



**Okungu v Republic (Criminal Appeal E236 of 2022)
[2025] KECA 2015 (KLR) (21 November 2025) (Judgment)**

Neutral citation: [2025] KECA 2015 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E236 OF 2022
MS ASIKE-MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
NOVEMBER 21, 2025**

BETWEEN

AYUB ONYANGO OKUNGU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at
Kisumu (F.A. Ochieng, J) dated 2nd July, 2018 in HCCRA No. 60 of 2017)*

JUDGMENT

1. Ayub Onyango Okungu, the appellant herein, was tried before the Senior Resident Magistrate's Court at Winam with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on 21st March, 2016 at Dago area in Nyamasaria village in Nyalenda Sub Location, Kolwa West Location in Kisumu East District within Kisumu County, the appellant intentionally and unlawfully caused his penis to penetrate the genital organ, namely, the vagina of W.S¹, a girl aged 5 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11[1] of the *Sexual Offences Act*.
2. The appellant pleaded not guilty to the charges. To advance its case against the appellant, the prosecution called five witnesses. At the end of the trial, the appellant was found guilty, convicted, and sentenced 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, that his evidence was not considered and in affirming a mandatory sentence.



5. Briefly, the facts of the prosecution case were that on the material date, the complainant's mother left her in the house and went to a funeral. While asleep, Baba Michael entered the house through a hole which he had dug in the wall and did 'bad manners' to her. She stated that the appellant inserted his hand into her vagina and her anus, as well as the insertion of his penis into her vagina. The complainant was able to identify the appellant with the help of the security light and the moon. She was categorical that Baba Michael who had a Rastafarian hairstyle, lived near them.
6. On her part, L.A. the complainant's mother who testified as PW2 told the court that on the night of 21st March, 2016 she left the house at around 10:00 pm for a funeral. Upon her return at around midnight, she found W.S. in the sitting room crying; on inquiring why she was crying, W.S. told her that Baba Michael had dug a hole through the house and defiled her. She further stated that Baba Michael was wearing a red vest and had a 'rasta'.
7. Jairus Agwa, PW3, the Investigating Officer told the court that on 22nd March 2016 at around 1:04 am he was at the station when L.A. came with a minor, and reported that on the previous night, she left her daughter locked in the house sleeping and went to a funeral. On getting back, she found the crying minor locked in the house and who told her that Baba Michael had defiled her. The scene of crime officer took the photographs of the house. In the morning the complainant's mother led them to the appellant's house where he was arrested and charged.
8. Philip Kilimo, PW4, produced a P3 form filled by Dr. Watanga of Kisumu County Hospital who had attended to the complainant. On physical examination, the doctor noted normal genitalia with blood stains at the introitus and lacerations at the labia minora. The hymen was freshly broken with no discharge. A high vaginal swab showed the presence of epithelial cells and spermatozoa. The doctor concluded that defilement had occurred.
9. PC Chrispinus Abula, PW5, the scenes of crime officer produced the photographs taken at the scene.
10. Placed on his defence, the appellant gave a sworn statement and called one witness. In his defence, the appellant testified that in the morning of 22nd March 2016, while in his house, 3 police officers came to his house and asked him whether he was Ayub. He responded that he was Andrew Onyango but they ransacked his suitcase and took away his Kshs.5,000/= and prepaid meter for Kenya Power & Lighting Company (KPLC). He was then arrested and taken to Kondele police station where he was informed that he had defiled the complainant. He denied committing the offence. On cross-examination, he admitted that he took plea as per the names on the charge sheet; that he was referred to as Baba Michael at home, that the complainant was his neighbour and knew him very well and that at the time of his arrest, he had Rastas.
11. Janet Atieno Onyango, DW2, the appellant's wife on her part recalled the evening of 21st March 2016 at about 6:30 pm she got home and found the appellant and his son Michael. She prepared supper which they ate and slept. At 7:00 am, she woke up and went to sell her groceries only to be called by the appellant and informed that he had been arrested on allegations that he had defiled the complainant. She maintained that she was with the appellant the whole night; and that the case was a result of the appellant reprimanding the complainant's mother for having left the complainant with them and only came back at 11:00 pm to pick her up. On being cross-examined about the reprimand, she stated that it happened about two months ago and not two weeks.
12. In support of the appeal, the appellant contended that the prosecution evidence was marred with contradictions and inconsistencies especially on his identification. In her evidence, the complainant told the court that the appellant dug a hole in the wall. The appellant maintains that the complainant could not have seen him properly when she was sleeping.



13. Regarding the sentence, the appellant contended that he was sentenced to a mandatory sentence contrary to Article 50[2][q] of *the Constitution*; that the mandatory life sentence takes away the freedom of the offender, is unfair and does not promote the principles in sentencing.
14. The appellant further contends that he was sentenced on a defective charge sheet as the time of the alleged offence was not indicated. Further, he was charged under section 8[2][4] which relates to children aged between 12 and 15 years.
15. Regarding his defence of alibi, the appellant contends that in his sworn evidence, he told the court that on the alleged date he was in his house sleeping which evidence was not rebutted. Relying on the case of Victor Mwendwa Mulinge vs. Republic 2014 eKLR the appellant submitted that the burden never shifted to the appellant to prove his defence.
16. In rebuttal, the respondent contended that PW1 clearly identified the appellant as the assailant, describing him as “baba Michael” with dreadlocks and wearing a red vest the same one he had during his arrest. Although the offence occurred at night, PW1 stated she recognized him using moonlight and security lights. The 1st appellate judge noted that the house had large windows near the place that the hole was dug, allowing light to pass through; and the appellant did not dispute the lighting issue. PW2 confirmed the windows were large with light curtains, supporting the evidence that there was sufficient lighting in the house.
17. Regarding the defective charge sheet, the respondent contends that Section 382 of the Criminal Procedure Code provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.
18. Despite the appellant being erroneously charged with defilement under Section 8(4) of the *Sexual Offences Act*, which applies to victims aged 15-17, yet the complainant was only 5 years old, the particulars clearly indicated the victim’s age, and the appellant understood he was accused of defiling a 5-year-old. Therefore, the mistake did not result in a miscarriage of justice.
19. It is submitted that the appellant having been convicted for defiling a girl aged 5 years old, life imprisonment was the valid and appropriate sentence. In this regard, reference was made to the Supreme Court decision in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa [ISIA] & 3 others [Amicus Curiae] [Petition E018 of 2023] [2024] KESC 34 (KLR) [12th July 2024] (Judgment) where the apex Court affirmed the mandatory sentences in the *Sexual Offences Act* holding that for as long as section 8 of the *Sexual Offences Act* remains in our statutes unaltered, the mandatory sentences therein are legal.
20. Lastly, on the appellant’s complaint that his defence was not considered, it was contended that the evidence of the prosecution witnesses was overwhelming and the defence by merely indicating that he was in his house sleeping did not dislodge the prosecution's case. The appellant was identified through recognition by PW1 as the assailant.
21. This being a second appeal, the mandate of the Court on such an second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have



considered, or failed to consider matters they should otherwise have considered, or looking at the entire decision, it is perverse. See Section 361(1) of the Criminal Procedure Code (CPC). In the case of Samuel Warui Karimi vs. Republic [2016] eKLR the Court held that:

“This is a second appeal and this Court has stated many times before, that it will not normally interfere with concurrent findings of fact 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 shown demonstrably to have acted on wrong principles in making the findings. See Chemangong vs. R, [1984] KLR 611.”

22. Having considered the record, the grounds of appeal, and the rival submissions set out above and in light of this Court’s mandate, the issues of law that fall for determination are whether the offence of defilement was proved to the required standard and whether the sentence was proper.
23. For the prosecution to secure a conviction on a charge under section 8 (1) and (2) of the Act, these three ingredients must be proved first, it must establish beyond a reasonable doubt that the victim must be a child aged 11 years or below, secondly, proof of penetration as defined in section 2 of the Act and thirdly, the identity of the perpetrator must be established. Was penetration proved to the required standard? The trial court and the first appellate court found that the evidence established that the complainant was defiled. From the evidence on record, the complainant described how while asleep in the house, the appellant dug a hole in the wall, got into the house; pushed his hand into her vagina and anus; held her neck tightly and inserted his penis into her vagina. Her evidence was corroborated by the medical evidence that the complainant’s labia minora was lacerated with blood stains at the introitus. From the foregoing, there is no reason for us to doubt the concurrent findings by the two courts below on this issue.
24. Regarding the complainant’s age, her mother stated that the complainant was born in August 2010 and produced her birth certificate as the prosecution exhibit 3, which showed that the complainant was approximately 5 years old. Therefore, at the time of the offence, the complainant was a child aged below 11 years, within the ambit of the age range prescribed in section 8
2. of the Act.
25. As to whether the appellant was properly identified, the complainant identified him as Baba Michael with ‘rasta’, further, it was not disputed that the complainant and the appellant were neighbours; and that she knew the appellant before the incident. She even went ahead to point at him at the dock. This was therefore a case of recognition rather than identification. In the dictum of this Court (per Madan, JA) in Anjononi and Others vs. Republic [1980] KLR this Court held 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.”

26. Similarly, in Peter Musau Mwanzia vs. Republic [2008] KECA 92 (KLR) it was 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 (sic) the suspect at the time of the offence, can recall very well having seen him before the incident in question.”

27. Considering the complainant’s evidence that the appellant lived in the neighborhood; that he was referred to as Baba Michael; and that there were security lights and moonlight on that night, we have no doubt that this was a case of recognition rather than virtual identification of a stranger in difficult circumstances. The appellant did not demonstrate by way of evidence that his identification was erroneous or unsafe. He did not deny that he was a neighbour to PW1, thus the appellant was positively identified by the complainant.
28. The appellant’s defence that he was framed by PW2 because he had reprimanded her for leaving the complainant alone till late, and his alibi defence that on the said night he was asleep in his house, did not dislodge the prosecution evidence. Therefore, the offence of defilement was proved beyond reasonable doubt.
29. The appellant had alluded to being charged on a defective charge sheet however, a careful perusal of the appellant’s petition of appeal before indicates that the appellant did not complain about the issue of a defective charge sheet before the High Court for its determination as such this Court is precluded from addressing the said issue. In *Peter Kihia Mwaniki vs. Republic* [2010] eKLR, this Court stated:

“Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter... By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit.”

30. Regarding the constitutionality or otherwise of the sentence of life imprisonment and the contention that the mandatory nature of the sentence deprives courts the discretion to impose an appropriate sentence, it is noteworthy that the sentence provided for defilement of a child aged 11 years or below under section 8
2. of the Act is life imprisonment.
31. By dint of Section 361(1) of the Criminal Procedure Code, the appellant is precluded from raising the complaint on the severity of sentence on a second appeal as severity of the sentence is a matter of fact. Yet even if the appellant’s argument regarding the constitutionality of the mandatory sentence was to find a footing from previous growing jurisprudence, that tide was stemmed by the Supreme Court decision in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curiae)* [2024] KESC 34 (KLR) where it was held 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..

(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.”

32. In the circumstances, the Court’s hands are tied and cannot interfere with the sentence imposed in this case. The upshot is that this appeal lacks merit and is dismissed in its entirety.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H. A. OMONDI

..... **JUDGE OF APPEAL**

A. O. MUCHELULE

..... **JUDGE OF APPEAL**

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

DEPUTY REGISTRAR

