & GV ODUNGA, JJA**

**OCTOBER 31, 2025**

**BETWEEN**

**MICHAEL OSURA OCHIENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of the High Court at Naivasha (Ngenye-Macharia, J) delivered on 19th May 2022 in Criminal Appeal No. 3 of 2018)***

## JUDGMENT

1. This is a second appeal lodged by the appellant against the judgement delivered on 19th May 2022 by the High Court at Naivasha (Ngenye-Macharia, J) in High Court Criminal Appeal No 3 of 2018. The appeal emanated from the judgement of the Chief Magistrate's Court at Engineer in Criminal Case (S.O) No. 17 of 2016 in which the appellant was charged, convicted and sentenced to life imprisonment for 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 of the offence were that on the night of 28th and 29th November 2016 in Kinangop within Nyandarua County, the appellant intentionally caused his penis to penetrate the vagina of LMW, a child aged 10 years. When the charges were read over to the appellant, he denied the offence and a plea of not guilty was entered.

2. In her unsworn statement, the complainant, PW1, stated that she is 11 years old. She knew the appellant, who was a farm help at Mama Mercy, where her mother, PW2, was working as a maid. On the material day, at about 6.30pm, her mother threatened to punish her for having fought with her sister. As a result, she went into the forest to hide. At 7pm on her way back, she came across the appellant who enticed her to go to his house where the appellant gave her tea, sweet potatoes, and a piece of ugali. After she had finished eating, the appellant tore her skirt, removed her pants and laid her on the bed. The appellant then removed his shorts, placed her on top of him, inserted his penis inside PW1's "thing for urinating" and retained it there for a while, teasing her that "Hii matako ni smart" while

touching her buttocks. After that, they slept and, in the morning, while it was still dark, the appellant gave her Kshs. 30 to buy a cake and warned her not to disclose the incident to anyone lest he kills her. The appellant advised her to say that she was in the forest. The appellant then took her to the fence and told her to pass through the wire fence.

3. When PW1 got home, she found PW2 still sleeping and she proceeded to the shop, which she found still closed. At about 8.00 a.m., when PW2 was going for her casual work, she saw her behind the shop. The complainant then disclosed to PW2 and one Mama Gerald what the appellant had done to her. On the advice of the police, she was taken to Engineer District Hospital, where she was examined and treated.

4. According to PW1, this was not her first time to spend the night out, and it was not the first time that the appellant was doing bad things to her. She however, insisted that on this day, it was the appellant who made her spend the night in his house. She recalled a day when she went to collect milk from Mama Mercy and found the appellant on the road, and the appellant started touching her vagina with his penis.

5. PW2, AW, PW1's mother told the court that PW1 was born on 17th September 2006 and produced PW1's baptism card. It was her evidence that on 28th November 2016 at about 6.30 p.m., when she called her six children to take supper, PW1 was absent and the other children said that PW1 was outside. However, when she went outside to look for her, she did not find PW1. The following morning, she saw PW1 on the road, but PW1 attempted to hide. PW1 then narrated to her what the appellant had done to her and on examining PW1, she saw injuries in her genitals. At Weru Dispensary, they were told that there was no facility to treat PW1, and they proceeded to the Engineer District Hospital, where she was given a P3 Form on 1st December 2016. It was her evidence that the appellant was her co- worker in the place where she was employed in the shamba while the appellant took care of the cows. However, she stopped working at the said place after a disagreement arose between her and the appellant from allegations by the appellant that she had stollen her employer's panga. It was her evidence that this was the first time for PW1 to spend the night out and that she had no grudge with the appellant.

6. PW3, Dr. Julius Twiga, who was based at Engineer District Hospital examined PW1, a 10 year old girl, and saw no physical injuries. Although her labia majora and her hymen sheath were intact, there was bruising and reddening along the interior and the labia minora. Based on the bruises, he concluded that there was an attempted defilement. He filled the P3 form on 1st December 2016.

7. PW4, Inspector Joseph Mulinge, the Investigating Officer attached at Kinangop Police Station, was on 1st December, 2016 at the station at around 10.30 a.m. when PW1 was brought to the station by her mother, PW2, on the allegation that PW1 had been defiled on the night of 28th and 29th November 2016. Based on the evidence of the witnesses and the P3 form, he charged the appellant with the offence in question. He was not aware of any bad blood between the complainant's mother and the appellant. He produced PW1's Baptismal Card.

8. Upon being found to have a case to answer, the appellant stated that on 2nd December 2016 at about 2.30 p.m., while at work, he saw two people standing with his employer. The two people informed him that they were police officers from Weru AP Camp. While being taken to Weru AP Post, at the entry of his employer's gate, he found PW2, and the officers asked PW2 whether he was the person, and PW2 confirmed he was the one. He stated that it was at the Police Station that he was told that a certain girl was lost and he was the one who knew her whereabouts. He denied having committed the offence. He stated that there was a disagreement between him and PW2 arising from the refusal by PW2 to give him food at his work place as a result of which, in October 2016, he was given his

budget, and his salary was increased from 7,000.00 to 10,000.00 and a small room was assigned to him. However, this arrangement annoyed PW2 who would still have to go to her home to eat. When a panga got lost at their place of work, it was decided that PW2's salary would be deducted to buy another panga. However, the panga was later found in possession of PW1 who disclosed that it was in PW2's house. It was his evidence that the defilement charges were maliciously preferred against him by PW2.

9. In her judgment, the learned trial magistrate found that all the ingredients of the offence of defilement were proved against the appellant and that from the evidence, although penetration was not complete, there was partial penetration. It was found that the defence of malice could not stand in light of PW1's evidence. She then sentenced him to life imprisonment as the lawfully prescribed mandatory sentence.

10. On appeal to the High Court at Naivasha, the appellant contended that the learned Trial Magistrate: failed to scrutinize the doctor's evidence, which showed that PWl's genitalia was intact; failed to invoke section 150 of the Criminal Procedure Code in not summoning crucial witness mentioned by both PW1 and PW2 who checked the minor's genitalia; based the sentence on the evidence which disclosed the offence of attempted defilement which attracts a sentence of less than 10 years; that the age of PW1 was not conclusively proven beyond any reasonable doubt; and that his mitigation was neglected without cogent reasons. The appellant prayed that his appeal be allowed, the conviction quashed, the sentence set aside, and he be set at liberty.

11. In his judgment, the learned Judge found that PW1's age was proved by the Baptism Card produced in evidence by PW 4 which indicated that she was born on 17th September, 2006. On penetration, the learned Judge considered the evidence of PW1 and PW3 as well as the P3 Form and found that there was slight penetration that resulted in bruising of PW1's labia minora and reddening of the introitus. According to the learned Judge, lack of a PRC Form was immaterial. The learned Judge held that the identification of the appellant was by way of recognition, which was undoubtedly proven. According to the learned Judge, the evidence of Mama Gerald would not have added any value to the prosecution's case since the evidence of the witnesses who were called sufficiently proved the offence.

12. On sentence, the Learned Judge upheld the sentence imposed because the law did not give the court any powers to consider the mitigation of a person convicted of the offence andor to impose a lesser sentence. The appeal was dismissed in its entirety for lack of merit.

13. This appeal is based on the grounds that:

    1. The learned appellate judge erred in finding that the evidence adduced established beyond reasonable doubt the offence but failed to take into consideration the evidence of the doctor on the attempted defilement.

    2. There were contradictions in the testimony of PW1 and PW2 that ought to have been considered in imposing the sentence.

    3. That the learned appellate judge erred in law and fact by sentencing the appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.

    4. That the learned appellate judge erred in law and fact by sentencing the appellant, yet failed to consider his mitigating circumstances.

14. The appellant prays that his appeal be allowed, the sentence set aside, and he be set at liberty.

15. We heard this appeal on the Court's virtual platform on 24th June 2025 when the appellant appeared in person while learned Assistant Deputy Director of Public Prosecution, Mr Omutelema,

represented the respondent. Both the appellant and the Mr Omutelema relied entirely on their written submissions.

16. In his submissions, although the appellant stated that he was withdrawing his appeal against conviction, he stated that based on the medical evidence adduced, he ought to have been convicted on attempted defilement as opposed to defilement. The appellant cited the case of Situma v R [2025] eKLR in submitting that attempted defilement involves taking steps towards penetration without actually achieving it. He further submitted that there were contradictions in the testimonies of PW1 and PW2 on whether PW1 had, on prior occasions, spent the night outside. Based on the case of Kioji v R [2024] eKLR, it was contended that mandatory life sentences violate several constitutional principles such as the right to fair trial, equality before the law and international law. According to the appellant the circumstances of the case did not call for the imposition of the mandatory life sentence.

17. On behalf of the respondent, it was submitted that pursuant to section 2 of the *Sexual Offences Act*, the slightest penetration is sufficient for the purposes of penetration hence the depth of insertion of the genital organ is immaterial. As regards the contradictions, it was submitted that the same cannot be raised on a second appeal as such appeals are circumscribed under section 361 of the Criminal Procedure Code to matters of law.

    According to the respondent, the sentence applicable for the offence in question was life sentence which we were urged to uphold.

18. We have considered the submissions made in this appeal.

    This being a second appeal, we derive our jurisdiction from section 361(1) of the Criminal Procedure Code which provides that:

> " A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or
>
> b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

19. In the appeal before us, we are called upon to determine three issues: whether the case against the appellant was proved beyond reasonable doubt; whether there were any contradictions in the prosecution case; and whether the sentence was lawful.

20. On the first issue, both the trial court and the High Court, on first appeal, concurred that the ingredients of the offence of defilement were proved. These were the age of the complainant, whether there was penetration and whether the penetration was by the appellant. As regards the age of the complainant, the baptismal card produced to support her age. There was also the evidence of PW2 and PW3. This Court in Richard Wahome Chege v Republic Criminal Appeal No 61 of 2014, while considering the question of proof of age of the victim held as follows:

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of

the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself."

21. Similarly, in Mwalango Chichoro Mwanjembe v Republic [2016] KECA 183 (KLR) this court held that:

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R,Cr.Appeal No.19 of 2014 and Omar Uche v R,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim.Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

22. We accordingly, find that the age of the complainant was proved.

23. As regards penetration, it must be emphasised that penetration is, for the purposes of the offence, a legal term. While medically, the evidence may not necessarily prove penetration, Section 2 of the *Sexual Offences Act* provides that:

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

24. This Court in Evans Wamalwa Simiyu v Republic [2016] eKLR, held that:

> " the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organs of the perpetrator's genital organs into a child's genital organs."

25. In the case of Alex Chemwotei Sakong v Republic [2018] eKLR the Court went to a great length to explain the extent of penetration in a sexual offence as follows:

> " Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
>
> "...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed.

So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ..."

26. In this case, the evidence was that there was partial insertion of the appellant's genital organ into the genital organ of PW1. This was confirmed by the bruising and reddening along the interior and labia minora of PW1 as well as the observation by PW2. Accordingly, penetration was proved.

27. On the identification, the appellant was well known to PW1 hence there was no possibility of mistaken identity.

28. On the issue of contradiction in the evidence of PW1 and PW2, the only divergence was on whether PW1 had spent the night out before the date of the incident. While PW1 stated that she had done so, PW2 denied that fact. However, the issue was not whether PW1 had spent the night prior to the date of the incident but whether she was defiled. Accordingly, the said contradiction was not material to the finding of defilement.

29. On the sentence, we are alive to the fact that in a second appeal, this Court has no jurisdiction to delve into allegation of severity of a sentence. However, there is a limited jurisdiction to interfere with the sentence, even on a second appeal, where it is alleged that the sentence imposed is illegal or where the circumstances contemplated by this Court in this Court in Robert Mutungi Muumbi v Republic [2015] eKLR are shown to exist. In that case it was stated that:

> " Section 361(1)(a) of the Criminal Procedure Code restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact. However, it is appreciated under section 361(2) of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing."

17. This Court stressed in MGK v Republic [2020] eKLR that:

> " 16. As regards the sentence, under section 361(1) of the Criminal Procedure Code severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal."

17. This position of the law was recently restated by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) thus:

> " "Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

30. By dint of that section, the jurisdiction of this Court on a second appeal is confined to matters of law. Section 361 (1) (b) of the Code bars us from entertaining appeals against sentence unless the

subordinate court had no jurisdiction to pass the sentence or the sentence was enhanced by the first appellate court. None of these factors apply to this appeal.

31. Section 8(1) and (2) of the said Act provides that:

    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.

32. There is no doubt that the sentence meted against the appellant was, going by the present jurisprudence from the highest court in the land, lawful. Accordingly, we cannot interfere with the sentence.

33. In the premises, this appeal fails and is dismissed.

34. We so order.

**DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF OCTOBER 2025**

**M. WARSAME**

**.....**

**JUDGE OF APPEAL**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**