Ondieng v Republic (Criminal Appeal E254 of 2022)
[2025] KECA 2001 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KECA 2001 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E254 OF 2022

MS ASIKE-MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA

NOVEMBER 21, 2025

BETWEEN

MOSES OKOTH ONDIENG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa-Bay, (Karanjah, J.) dated 29th October, 2020)

JUDGMENT

1. The appellant, Moses Okoth Ondieng, appeared before the Senior Resident Magistrate's court at Oyugis charged with defilement, contrary to Section 8(1) read with Section 8(2) of the Sexual Offenses Act. The particulars of the offence were that on the 20th July 2018 at Kokwanyo location Rachuonyo East, Homabay county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MA[1], a child aged seven (7) years.

   [1] Initials used to protect the identity of the minor Riding on the same facts, the appellant was in the alternative charged with committing an indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*.

2. He pleaded not guilty to the offence and his trial ensued. After considering the evidence by the prosecution as well as the defence witnesses, the learned Magistrate concluded that the charge of defilement had been proved beyond reasonable doubt and proceeded to convict and sentence the appellant to life imprisonment on the main count.

3. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court which dismissed the appeal and upheld both the conviction and the sentence.

4. The appellant is now before this Court in this second appeal challenging his conviction and sentence on the grounds that the offence was not proved, the evidence was not re-evaluated, his defence was not considered and that the sentence was unconstitutional, harsh and excessive in the circumstances of this case.

5. Briefly, the facts of the prosecution's case were that on the said date, M.A. (PW3), a nursery school pupil, was going on a lunch break, when she met the appellant whom she knew as "Baba Brian". The appellant sent her to a certain house and followed her there. On his arrival, he removed her underpants and touched her private parts and then removed his trousers and inserted his penis in the complainant's vagina.

6. While going around her house, Covin Akinyi [Covin], who testified as PW2, heard the voice of a child crying. Nearby, two young children were standing outside a neighbour's house wall. She enquired as to their mission there, and they told her that they were waiting for the complainant. Shortly thereafter, Covin heard a young girl crying from the neighbour's house, saying "Niache Niende" (i.e., let me go). A male voice responded, "Wacha kelele watu watasikia" (i.e stop making noise, people will hear).

7. On enquiring from the children outside the house, Covin, learnt that it was the complainant crying inside the house of "Baba Brian". She then approached the house and knocked on the door. In the process, the complainant came out crying and on seeing her, she stopped and leaned on the house wall. The complainant's suspected tormentor also came out of the house, padlocked it, and left even after she [Covin] had already seen him.

   She decided to talk to the complainant, and on realizing that, the suspect returned to the scene, held the complainant's hand and told her to run to school. All this happened in broad daylight such that she [Covin] saw and identified the appellant as the suspect.

8. Suspecting that the complainant might have been defiled by the appellant, Covin followed her to school. At the school, she met Ruth Achieng Ojala[Ruth], a teacher, and told her what the complainant had informed her. Ruth took Covin to the Deputy Principal of the school, Caroline Juma Otieno (Caroline) who talked to her and confirmed from her that she had been defiled by "Baba Brian".

9. The Deputy Principal identified the appellant as "Baba Brian," a motorcycle mechanic based at Kochola Market. When he could not be located at his workplace, the matter was reported to the complainant's father, LOO[2], who was familiar with the appellant. Leonard went to the complainant's school, verified the allegations against the appellant, reported the incident at Oyugis Police Station, and subsequently took the complainant to the hospital.

10. PW5 Kibet Serem, a clinical officer at Rachuonyo Sub-County Hospital attended to the complainant and also filed a P3 Form. On physical examination, he noted a bruised hymen and on urinalysis, there were red blood cells in the urine. Dr Kibet concluded that there was penetration.

11. PC Sammy Meldiki, PW7 of Oyugis Police Station arrested the appellant and charged him with the present offence.

12. Placed on his defence, the appellant chose to give an unsworn statement and denied the offence, arguing that it was a frame- up by Stephen Okoth, the owner of the complainant's school who owed him money for repairing a generator, a matter reported to the police in May 2018. He indicated that his arrest for the alleged offence was unjustified and driven by a vendetta against him by Stephen Okoth.

13. This is the evidence that the trial court considered, and the first appellate court reconsidered before concluding that the prosecution had established the guilt of the appellant on the main count beyond reasonable doubt.

14. At the plenary hearing of this appeal, the appellant appeared in person from Kibos Maximum prison on our virtual platform while Ms. Kanyita, learned prosecution counsel appeared for the respondent.

15. In the submission by the appellant, there was the contention that the first appellate court had failed to properly re-evaluate the prosecution evidence; that his identification was not proper as he was identified as Baba Brian. Further; that PW2 was not a credible witness as she did not clearly state where she was at the time of the alleged incident, and whether she recognized the appellant's voice.

16. Regarding the age of the complainant, it is contended that there was no conclusive evidence on the complainant's age as no evidence was tendered. Relying on the case of Alfayo Gombe Okello and Another vs. Republic Criminal Appeal No. 203 of 2009 among others, the appellant maintains that there was no basis to believe that the complainant was less than 11 years. It is further contended that the prosecution case was not corroborated. That the unsworn evidence of PW3 did not corroborate the evidence of Kibet Serem, the clinical officer.

17. On sentence, the appellant contends that he was sentenced to a mandatory life sentence which is unconstitutional as it denies the trial court the discretion in sentencing; further, that the sentence violates the provisions of Articles 28 and 50[2] of *the Constitution*.

18. Opposing the appeal, the respondent argued that the offence was proved to the required standards. As regards the complainant's age, it was submitted that this was demonstrated through the production of the complainant's birth certificate, which showed that she was born on 15th September 2011, and was therefore 7 years old at the time of the alleged offence.

19. It was further contended that the complainant testified that she was defiled, and her account was supported by the clinical officer (Pw5), who presented medical evidence including a P3 form and treatment notes. Pw5 observed that the complainant was in pain, had a bruised hymen, and red blood cells in her urine confirming partial penetration which constitutes defilement under the *Sexual Offences Act*. The complainant identified the appellant as the offender, noting she knew him well as a motorcycle repairer at Kochola market. The prosecution thus argued that all elements of the offence, the age of the victim, penetration, and identity of the perpetrator, were proved beyond a reasonable doubt.

20. This being a second appeal, the Court's jurisdiction is limited to considering matters of law as stipulated by section 361 of the Criminal Procedure Code. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence or the courts below are demonstrably shown to have acted on wrong principles in arriving at their findings. (See David Njoroge Macharia v Republic [2011] eKLR). This Court in Karani v R. [2010] 1 KLR 73 held that:

> " 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."

21. Having considered the appeal, the impugned judgment and the rival submissions, the issue for determination is whether the first appellate court properly re-evaluated the evidence adduced in the trial court before arriving at its decision; and whether there is a basis for this Court to interfere with the sentence.

22. Turning on the question whether the offence was proved, in Karingo & 2 Others vs. Republic [1982] KECA 23 (KLR) the Court stated that on a second appeal, the question that ought to be asked by the Court is whether there was any evidence on which the trial court could find as it did.

23. In respect of the charge of defilement, the prosecution was required to establish that the victim was aged eleven years or less, that there was penetration of her genital organ and that the person who committed the act was none other than the appellant.

24. The first element of the offence of defilement is age. In Peter vs. Republic [2024] KECA 1124 (KLR) the Court addressed the manner in which the age of a child can be proved as follows:

> " From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians."

25. In the instant appeal, the age of the complainant was proved through the production of her birth certificate which indicated that she was born on 15th September, 2011 and thus was 7 years at the time of the offence. The age of the victim was therefore proved to the required standard.

26. Regarding penetration, the principles surrounding proof of penetration in sexual offences were aptly captured by the Supreme Court of Uganda in Bassita vs. Uganda SC Criminal Appeal No 35 of 1995, as cited with approval by this Court in Muguanah vs. Republic [2023] KECA 828 (KLR), thus:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

27. In this case, the complainant provided an account of events at the appellant's house. Covin heard the complainant crying there. Suspecting that the complainant had been defiled, she interrogated her and also informed the teacher at her school. Dr Kibet attended to the complainant at Rachuonyo Sub-County Hospital, filed and produced her P3 form along with treatment notes and his own observations, confirming that the minor had been defiled. This evidence corroborates and confirms that the complainant was defiled. Given these facts, there is no reason to depart from the consistent findings of the two lower courts that the complainant was defiled.

28. Was the appellant properly identified as the offender? The complainant knew the appellant quite well. She referred to the appellant as Baba Brian who repaired bicycles at Kochola market. This was therefore a case of recognition rather than virtual identification of a stranger. This Court (per Madan,

29. JA) in Anjononi and Others vs. Republic [1980] KECA 23 (KLR) thus:

> " ...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

30. Similarly, in Peter Musau Mwanzia vs. Republic [2008] KECA 92 (KLR) this Court stated that:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example that the suspect had been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in serving (sic) the suspect at the time of the offence, can recall very well having seen him before the incident in question."

31. Considering the complainant's evidence and that of Covin that the appellant was Baba Brian and Cyclist repair at Kochola market; and the fact that the incident happened in broad daylight, this was a case of recognition, therefore, the appellant was positively identified by the complainant. The appellant's defence that he was framed by Stephen Okoth the owner of the complainant's school who owed him money for the repair of a generator, a matter which was reported to the police in May 2018, because they had disagreed did not dislodge the prosecution evidence. Therefore, the inevitable conclusion is that the offence of defilement was proved beyond reasonable doubt.

32. Regarding the alleged unconstitutionality of the life sentence meted out on the appellant by the trial Court and the fact that the trial court is deprived the discretion to mete out an appropriate sentence, the Supreme Court affirmed the lawfulness of mandatory minimum/sentences under the Sexual Offences Act in Republic vs. Mwangi; Initiative for Strategic

> Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) 12 July 2024 when it stated:
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> "(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...
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> (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...
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> (68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remains lawful as long as section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

33. Owing to the circumstances, unless the law changes and the Supreme Court rules differently, this Court's hands are tied by the principle of stare decises; and therefore, cannot interfere with the sentence imposed in this case. Consequently, we are satisfied that the appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF NOVEMBER 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Deputy Registrar