



**Oluoch v Republic (Criminal Appeal E075 of 2024)
[2026] KEHC 2149 (KLR) (19 February 2026) (Interim Judgment)**

Neutral citation: [2026] KEHC 2149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E075 OF 2024
ACA ONG'INJO, J
FEBRUARY 19, 2026**

BETWEEN

PHELIX OTIENO OLUOCH APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Sentencing of Hon. S.N Mutava RM in the Principal Magistrate's Court at Rongo MCSO NO. E029 of 2022 delivered on 5th March 2024)

INTERIM JUDGMENT

1. The Appellant Phelix Otieno Oluoch was found guilty 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 and he was convicted and sentenced to serve 15 years' imprisonment.
2. The particulars of the offence are that on the 29th day of November 2022 at around 2300Hrs at [Particulars Withheld], Awendo Sub-County in Migori County within the Republic of Kenya, the Appellant intentionally caused his penis to penetrate the Vagina of M.A.O a child aged 16 years.
3. The Appellant was aggrieved and dissatisfied by the conviction and sentence by the Trial Magistrate and he lodged his petition of appeal dated 9/8/2024 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 not complying with article 50 (2) (g) (h) of *the constitution* 2010.
 3. That the Trial Court erred in both law and facts by not considering that the ingredients of the offence herein were not proved to the required standards in law.



4. That the Trial Court erred in both law and facts by meting a harsh and excessive sentence in the circumstance
4. Reasons Wherefore the Appellant prayed that the conviction be quashed and sentence set aside and/or a reduction of the sentence or a retrial.
5. The Prosecution's case was supported by the evidence of four (4) witnesses who testified as follows: -
6. PW1 Joseph Otieno Owira the Clinical Officer testified that he examined the Complainant and filled the relevant documents. He stated that the Complainant told him that she had protected sex with an adult of 20 years and their first encounter was in August, then September and Finally November the previous year. He stated that the Complainant told him that she was given Ksh. 200 to coerce her into having sexual intercourse. That upon examination, the Complainant was calm and sober and after examination he concluded that there was defilement as the hymen was perforated and there was penetration through the vaginal opening. He stated that high vaginal swabs revealed that there were epithelial cells, some peeling off the vagina caused by friction and infections but there was no infection and the lab results were negative. He stated that he gave the Complainant antibiotics, PEP and emergency contraceptives. He testified that he also Assessed the Age of the Complainant and found it to be approximately 16 years. PW1 produced the P3 Form, Treatment Notes, PRC Form, Lab Results and Age Assessment Report in respect of the Complainant as Exhibits 1 to 5.
7. PW1 stated that he also examined the Appellant who confirmed to him that he had had sexual intercourse with the Complainant. That his results were normal and he had calcium crystals in his urine and also had kidney stones. He then Produced the P3 Form and Treatment Card in respect of the Appellant as Exhibits 6 to 7. In Cross-examination he stated that the Appellant admitted that he had sexual intercourse with the Complainant.
8. PW2 M.A.O the Complainant herein testified that she was a Student at [Particulars Withheld] Secondary School and that the Appellant was her boyfriend. She stated that on 29/11/2023 She left home at midnight and went to meet the Appellant who had come to pick her and they went to his home which was about 1 km from her home. She stated that she removed her clothes and the Appellant also removed his clothes and they then had protected sex. It was her testimony that she left the Appellant's home at around 4a.m but she did not return home but rather went to her friend's place and stayed there until 1p.m the next day. She stated that she then went to Lilian's place and her parents found her at home after being away for 3 days. That she was taken to Awendo Police Station and then to Awendo Hospital where she was examined and treated. That the Appellant was found at the Centre. On cross-examination she stated that she denied knowing the Appellant the first time she stood to testify in court because she was afraid of stating the truth but was now ready. That she knew how the Appellant's house looked like.
9. PW3 JA the Complainant's mother testified that She knew the Appellant after her daughter went missing and that he was her daughter's boyfriend. That on 29/11/2022 she did not find PW1 in the house and PW1's sister told her that she did not know where the Complainant had gone to. She stated that she assumed that her daughter had gone to the farm and checked the same but did not find her thus she reported the matter at Awendo Police Station. That she later heard that PW1 was seen at a village elder's home and when she went to inquire, she found the Village Elder's daughter who was PW1's school mate who informed her that PW1 had already left. That the next day she heard that PW1 was in another Village Elder's home and her father went and found her there and she was taken to the Police Station. She stated that PW1 refused to talk but later on opened up to the Police. PW3 stated that she found the Appellant had been arrested and PW1 was taken to the hospital where it was established that she had been defiled. On cross-examination she stated that PW1 was found with a female class mate



and that the Appellant was arrested later. That PW1 stated that she was with the Appellant. She stated that the Appellant's mother helped process his bond and that she had never spoken with the Appellant nor threatened or asked for money from him. That she found his number in her daughter's phone and wanted to establish whose number it was and it was the Appellant's family that called her to discuss.

10. PW4 Gimisi Sarah the Investigating Officer testified that on 30/11/2022 she received a report that on 29/11/2022 the Complainant had gone missing and on 4/12/2022 the Complainant in company of her parents visited the Police Station. That the Complainant stated that she had gone to visit the Appellant at night and when she returned home, she found out that her parents had realized that she never slept at home. That on 5/12/2022 the Complainant was taken for examination and the P3 and PRC forms were filled and that the Complainant had been defiled.
11. The Appellant Phelix Otieno Oluoch was placed on his defense and he testified that on 25/11/2022 he received a call that his mother was unwell and he went home and took her to the hospital. That he travelled home on 26/11/2022 and took her to the herbalist but on 27/11/2022 she was still unstable. He stated that he stayed with his mother until 2/12/2022 and travelled back to work on 3/12/2022. That on 4/12/2022 he worked late till around 6p.m and some officers went to the filling station, arrested him and took him to the Police Station and he was then charged with the offense herein before the court. On Cross-examination he stated that he had no relationship with the Complainant and he had never met her and that he did not defile her.

This Appeal was canvassed by way of written submissions.

12. The Appellant's Submissions were filed on 28th April 2025 and he submitted that he was seeking a leave of the Court to amend his grounds of appeal and he wanted to appeal against his sentence of 15 years only.
13. He Submitted that this court considers that he was a first offender and the pre-sentence report favored him in terms of probation. As such he prayed for a lesser sentence and stated that the Supreme Court of Kenya Petition No. E018/2023 – Joseph Gichuki Mwangi came into force on 12/7/2024 after he had been sentenced on 23/3/2024. He relied on the case of Kerugoya High Court Criminal Petition No. E052/2022 to support his prayer. In the said case the presiding judge stated that

“In the end, I declare that the mandatory minimum sentence under section 8(4) SOA is unlawful only if applied without due and considered regard for and incorporation of mitigating circumstances prior to, and in the sentencing exercise. The sentence can itself be meted in law. However, it cannot be applied without due and clear regard to mitigating circumstances, discretion of which the court must show it has taken on board.

Accordingly, I hereby reduce the sentence of the offender from 15 years to 13 years in the circumstances. The period shall take into account any period spent in custody.”

14. The Appellant prayed for a reduction of his sentence or any other order the court may deem fit to grant.
15. The Respondents' Submissions are dated 24th April 2025. On whether the Trial Court erred in law by not complying with article 50 (2) (g) (h) of the Kenyan Constitution 2010 it was submitted that the Appellant was well informed of his right to legal representation under the said Article during plea taking. That the Trial Magistrate informed him of his right to representation under Article 50 and the Appellant chose to represent himself during plea taking. That he was also able to cross-examine the prosecution witnesses well which indicated that he could understand the proceedings. To Support



their argument, 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.”

16. On whether the offense of defilement was proved to the required standard thereby warranting a conviction it was submitted that the said offense is rooted on three main elements; Age of the victim (must be a minor), penetration, and proper identification of the perpetrator.
17. On Age it was submitted that PW1 the Clinical Officer produced an Age Assessment Report as Ex P5 in which he examined the Complainant and indicated that she was approximately 16 years’ old.
18. On Penetration it was submitted that PW1 the Clinical Officer testified that on medically observing the minor he found that the hymen had been perforated indicating that penetration had occurred. That he also found epithelial cells after conducting a high vaginal swab and concluded that penetration had occurred and that the minor had been defiled. PW1 duly filled and produced the P3 form as Exhibit No.6 where he established that the Complainant had been defiled.
19. On whether the perpetrator was positively identified, it was submitted that PW2 positively identified the Appellant as the man who defiled her and stated that she knew him as Phelix and that he was her boyfriend. It was also submitted that the Complainant was able to positively identify the Appellant in the dock when giving her testimony.
20. On whether or not the sentence meted on the Appellant by the Trial Court was harsh it was submitted that the Trial Court relied on the pre-sentence report dated 23rd March 2024 when it passed the Appellant’s sentence. That the sentence of 15 years’ imprisonment issued by the Trial Court in this matter was sufficient given the circumstances of the Case. They cited the case of *Benard Kimani Gacheru v Republic* [2002] eKLR where the court stated that:

“It is now settled law, following several authorities by this Court and by the Superior Courts, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

21. In conclusion it was Submitted that this Appeal lacked merit and should be dismissed.



Analysis and Determination

22. 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.”
23. The Appellant appealed against conviction and sentence but, in submissions, abandoned all other grounds and pursued only the challenge to the sentence.
24. 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 issues for determination are:
1. Whether the Appellant’s rights under Article 50(2)(g) & (h) were violated.
 2. Whether the 15-year sentence was harsh or excessive, particularly in light of *Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi*.
 3. What is the appropriate relief.
25. On whether the Appellant’s rights to legal representation under Article 50(2)(g) & (h) was violated. Art 50(2)(g) & (h) of *the Constitution*, which guarantees that:
- Every accused person has the right to a fair trial, including the right to choose and be represented by an advocate and to be informed of this right promptly; and to have an advocate assigned by the State at State expense if substantial injustice would otherwise result.
26. In *Mokaya v Republic (Criminal Appeal E020 of 2023)[2024] KEHC 4607 (KLR)* the court held that:
- The right to be informed of the right to legal representation is fundamental to a fair trial. State-funded legal representation is not automatic in every case, but is required where substantial injustice would result if the accused is unrepresented.”
27. Further in *David Macharia Njoroge v R* (2011) the Court held that:
- The right to legal representation at State expense is dependent on the existence of substantial injustice if the accused is not represented.”
28. And further that:
- Substantial injustice may arise in cases where the offence is serious, the penalty is severe, or the accused is unable to defend himself adequately.”
29. The record in the Trial Court shows that the Appellant was informed of his right to representation and chose to proceed in person. His cross-examination of witnesses was coherent and indicated understanding of the proceedings. In the circumstances this court finds that having been informed of the right to legal representation and considering he properly mounted his appeal, the Appellant suffered no prejudice during trial that can be said to have amounted to violation of rights.
30. On whether the sentence was harsh and excessive in the circumstances, the Supreme Court affirmed that minimum sentences under the *Sexual Offences Act* remain lawful, but courts must actively consider mitigation and cannot treat the minimum as rigid.



31. A sentence becomes unlawful if the trial court fails to demonstrate that it considered the offender's mitigation, circumstances of the offence, and proportionality.
32. The trial court considered the pre-sentence report and the fact that the Appellant was a first offender, but the record does not show a clear evaluative discussion of the weight of mitigation, the rehabilitative circumstances and proportionality of the specific 15-year term.
34. The Court of Appeal and High Court have consistently held that where the minimum sentence is imposed without demonstrable consideration of mitigation, an appellate court may intervene.
35. In Kerugoya HCC Pet. E052/2022 it was held:

The offence for which the Appellant was convicted remains serious; however:the Appellant is a first offender; The pre-sentence report was favourable; The sexual encounter, though illegal, was described as consensual by the minor and no violence or aggravating factors were established.
36. A modest reduction would strike a balance between deterrence and rehabilitation while remaining faithful to the Supreme Court's guidance.
37. In conclusion the appeal on conviction cannot stand as they lack merit save that the Appellant's mitigation as a youthful first offender and circumstances of the case have persuaded this court to temper justice with mercy and interfere with the sentence to give him a new lease of life within the community. The sentence of 15 years is therefore set aside and substituted with 10 years from the date of sentence on 26th March 2024 and to serve the last 3 years on probation supervision.

Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 19th DAY OF FEBRUARY, 2026.

HON. ANNE ADWERA- ONG'INJO

JUDGE

In the Presence of:

Victor – Court Assistant

