Kola v Republic (Criminal Appeal E022 of 2025)
[2025] KEHC 18745 (KLR) (19 December 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E022 OF 2025

A MABEYA, J

DECEMBER 19, 2025

BETWEEN

GEORGE ODHIAMBO KOLA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment, conviction & sentence of Hon. C.N.C Oruo SRM delivered on the 18/11/2022 in Winam SPMC in SO Case No. 58 of 2020, R. vs George Odhiambo Kola)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that, on the 7/7/2020 at Coptic Nyamasaria area in Kisumu East sub-county within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of E.A. a child aged 15 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The appellant pleaded not guilty and a full trial ensued. The prosecution case was founded on the evidence of five (5) witnesses. The appellant gave his own sworn testimony in defence.
3. In its judgment dated 15/11/2022 and delivered on the 18/11/2022, the trial court found the appellant guilty of the main charge, convicted and sentenced him to serve 15 years' imprisonment.
4. Dissatisfied with that decision, the appellant filed an undated petition of appeal as well as an amended petition of appeal each raising four (4) grounds which may be summarised as follows: -
    a. That the trial court erred in failing to consider that the evidence tendered was marred with contradictions, inconsistencies and discrepancies therefore unsafe for conviction.

b. That the sentence imposed was harsh as it disregarded the principle of fair trial under Article 50 in addition to breaching article 27 of *the Constitution*.

c. That the sentence went against the weight of the evidence and circumstances surrounding the case hence both disproportionate and incommensurate with the circumstances.

5. The appellant submitted that the medical officer who examined the complainant failed to disclose her qualification prior to giving expert opinion contrary to section 77 (2) of the *Evidence Act* thus the evidence ought to be declared unreliable, insufficient and incompetent.

6. That the failure by the trial court to carry out a voire dire prior to taking the testimony of the complainant occasioned a miscarriage of justice as it violated the appellant's rights. That the case was full of contradictions, inconsistencies and discrepancies therefore the court ought to analyse it afresh. That the trial court failed to consider the appellant's defence which he started to build during the testimony of Pw3.

7. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach its own independent conclusions and findings but at all times bearing in mind that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

8. Before the trial court, Pw1, E.A. the complainant, testified that she knew the appellant who used to visit them. That on the material at night when she and her sister were sleeping, the appellant came to where she was sleeping and removed her panty and raped her. She was sleeping on the floor when the appellant had sex with her. That the lights were off at the time but her sister who was sleeping on the bed stood up and switched on the lights. That the appellant slept in the house till morning.

9. Pw2, Stacy Anyango Otieno, the complainant's neighbour testified that on the 7/7/2020 at about 1.30am she was sleeping at the complainant's house with the complainant when she was awoken by the complainant's three shouts of "wachana na mimi" in Dholuo.

10. That she woke up and switched on the lights and saw the complainant lying on the floor where she was sleeping. She was naked and she saw the appellant rising from where the complainant was lying on the floor and sat on the seat. That the appellant had stayed in the room until midnight despite their asking him to leave but he declined. That after turning on the lights, she asked the complainant why she was crying and the complainant told her that the appellant had removed her clothes and had sex with her. She went and woke up the complainant's parents and informed them of what had transpired.

11. Pw3, Jane Anyango, the complainant's mother testified that the complainant was 15 years old as she was born on the 20/6/2005. That on 7/7/2020, she was informed by her 10-year-old son Isaack Odera and Pw2 that the appellant had raped the complainant. That the appellant had come to visit her husband at around 9pm but claimed that he could not leave as his leg was paining. Her husband allowed him to sleep with the children in their room. That the appellant was arrested by the police and both him and the complainant were taken to hospital.

12. Pw4 No. 107257 PC Lydia Adhiambo, the investigating officer, testified that on the 7/7/2020 between 8 and 9 am a report of defilement was made at Kasagam Police Station by Pw3 accompanied by the complainant. That the appellant was arrested at Nyamasaria near Wells Petrol Station at about 15:00 hrs. She produced the minor's Birth Certificate as PExh1.

13. Pw5 Dr. Lucy Ombok testified that she examined the complainant, a 15-year-old, and filled the P3 form on the 15/6/2021. That on examination the complainant appeared mentally challenged and withdrawn. That she had normal external genitalia with a broken hymen. She produced the P3 form

as PExh2 and the PRC form as PExh3. That the medical and physical examination confirmed that the minor was defiled.

14. When placed on his defence, the appellant denied defiling the complainant. He stated that on the date of his arrest, he had gone to take alcohol and gave the lady selling it Kshs. 1,000/- but she refused to give him change. Instead, she used 4 men to assault him and rob him of his money. She then left the place and shortly thereafter returned with police officers who arrested him and subsequently charged him. That he had known the lady for a period of 1 month but did not know her husband.

15. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him accordingly.

16. Section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* establishes the offence of defilement as follows: -

> " 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

17. The specific elements of the offence arising therefrom which the prosecution must prove beyond reasonable doubt are: -

    a. Age of the complainant;

    b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*;

    c. Positive identification of the perpetrator.

18. The age of the victim of defilement is an essential element because defilement is a sexual offence committed against a child who under the Children's Act, is a person below the age of 18 years. In addition, the age of the child is an aggravating factor for purposes of determining the sentence to be imposed as per the penalty clauses in the *Sexual Offences Act*. The younger the child the more severe the sentence.

19. In this case, the age of the complainant was undisputed. Her mother, Pw3, testified that the minor was 15 years old having been born on the 20/6/2005. This was corroborated by the Birth Certificate produced by the Investigating Officer Pw4 as PExh1. Accordingly, I find that the proven age of the complainant was 15 years old at the time of the offence.

20. On the issue of penetration, section 2 of the Act defines penetration as follows: -

> " the partial or complete insertion of the genital organs of a person into the genital organ of another person."

21. The complainant testified that on the material day at night, the appellant removed her dress and panty then had sex with her. The complainant was firm in cross-examination that it was the appellant who had sex with her. Her testimony was corroborated by Pw2 who was also in the room. Pw2 told the court how she heard the complainant shout three times in dholuo '"wachana na mimi'. When she put on the light, she found the complainant who was sleeping on the floor naked and the appellant was rising from where the complainant was lying.

22. The findings of the doctor who testified as Pw5 told the court that the complainant had been penetrated. That upon examining the complainant, it was found that her hymen was broken. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

23. The other question is whether the appellant was positively identified as the perpetrator. The appellant was well known to the complainant. Both the complainant, Pw2 and Pw3 that the appellant had spent the night in the same room as the complainant. From the foregoing, it is clear that the appellant was not a stranger to the victim.

24. In his defence, the appellant denied the charge. He raised an alibi defence that had come to take chang'aa in Pw3's home and that Pw3 refused to give him his change and instead called the police on him.

25. The law is that when an accused puts forward an alibi defence, he does not bear any burden to prove its falsity or truth. The burden always remains with the prosecution. In Victor Mwendwa Mulinge v Republic (2014) eKLR the court said: -

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution ..."

26. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated is a factor which may be considered in determining the weight given to it. See Nyakundi J in Charles Kasena Chogo v Republic [2019] e KLR.

27. In the present case, the appellant submitted that he raised his alibi in cross-examination of Pw3. The record reveals that in cross-examination Pw3 admitted that the appellant had come to her home to take chang'aa however he had not lost any money.

28. When taken as a whole, the appellant's defence did not, in my view, displace the evidence presented by the prosecution. The said defence failed to displace the testimony of the complainant and Pw2 that he was in their bedroom at the material night. That he defiled the complainant and that he was caught by Pw2 while rising from where the complainant was lying naked. In my view, the appellant's defence was a mere afterthought that failed to shake the evidence presented by the prosecution.

29. The appellant impugned his conviction and sentence on account that the trial court's failure to carry out a voire dire prior to taking the complainant's testimony occasioned a miscarriage of justice by infringing on his right.

30. The law is that absence of voire dire examination is not automatically fatal to the evidence of a witness. This was the observation made by the Court of Appeal in Maripett Loonkomok v Republic (2016) eKLR where it was held that: -

> " We turn to consider the effect of failure by the trial court to administer voire dire on the complainant. It is firmly settled that not in all cases that voire dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014."

31. In Athumani Ali Mwinyi v Republic, Criminal Appeal No.11 of 2015, the Court of Appeal stated that: -

> " In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

32. It is worth noting that a voire dire examination is done for the benefit of the court that the child of tender age is intelligent enough and understands the meaning of oath. In Japheth Mwambire Mbitha v Republic [2019] eKLR, the Court of Appeal held that: -

> " With specific regard to the testimony of children, voire dire examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of voire dire was explained by this court in Johnson Muiruri vs Republic [1983] KLR 445 as follows:
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> 1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
> 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
> 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
> 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

33. The question then is, was Pw1 a child of tender years? In the case of FMG v Republic [2022] eKLR the court stated that;

> " In Maripett Loonkomok vs Republic [2015] eKLR, the Court of Appeal restated that: -
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> > "Voire dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voire Dire definition" Duhaime's Legal Dictionary."

41. It is now trite that a child of tender years is one under the age of 14 years. In the Maripett Case (supra) it was held that:

> "Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Korir v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honored 14 years remains the correct threshold for voire dire examination..."

34. Section 19 (1) of the Oaths and Statutory Declaration Act is the provision under which voire dire examinations are underpinned to determine the child's understanding of the nature of an oath. The provision states:

> " Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

35. In the present case, the record shows that the trial court did not conduct voire dire examination. The complainant was proven to be 15 years old and thus not a child of tender years as envisioned by the law.

This is drawn from the description in the *Children Act* and which the Court of Appeal in the Maripett Case (supra) distinguished.

36. It evident from the record that the child understood why she was in court, and though described as mentally challenged by Pw5, gave her testimony cogently. She was cross examined by the accused and her testimony remained coherent and credible. What she told the court was supported by the testimony of Pw2 and the medical evidence obtained from the physical examination of her body. Clearly there was no prejudice suffered at all by the appellant. The trial court's omission is not sufficient reason to nullify the proceeding.

37. The appellant further sought to have the medical evidence tendered by Pw5, Dr. Ombok disregarded on account that the medical officer who examined the complainant failed to come to court to testify on the same and further disclose her qualification prior to giving expert opinion contrary to section 77 (2) of the *Evidence Act*. That the said evidence ought to be declared unreliable, insufficient and incompetent. In essence the appellant was faulting the trial court for having received medical evidence from a doctor who had not examined the complainant.

38. The medical evidence was presented by Pw5 Dr. Ombok who examined the complainant and filled the P3 form. Her competence was never challenged. She testified that the PRC form was filled by her colleague Calvin Odhiambo whom she had worked with for a year and whose handwriting she was familiar with but whom could not attend court. The appellant did not object to the production of that PRC form.

39. In Joseph Mahende v Republic (2019) eKLR, the Court of Appeal stated that: -

> "Our interpretation of section 33 (d) of the *Evidence Act* as read with section 77(1) & (2) of the *Evidence Act*, is that evidence touching on expert opinion should be tendered by experts themselves as provided for under Section 48 of the *Evidence Act*. However, in instances where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar fields of expertise and who are familiar with the handwritings of the unavailable expert can be called upon to tender such evidence as provided for under Section 33 (d) of the *Evidence Act* and which evidence by dint of Section 77 (1) & (2) of the *Evidence Act*, is admissible and presumed as genuine and authentic.
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> In Joseph Bakei Kaswili -vs- Republic [2017] eKLR, the Court confronted with a situation where a victim had been attended to by 3 different medical practitioners but only one appeared at the trial, held inter alia as follows: -
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> > "Section 33 of the *Evidence Act* Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable. Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence."

40. In Angela -vs- Republic [2001] eKLR, the Court of Appeal stated: -

> "A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is undoubtedly performing and discharging a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that subject to other requirements being met, a postmortem examination report is a document

made in the discharge of a professional duty and would be covered by Section 33(b) of the *Evidence Act*. But before Section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs (a) to (h) may not be applied. Once again for the sake of convenience and clarity, we set out below the requirements of the first part of the Section. They are: -

> "Statements, written or oral on admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases..."”

41. The aforementioned authorities clearly explain the jurisprudence of section 33(d) and 77(1) & (2) of the *Evidence Act*. Consequently, the trial court cannot be faulted for having permitted Pw5 who testified on behalf of her colleague to testify. This limb of the appeal thus fails.

42. The appellant further impugned his conviction on account that the evidence tendered particularly that of Pw1, Pw2 and Pw3 was marred with contradictions, inconsistencies and discrepancies therefore unsafe for conviction.

43. In MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment) cited with approval Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 as follows: -

> “With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

44. In the present case, this Court has carefully considered the evidence of the said witnesses but is unable to find any contradictions or inconsistencies. And, if at all there were any, the same were not material enough to warrant interference with the conclusions arrived at by the trial court.

45. Taking all the foregoing into consideration, I find that the appellant’s conviction was proper. I uphold the trial court’s conviction of the appellant.

46. The appellant also challenged the sentence meted out against him stating that it was harsh as it disregarded the principle of fair trial under Article 50 in addition to breaching Article 27 of *the Constitution* and was both disproportionate and incommensurate with circumstances.

47. Article 27 of *the Constitution* provides for equality and freedom from discrimination while Article 50 provides for gguarantees the right to a fair trial for every person and outlines the rights of an accused person in a criminal trial. The appellant did not detail how the aforementioned rights were infringed.

48. In Anarita Karimi Njeru (No.1) (1979) 1 KLR 154, the Court of Appeal held that it is not enough to allege constitutional violation, one must plead the specific violation and proceed to demonstrate the same.

49. In Aluochier v Senate & 2 others (Petition E014 of 2025) [2025] KESC 59 (KLR) (3 October 2025) (Judgment), the Supreme Court complimented the Anarita case by stating, inter-alia, that a petitioner has the burden of presenting evidence showing on a balance of probabilities that the allegations of constitutional violation are true and factual.

50. The appellant was charged under section 8(1) (3) of the *Sexual Offences Act*. This was an error as there is no such section. It seems that the prosecution intended to charge the appellant under Section 8(1) as read with section 8(3).

51. Section 8(3) provides that a person who commits an offence of defilement with a child aged between twelve and fifteen years is liable to imprisonment for a term of not less than twenty years. In this case, the complainant was aged 15 years and appellant should have been sentenced to imprisonment for 20 years as provided in section 8(3) of the *Sexual Offences Act* and not 15 years as meted out by the trial court.

52. Since the respondent does not seek the enhancement of the sentence, and as the appellant was not warned of the possibility of the enhancement of the sentence before he prosecuted the appeal, it would not be just to interfere with the sentence. The court therefore upholds the sentence meted out by the trial court.

53. The totality of all the above is that the appellant's appeal is without merit and is hereby dismissed.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE