Aomo v Republic (Criminal Appeal E002 of 2024)
[2026] KEHC 2195 (KLR) (12 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2195 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E002 OF 2024

ACA ONG'INJO, J

FEBRUARY 12, 2026

BETWEEN

RAMADHAN OMOLLO AOMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Sentencing of Hon. C.N.C Oruo PM in the Principal Magistrate's Court at Rongo S.O.A NO. E026 of 2021 delivered on 16th January 2023)

JUDGMENT

1. The Appellant was convicted and sentenced to serve 15 years' imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on the 29th July, 2021 at [Particulars Withheld] in Rongo Township, Central Kamagambo location in Rongo Sub-County within Migori County, the Appellant intentionally and unlawfully caused his penis to penetrate the Vagina of V.A.O a child aged 16 years.

3. The Prosecution's case was supported by the evidence of four (4) witnesses who testified as follows: -

4. PW1 V.A.O the Complainant herein testified after she was recalled that the Appellant was her boyfriend. That on 29/7/2021 she was found with him after she had gone to his house at around 4pm and stayed with him the whole night. She stated that they had supper, slept and had sex after removing their clothes. That they were taken to the hospital and examined after her mother called the police and found her with the Appellant herein. She stated that the examination confirmed that they had sex and she presented her Treatment Card, P3 form, and PRC form as PMFI 2-4 which were filled at Rongo Sub-County hospital.

5. PW2 CA testified after being recalled and stated that the Complainant was her daughter and was born in 2004. She identified the birth certificate as Exhibit 1 and stated that she knew the Appellant

who was a student at Chabanda Mixed Secondary School. She testified that her daughter left home on Wednesday at 3 Pm and did not return home. That they found her the next morning inside the Appellant's house at Rongo [Particulars Withheld] after a motorcycle rider led her to the Appellant's home.

6. PW3 Lilian Nyaboke a Clinical Officer at Rongo Sub-county hospital testified that she examined and treated the Complainant who was brought in on history of sexual assault by a person well known to her on 28/7/2021 at 10pm around [Particulars Withheld]. She stated that the examination revealed that she was fair in general condition and had no physical injuries. That on genital examination, the complainant had a broken hymen, tears on the labia majora minor and a blood stained vagina. That the laboratory, pregnancy, VDRL and urine analysis tests all turned negative. PW3 gave brufen and antibiotics to the Complainant and concluded that there was penetration. She presented the P3 form, Filter clinic attendance card (Pexhibit 3), and PRC form (Pexhibit 4) all dated 29/7/2021 in respect of the Complainant and a P3 form and filter clinic attendance card for the Appellant.

7. PW4 PC Sharon Onyango the Investigating Officer testified that she was attached at Kamagambo police station and stated that she took over from CPC Masasa. She stated that the investigations were completed and the charges preferred for a case of defilement reported and alleged that the Appellant had defiled the Complainant who was aged 16 years after she had gone to the appellant's house and spent the night there. That CPL Masasa arrested both the Complainant and the Appellant and took them to Rongo Sub-County hospital for examination and that the p3 form confirmed defilement.

8. The Appellant Aoro Ramadhan Omollo was placed on his defense and he denied the charges. He stated that on 29/7/2021 at around 7:30pm he was at Rongo supplying vegetables and that he found the Complainant at the gate who informed him that she was from her grandmother's place and could not get home and she had no contacts. That he allowed the Complainant to stay over and her uncle called him and asked him to release the Complainant but he could not as it was already curfew. That the following day the Complainant's uncle went to him demanding for money and informed him that PW2 was at the Police station. He stated that he was later arrested and charged with the offence. The Appellant also stated that the Complainant's mother knew him and that she lived where he used to school.

9. The Appellant was aggrieved by the conviction and sentence and he lodged his undated petition of appeal on 14th February 2024 on the following grounds:

    1. THAT he pleaded not guilty to the charge herein.

    2. That the Trial Court erred in both law and facts by failing to comply with article 50 (2) (g) (h) of *the constitution* 2010.

    3. That the Trial Court erred in both law and facts by not observing that the ingredients of the offence herein were not proved to the required standard in law.

    4. That the Trial Court erred in both law and facts by not observing that the case had so many contradictions which could not support the conviction but rather total acquittal.

    This appeal was canvassed by way of written submissions.

10. The Appellant's submissions are dated 20th August 2024 and he submitted that the trial court only relied on the evidence of PW1 to convict him. He stated that the evidence adduced by PW1 was changed and that she had to be stood down and recalled to testify and she chose to change her testimony. That as such, her testimony could not prove the elements of the offense beyond reasonable doubt. The Appellant also questioned whether PW1 was coached by the prosecution witnesses on

what to say and questioned whether the trial court complied with the provisions of section 19(1) of oaths and statutory Declaration Act Cap 15 laws of Kenya. He asked the court to apply discretion on the severity of the sentence meted and reduce it due to the peculiar circumstances in PW1's testimony.

11. The Appellant submitted that articles 23(f), 27 and 28 of *the Constitution* be considered for his sentence to be reduced. He stated that he was a first offender who conflicted with the law for the first time and was not aware of the dire consequences. He also submitted that he was reformed, remorseful and changed and mitigated that he was the sole breadwinner of his young and vulnerable family who wholly depended on him even for basic essential necessities thus they were suffering in his absence. In conclusion the court was urged to reduce the Appellant's sentence as prayed.

12. The Respondent's submissions are dated 14th March 2025. On whether the trial court erred by failing to comply with article 50 (2) (g) (h) of *the constitution* 2010, it was submitted that the right to free legal representation by the state was not an absolute right and was only mandatory where the accused person was charged with an offence whose penalty is death and substantial injustice would arise in the absence of legal representation. That in the present case, the Appellant was not charged with a capital offence and during trial, he demonstrated that he clearly understood the charges against him and was able to cross-examine the prosecution witnesses as well as mount his defense. That as such the trial court did not infringe Article 50(2) (g) (h) of the Kenyan Constitution 2010.

13. The Respondents cited the case of Mokaya v Republic (Criminal Appeal E020 of 2023) [2024] KEHC 4607 (KLR) where W.A Okwany J stated

> " In the instant case, I note that even though the trial court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It is also noteworthy that the Appellant was not charged with a capital offence whose penalty is death so as to necessitate the mandatory requirement for legal representation. I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation."

14. On whether the Trial Magistrate erred in both law and fact by not observing the ingredients of the offense it was submitted that the offense of defilement is rooted in three main elements; Age of the victim (must be a minor), penetration, and proper identification of the perpetrator. On age it was submitted that the minor stated that she was 16 years old and produced her birth certificate indicating that she was born on 18th August 2004 thus the element of age was proven. On penetration, it was submitted that PW1 testified that she knew the Appellant as her boyfriend and that on the night of the incident they had sexual intercourse. On positive identification, it was submitted that PW1 testified that she knew the Appellant well as she was in a relationship with him and identified him as the one who defiled her on the material day. That as such all the elements of defilement proven.

15. In conclusion it was submitted that the trial court did not infringe upon the Appellant's right to representation during trial and that the Trial Magistrate took into consideration the elements of the offense in the judgement. The court was urged to dismiss the appeal for lack of merit.

Analysis and Determination

16. In a first appeal, the duty of the court was stated in Mark Oiruri Mose vs. R (2013) eKLR thus;

> "…. the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

17. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issue for determination are: -

    1. Whether the Appellant's rights under Article 50(2)(g)(h) of *the Constitution* were violated.
    2. Whether the prosecution proved the elements of defilement under Section 8 of the *Sexual Offences Act*.
    3. Whether any contradictions were material.
    4. Whether the sentence imposed should be interfered with.

18. On alleged violation of Article 50 the Appellant contends that he was not informed of his right to legal representation. Article 50(2)(g) guarantees the right to choose counsel, while 50(2)(h) guarantees State-funded counsel only where substantial injustice would otherwise result.

19. Kenyan courts have consistently held that the right to State-funded counsel is not automatic for all offences. In Mokaya v Republic (Criminal Appeal E020 of 2023) [2024] KEHC 4607 (KLR) where W.A Okwany J stated

> In the instant case, I note that even though the trial court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It is also noteworthy that the Appellant was not charged with a capital offence whose penalty is death so as to necessitate the mandatory requirement for legal representation. I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation."

20. The Appellant actively cross-examined witnesses, understood the proceedings, mounted a coherent defence, and was not charged with a capital offence.

21. There was no demonstration of prejudice or substantial injustice that was occasioned to him during trial. This court finds that this ground fails.

22. On whether the ingredients of the offence of defilement were proven beyond reasonable doubt and whetherthe Prosecution's evidence was riddled with inconsistencies, Section 8(1) of the Sexual Offence Act No. 3 of 2006 provides that:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

23. In this regard, the offence of defilement is anchored on three (3) main ingredients namely; (1) The Age of the victim, (2) Penetration, and (3) The Proper Identification of the Perpetrator as was established

in George Opondo Olunga v Republic [2016] eKLR (see also Charles Wamukoya Karani v R [2010] eKLR).

24. On proof of age the Court of Appeal in Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR) stated that:

> Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

25. Likewise, the Court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> ... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

26. PW1 testified that she was 16 years' old and identified her certificate of birth as which showed that she was born o 18th August 2004. PW2 also testified that PW1 was born in 2004 and produced the Certificate of Birth. This is conclusive proof under Section 8(4). The Complainant's age was thus proved to the required standard.

27. On proof of Penetration, Section 2 of the *Sexual Offences Act* defines penetration as-

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

28. In the case of Mark Oiruri Moses V R [2013] eKLR the Court of Appeal stated as regards to penetration:

> Many times the attacker does not fully complete the sexual act during commission of the sexual act. That is the reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.

29. This position was fortified by the same court, differently constituted, in Erick Onyango Ondeng v Republic [2014] eKLR where it was held:-

> In sexual offences, the slightest penetration of female sex organ is sufficient by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen is raptured.

30. PW1 testified that on 29/7/2021 she was found with the Appellant after she had gone to his house at around 4pm the previous day and stayed with him the whole night wherein they had supper, slept and had sex. PW1's evidence was corroborated by the evidence of PW3 the Clinical Officer who examined and treated the Complainant and testified that on genital examination, the Complainant had a broken hymen, fresh vaginal tears on the labia majora and minor and blood stains were also observed. PW3 concluded that there was penetration into her genitalia. These findings satisfy the statutory definition of penetration under Section 2 of the Act.

31. On Identification of the perpetrator, it was observed in Stephen Kimari Gathano v Republic [2022] eKLR as follows:

> It bears repeating that the Appellant was a person known to the complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia. She was categorical it was Mzee was Purity- She knew the accused as such."

32. PW1 gave evidence that the Appellant was her boyfriend and that they had been in a relationship for one year. The Appellant also confirmed that he was known by the Complainant's family and that the Complainant's mother lived in the area he used to go to school. The Appellant also confirmed that he was with the Complainant on the night before he was arrested and PW4 gave evidence that her colleague CPL Masasa arrested the Appellant and the Complainant at the Appellant's house. As such the prosecution witnesses positively identified the Appellant as the perpetrator.

33. On whether there were contradictions in the prosecution evidence, the Appellant argued that PW1's recall demonstrated coaching. the court reiterates the principle that minor discrepancies are immaterial unless they go to the root of the charge-see Twehangane Alfred v Uganda [2003] UGCA 6; Njuki v R [2002] 1 EA 189.

34. PW1's recalled testimony remained consistent on material facts—age, presence at the Appellant's house, and sexual intercourse. The recall did not introduce contradictions affecting the central narrative. There were no material contradictions.

35. On whether or not the Appellant's sentence should be reduced subject to the circumstances of the case, In Charo v Republic [2016] KEHC 5619 (KLR) the High Court of Kenya at Malindi held that: -

> The offence of defilement should not be limited to age and penetration. If those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagreed with their boyfriends. The conduct of the complainant played a fundamental role in a defilement case. One could easily conclude that the complainant was defiled after hearing her evidence."

36. Similarly, in the same case, the High Court at Malindi observed that: -

> ... It can easily be concluded that it is immoral for one to have sex with a child under the age of 18 years. However, where the same child under 18 years who is protected by the law opts to go into men's houses for sex and then goes home, why should the court conclude that such a person was defiled. In my view that cannot be defilement. The complainant normally does not complain but is made to be the complainant because she is under 18 years. My view is that such a behaviour is that of an adult and not of a child. Children are not meant to enjoy sexual intercourse. Whenever they do, then that becomes the behaviour of an adult. Although the public will frown upon an adult who engages in sex with such a child, we should not forget that circumstances have changed. Young children engage in sex at very young age. This is not out of defilement."

37. Further, the Court of Appeal in the case of Eliud Waweru Wambui Vrs Republic (2019) eklr had this to say: -

> ... We think it is rather unrealistic to assume that teenagers and maturing adults in the since employed by the English house of lords in Gillick Vrs West Norefolk & Wisbech Area Health Authority (1985) 3 ALL ER 402, do not engage in, and often seek sexual activities with their eyes fully open. They may not have attained the age of maturity but they may well have

reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process and not a series of disjointed leaps. As lord scarman put it in that case (at page 421);"if the law should impose on the process of, "growing up" fixed limits where nature knows only a continuous process, the price would be artificially and lack of realism in an area where the law must be sensitive to human development and society change." At page 422 The law also referred to the judgment of chief justice Lord Parker in R vrs Howard (1965) 3 ALL ER 684"…. Where he ruled that in the case of prosecution charging rape of a girl under the age of 16 the crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist and added the comment that, "there are many girls who know full well what it is all about and can properly consent".

38. PW1 testified that the Appellant was her boyfriend and that she went to the Appellant's house on her own volition and they had sexual intercourse. Even during trial, she referred to the Appellant as her boyfriend and at first did not want to give evidence against him and had to be stood down and recalled. In light of these circumstances and based on foregoing cases as mentioned above, it is clear that PW1 knew very well why she visited the Appellant and was conscious of her own actions. As such, she was merely made a Complainant as she was under 18 years but she herself did not complain.

39. On whether the sentence was harsh and excessive, Section 8(4) prescribes a minimum of fifteen (15) years' imprisonment. The sentence imposed was therefore lawful.

40. However, following the Supreme Court's guidance in Francis Karioko Muruatetu v R (2017) and the Court of Appeal's reasoning in Dismas Wafula Kilwake v R [2018] eKLR, Christopher Ochieng v R [2018] eKLR and JWA v R [2021] eKLR the mandatory nature of statutory minimums does not prevent the Court from exercising discretion in appropriate circumstances, especially where the sexual activity, though unlawful, was non-violent, the complainant voluntarily left home and considered the Appellant a boyfriend, the Appellant was a first offender, both parties were relatively youthful and there was no evidence of coercion or exploitation. Appellate courts have reduced sentences in similar "romantic relationship" cases while maintaining sufficient deterrence. In this case, the mitigation and surrounding circumstances justify without trivializing the seriousness of the offence. This Court finds a basis to review the sentence downward.

41. Based on the foregoing, this court finds that the Sentence of 15 years' imprisonment though lawful was on the higher side considering the circumstances surrounding this case. In exercise of this Court's discretion and having taken into account the circumstances of this case and the conduct of the Complainant, this court sets aside the sentence of 15 year's imprisonment and substitutes it with 5 years' imprisonment to run from the date the Appellant was sentenced. The 1 year6 months spent by the Appellant in remand during trial to be factored in his sentence.

Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 12th DAY OF FEBRUARY, 2026.

HON. ANNE ADWERA- ONG'INJO

JUDGE

In the Presence of:

Victor – Court Assistant

Mr. Oimbo Prosecuting Counsel

Advocate for the Accused

Appellant P/P