Odhiambo v Republic (Criminal Appeal 367 of 2019)
[2025] KECA 1786 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1786 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 367 OF 2019

MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA

OCTOBER 24, 2025

BETWEEN

GASTONE OCHOLA ODHIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Migori (A.C. Mrima, J.) dated on 4th October, 2018 in HCCRA No. 34 of 2017)

JUDGMENT

1. The appellant, Gastone Ochola Odhiambo was charged before the Senior Resident Magistrate Court at Rongo with defilement contrary to Section 8[1] as read with Section 8[2] of the *Sexual Offences Act*. The particulars of the charge were that on 21st July 2017 at Awendo town in Awendo Location in Awendo sub county of Migori County, he intentionally and unlawfully caused his penis to penetrate the vagina of R.A.[1] a child aged 10 years.
2. In the alternative, the appellant faced counts of committing an indecent act with a child Contrary to Section 11(1) of the *Sexual Offences Act*.
3. He pleaded not guilty on both the main and the alternative counts and the matter proceeded to full trial with the prosecution calling four witnesses in support of its case. In his defence, the appellant gave sworn evidence, denying committing the offence. At the conclusion of the trial, the appellant was found guilty of the offence of defilement, convicted, and sentenced to life imprisonment.
4. Aggrieved, the appellant appealed against both the conviction and sentence before the High Court of Kenya at Migori which appeal was unsuccessful, prompting this second appeal against both conviction and sentence.

5. The appellant faults the learned judge for failing to find that the ingredients of the offence were not proved, failing to find that the trial was unfair and meting out a severe and excessive sentence in the circumstances.

6. Briefly, the prosecution's case was that on 21st July 2017, the complainant arrived home from school and found her mother at home. She requested her mother for money to go and mend her slippers, which she gave her and the complainant went to the fundi who was based at the nearby Boda shopping centre. At 7:00 pm, the complainant had not come back. Her mother became worried and started looking for her in vain. She informed neighbours and friends who searched for her in vain and at 1:00 am, she went to bed. At around 6:30 am, she heard the door open and on checking, it was the complainant. The complainant did not speak to her but went to the table where the leftover food was, she ate and upon finishing, she disclosed to her mother what transpired. The complainant's mother noted that her dress had blood stains.

7. In her evidence, R.A the complainant (PW2) told the court that on the fateful day, while on her way from mending her slippers, she met Okoth a frequent visitor on their plot. Okoth grabbed her hand and led her back towards Boda. She tried to scream but the appellant grabbed her neck ensuring that she could not make any noise. He took her to a house in Sare area which had a mattress only on the floor. The appellant locked the door and held both her arms and put her on the mattress. The appellant removed her skirt and panty, unzipped his trouser and removed his penis and inserted in her vagina. The complainant felt pain and when she complained, the appellant grabbed her neck. She was with the appellant the whole night and at some point she slept. When she woke up, the appellant was still asleep and she put on her clothes and went home. Her parents took her to hospital and reported to the police station.

8. PW1, Lorraine Adhiambo a clinical officer at Awendo District Hospital, attended to the complainant. On physical examination, the doctor noted dry blood stains and dry discharge on her thighs. The hymen was torn with a foul-smelling vaginal discharge. The vaginal opening was tender with fresh blood. High vaginal swab revealed presence of spermatozoa, pus cells, and white and red blood cells. The complainant's age was assessed as 10 years and the doctor opined that there was penile penetration.

9. Placed on his defence, the appellant gave a sworn statement and denied committing the offence. He testified that he went to work as usual however, upon arrival, his employer informed him that some people were looking for him. The said people came back and accused him of having defiled a minor and arrested him.

10. When the appeal came up for hearing, the appellant appeared in person on the virtual platform. Mr Chirchir appeared holding brief for Ms. Ikol, learned Prosecution counsel for the respondent. Both parties relied on their respective written submissions.

11. The appellant submitted that the offence was not proved to the required standard, contending that the age of the complainant was not established, as the clinical officer conducted the age assessment considering the external characteristics and estimated her age to be 10 years; that in assessing the age, the clinical officer never gave an allowance for late maturity. Further, that in their evidence both the complainant and her mother never gave conclusive evidence on her age.

12. Regarding the unfair trial, the appellant argues that he did not understand the language used by the court as he was only familiar with the Luo language; and that during the trial, he was unable to cross-examine the complainant on identification due to the language barrier.

13. The appellant complains that, despite raising an issue regarding how the baptismal card was obtained and its production, both the trial and the first appellate courts never considered the objection. Further, that despite finding blood on the mattress, no DNA samples were taken for examination.

14. Regarding the sentence, the appellant contends that he was sentenced to a mandatory life sentence which is harsh and excessive in the circumstances; that the said sentence contravenes the provisions of Articles 26[1], 27[1] and 28 of *the Constitution* and does not achieve the principles of sentencing of rehabilitation and retribution.

15. In reply, the respondent submitted that the prosecution's case was proved beyond a reasonable doubt, as the age of the complainant was proved to be 10 years; and was corroborated by the evidence of PW4; that the discrepancy in the age of the victim is minor and did not affect the substance of the case. Relying on the case of Alex Nzaku Ndaka vs. Republic [2019] eKLR the respondent urged the Court not to quash the convictions in view of the provisions of Section 382 of the Criminal Procedure Code.

16. Regarding penetration, it is submitted that the findings on the P3 form were proof of penetration. In this regard it is pointed out that the physical examination by the doctor revealed that the hymen was torn, the vagina was tender and there was the presence of fresh blood around the vagina; leading to the conclusion that there was penile penetration.

17. On identification, the respondent submitted that the appellant was not a stranger to the complainant as he was a neighbour; that the complainant was candid in the description of the appellant, where she was taken by the appellant and how she was defiled. Further, she described the appellant to PW3 as the person who used to visit their plot; buying her and other children samosas and sweets, thus it was a case of recognition which is more reliable.

18. Regarding the trial, the respondent contends that the appellant was informed of his rights and the language he preferred which was recorded; that the appellant elected to proceed in a language he was most comfortable with, therefore understood the charges against him and could adequately make his defence.

19. Lastly, on sentence, the respondent maintains that the appellant was sentenced to life imprisonment which sentence is within the law. Relying on the Supreme Court Case of Republic vs. Joshua Gichuki Mwangi, initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition No. E018 of 2023) [2024] KESC 34 (KLR) the respondent submitted that the instant appeal was deserving of a mandatory sentence considering the age of the victim.

20. Having considered the appeal, the rival submissions, the authorities cited and the law, in view of the mandate of this Court on a second appeal, this Court's duty is confined to a consideration oof issues of law only. As was succinctly articulated in Karani vs. R [2010] 1 KLR 73:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law." the main issues that fall for determination are whether the offence of defilement was established beyond a reasonable doubt and whether the sentence was proper.

21. Turning on the first issue, in a case of defilement, the prosecution must prove three key ingredients: the age of the victim, that there was penetration, and the identification of the perpetrator.

22. As regards the question of the age of the complainant, the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows:

> "...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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

23. From the evidence on record the age of the minor in this case was proved to be 10 years old. This was confirmed by the clinical officer who conducted the age assessment report and produced the report of her age which indicated that she was 10 years old at the time of the incident. The prosecution therefore proved that the complainant was 10 years old at the time of the commission of the offence.

24. The second issue to be addressed is whether the element of penetration was proved. The evidence on record confirmed the absence of the hymen, presence of the spermatozoa, foul foul- smelling discharge and a tender vagina. The doctor concluded that the absence of the hymen was due to penile penetration.

25. Turning to the last element of identification of the appellant as the perpetrator of this offence, the appellant was well known to the complainant. She identified him as the person who used to come to their plot and bought for her and the other children sweets and samosas. She also described the place she was taken and defiled. The appellant was a person who was well known to the complainant. The appellant's identification was one of recognition as opposed to the identification of a stranger which is more satisfactory, reassuring, and more reliable because it depends upon personal knowledge of the assailant in some form or another. See Anjononi & Others vs. Republic [1980] KLR 59.

26. All the ingredients of the offence of defilement were established to the required standard and the concurrent findings of the two courts below were based on credible evidence.

27. The appellant raised the ground that his trial was unfair as he did not understand the language of the court and further, he was not given an opportunity to be represented. The issue was not raised before the trial court, nor were they grounds for appeal before the High Court. The appellant is, accordingly precluded from raising it in this appeal. In this regard we refer to the case of John Kariuki Gikonyo vs. Republic [2019] eKLR where this Court cited with approval the decision in Alfayo Gombe Okello vs. Republic [2010] eKLR Criminal Appeal No. 203 of 2009 where it was held as follows:

> "... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for the failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

28. In light of the overwhelming evidence adduced against the appellant, his denial that he did not commit the offence was properly rejected. We detect no error on the part of the trial Court and the first appellate Court in their comprehension and evaluation of the evidence on record in light of the applicable legal principles and rules of evidence. We hold that the conviction was therefore sound.

29. As relates to the appeal against sentence, Section 8(2) of the *Sexual Offences Act* provides the penalty of mandatory life imprisonment for the offence of defilement. Section 8 (2) provides as follows:

> " 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."

30. The appellant was sentenced to life imprisonment which is the mandatory sentence provided for under Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* which the appellant complains to be excessive in the circumstances.

31. On mandatory sentences, the Supreme Court in the case of Republic vs. Joshua Gichuki Mwangi, supra while affirming the lawfulness of minimum/mandatory sentences in the *Sexual Offences Act* stated that:

> "[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...
>
> (62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

32. Owing to the above reasons, this Court is precluded from interfering with the sentence on the ground of severity. The upshot of our finding is that this appeal lacks merit in its entirety, and is dismissed.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar