KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Otieno v Republic (Criminal Appeal E024 of 2023) [2025] KEHC 17389 (KLR) (25 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17389 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E024 OF 2023

JN KAMAU, J

NOVEMBER 25, 2025

BETWEEN

GEORGE ONYANGO OTIENO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (SPM) delivered at Vihiga in the Senior Principal Magistrate's Court in Sexual Offence Case No 24 of 2019 on 17th December 2021)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *akn ke act 2006 3 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 *akn ke act 2006 3 Sexual Offences Act*.

2. The Learned Trial Magistrate, Hon S. O. Ongeri (SPM) convicted him on the main charge of attempted defilement and sentenced him to fifteen (15) years imprisonment.

3. Being dissatisfied with the said Judgement, on 14th August 2023, he lodged an appeal herein. His Grounds of Appeal were undated. He set out eight (8) grounds of appeal. In his Written Submissions dated 6th March 2025 and filed on 14th March 2025, he incorporated his Supplementary Grounds of Appeal of even date. The Respondent's Written Submissions were dated and filed on 25th March 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. 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.

5. 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.

6. Having looked at the Appellant's Grounds of Appeal, Supplementary 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 Prosecution proved its case beyond reasonable doubt; and

   b. 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.

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

I. Proof Of Prosecution's Case

8. Grounds of Appeal No (1), (2) and (3) and Supplementary Grounds of Appeal No (3), (4) and (5) were dealt with under this head.

9. The Appellant submitted that the Trial Court erred in convicting him relying on unsworn and uncorroborated evidence of the minors. He placed reliance on the cases of May vs Republic (1981) KLR where it was held that unsworn statement had no probative value and that it should be considered in relation to the whole evidence and Johnson Muiruri vs Republic (1983) KLR 445 where it was held that the failure by the judge to direct himself and assessors on the dangers of relying on uncorroborated evidence of a child of tender years and the reliability of such evidence was a fatal error and conviction could not stand.

10. He also cited the case of Reagan Mokaya vs Republic Criminal Appeal No 49 of 2006 (eKLR citation not given) where it was held that a minor's evidence could not corroborate another minor's evidence and that a person who suffered some disability could not corroborate another witness of similar disability. He argued that the statements of the minor witnesses on identification were not corroborated. He added that the Trial Court did not point out the demeanour of the witnesses which it noted and relied upon as a basis of accepting their evidence.

11. He argued that although the Complainant, EM (hereinafter referred to as "PW 1") testified that he gave her Kshs 70 =, she did not present the same to her mother and or the Investigating Officer. He contended that PW 1's memory was not credible as she had forgotten the day when she was attacked. He added that the probability she saw her attacker was zero (sic).

12. He further submitted that DM (hereinafter referred to as "PW 2") stated that he was not her neighbour and that the Investigating Officer did not visit the scene of crime to establish the distance from PW 1's home to his home.

13. It was his contention that dock identification was worthless if it was not preceded by a properly conducted identification parade. He added that there were contradictions in the evidence of penetration and which were deliberately done by PW 1 with intent to bring out untruthfulness. He prayed that he be acquitted.

14. On its part, the Respondent submitted that the Trial Court convicted and sentenced the Appellant based on the evidence of PW 1 as corroborated by that of PW 2, VH (hereinafter referred to as "PW 3") and the Clinical Officer, Odeyo Dismas Otieno (hereinafter referred to as "PW 5").

15. It placed reliance on the case of Stephen Nguki Mulili vs Republic[2014]eKLR where it was held that although the evidence of a victim had to be corroborated, in a criminal case involving a sexual offence, if the only evidence was that of the alleged victim of the offence, the court could receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court was satisfied that the alleged victim was telling the truth.

16. It pointed out that pursuant to Section 211 of the Criminal Procedure Code, the Appellant chose to give a sworn statement and did not call any witnesses. It asserted that he gave a defence of alibi and never called any of his workmates to support his claim that he was at a funeral at the alleged time of the commission of the offence. It further contended that the governing principle on alibi defence was that 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.

17. It contended that the Trial Court also warned itself on convicting on the evidence of minors (PW 1, PW 2 and PW 3) and further observed that the minors were well acquainted with the Appellant and were truthful. It was emphatic that the Appellant did not rebut its evidence and, therefore, his claim that the Trial Court did not consider his defence was without merit.

18. 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.

19. 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. It argued that the Appellant had not shown this court any substantial inconsistencies or contradictions in the prosecution's case.

20. Notably, PW 1 gave an unsworn testimony. She testified that on the material day of 10th May 2019 at around 6.00p.m, she was at home playing with other children, her sisters, V and T, outside the house when the Appellant who was their neighbour called her and said that he wanted to give her money at the shop. She said that she went with him to his house where he pushed her to his bed, pulled her dress, removed his trouser and did, "tabia mbaya" to her by removing his "dudu" and inserting in hers between her legs. She added that she screamed and he gave her Kshs 70 = and pushed her outside.

21. PW 2 and PW 3 who were also minors gave unsworn statement. They testified that indeed on the material day, they were with PW 1 when the Appellant called her.

22. PW 4 was PW 1's mother. She testified that on the material day of 10th May 2019, she was at home doing house chores when PW 1's grandmother came asking for PW 1 to send her to the posho mill. When she called out PW 1's name, PW 2 and PW 3 said that she had left with the Appellant who had alleged that he was going to give her money. When PW 1 came, she was walking with her legs apart,

limping and was shy. When she asked her where she was from, she said that the Appellant told her to go to the shops so he could give her money and when she went, he defiled her.

23. It was her further evidence that she took PW 1 to the house and when she checked her private part, she saw some whitish discharge. She later took her to hospital.

24. PW 5's evidence was that on examination of PW 1, he found that she appeared sickly. He said that she had normal lateral genitalia and the hymen was intact. He added that epithelial cells were seen in the high vaginal swab. He concluded that there was no evidence of penetration, a fact that he reiterated when he was cross-examined.

25. As the Appellant did not challenge proof of the other ingredients of age and identification, this court did not belabour to canvas the same. He seemed to have focused on the unsworn statements of the minors.

26. Notably, in an offence of attempted defilement, the prosecution must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement was as if it were a failed defilement, because there was no penetration.

27. Section 9(1) of the *akn ke act 2006 3 Sexual Offences Act* defines attempted defilement as follows:-

> " A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

28. On the other hand, Section 2 of the *akn ke act 2006 3 Sexual Offences Act* defines "penetration" as follows:-

> " 'penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person".

29. The Trial Court found PW 1, PW 2 and PW 3 to have been truthful and convicted the Appellant on the offence of attempted defilement. The evidence on record showed that penetration was not proved. It was on that basis that the Trial Court may have convicted him for having attempted to defile PW 1.

30. It has been held time and again by courts that unsworn statement has no probative value and should be taken into consideration in relation to the whole of the evidence. Having said so, under Section 124 of the *akn ke act 1963 46 Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

31. Notably, the proviso of Section 124 of the *akn ke act 1963 46 Evidence Act* states that:-

> " Notwithstanding the provisions of section 19 of the *akn ke act 1926 29 Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be

recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

32. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be the evidence of the minors that were playing with PW 1 at the material time and saw the Appellant calling her to the shop.

33. Although it was clear from the Appellant's evidence that he was a cousin to PW 1, PW 2 and PW 3 and hence identification was not in question, there were material contradictions and inconsistencies in the evidence of PW 1, PW 2 and PW 3 regarding what transpired after PW 1 allegedly came back which led this court to entertain doubt as to what really transpired on the said date.

34. Indeed, PW 1 told the Trial Court that the Appellant herein was their neighbour. PW 2 who was PW 1's sister told the Trial Court that the Appellant was not their neighbour. PW 2 also stated that when PW 1 came, she did not tell them anything. On her part, PW 3 who was also PW 1's sister said that when PW 1 came, she told "them" that the Appellant had done "tabia mbaya" (bad behaviour) to her.

35. Going further, PW 1's evidence of what the Appellant did to her was not consistent with the findings of PW 5. While PW 1 told the Trial Court that the Appellant inserted his "dudu" into her "dudu" and that she was feeling pain, PW 5 stated that there was no evidence of penetration. It was difficult to decipher what exactly the Appellant did to her as she also said that he touched her "dudu" using his hand.

36. PW 4's evidence was also not consistent with the Treatment Notes that were adduced as evidence. She had stated that she examined PW 1 and saw some whitish discharge but there was no blood. She also said that PW 1 was walking with her legs apart. However, the Treatment Notes of 10th May 2019 confirmed PW 5's testimony that there was no penetration, evidence of vaginal fluids or blood and that PW 1's hymen was intact.

37. This court took the firm view that in the absence of scientific evidence that could have corroborated PW 1's evidence, it was difficult to rely on unsworn evidence of PW 1, PW 2 and PW 3 to convict the Appellant. Indeed, an accused person could not be convicted on unsworn evidence as it was not subjected to the rigours of cross-examination.

38. An accused person was a maiden of the law and his liberty ought not to be curtailed unless the same was justified. Indeed, Article 29(a) of *akn ke act 2010 constitution the Constitution* of Kenya, 2010 provides as follows:-

> " Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

39. This court thus found and held that Prosecution did not prove its case to the required standard which in criminal cases is, proof beyond reasonable doubt and hence, the Trial Court erred in having relied on the evidence on record to convict the Appellant for the offence herein as the same was unsafe.

40. In the premises foregoing, Grounds of Appeal No (1), (2) and (3) and Supplementary Grounds of Appeal No (3), (4) and (5) were, therefore, merited and the same be and are hereby allowed.

Ii. Sentence

41. Having found that the Prosecution had not proved their case against the Appellant herein, it would not have been necessary to consider Grounds of Appeal No (4), (5), (6) and (7) and Supplementary Grounds of Appeal No (1) and (2) which related to the sentence that was meted out to the Appellant herein. However, a court must always keep at the back of its mind that its decision could be overturned by a higher court. It was on that basis that this court found it prudent to deal with the Grounds of Appeal relating to the sentence that was meted out to the Appellant herein just in case it was found to have arrived at an erroneous conclusion.

42. The Appellant invoked Section 9(1) and (2) of the *akn ke act 2006 3 Sexual offences Act* and 389 of the Penal Code and placed reliance on the case of David Mwangi Mugo vs Republic[2011]eKLR where it was held that in terms of Section 389 of the Penal Code, the appellant shall not be liable to imprisonment for a term exceeding seven (7) years. He argued that he was sentenced to fifteen (15) years while the Act provided for ten (10) years. He contended that he was entitled to the less punitive sentence in accordance with Article 25(c), 50(2)(p) and 24(1)(e) of *akn ke act 2010 constitution the Constitution* of Kenya, 2010.

43. He contended that the Trial Court failed to direct that his sentence run from the date of arrest on 12th May 2019 to take care of the period he spent in remand during trial pursuant to Section 333(2) of the Criminal Procedure Code. He added that he was sentenced on 17th March 2022. He, therefore, urged the court to consider the same.

44. The Respondent was not opposed to the Appellant's prayer under Section 333(2) of the Criminal Procedure Code. It cited the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR where it was held that courts were obliged to take into account the period that the accused persons spent in custody before they were sentenced.

45. It further invoked Section 9(1) and (2) of the *akn ke act 2006 3 Sexual Offences Act* and Section 329 of the Criminal Procedure Code and submitted that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at the sentence. It placed reliance on the case of Benard Kimani Gicheru vs Republic[2002]eKLR where it was held that sentencing was a matter that rested with the discretion of the court and that an appellate court would not interfere with sentence unless the same was manifestly excessive in the circumstances of the case or the trial court took into account some wrong factor.

46. It also relied on the case of Republic vs Jagani & Another (2001) KLR 590 where it was held that the purpose of sentence was to assist in rehabilitation. It further cited the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation was not given) where it was held that mandatory sentences leave no discretion to the judicial officer. It was its contention that the Appellant's sentence was safe and should be upheld.

47. The Appellant was convicted under Section 9(1) and (2) of the *akn ke act 2006 3 Sexual Offences Act* Cap 63A (Laws of Kenya). The said Section 9(2) provides as follows:-

> "A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

48. The Trial Court sentenced the Appellant to fifteen (15) years which was illegal as the law provided for ten (10) years. If this court had found the Appellant to have been guilty as charged, it would have set aside and or varied and or vacated the sentence herein and meted out the least prescribed sentence

of ten (10) years as there were no aggravating circumstances that would have led this court to mete out a higher sentence than what had been prescribed in line with Article 50(2)(p) of *akn ke act 2010 constitution the Constitution* of Kenya, 2010 that provides as follows:-

> "Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

49. Going further, this court would have been mandated to consider whether the time the Appellant spent in remand was considered by the Trial Court pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

50. The said Section provides that:-

> "Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

51. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

> "The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...
>
> (ix) Time already spent in prison by the convict..."

52. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic(Supra).

53. A perusal of the Charge Sheet indicated that the Appellant was arrested on 12th May 2019. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 17th March 2022. This was a period that ought to be taken into account while computing his sentence. A perusal of the court proceedings indicated that the Trial Court did not take this period into account which was erroneous. This court would, therefore, have directed that the period that the Appellant remained in custody while his trial was on-going be taken into account at the time of computing his sentence in line with Section 333(2) of the Criminal Procedure Code.

54. In the premises, Grounds of Appeal No (4), (5), (6) and (7) and Supplementary Grounds of Appeal No (1) and (2) would have been merited and hence allowed.

Disposition

55. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Grounds of Appeal dated 31st October 2022 and filed on 14th August 2023 was merited and be and is hereby allowed. The conviction and sentence that was meted out against the Appellant herein be and are hereby set aside and or vacated as they were both unsafe.

56. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

57. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25 TH DAY OF NOVEMBER 2025

J. KAMAU

JUDGE