VMO v Republic (Criminal Appeal 76 of 2020)
[2025] KECA 1877 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1877 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 76 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

NOVEMBER 7, 2025

BETWEEN

VMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii, (Okwany.J), dated 8th September 2016 in HCCRA No. 39 of 2015)

JUDGMENT

1. This is a second appeal against the judgment of the Principal Magistrate's Court at Ogembo delivered on 18th May 2015. By that judgment, the appellant, Vincent Manoti Obita, was charged, tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, "SOA". The appellant had also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, but no finding was made in respect of this alternative count, and correctly so. We shall consequently not belabor on it. Suffice to add that all these counts involved a child aged four years whom we shall christen CDS for protection of her identity. They arose from an incident that occurred on 21st August 2013 at Thurwa Sub- location in Nyamache District, Kisii County, where the appellant was alleged to have either intentionally caused his male genital organ namely the penis to penetrate the female genital organ namely the vagina of CDS or used it to touch her vagina.

2. The appellant entered a plea of not guilty on both counts and thereafter his trial ensued in earnest. The prosecution called a total of six witnesses to establish the offence against the appellant. PW1, CDS, then aged seven years at the time of trial, in the evening of the material day while on her way from her grandmother's house, went to a toilet to answer to a call of nature. Whilst at it, the appellant, who was her cousin lured her to the bathroom, undressed her, and sexually assaulted her. Once done, she went

and immediately informed her grandmother PW2, AK[1] and her mother PW3, ANS. AK confirmed that CDS was indeed her granddaughter whereas the appellant was her grandson who lived nearby. On the other hand, ANS confirmed that,

We shall codename witnesses who are related to the minor by their initials to avoid the possibility of the minor's identity being revealed or detected CDS had complained to her of stomach and leg pains the following morning, when she was cleaning her and disclosed what the appellant had done to her. She in turn reported the occurrence to her husband and father to CDS, PW4, SNO. Together they took her to Gucha Level 4 Hospital for medical examination and treatment. SNO confirmed that the appellant was his nephew as he was a son of his brother. During the hearing, this witness produced the birth certificate of CDS placing her age at 4½ years at the time of the offence.

3. Wycliffe Atombo, PW5, a clinical officer at the facility examined CDS and found her hymen torn with bruises on the vaginal wall, consistent with recent penetration. Cpl. Emily Rop (PW6,) the investigating officer received the report from SNO, issued the P3 form, and conducted investigations which led to the arrest and subsequent charging of the appellant.

4. Put on his defence, the appellant in unsworn statement denied committing the offence. Indeed, he raised an alibi defence claiming that on the day in question he was in South Mugirango crushing sugar cane when his uncle, PW4 set him up over a debt he owed him by summoning him to Gucha police station but upon arrival, he was arrested and subsequently charged with an offence he knew nothing about.

5. The trial court in its judgment found CDS's evidence to be clear, consistent, and credible. That her identification of the appellant was reliable, as he was known to her being a relative. The medical evidence corroborated her account, and the defence offered by the appellant was a general denial and unconvincing. The court concluded that the prosecution had proved all the elements of the offence beyond reasonable doubt, leading to the conviction and imposition of life imprisonment on the appellant as the punishment.

6. In his appeal to the High Court of Kenya at Kisii, the appellant, challenged both his conviction and sentence on several grounds to wit; poor investigations; violation of his constitutional rights under Article 50(2) (j) and (k) of *the Constitution* of Kenya; reliance on hearsay and uncorroborated evidence from a single witness who was a minor; failing to consider his defence; and that the life sentence imposed was manifestly harsh and unlawful.

7. Upon consideration of the appeal, the High Court, (Okwany, J). dismissed it in its entirety. The High Court reaffirmed the trial court's findings that CDS's evidence was clear, consistent, and credible, noting that her identification of the appellant was reliable given their familial relationship. That medical evidence presented by PW5 corroborated her account, confirming penetration. On violation of constitutional rights, the court held that the right to legal representation does not require automatic assignment of counsel by the State to an accused unless substantial injustice would result, which was not demonstrated in this case. The court further affirmed that under Section 124 of the *Evidence Act*, a conviction can be sustained on the evidence of the victim alone if the court believes the evidence of the victim and records its reasons. Finally, the court upheld the life sentence imposed on the appellant by the trial court as lawful under Section 8(2) of the SOA, given that CDS was only 4½ years old at the time of the commission of the offence.

8. The appellant, being still dissatisfied with the decisions of both the trial and the High Courts, now appeals to this Court perhaps as a last bite at the cherry. Through his Memorandum of Appeal the appellant complains against the said judgments on the grounds that the two courts below erred in law: in placing undue reliance on the unsworn evidence of CDS on matters identification; in failing

to hold that the prosecution did not prove its case beyond reasonable doubt; in not appreciating the contradictions, inconsistencies, and discrepancies in the prosecution's case; in failing to appreciate that substantial injustice resulted from the breach of the appellant's constitutional rights under Article 50(2)(h) of *the Constitution*; and in failing to find that indeterminate life sentence is unconstitutional, given that the SOA does not define "minimum life sentence". The appellant thus prayed that the appeal be allowed in its entirety.

9. When the appeal was called out for plenary hearing, the appellant appeared in person from Kisumu maximum prison, while, Ms. Kitutu, learned Principal Prosecution counsel, was present for the respondent on our virtual platform. Both parties elected to entirely rely on their respective written submissions that they had filed and exchanged in canvassing the appeal.

10. The appellant submitted that the two courts below erred in law by relying on the unsworn testimony of CDS, whose identification of the appellant was under difficult circumstances. He contended that the courts failed to exercise the necessary caution, especially given the inconsistencies in her account; and the absence of a police identification parade conducted in respect of the appellant. Citing the cases of Maitanyi v Republic [1986] KLR 196 and Paul Etole & Another v Republic [2001] KECA 285 (KLR), the appellant emphasized that identification evidence must be scrutinized with care, particularly where such identification is alleged to have been made in difficult conditions.

11. Second, the appellant submitted that the prosecution's case was marred by material contradictions and inconsistencies, arguing that PW1 gave conflicting accounts of her movements before the incident; her post-incident behavior was inconsistent with other witnesses' testimony; and how she was allegedly lured to the bathroom. He argued that these contradictions cast serious doubt on the prosecution's narrative and failed to meet the legal threshold of proof beyond reasonable doubt.

12. Third, the appellant asserted that his constitutional right to legal representation under Article 50(2)(h) of *the Constitution* was violated. That he was not informed by the trial court of his right to be assigned counsel and paid for by the State; that he was also not supplied with witness statements pursuant to Article 50(2) (j); and was therefore unable to effectively challenge the prosecution's evidence. He relied on the cases of Joseph Ndungu Kagiri v Republic (2016) eKLR, Leonard Maina Mwangi v DPP & Others [2017] eKLR, and the *Legal Aid Act*, 2016, in support of the above proposition.

13. Finally, the appellant challenged the constitutionality of the life sentence imposed on him. He argued that while the SOA prescribes a "minimum sentence of life imprisonment," it does not equate this to whole-life incarceration. Equating minimum life imprisonment to whole-life imprisonment, he argued violated Articles 27, 28, and 29 of *the Constitution*. The appellant contended therefore that the sentence imposed was disproportionate, inhumane, and discriminatory, and invited the Court to interpret the SOA in a manner consistent with constitutional values.

14. In opposing the appeal, counsel submitted that CDS's recognition of the appellant was credible and reliable Pointing out that the appellant was a cousin who stayed 10 metres away and whom she knew very well. Indeed, AK confirmed the relationship between the two. Her identification and or recognition of the appellant was therefore not mistaken. Counsel submitted that in any event, Section 124 of the *Evidence Act* allows a court to convict an accused on the sole evidence of the victim in sexual offence cases, provided the trial court records reasons for believing that the victim was telling the truth; that in this case, the trial court found the CDS's testimony truthful and consistent with the medical evidence.

15. Counsel further submitted that the CDS 's account of the sexual assault was corroborated by PW5, the clinical officer, who confirmed that her hymen was torn and the vaginal walls were bruised; and that the clinical findings supported the prosecution's case beyond reasonable doubt therefor.

16. On the contradictions, counsel acknowledged that there were indeed minor discrepancies in the testimonies of PW3 and PW5 regarding how CDS was lured to the bathroom, whether by mandazi or money, but submitted that these did not amount to material contradictions as to affect adversely the totality of the prosecution case.

17. On legal representation, counsel argued that the right to state- funded counsel under Article 50(2)(h) of *the Constitution* was not absolute. An accused must demonstrate indigence and that substantial injustice would result if he was not represented by counsel; that the Supreme Court in the case of Republic v Karisa Chengo & 2 Others [2017] eKLR clarified further that legal representation at state expense is subject to judicial discretion and contextual factors, including the seriousness of the offence, the complexity of the charge, and the accused's ability to afford counsel. Counsel submitted that the appellant failed to meet this threshold.

18. Regarding the constitutionality of life sentence, counsel noted that this issue was not raised before the High Court and was being introduced for the first time on second appeal; that the Supreme Court had in any event extensively addressed the issue of mandatory minimum sentences under the SOA in the cases of Republic v Evans Nyamari Ayako [2025] KESC 20 (KLR) and Republic v Julius Kitsao Manyeso [2025] KESC 16 (KLR), in which it upheld the validity of the minimum and maximum sentences therein.

19. In conclusion, counsel submitted that the appeal lacked merit both on conviction and sentence, and accordingly ought to be dismissed in its entirety.

20. The jurisdiction of this Court on second appeals is confined to consideration of issues of law only. Indeed Section 361(1)(a) of the Criminal Procedure Code explicitly provides that on second appeals, this Court is barred from hearing appeals on matters of fact. This means that the appellate court cannot re-examine factual findings that were already considered by the courts below, preserving its role as a court focused on legal errors rather than re-evaluating evidence or the severity of a sentence unless it was irregularly or illegally enhanced by the first appellate court. See also the case of Sichei v Republic [2025] KECA 152 (KLR). Further in the case of Karani v Republic [2010] 1 KLR 73, this Court also held that the second appellate court should not interfere with concurrent findings of fact of the two courts below unless it is shown that the findings were based on no evidence or were plainly wrong.

21. Having considered the record of appeal, the judgments of the two courts below, the respective written submissions and authorities cited by the parties and the law, the issues that we frame for determination are whether: the prosecution proved its case against the appellant beyond reasonable doubt; the appellant's right to a fair trial was compromised; and whether the sentence of life imprisonment imposed was lawful and constitutional.

22. On the first issue, the appellant's main challenge is on the evidence of his identification in the commission of the offence. That the trial court relied on the testimony of CDS, a minor, who claimed to have recognized the appellant in the act. It is not disputed that the appellant was a neighbour who stayed hardly 10 metres away. Indeed he was even a cousin to CDS. Given those circumstances the recognition of the appellant cannot be faulted. The High Court affirmed this finding. Though the appellant challenged the reliability of this identification, citing the cases of Maitanyi v Republic (supra) and Paul Etole & Another v Republic (supra) thereof, the trial court properly cautioned itself of the dangers of relying on the evidence of a single identifying witness and in particular that of a minor. However having evaluated the circumstances obtaining at the time of the identification and or recognition of the appellant at the scene of crime, both courts below were satisfied that the circumstances were favourable for a positive identification and or recognition.

23. It should be appreciated that this was a case of recognition as opposed to visual identification of a stranger in difficult circumstances. In the case of Benard Gitonga Karanu v Republic [2019] eKLR, the Court held that recognition is more reliable than identification of a stranger, and where the witness knew the accused, the court must still examine the circumstances obtaining during the recognition but need not require a police identification parade to be conducted. In the premises the appellant's demand that a police identification parade ought to have been conducted has no legal basis. Accordingly, the trial court's finding on the identification/recognition of the appellant by CDS was supported by evidence and the High Court correctly upheld it. No error of law is accordingly disclosed as to invite our intervention. Besides, both courts properly fell back to Section 124 of the *Evidence Act* which allows a court to convict an accused on the sole evidence of the victim in sexual offence cases, provided that the trial court records reasons for believing that the victim was telling the truth. In this case, both courts found CDS's testimony truthful and consistent with regard to the identification/recognition of the appellant.

24. No doubt there were contradictions and inconsistencies in the evidence of some of the prosecution witnesses. The contradictions the appellant alluded to were whether: CDS was going to Aunty Alice's house or to answer to a call of nature before the incident, she reported the incident immediately, she was allegedly lured to the bathroom, by being held by the hand or enticed with mandazi and money by the appellant. However, to our mind these contradictions were minor and did not go to the root of the prosecution case. They do not distract from the fact that CDS was lured to the bathroom from where she was Sexually.

25. In the case of Philip Nzaka Watu v Republic [2016] eKLR, this Court differently constituted, had this to say on contradictions in evidence. "It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognised in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question"

26. In this case, and as already stated, the contradictions adverted to were minor which did not shake the otherwise the overwhelming evidence adduced by the prosecution witnesses that the appellant defiled CDS. Nor do the contradictions point to any untruthfulness on the part of the witnesses.

27. Did the prosecution otherwise prove its case against the appellant as required? We can do no more than reiterate that CDS 's account of the Sexual assault was corroborated by PW5, the clinical officer, who confirmed that her hymen was torn and the vaginal walls were bruised.

    There can be no doubt that penetration was thus proved. We have extensively addressed the issue as to whether the appellant was the culprit, when we dealt with the identification/recognition of the appellant. Accordingly, the identification/recognition of the appellant could not be impugned.

28. Turning to the age of CDS, this was not really an issue as it was never raised. But even if it was, PW4 tendered in his evidence CDS's birth certificate which was sufficient proof of her age which was 4½ years old at the time of the offence.

29. All said and done therefore, we are satisfied just like the two courts below that all the ingredients of the offence were unequivocally proved. In any event, these were concurrent findings of the two courts below which we must pay homage to.

30. Regarding the appellant's lack of representation by counsel, we appreciate that Article 50(2) (g) and (h) of *the Constitution* guarantees every accused person the right to choose and be represented by counsel, and to have one assigned at State expense if substantial injustice would otherwise result.

31. In the case of William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v Republic [2022] KECA 23 (KLR), this Court held that the operative trigger for mandatory legal representation is the likelihood of substantial injustice, which may arise from the complexity or seriousness of the charge, or the accused's inability to effectively participate in the trial or that the accused was indigent incapable of affording the services of counsel. In the present case, however, the record shows that the appellant actively participated in the trial, cross-examined a witness but on his own volition refused to cross examine the remaining others. There is no indication that he requested for services of counsel and was denied nor that he was indigent. Neither is there evidence to suggest that the appellant suffered any prejudice or substantial injustice on account of want of representation by counsel. Accordingly, we find no merit in the appellant's claim that his rights under Article 50(2)(g) and (h) of *the Constitution* were violated.

32. The appellant also challenged the constitutionality of the mandatory life sentence imposed on him. He cited the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR in support thereof. However, the Supreme Court in yet another Muruatetu case being Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae) [2021] KESC 31(KLR) clarified that the decision in the earlier Muruatetu case did not apply to sentences under the SOA.

    This Court in Christopher Ochieng v Republic [2018] eKLR also held that the mandatory nature of the sentence under Section 8(2) of SOA is constitutional and does not violate the rights of the accused. The sentence imposed herein was therefore lawful. Indeed, the trial court acted within the statutory framework. There is no basis for our interference therefor.

33. Having found no error of law in the concurrent findings of the two courts below and being satisfied that the appellant was properly convicted and sentenced, the appeal is accordingly dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF NOVEMBER, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H.A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the origina

DEPUTY REGISTRAR.