Otieno v Republic (Criminal Appeal E051 of 2024)
[2025] KEHC 16800 (KLR) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16800 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E051 OF 2024

WM MUSYOKA, J

NOVEMBER 14, 2025

BETWEEN

PASCAL OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. R. Odenyo, Senior Principal Magistrate, SPM, in Sexual Offence Case No. E009 of 2022, of 19th November 2024)

JUDGMENT

1. The appellant herein had been charged with defilement, contrary to section 8(1), as read with section 8(2), of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. The allegations were that he had on, 27th January 2022, at [Particulars Withheld], Samia County, within Busia County, intentionally caused his penis to penetrate the vagina of JA, a child aged 5 years.

2. He denied the charge, and a trial was conducted. 5 witnesses testified. The appellant was found to have a case to answer, in a ruling, delivered on 16th July 2024. He was put on his defence. He made a sworn statement, on 20th September 2024. He was convicted, in a judgement delivered on 19th November 2024. He was sentenced to serve 40 years in prison, pronounced the same day.

3. The appellant was aggrieved by that outcome, and has brought the instant appeal. His grounds are that his unlimited rights and fundamental freedoms were violated; the evidence adduced was insufficient to sustain a conviction for defilement; and the medical evidence did not connect him to the offence.

4. Directions were taken, on 20th May 2025, for canvassing of the appeal, by way of written submissions. I see written submissions on the record, filed by the appellant.

5. His grounds of appeal turn on the trial being unfair, to the extent of his constitutional rights, on legal representation, not being respected; failure to comply with the provisions of section 211 of the

Criminal Procedure Code, Cap 75, Laws of Kenya; the offence of defilement not being sufficiently established, and on account of the evidence being weak and inconsistent; penetration not being proved; absence of the hymen and presence of a laceration, not being conclusive proof of defilement; his mitigation not being considered; and the sentence being harsh.

6. I sit, in this appeal, as a first appellate court. I am alive to my obligations, as such, guided by Okeno vs. Republic [1972] EA 32 (Sir William Duffus P, Law & Lutta, JJA), that I should re-consider and re-evaluate the evidence recorded by the trial court, as against the pleadings, and the law applicable, and draw my own conclusions, on whether the judgement of the trial court should be upheld. It allows me to sort of conduct my own trial of the matter, based on the recorded evidence.

7. The first consideration, in any trial, is on the fundamentals, even before a go is made at the merits of the matter, and that is on issues around jurisdiction and other constitutional prerequisites. No jurisdictional issues arise, in this case, but since Article 50 of *the Constitution* provides safeguards to a proper criminal trial, constitutional issues ought to arise.

8. Article 2 of *the Constitution* of Kenya pronounces that the said Constitution is the supreme law of the country. That would mean that all the other laws are subordinate to it, including the law that regulates criminal trials. Article 2(4) of *the Constitution* pronounces that any law, and any act, which does not align with *the Constitution*, would be void and a nullity. *The Constitution* is the standard, to which other laws, and acts done in the name of *the Constitution* and of those other laws, are measured.

9. Regarding criminal trials, Article 50 of *the Constitution* has set out certain principles and standards. It is a bill of rights for persons who are on trial. It sets out what an accused person is entitled to in the course of that trial. For every right, there is a corresponding duty. For the Article 50 rights, the duty-bearer, from the language of that provision, is the trial court. Article 50 sets the standard that the court, trying an accused person, is expected to maintain, before it can be said that a person has been subjected to a fair trial process. Anything, short of that standard, would be a farce, and a nullity.

10. The Article 50 rights relate to presumption of innocence; being informed of the charge; having adequate time and facilities to prepare for the defence; a public trial in a court established under *the Constitution*; a speedy or expeditious trial; presence at the trial; choosing an Advocate of own choice and being informed of that right; an Advocate being assigned, where substantive injustice could otherwise arise, and being informed of the right; choosing to be silent at trial, and not to testify; advance disclosure of evidence, and access to it; adducing and challenging evidence; refusing to give self-incriminating evidence; assistance of an interpreter, among others.

11. These are the rights that a person on trial should enjoy, and it is the duty of the court, trying the person, to ensure that that person enjoys those rights. The discharge of that duty ought to be documented, so that, should issues be raised, at a later date, concerning whether the trial passed the constitutional muster, there would be material upon which the higher courts can make an informed evaluation. Criminal trials are about lives of individuals. They have profound effects and consequences. The sanctions available, upon conviction, include death, loss of liberty for extended periods of time, and loss of property. Consequently, there ought to be proper documentation of each step taken, or anything done, in the course of the trial, to comply with *the Constitution*, or any other applicable law. It is from that documentation that it would be possible to gauge whether the rights were enjoyed, and whether the trial court did everything that was required, of it, to ensure that *the Constitution*, and other relevant laws, were complied with. Lack of such documentation would suggest that the person tried did not get to enjoy his fair trial rights, as guaranteed under *the Constitution*, and the other laws, and that the duty-bearer, the trial court, did not measure up to the constitutional and legal standards, governing fair trials.

12. The appellant herein, was arraigned on 1st February 2022. The record reflects that the languages used at arraignment were English and Kiswahili, which are the languages of the court. The record is silent on whether the court inquired into the language that he was competent in, and whether he indicated competence in Kiswahili, for his response, to the charge, was in Kiswahili. Article 50 provides for the right to a translator or interpreter, if the accused is unfamiliar with the languages of the court. There should be a duty, on the part of the trial court, to probe into the language, and to record what the accused person states to be the language he is familiar with. Should issues around language be raised later, before higher courts, that the accused was not familiar with the language used at trial, there would be a challenge, if the trial record is silent on whether the trial court made an effort to establish the language the accused person was competent in, before the trial commenced, and it would lend credence to an argument that the trial proceeded in a language or languages that he was unfamiliar with, to his disadvantage.

13. At the arraignment, on 1st February 2022, the record is silent on whether the appellant had been given the evidence, to be adduced at trial, in advance, to assist him make a decision on how to plead to the charges, by way of informing him of the charges, and of the evidence marshalled against him. That issue came up later, on 3rd February 2022 and 8th February 2022. However, that related only to witness statements, yet the case was founded on a charge sheet, which carries the pleadings or the charges. The charge sheet would be the most critical document, for it is the foundation for the trial. It is the allegations, made in the charge, that the prosecution seeks to prove, against the accused person, and the accused is expected to defend himself on. The record is silent on whether a charge sheet was ever availed to the appellant.

14. Other documents were produced as exhibits, at trial, such as the Post Rape Case Form, the P3 Form and the treatment book. Yet, the record is silent on whether these documents, which formed part of the case against the appellant, were ever shared with the appellant, prior to their production in court. Prior disclosure of these exhibits would have assisted the appellant prepare for his defence, by way of availing him with material for the purpose of cross-examining or confronting the witnesses, who were to bespeak them. The failure to be furnished with such crucial evidence would raise questions about whether he was afforded time and facilities to prepare his defence. The trial was about him, and whatever material was placed on record, was ultimately used against him. Fair trial would have required that such material be availed to him, prior to the trial commencing, to enable him effectively challenge those who would be referring to that material, at trial, before the same was placed in the record.

15. There is the issue of legal representation. This is a critical matter, for certain classes of offences. For murder, for example, the law provides for provision of an Advocate, paid for by the State, and, as a matter of practice, no plea is taken, at the High Court, in the absence of that Advocate. What, essentially, informs that policy, is the gravity of the offence, in terms of the penalty, the death sentence. It is on account of that that a legal technician is placed at the disposal of a suspect for murder, to assist him navigate through the technicalities of the applicable law, procedure and evidence, so that, at the end of it, he gets a fair and square deal, in terms of trial. There would be equality of arms, in the sense that both the prosecution and the defence would benefit, from the presence of persons qualified in law leading their charges.

16. For a long time, provision of Advocates for accused persons, at State expense, was preserved for murder and treason, the initial capital offences. It was not, curiously, extended to robbery with violence, when that offence was added to the category of capital offences. The advance in international human rights law has witnessed a serious assault on capital punishment, the death penalty, and the same has fallen in many jurisdictions. Kenya is not yet quite there, but Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) is

a pointer that that is the direction being taken. It is a matter of common notoriety that no executions, of the death sentence, have been carried out since the 1980s, and these death penalties are, currently, routinely commuted, by the President of the Republic, into life imprisonment.

17. Because of Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), the death sentence has lost its sting. It is no longer a serious option. Riding on Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), discretion has been unleashed, and, in exercise of it, the High Court has, largely, settled on an average sentence of 20 years' imprisonment, upon a conviction for murder, with the extremes of 10 years, on the lower end, and 30 years, on the upper side. Yet, the suspects for murder continue to enjoy the right to an Advocate, availed to them by the court, paid for by the State.

18. Defilement, particularly of minors of tender years, charged under section 8(2) of the *Sexual Offences Act*, is attracting sentences that are heavier than what conviction for murder attracts. Section 8(2) provides for a statutory mandatory sentence of life imprisonment. Mandatory life sentence is hardly ever imposed these days, for that offence, since Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) came into the picture, and despite Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), and Republic vs. Manyeso [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) and Republic vs. Ayako [2025] KESC 20 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), for the trial courts, now, exercise discretion, and impose sentences ranging from a minimum of 30 years imprisonment to a maximum of 70 years imprisonment.

19. Yet, suspects facing charges, under section 8(2) of the *Sexual Offences Act*, do not benefit from the advantage of Advocates being availed to them by the court, paid for by the State, despite being exposed to far more stiffer sentences than murder suspects. There is an unequal treatment of suspects, in respect of these 2 categories of offenders, and I believe that there is discrimination of the suspects charged under Section 8(2) of the *Sexual Offences Act*. Most of the suspects, on charges under section 8 of the *Sexual Offences Act*, are young persons, in their teens or in their 20s, and they are far more deserving of technical assistance, from the State-provided Advocates, than murder suspects, for they have lesser exposure, experience and knowledge of the ways of the world, than the suspects who are a little older.

20. Looking at the record of the trial court, I note that the appellant was not represented by an Advocate at the trial. Yet, the charge he faced, was brought under section 8(2) of the *Sexual Offences Act*, which exposed him to the mandatory penalty of life imprisonment, which Republic vs. Manyeso [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) and Republic vs. Ayako [2025] KESC 20 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) have stated remains a lawful sentence. When he was being sentenced, on 19th November 2024, Republic vs. Manyeso [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) and Republic vs. Ayako [2025] KESC 20 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) were not yet with us.

21. The trial court was, no doubt, guided by the judicial opinion prevailing then, represented by Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), and Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), and perhaps unaware of Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u

& Lenaola, SCJJ), which had pronounced Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) to be bad law. The trial court exercised discretion, to consider other sentences, apart from the mandatory life imprisonment, prescribed by section 8(2) of the *Sexual Offences Act*, by sentencing him to 40 years in jail.

22. No murder convict currently stands a chance of being sentenced to a term of imprisonment beyond 30 years. Yet, the system, as it currently works, would afford him a state-sponsored Advocate, and the appellant, who was facing a much stiffer penalty, did not have that benefit. There ought to be a paradigm shift, in the provision of state-supported legal representation, in favour of the suspects of the offence of defilement of minors of tender years.

23. The trial court, at arraignment, on 1st February 2022, was alive to the fact that the charge, that the appellant faced, was a serious one. When the appellant appeared to be admitting the offence, the trial court was cautious about recording a guilty plea, and, quite properly, warned him of that danger, no doubt guided by the principles in Adan vs. Republic [1973] EA 445 (Sir William Duffus P, Spry VP & Mustafa JA). However, the trial court paid more regard to caselaw, rather than *the Constitution*. The seriousness of the charge, informed by the stiff penalty awaiting, should there be a conviction, should have required that the appellant be given access to legal representation, to assist him navigate through the technicalities of the law, procedure and evidence, at the trial.

24. Based on Article 50, the trial court had a duty to inform the appellant of his right to an Advocate of his own choosing; and, should he be unable to afford one, to inform him of the right to access one, paid for by the State. The *Legal Aid Act*, Cap 16A, Laws of Kenya, places an obligation, on a trial court, to assess whether an accused person would need the services of an Advocate, paid for by the State, and, upon establishing that he needed one, to guide him on the steps he should take to facilitate access to enjoyment of that right.

25. The record is silent, on the matter of legal representation. The trial court did not address itself to that constitutional right, and it did not do its duty of informing the appellant of it, both generally and with respect to accessing legal representation availed by the State. It was not addressed on 1st February 2022, when the appellant was first arraigned. It was not addressed on 3rd February 2022, when plea was eventually taken. It was not addressed on 8th February 2022, when witness statements were availed. It was not addressed on 3rd March 2022, when the trial commenced in the earnest.

26. Was the appellant deserving of legal representation? Would it have impacted on the trial?

27. Age assessment was done on the appellant. The record of 3rd February 2022 reflects that he was 18 years old, at the time, having been born on 10th April 2003. He was just at the threshold or cusp of adulthood, having just transited from minority. He was a young person, and, for all practical purposes, still a child, in many respects still unlearned of the ways of the adult world. He was being thrust into the very thick of adult drama, the theatre of a criminal trial. He, no doubt, required a helping hand, to walk him through it. His case was most deserving of an Advocate representing him, and, if he could not afford one, the court had a duty to facilitate him, for the purpose of provision of one paid for by the State.

28. The trial court bespeaks a bewildered spectator, rather than an actor, in the entire drama. When he was arraigned, on 1st February 2022, he was very eager to admit the charge, perhaps to quickly get it over with. When the plea was taken on 3rd February 2022, he did not respond to the charges, when the same were read out to him. A plea of not guilty was recorded. Why did he not respond? Perhaps, he did not understand what was playing out, or he did not know what was expected of him in the circumstances, or he did not understand what was going on, or, maybe, he was just defiant. The record

is silent on whether an attempt was made to explain to him what that process was all about, or even to have the charges read in local dialect. When the first witness was presented, PW1, Lilian Anyango, on 3rd March 2022, he had no questions to ask her. When PW2, JA, the complainant testified, his cross-examination was brief, eliciting only 3 short answers. The same happened with PW3, Judith Taaka, a brief cross-examination, bringing out only 3 short answers. The same happened with PW4 and PW5, the investigating officer and the clinician, brief cross-examinations, 3 short responses.

29. This was a case of an 18-year-old, who was still in primary school, at Class 7, being taken through a criminal trial, where he was exposed to a lifetime in prison, should he be convicted. This primary school pupil was not afforded an Advocate, paid for by the State. He was dragged through a trial, which saw his conviction, and sentence to 40 years in prison. He entered the criminal justice system at age 18, when he was arrested, on 31st January 2022, and he shall leave it, in the event he serves out the full term of 40 years, at age 58. He deserved better. The trial court should have considered his case, under Article 50 and the *Legal Aid Act*, and facilitated his legal representation by an Advocate paid for by the State. A fair trial could only be achieved that way. It should not matter that he might have committed the offence, he was entitled to presumption of innocence. *The Constitution* and other laws have laid out the standards for a fair trial. He deserved to be treated in a manner that measured up to those standards. *The Constitution* is not a suggestion. It is the basic law, which sets the standards on how Kenyan citizens and residents are to live their lives, inclusive of how they are to be handled or treated, in the event they find themselves in conflict with the law.

30. The appellant was just a Standard 7 pupil, who had the might of the State ranged against him. The police with its immense resources, with a professional capacity to conduct investigations, and to mobilise witnesses; and a prosecution, equally well resourced, and driven by university-trained Advocates, conducting the case against this primary school pupil, who had no help from an Advocate, to go head-to-head with a professionally-qualified prosecutor, yet expected to confront medical personnel and police detectives, presented as part of the body of witnesses. It would be unrealistic to talk of fairness and justice. There was no equality of arms. The appellant could be no match to the State juggernaut that had been set against him. A trial should not be conducted for the sake of it. It must have value. That value lies in, or is added by, the same being conducted in complete compliance with *the Constitution* and the other relevant laws.

31. *The Constitution* of Kenya, 2010, is hailed as people-centred. Its own provisions say so. That language is not just addressed to the Executive, for it applies to the courts too. The duty, on the part of the State, of which the courts are an integral part, is to care for the people. One of the ways, a criminal court cares for the people and residents of Kenya, is through compliance with what Article 50 of *the Constitution* requires. The appellant was not cared for, in terms of Article 50 of *the Constitution*. He was left to his own devices. He was not treated and handled in a fair and caring manner. His trial did not measure up to the constitutional standards of fairness, enshrined in Article 50.

32. In view of what I have stated above, there would be no need, for me, to evaluate the appeal on its merits, with respect to the other grounds of appeal, set out in the petition of appeal.

33. As the trial was unfair and unequal, I shall declare a mistrial. I, accordingly, quash the conviction of the appellant, and set aside the sentence imposed upon him. Given the gravity of the charges, I shall order a re-trial. The appellant shall be released from prison custody, forthwith, to be handed over to the police, who shall present him before the Chief Magistrates' Court, at Busia, for re-trial. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 14 TH DAY OF NOVEMBER 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Pascal Otieno, the appellant in person.

Advocates

Mr. Tony Onanda, instructed by the Director of Public Prosecutions, for the respondent.