Ongera v Republic (Criminal Appeal 001 of 2020)
[2026] KECA 152 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 152 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 001 OF 2020

P NYAMWEYA, LA ACHODE & JM MATIVO, JJA

JANUARY 30, 2026

BETWEEN

ALFRED BOGONGO ONGERA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyamira (Maina, J.) dated 29th March, 2019 in HCCA No. 431 of 2014))

JUDGMENT

1. Alfred Bogongo Ongera (the appellant), was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (the Act) at the Principal Magistrate's Court at Keroka in Criminal Case No. 431 of 2014. The particulars of the offence were that on 25th April 2014 at Riamakogoti village within Borabu District, Nyamira County, he intentionally and unlawfully caused his penis to penetrate the vagina of MN, a child aged 4 years. The appellant faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act. It was alleged that on the above date and place, he touched the buttocks and vagina of MN with his penis.

2. The prosecution case rested on the testimony of 5 witnesses, namely, a clinical officer then based at Chepngombe Health Centre, (PW1), the complainant's unsworn, (PW2), the complainant's uncle, (PW3), the complainant's mother, (PW4), and the Investigating Officer, (PW5). The defence case rested on his sworn testimony. He did not call any witness in support of his defence. At the conclusion of the case, the trial court returned a verdict of guilty on the main count. There was no finding on the alternative count. After considering the appellant's mitigation, the trial magistrate sentenced the appellant to serve life imprisonment. The appellant's appeal to the High Court at Nyamira in Criminal Appeal No. 42 of 2016 seeking to overturn his conviction and sentence was dismissed by Maina J. on 29th March, 2019 who upheld both the conviction and sentence.

3. In this appeal, the appellant seeks to overturn the said judgment citing 7 grounds in his memorandum of appeal dated 3rd January 2025 which can be summed up as follows: (a) the case against him was not proved beyond reasonable doubt; (b) the prosecution evidence was marred by contradictions; (c) his rights under Article 50 (2) (c) and (e) of *the Constitution* were violated; (d) the prosecution failed to avail key witnesses; (e) his defence was not considered; (f) the sentence imposed upon him is harsh, inhumane and illegal.

4. During the virtual hearing of this appeal on 2nd September 2025, learned counsel, Ms. Momanyi appeared for the appellant, while Mr. Mwangi, learned prosecution counsel, appeared for the respondent. Both parties relied on their written submissions which they briefly highlighted.

5. Ms. Momanyi argued that the burden of proof in criminal cases never shifts to the accused even if the accused does not rebut the allegations against him. Counsel cited this court's decision in Sawe vs Republic [2003] eKLR, in support of the proposition that suspicion, no matter how strong it can be, cannot form the basis of a conviction.

6. Regarding the ingredients of the offence, Ms Momanyi argued that penetration was not proved with cogent medical evidence since the P3 form and the medical report were inconclusive and had inconsistences.

7. In addition, counsel contended that the complainant's age was not proved by a birth certificate or any medical evidence or any official record.

8. Regarding the issue whether the appellant was properly identified, as the offender, counsel submitted that the evidence adduced was dock identification which was not corroborated and therefore the identification was unsafe as was held in Wamunga vs Republic [1989]eKLR.

9. It was her submission that the prosecution evidence was marred by contradictions and inconsistencies which go to the root of the charge rendering the conviction unsafe. She argued that PW4 testified that there was penetration despite the fact that the complainant's evidence was that he only that slept on her while she fully dressed. Counsel also argued that there were inconsistencies regarding where the appellant found the complainant since the complainant stated that she went to the cowshed on her own while the complainant's version was that the appellant held her hand towards the scene of crime.

10. Ms. Momanyi also submitted that the appellant's rights were violated in various aspects, including lack of full disclosure of evidence, hurried proceedings and denial of adequate time to prepare his defence. She cited the Supreme Court decision in Tom Martins Kibisu vs Republic [2014] eKLR in support of the proposition that violation of fair trial rights vitiates the entire trial.

11. Counsel also submitted that the prosecution failed to avail key witnesses because the complainant's evidence was that she was playing with Belma and Spe, but the said children were never called as witnesses and the cousin to the complainant who informed PW4 that the complainant had been defiled was also not called as a witness. For authority counsel cited the case of Bukenya vs Uganda [1972] EA 549 in support of the proposition that failure to call a crucial witness by the prosecution entities the court to make an adverse inference that the evidence of the uncalled witness would be adverse to the prosecution.

12. Regarding sentence, Ms. Momanyi contended that the trial court failed to consider the mitigating circumstances and imposed a harsh, excessive and an unlawful sentence. She cited Francis Karioko Muruatetu vs Republic [2017] eKLR, where the Supreme Court held that mandatory sentences that deny courts discretion are unconstitutional.

13. Ms. Momanyi contended that the appellant's sworn defence raised reasonable doubts on the prosecution's case but nevertheless, it was dismissed.

14. Mr. Mwangi, the respondent's counsel maintained that there was overwhelming evidence of penetration which was corroborated by medical evidence tendered by the clinical officer who upon examining the complainant noted that she had bruises on her labia majora and minora with hyper anaemic hymen which was perforated.

15. Regarding the appellant's age at the time of defilement, Mr. Mwangi maintained that the medical documents including the P3 form and both the complainant's evidence and her mother's the evidence plus all the medical reports clearly stated that the complainant was 4 years old. It was also his submission that the appellant never questioned the issue of age. Counsel cited this Court's decision in Edwin Nyambogo Onsongo vs Republic [2016] eKLR in support of the proposition that age can be proved by evidence such as birth certificate, baptism card or by oral evidence of the parents or the guardians or medical evidence.

16. Lastly, regarding identification, Mr. Mwangi maintained that the complainant clearly identified the appellant and there was no doubt that the complainant knew the appellant since he had worked in their homestead for two years and both the trial court and the High Court were convinced that there was no error. Further, the complainant's brother one Wesley Ochogo (PW3) put the appellant at the scene. Counsel also submitted that there could be some inconsistencies and contradictions, however, the same were not fatal to exonerate the appellant.

17. Regarding the alleged violation of Article 50 (2) and (e) of *the Constitution*, Mr. Mwangi submitted that in sexual offences, if the only evidence is that of the victim, the court can convict if it is satisfied that the victim is truthful under section 124 of the *Evidence Act* and in this case the appellant squandered an opportunity to cross-examine the complainant, therefore her credibility was not shaken despite her young age. Counsel also maintained that the complainant's evidence was corroborated by her mother and the medical evidence through the clinical officer.

18. Regarding the complaint that the appellant was not supplied with witness statements, Mr. Mwangi submitted that the said issue was not raised during trial and before the first appeallate court, therefore the same is an afterthought.

19. On the failure by the prosecution to avail key witnesses, counsel cited section 143 of the *Evidence Act* and submitted that no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact and therefore the prosecution is not obliged to call a superfluity of witnesses but only such witnesses as may be sufficient to establish the charge beyond reasonable doubt as was held in Keter vs Republic [2007] 1 E A 135.

20. Addressing the question whether the trial court considered the appellant's defence, Mr. Mwangi maintained that the appellant's defence was carefully examined but the same was not worthy to shake the strong prosecution case and that the prosecution evidence put the appellant at the crime scene.

21. Regarding the sentence, Mr. Mwangi submitted that the appellant took advantage of the trust he had built with the child. Therefore, he did not deserve any mercy by the trial court considering the circumstances of the case. Further, the sentence is lawful and the appeal on sentence is devoid of merit.

22. This is a second appeal, therefore, our jurisdiction is limited to considering matters of law as stipulated by Section 361 of the Criminal Procedure Code. This Court in Hamisi Mbela Davis & another vs

Republic [2012] KECA 147 (KLR) stated as following regarding the ambit of our jurisdiction as delineated in the said section:

> " This being a second appeal, this Court is mandated under Section 361(1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu vs Republic (1983) KLR 445:- "Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holding of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/ a MBS Fastenings)."

23. Similarly, the Supreme Court in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) emphasized that the scope of this Court's jurisdiction in second appeals is limited only to matters of law. It stated:

> " Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

24. We have reviewed the record as well as the parties rival submissions in this appeal and the law. We find that the following issues fall for determination, namely:

    (a) whether the ingredients of the offence were proved beyond reasonable doubt,

    (b) whether the appellant's defence was considered by the two courts below,

    (c) whether the appellant's right to a fair trial under Article 50(2) (c) & (e) was violated;

    (d) whether the prosecution failed to avail key witnesses,

    (e) whether the prosecution evidence was marred by contradictions, and,

    (f) whether there is basis for this Court to interfere with the sentence.

25. We will first address our minds to the question whether the offence of defilement was proved to the required standard. Section 8(1) of Act states that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. A reading of the said section shows that to secure a conviction for the offence of defilement, the prosecution is obligated to prove the following ingredients:

    (a) the prosecution must prove that the victim is a child, within the meaning assigned thereto in the *Children Act* which defines a child as a person below the age of 18 years.

    (b) the prosecution must prove an act causing penetration which is defined under the Act to mean partial or complete insertion of the genital organs of a person into the genital organs of another person, and,

(c) the assailant must be identified as the offender. These three ingredients must be proved beyond reasonable.

26. Was penetration proved to the required standard? The Act defines penetration as the partial or complete insertion of the genital organs of one person into the genital organs of another person. This definition is central to offences under the Act because the prosecution is required to prove that the perpetrator's actions caused penetration. We have re-evaluated the evidence on record. We note that PW2 in her unsworn testimony, recalled how the appellant led her to the cowshed and did "tabia mbaya" to her while forcefully laying her on the ground. The complainant testified that she told Nyaramba and later her mother that "Ongera amenifanyia tabia mbaya". PW3 testified that he checked her private part and he saw some mucus discharge in her vagina. PW2's evidence was corroborated by the medical evidence tendered by PW1 who testified that the complainant was examined by his colleague, and his findings on examination were that the complainant had lacerations on the labia majora and there was presence of a white discharge which was explained to be semen. Confronted by this evidence, the learned magistrate who, unlike us, had the benefit of hearing and seeing the witnesses testify stated:

> "...the medical evidence herein produced as P3 form (exhibit 1) and treatment notes exhibit 2 clearly points out that there was penetration of the victims vagina and spermatozoa deposits found under high vaginal swab laboratory tests...I find that her evidence to have been properly corroborated by the evidence of pw1, the clinical officer as well as the P3 form (exhibit 1) and treatment notes (exhibit 2) which is clear evidence that there was penetration of the minor's vagina."

27. In the impugned judgment, the first appellate court had this to say:

> "there were lacerations in her genitalia and also presence of spermatozoa. This evidence offered corroboration to her evidence even though no corroboration is required – see Section 124 of the *Evidence Act*."

28. We have earnestly re-evaluated the evidence tendered before the trial court on the issue under consideration and the first appellate court's decision upholding the trial court's finding on this issue. This Court has consistently held that concurrent findings of fact by the trial court and the first appellate court should not be disturbed unless they are perverse or based on no evidence. This principle was reiterated by the Supreme Court in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [supra]. We find no reason for us to disturb the concurrent findings by the two courts below on this issue. This ground of appeal fails.

29. Next, we will address the issue whether the complainant's age was proved to the required standard. Another critical ingredient of an offence under section 8 (1) of the Act is the age of the victim. The said section is specific that the victim must be a child aged 11 years or below. The complainant's evidence was that she was 5 years old. PW4, the complainant's mother told the trial court that the complainant was born on 1st November 2009. The offence took place on 25th April 2014. PW1, the clinical officer gave her age as 5 years and produced her P3 form. The trial magistrate after evaluating the evidence stated:

> "Going by evidence of the mother, if victim was born on 1. 11. 2009, then at the time the incident occurred on 25.4.2014 the girl was aged 5 years 5 months. Being the 1st trial court

i had the opportunity to see the victim in court during hearing. From my own observation of the victim, she cannot have been more than 6 years old."

30. The first appellate court regarding the issue of age held that:

> " Although there was no documentary evidence to prove the complainant's age, the medics who examined her at Borabu District Hospital put her apparent age at between 4/12 and five years old. This confirms that she was a child aged below 11 years and that is what was material to the charge against the appellant."

31. This Court in Mwalango Chilango Chichoro vs R [2016] eKLR, held: -

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R, Cr Appeal No 19 of 2014 and Omar Uche v R, Cr App No 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim Appeal No 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

32. We have evaluated the evidence adduced in support of the question of age and the findings by the two courts below. Age is an issue of fact. We have considered the complainant's date of birth and the date the offence was committed as highlighted earlier. We are persuaded that the evidence adduced established that the complainant was 5 years old at the time she was defiled. Therefore, the ingredient of age of the minor was proved beyond reasonable doubt and we find no reason to depart from the concurrent findings by the two courts below on the issues.

33. Last, is the question whether the appellant was properly identified as the offender. Addressing this issue, the trial court stated:

> " ...the minor herein also stated she knew the accused very well. In fact, in evidence she called him by the name "Ongera" and even said that he used to milk cows. Therefore, there was proper identification of the accused even by name. The offence also happened during the day so the minor/victim was able to clearly identify the accused. In any event, the complainant, a mere child would have had no reason to frame the accused herein. No grudge existed between them."

34. On the issue of identification, the first appellate court stated:

> " The complainant knew the appellant well as he had worked in their home for two years. In his defence the appellant stated that there were no differences between him and the witnesses. They therefore had no reason to lie against him."

35. It was not disputed that the appellant had worked for PW2's family as a cow herder for two years. Clearly, the appellant was known to the complainant and PW2. Therefore, this was a clear case of

recognition rather than identification. We are satisfied that the appellant was positively identified. The identification was free from error. Accordingly, we agree with the conclusion by the two courts below.

36. The other ground urged by the appellant is that his defence was not considered. In determining this issue, this court has a legal duty to re- analyse, re-evaluate and assess the evidence adduced before the trial court. We must, however, make it clear that by requiring the trial court to consider the appellant's defence does not mean that the judgment must include a complete embodiment of all evidence led and the submissions made as if it comprises a transcript of the proceedings. In order to determine whether there is any merit in the appellant's complaint that his defence was not considered, this court must consider the evidence and the defence led the trial court, the submissions tendered by the parties and juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for to find that the defence was ignored or not accorded due consideration.

37. This means that if this court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by this Court.

38. We have carefully considered the record. We note that the learned magistrate found the appellant's defence to be a sham since the appellant did not deny that he knew the victim. The trial court also noted the appellant is on record testifying that no grudge existed between him and the victim prior to the incident, and that, he also confirmed that the victim knew him even by name and that he used to milk cows which tallied with the victim's evidence. The first appellant court had the following to say regarding the same issue:

> "In his defence the appellant stated that there were no differences between him and the witnesses. They therefore had no reason to lie against him. The child was defiled and there is proof beyond reasonable doubt that it was the appellant who defiled her."

39. We find no merit in the appellant's argument that his defence was not considered. We can only add that his defence did not dislodge the overwhelming prosecution evidence.

40. The appellant argued that his rights under Article 50(2) (c) & (e) were violated. The complaint here is that he was not supplied with witness statements. Regarding this issue, the first appellate court had this to say:

> "... It would however appear that the appellant was supplied with statements because after the court made the order, the appellant indicated he was ready to proceed. The record also shows that he robustly participated in the trial and there is nothing to show that his right to a fair trial was violated."

41. As the record shows, on the 28th April 2014, the trial magistrate ordered that the appellant be supplied with witness statements and the charge sheet. On 12th June 2014, when the matter was mentioned to confirm compliance with the said order, the trial magistrate noted that there was no compliance and ordered that he be supplied with statements. The matter came up for hearing on 15th October 2014 and the appellant indicated that he had not been supplied with statements. Again, the court ordered the same to be supplied at his own costs and a mention date to confirm compliance was set for the 29th October 2014. Notably, when the matter came up for mention on 29th October 2014 to confirm compliance, the appellant never raised the issue at all. When the matter came up for hearing on 23rd

February 2015, again the appellant never raised the issue. Hearing proceeded as scheduled. We also note that during the trial, the appellant ably cross-examined PW4 and PW5 and it cannot be said that he was not afforded adequate time to prepare his defence, therefore, there is nothing to suggest that the appellant suffered any prejudice. Accordingly, nothing turns on this issue.

42. Regarding the argument that the prosecution deliberately avoided to avail some key witnesses and that the prosecution evidence was marred by contradictions, we have carefully considered the appellant's undated petition of appeal and his submissions before the High Court. We note that the appellant did not specifically complain regarding the said issues before the High Court. The Court of Appeal will not address grounds not argued in the High Court. This court's role is to review the evidence and arguments presented before the trial court and escalated to the first appellate court. Therefore, this court will not consider new arguments raised for the first time before this Court, and more so, those that require factual re-evaluation or contradict the record of the lower court. This approach ensures that the first appellate court has the opportunity to make a pronouncement on the issues before they are raised on appeal to this Court, preventing this court from acting as a first appellate court and ensuring the orderly progression of litigation. (See this Court's decision in Alfayo Gombe Okello vs Republic [2010] eKLR).

43. Lastly, the appellant is inviting this Court to interfere with the sentence of life imprisonment urging that his mitigation was not considered, which contributed to the harsh, excessive and unlawful sentence. The first appellate court on this issue stated:

> " The sentence meted is the minimum prescribed by the law. It was therefore lawful."

44. Section 8(2) of the 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. The sentence provided by the Act for an offence under section 8 (1) and (2) of the Act is a minimum mandatory sentence which is usually pegged on the age of the victim in which case the younger the victim the stiffer the sentence. Therefore, once the trial court was satisfied that all the ingredients of the offence of defilement had been proved beyond reasonable doubt, (as we have already found in this judgment), there was no room for the trial or the first appellate court to exercise discretion because the only minimum mandatory sentence provided under the said section is life imprisonment. In any event, severity of sentence in a second appeal is a question of fact pursuant to section 361(2) of the Criminal Procedure Act.

45. It is important for us to underscore that the said provision bars this court from entertaining matters of fact in a second appeal. It is also important to mention that the Supreme Court in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [supra] clarified that the minimum mandatory sentences provided under the Act are lawful so long as they remain in the statute. In conclusion, we find that this appeal is without merit and the same is hereby dismissed in its entirety.

46. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2026.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

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JUDGE OF APPEAL