



**Bwana v Republic (Criminal Appeal E038 of 2022)
[2025] KECA 1891 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1891 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E038 OF 2022
MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA
NOVEMBER 7, 2025**

BETWEEN

JOSEPH OGOLA BWANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Homa Bay (Karanjah, J.) dated 22nd October, 2020 in HCCRA No. 27 of 2019)

JUDGMENT

1. The appellant Joseph Ogola Bwana was tried and convicted by the Principal Magistrate's Court at Oyugis for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#). The particulars of the offence were that on 7th June 2018, at Rachuonyo South, Homabay County, unlawfully and intentionally caused his penis to penetrate the vagina of EAO a child aged ten (10) years.
2. In the alternative, the appellant was charged with indecent act with a child contrary to section 11[1] of the [Sexual Offences Act](#) with particulars similar to the main charge.
3. The appellant pleaded not guilty to the charge and a trial ensued, during which seven witnesses testified for the prosecution and the appellant gave a sworn statement. At the conclusion of the trial, the appellant was found guilty of the main charge, convicted and sentenced to life imprisonment.
4. The appellant being dissatisfied with the judgment of the trial court, appealed to the High Court against both conviction and sentence. Upon hearing the appeal, the High Court dismissed the appeal in its entirety.



5. Undeterred, the appellant preferred the instant appeal faulting the learned judge for failing to find that his identification was not proper; and the age of the complainant was not proved to the required standards.
6. Briefly, the facts of the prosecution case were that on the material day at about 7:00 am, EAO¹ the complainant herein who testified as PW1, was heading to school when she was waylaid by ¹ Initials used to protect the identity of the minor a person armed with a machete (panga) who forced her into a bushy area threatened her and defiled her before running away.
7. On 9th June, 2018, EAN² the complainant's mother, PW2 noticed that the appellant was not walking well. On checking her private parts, she found a whitish mucoid discharge. PW2 informed JON³ the complainant's father, PW3, who upon inquiring learnt from EAO that Jossy defiled her. She described him as having a scar on the left side of the jaw.
8. On 10th and 11th June, 2018, the complainant was taken to Rachuonyo Sub-County Hospital where she was attended to by Dr Peter Ogolla, PW6. On examination, the Doctor noted a breeched hymen, inflammation, redness and swelling of both the internal, external genitalia and the cervix, cut wounds on the vagina with a discharge. Dr Ogolla concluded that there was recent penetration.
9. PC Sammy Meldiki [PC Meldiki] PW5, from Oyugis police station investigated the matter and preferred the present charges against the appellant. He also issued the complainant with a P3 Form; and obtained the minor's birth certificate from her father ² Initials used to avoid tracing identity of the minor ³ Initials used to avoid tracing the minor's identity which indicated that she was born on 1st March, 2007. The P3 Form and the birth certificate were produced as Ex 1 and 2 respectively.
10. Placed on his defence, the appellant gave sworn evidence and denied committing the offence asserting that he was a victim of a frame-up orchestrated by the complainant's father over an outstanding debt of Kshs.2,000. He claimed that both he and another individual had initially been arrested as suspects, but the complainant did not identify either of them as the offender. He further alleged that charges were only brought against him after the complainant's father paid a bribe of Kshs.4,000/- to a police officer.
11. At the plenary hearing, the appellant appeared in person from Kisumu Maximum Prison while Ms. Kanyita learned prosecution counsel appeared for the respondent. Relying on his written submissions the appellant contended that the offence was not proved to the required standards. The age of the complainant was not proved as in their testimonies, the complainant and her mother testified that she was 10 years old having been born in 2007. The complainant's father in his evidence produced her birth certificate which indicated that she was born on 1st March 2007 thus she was aged 11 years, 3 months and 6 days as such the appellant ought to have been charged under section 8[3] of the [Sexual Offences Act](#).
12. The appellant submits that the identification was not proper as the complainant only described the perpetrator by the scar; that since there could be a lot of people with scars in the village, it was prudent that an identification parade be conducted which was not.
13. Opposing the appeal, Ms. Kanyita submitted that the appellant's identification was by recognition; the complainant having recognized him as Jose from her village, the one who had a scar on the left lower jaw. The offence took place at around 7 a.m., in broad daylight, as the 10-year-old girl was on her way to school, when she was accosted by the appellant. The complainant described the offender to her parents, who, being from the same village, recognized that description as indeed fitting Jose. She later confirmed the identification at the cells and after trial, the court followed due process before convicting the appellant.



14. It was further argued that under Section 124 of the *Evidence Act*, the trial court believed the complainant's testimony and she positively identified the appellant, leading to the conviction and sentencing of the appellant based on the credibility of the complainant's words.
15. Regarding the age of the complainant, it is the respondent's contention that the birth certificate was the documentary evidence produced as proof of age. The birth certificate showed that the minor was born on 1st March 2007 as such she was around 11 years and 3 months old thus the appellant was rightfully charged under section 8[1][2] as the complainant was not yet 12 years old. The respondent urged the Court to dismiss the appeal.
16. This being a second appeal, the Court's mandate is restricted to addressing only matters of law. The court will also not normally interfere with concurrent findings of fact by the two courts below, unless such findings were not based on evidence, or were based on a misapprehension of the evidence, or the courts below acted on wrong principles in arriving at the findings. In the case of *Chris Kasamba Karani vs. Republic* [2010] eKLR the role of the second appellate court was succinctly set out as follows:

“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 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.”
17. Having considered the appeal, the rival submissions, the authorities cited and the law and in view of the mandate of this Court on a second appeal, the main issues that fall for determination revolve around whether the offence of defilement was established beyond a reasonable doubt and whether the sentence was legal. Although at the plenary hearing, the appellant towards the end, in response to the submissions by the State, indicated that he was abandoning his appeal on conviction, we perceive that he was not very certain as to what he was responding to, thus we have addressed his appeal based on the issues he raised in his submissions.
18. The appellant faults the trial court and the learned judge on the grounds that the elements of defilement were not established. In respect to the element of age, the appellant contends that the age of the complainant was not established beyond reasonable doubt. He argued that the evidence of the complainant's age as disclosed in the certificate of birth was 11 years and 3 months as such he was charged under the wrong provision. Faced with a similar issue, the Court in *Maripett Loonkomok vs. Republic* [2016] KECA 520 [KLR] pointed out that:

“The question of age, as we have stated earlier is a question of law under the *Sexual Offences Act*, at least to prove that the victim was a child at the time of defilement and also for purposes of sentence. However, the question whether the complainant was 9, 10 or 13 is a question of fact with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were perverse in nature. It follows that to constitute a question of law the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises.”
19. In the instant case, the complainant stated that she was 10 years old. Her mother stated that she was born in 2007 while her father produced her birth certificate which gave the complainant's date of birth as 1st March, 2007. The doctor estimated the complainant's age as 10 years old. Under the *Sexual*



offences Act which categorizes the penalty on a graduated scale based on age, Section 8 provides as follows:

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.
 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.
20. The incident occurred in June 2018, which would give her age as 11 years and 3 months, placing her squarely below the top up age of 12 years, thus remained within her eleventh year of life until such a time as she tipped the 12 years on earth. There was therefore no error or injustice in charging the appellant under the provisions of section 8(1) as read with section 8(2) of the said Act.
21. Regarding the identity of the appellant as the perpetrator, the appellant took issue with the reliance on the sole evidence of the complainant to link him to the offence. Further, that the only leading evidence is the appellant's scar on the left side of the jaw which according to the appellant was not a proper identification.
22. However, the evidence on record shows that the appellant was known to the complainant. She even mentioned him by name to her parents as Jossy from the same village. 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.
23. In relation to the appellants identification, the learned judge stated thus;
- “Herein, none of the shortcomings specified above are evidenced in the proceedings and judgment of the trial court. As such, it may safely be stated that the conviction of the appellant by the trial court was sound and proper even if it was based on the complainant/victim's credibility in the identification of the appellant as the person who offended her.
- In any event, prior to the conviction, the trial court properly directed and warned itself of the dangers of convicting an accused person on the basis of the uncorroborated evidence of identification by a single witness. Besides, in Sexual Offences, by dint of Section 124 of the Evidence Act corroboration of the sole evidence of the victim is not necessary. The provision thereto states that:
- “Where in a criminal case including a sexual offence, the only evidence is that of the alleged victim of the offence. The court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”
- In this case, the trial court was satisfied that the complainant told the truth when she positively identified the appellant as the culprit and thereby, disproved his defence and rendered it an afterthought. This court does not see any solid reason to depart from that finding and therefore, upholds the appellant's conviction by the trial court.”
24. As pointed out by the trial court, the evidence of the complainant was credible, and there was no plausible reason why she would frame the appellant. The High Court did not err in affirming the decision of the trial court by finding that the appellant was the defiler.



25. Finally, the appellant urged us to interfere with the sentence and consider a reduction thereof to allow him go home. In this regard, the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 Others [Amicus Curiae]* [2024] KESC 34 [KLR] held that

“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.”

26. The complainant having been established to be the age of 11 years, the sentence of life imprisonment imposed was lawful and legislated by the provision under which he was charged.

The appellant’s challenge to the sentence is therefore without merit. Ultimately, we hold and find that the appeal lacks merit in its entirety, and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF NOVEMBER, 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

