REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL APPEAL NO E034 OF 2024

WILSON MAYUAKA OLIYA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an Appeal from the Judgment of Hon Beryl M. A. Omollo (SRM) delivered at Vihiga in the Senior Principal Magistrate's Court in Sexual Offence Case No E071 of 2021 on 19th August 2024)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
2. The Learned Trial Magistrate, Hon Beryl M. A. Omollo (SRM) convicted him on the charge of defilement and sentenced him to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgement, on 3rd October 2024, he lodged an appeal herein. His Petition of Appeal was dated 30th September 2024. On 12th May 2025, he filed Amended Grounds of Appeal dated 5th May 2025. He set out four (4) amended grounds of appeal.

4. His Written Submissions were dated 5th May 2025 and filed on 12th May 2025 while those of the Respondent were dated 16th June 2025 and filed on 18th June 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-
    a. **Whether or not the Charge Sheet was defective;**
    b. **Whether or not the Prosecution proved its case beyond reasonable doubt; and**

c. **Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted**.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. DEFECTIVE CHARGE SHEET

9. Amended Ground of Appeal No (4) was dealt with under this head.

10. The Respondent did not submit on this issue. On the other hand, the Appellant submitted that the Charge Sheet indicated that the minor who was defiled was JFI whereas the Complainant, NJI (hereinafter referred to as "PW 1") testified that her name was Nifa Josephine Ikhabi. He added that the Post Rape Care (PRC) form indicated that her name was Josephine Achali. He questioned why the proceedings indicated different names of PW 1. In this regard, he placed reliance on the case of **Martin Oduor Lango & 2 Others vs Republic [2014]eKLR** where an appellant was released because of two (2) contradicting names of two (2) different people that resulted in mistaken identity.

11. He pointed out that the Prosecution did not amend the Charge Sheet so as to give a clear name of PW 1 that aligned with the evidences adduced by the Prosecution witnesses.

12. Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or

offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

13. A perusal of the Charge Sheet indicated a statement of the specific offence with which the Appellant was charged, together with particulars as to the nature of the offence charged. The proceedings during trial were clear that the evidence that was tendered showed that the particulars of the offence he committed tallied with the offence that he was charged with while identifying the victim of the said offence.

14. The Trial Court proceedings showed that the Charges and the particulars thereof were read over and explained to him and he responded to the same. He was given an opportunity to cross-examine the Prosecution witnesses throughout trial. At no single time did the Appellant question the alleged anomaly on PW 1's name. The said issue was not raised at the Trial Court to enable this court deal with it on appellate stage.

15. Be that as it may, this court was not satisfied that the Appellant was prejudiced in the manner the Charge Sheet was drafted and/or the evidence tendered with regard to PW 1's name. The case involved a child of very tender age and may not have known all her names apart from her first name, Josephine, which stood out in the Charge Sheet and the PRC form.

16. In the premises foregoing, Amended Ground of Appeal No (4) was not merited and the same be and is hereby dismissed.

II. PROOF OF PROSECUTION'S CASE

17. Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) and Amended Ground of Appeal Nos (1), (2) and (3) were dealt with under this head as they were all related.

18. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

19. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of **George Opondo Olunga vs Republic [2016] eKLR**. This court dealt with the same under the following distinct and separate heads.

A. AGE

20. The Appellant did not submit on the issue of age. On the other hand, the Respondent submitted that the Charge Sheet indicated that PW 1 was four (4) years of age at the time of the commission of the offence. It relied on the case of **Musyoki Mwakavi vs Republic[2014]eKLR** where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim's parents and/or guardians, observation or common sense.

21. It pointed out that PW 1's mother, Sabina Ayako (hereinafter referred to as "PW 2") produced PW 1's Birth Notification as an exhibit which indicated that she was born on 22nd August 2012 **(sic)**, thus, meant that she was four (4) years at the time of the commission of the offence.

22. This court had due regard to the case of **Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010** (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates.

23. Notably, without reproducing the evidence as laid out by the Respondent, a perusal of the Birth Notification produced as exhibit before the Trial Court in respect of PW 1 indicated that she was born on 5th December 2016. The incident took place on 2nd November 2021. This meant that PW 1 was about four (4) years old at the material time.

24. As the Appellant did not challenge the production of the aforesaid Birth Notification and/or rebut the said evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven beyond reasonable doubt and that she was a child at all material times.

B. IDENTIFICATION

25. The Appellant submitted that the testimonies of PW 1 and PW 2 were inconsistent in regard to his identification as whereas PW 1 stated that there was electrical light which enabled her recognise him, PW 2 testified that she got a lamp to assist her see them. He argued that the use of the lamp meant that the house where the incident occurred was dark contrary to PW 1's assertion.

26. On its part, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her. It asserted that she identified him in court and stated that there was light which helped her identify the Appellant. It added that PW 1 stated that the Appellant used to stay nearby.

27. It contended that as the Appellant was someone PW 1 knew well, she could not have been mistaken as to his identity. It pointed out that his identification was through recognition which was more reliable and weightier than that of identification of a stranger as was held in the case of **Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568.**

28. It further contended that PW 2 testified that she found PW 1 at the house where the Appellant was staying after hearing children crying therein. It added that she found the door locked and was assisted by relatives to break the door where she found PW 1 bleeding. It said that PW 2 called the Assistant Chief, Peter Oscar Abdall (hereinafter referred to as "PW 4") who came to the said house and confirmed that PW 1 was bleeding and he escorted her to Coptic Hospital.

29. It asserted that the inconsistencies and contradictions did not go into the core of the case and that the variance in itself did not in any manner distort or dislodge the commission of the offense as was held in the case of **S.O.O vs Republic[2018]eKLR** which cited the Tanzanian case of **Dickson Elia Nsamba Shapwata & Another vs The Republic Criminal App No 92 of 2007.**

30. It also cited the case of **MTG vs Republic** (eKLR citation not given) where it was held that contradictions in evidence of a witness that would be fatal had to relate to material facts and be substantial.

31. A perusal of the proceedings showed that PW 1 testified that she was defiled by Willy, the Appellant whom he said stayed near her home. She identified him in court by pointing at him. She said that she was playing outside their door when he called her and touched her (pointing to her thigh) with his urinating body part. She stated that the incident happened in the house of one Ichi. She added that she was with one Emily who was younger than her but that the Appellant did not touch Emily.

32. She further told the Trial Court that it was at night and her mother had gone to buy food for the pigs. She said that there was an electric light which helped her recognise the Appellant. She pointed out that at the time of the commission of the act, the Appellant removed her clothes and she remained without a pant. She said that she felt pain, cried and bled and that that was the first time he was defiling her.

33. PW 2 testified that on the material day of 2nd November 2021, at around 5.30 pm, she had gone to the market to get food for the pigs. She stated that she left PW 1 and Emily Omwenge who was two (2) years old at home as they were playing. She further said that it rained while she was at Luanda Market and that she went back home at around 7.00 pm. She said that she found the house where she left the children open but heard them crying in the Appellant's house which was in the same homestead.

34. It was her further evidence that she went to see what was happening and found that the door was locked. She stated that she broke the door with the help of other relatives and found PW 1 bleeding with her dress on but without her trouser. She said the Appellant was not in the house and that she informed PW 4 who assisted him to get a motorcycle to take the child to hospital.

35. PW 1 positively identified the Appellant as the perpetrator of the offence. PW 2 and PW 4 confirmed that they found PW 1 in the Appellant's house bleeding from her private parts. They took her to hospital. PW 1 testified that the Appellant was their neighbour and called him by his name Willy during trial. In his unsworn evidence, the Appellant stated that he gave shelter to PW 1 and another child as it was raining and went to look for their mother. As he was not a stranger to PW 1, there could not, therefore, have been any possibility of mistaken identity.

36. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by

recognition. The Appellant's assertions that there were inconsistencies in the evidence of PW 1 and PW 2 with regard to his identification, therefore, fell by the wayside.

C. PENETRATION

37. The Appellant submitted that PW 1 failed to describe the act which caused penetration. He cited Section 2 of the Sexual Offences Act and submitted that for a charge of defilement to stand, it had to be a result of penetration by a genital organ of the appellant to the genital organ of the victim and neither partially nor completely. He argued that PW 1's testimony was that he touched but did not penetrate her vagina. He added that the word, "touch" deemed the act as an indecent act pursuant to Section 11(1) of the Sexual Offences Act. He questioned how could penetration occur if PW 1 had her pant on.

38. He asserted that the evidence of the Clinical Officer, Paul Muturi (herein after referred to as "PW 3") did not corroborate the oral evidence of PW 1. He added that as per the proviso to Section 124 of the Evidence Act, a trial court could convict on the evidence of the victim of sexual offence alone, but that before it could do so, it had to be satisfied that the victim was telling the truth and record the reasons for such belief. He further argued that PW 1 testified that she bled after she was defiled but that her pant was not blood-stained.

39. He placed reliance on the case of **Ndungu Kimani vs Republic[1979]eKLR 282** where it was held that the witness in

criminal case upon whose evidence is proposed to rely on should not create an impression on the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness.

40. He was emphatic that the evidence of PW 1 and other witnesses were not corroborated hence leaving the prime ingredient of defilement not strong. He further asserted that the evidence of PW 1 and PW 2 on defilement on the part of PW 1 also contradicted each other.

41. In this regard, he relied on the case of **Ramkrishna Denkerrai Pandiya vs Republic Appeal No 6 of 1920 EHCH 93** (eKLR citation not given) where the common thread was that two (2) contradictory statements could not be admitted in a court of law as either one was the truth and the other was not.

42. He also relied on the case of **CMM vs Republic[2012]eKLR** where it was held that the truth or otherwise of the complainant's story could only be confirmed by calling one of the children who were present with the complainant and the appellant in the house.

43. He contended that the Prosecution did not call crucial witnesses like Emily and Risper to testify. In this regard, he placed reliance on the cases of **Ng'anga vs Republic Criminal Appeal No 50 of 1981**(eKLR citation not given) where it was held that the prosecution may elect not to call a material witness but they do so at the risk of their own case and **Wendoh vs Republic (1953) 20 EA 166** where it was held that the prosecution had to make

available all witnesses necessary to establish the truth even if the evidence might be inconsistent.

44. On its part, the Respondent invoked Section 2 of the Sexual Offences Act and placed reliance on the case of **Mohammed Omar Mohammed vs Republic[2020]eKLR** where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of PW 3 corroborated that of PW 1 and that penetration was, therefore, proved.

45. It argued that it was trite that no particular number of witnesses were required for the proof of a fact. It invoked Section 143 of the Evidence Act (Cap 80 Laws of Kenya) and relied on the case of **Keter vs Republic(2007) EA** 135 where it was held that the prosecution was not obliged to call superfluity of witnesses, but only such witnesses as were sufficient to establish the charge beyond any reasonable doubt. It was emphatic that it called all the crucial witnesses to support its case.

46. It further contended that pursuant to Section 211 of the Criminal Procedure Code, the Appellant chose to give unsworn statement and did not call any witnesses. It asserted that he gave an alibi defence. It added that the governing principle on alibi defence was that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police was a factor

which may be considered in determining the weight given to it as was held in the case of **Charles Kasena Chogo vs Republic[2019]eKLR**.

47. It agreed with the Trial Court's holding that the Appellant also failed to call crucial witnesses in support of his case hence did not rebut the Prosecution's evidence.

48. Notably, PW 3 confirmed that PW 1's labia minora and majora were swollen. There was partial rapture to the hymen and she had internal injuries. The high vaginal swap had spots of blood. He confirmed that the weapon was a penis and that there was penetration. He produced the P3 Form and Post Rape Care (PRC) Form as exhibits in the case.

49. In his defence, the Appellant denied defiling PW 1. In his evidence, he stated that he was a Form Four (4) student and that on the material day at around 6.00p.m, he came from school and changed his uniform. He said that he came out of the house and found the two (2) children out in the cold. The children asked him to open their door but that it was locked with a padlock.

50. He told them to get inside his house as it was raining and he went to the drinking place to look for their mother and that when he got there, he was told that she had left for her home. He said that when she went back, she found their mother had broken into his house and picked the children. He was later arrested. He pointed out that he had had a surgical operation on his private part a week before the incident and he could not, therefore, have defiled PW 1.

51. Although the Appellant submitted that PW 1 was coached and testified on what PW 2 had told her to say, the evidence on record showed that she was actually defiled. Her evidence was corroborated by the scientific evidence of PW 3. He examined her the day after the incident to wit, 3rd November 2021 and observed that the high vaginal swab had spots of blood, the labia majora and minora were swollen and the hymen was partially ruptured by a penis.

52. Going further, the Appellant did not rebut PW 1's evidence that she broke into his house to rescue PW 1 and another child. He only stated that the lady came and took her children. He did not also explain how he knew PW 2 was in a drinking den so that he could leave PW 1 and the other child to go and look for PW 2. Having admitted that he left PW 1 and the other child in his house, the burden of proof shifted to him to extricate himself from the averments that had been levelled against him.

53. Although he indicated that he wished to produce medical reports to show that he had undergone an operation on his scrotum and could not, therefore, have defiled PW 1, it was not clear if the said medical report was adduced as evidence in court. There was, however, a letter dated 10th November 2021 annexing a Discharge Summary from The Great Lakes Medical Centre. Be that as it may, he and his witness adduced unsworn evidence which had little or no probative value as it was not subjected to the rigours of cross-examination. Under the circumstances, the said Discharge Summary

could not, therefore, have assisted him to rebut the Prosecution's case.

54. It was evident that his defence was simply a denial. His evidence was not watertight enough to have displaced the Prosecution's inference of guilt on his part. His argument that the case was full of contradictions or that he was framed by the wayside. Indeed, as had been stated hereinabove, any contradictions or inconsistencies were insignificant and did not affect the inference of guilt on his part. The witnesses that were called by Prosecution adduced sufficient evidence to establish the charge. It was not necessary to call other witnesses. Indeed, Section 143 of the Evidence Act Cap 80 (Laws of Kenya) provides that:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

55. This court thus found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material day as there was proof of defilement as PW 3 testified.

56. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) and Amended Ground of Appeal No (1), (2) and (3) were not, therefore, merited and the same be and are hereby dismissed.

I. SENTENCE

57. The Appellant did not challenge his sentence. He did not submit on the same. However, for completeness of record, this court found it prudent to determine the same. The Respondent submitted that the sentence was proper and should be upheld. Although, the court noted that the Respondent stated that the Appellant was sentenced to life imprisonment which was not the case as he was sentenced to twenty (20) years imprisonment.

58. Notably, the Appellant was convicted and sentenced under Section 8(2) of the Sexual Offences Act Cap 63 A (Laws of Kenya). The said Section 8(2) of the Sexual Offences Act provides that:-

“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.”

59. This court noted that Trial Court sentenced the Applicant to twenty (20) years imprisonment instead of the life imprisonment mandatory minimum sentence. This court could not fault the Trial Court for having sentenced him to a lesser sentence than was prescribed in the Sexual Offences Act as the jurisprudence at the time he was sentenced allowed courts to exercise discretion during sentencing.

60. Notably, on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case **Joshua Gichuki Mwangi vs Republic [2022] eKLR** which had reiterated the reasoning in the case of **Dismas Wafula Kilwake vs Republic**

[2018] eKLR to the effect that Section 8 of the Sexual Offences Act had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. In its said decision, the Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

61. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Appellant's sentence. It had no option but to leave the sentence of twenty (20) years that was meted against the Appellant herein undisturbed.

62. This court was not persuaded to enhance the sentence to life imprisonment, as the Respondent did not put the Appellant on notice that it would be seeking an enhancement of the sentence which would have allowed him to make an informed decision as to whether he would have wished to proceed with his appeal or if he would have wished to abandon the same. Enhancing his sentence without giving him an opportunity to respond would be contrary to the principles of fair trial provided in Article 50 of the Constitution of Kenya. All the same, the Respondent did not seek an enhancement of the sentence of twenty (20) years but merely proposed that the same be upheld.

63. A perusal of the Trial Court's decision on his sentencing showed that it considered the period that he spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

DISPOSITION

64. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Grounds of Appeal dated 30th September 2024 and filed on 3rd October 2024 and Amended Grounds of Appeal 5th May 2025 and filed on 12th May 2025 were not merited and the same be and are hereby dismissed. In this regard, his conviction and sentence be and are hereby upheld as they were both safe.

65. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **26th** day of **November** 2025

J. KAMAU
JUDGE