Owiti v Republic (Criminal Appeal 268 of 2019)
[2026] KECA 608 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KECA 608 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 268 OF 2019

MS ASIKE-MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA

MARCH 13, 2026

BETWEEN

MOI OWITI OWITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Ali-Aroni, J.) dated 23rd September, 2011 in Criminal Appeal No. 87 of 2010)

JUDGMENT

1. The appellant, Moi Owiti Owiti, was charged, tried and convicted of the offence of defilement contrary to Section 8(2) of the *Sexual Offences Act*. The particulars of the charge alleged that on 13th July 2008, at [Particulars Withheld], in Bondo District, within the then Nyanza Province, the appellant unlawfully defiled E. A. O.[1], a child of ten (10) years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on the same date and place, the appellant committed [1] Initials used to protect her identity an indecent act with a child namely E. A. O., aged ten (10) years, by touching her private parts (vagina).

3. The brief facts of the case according to the prosecution were as follows: The complainant (PW2) told the court that on 13th July 2008, at about 5.00 p.m., she was on her way to take a bath when the appellant approached her, held her hand and asked her to accompany him to his house. He promised to give her money. It was her testimony that when they got to the appellant's house, he pushed her on his bed. She screamed. He then removed his clothes, undressed her and did sinful things to her. She stated that she felt pain in her vagina and let out a scream. Some children came to the house and started throwing stones at the appellant's roof. The appellant opened the door to chase away the children. The complainant got a chance to escape and get away. She stated that as she was running away, the appellant

chased after her, but was stopped by a certain man unknown to the complainant. The complainant stated that when she got home, she told her aunt, Rose Odunga (PW1) what had happened. Upon cross-examination, the complainant was categorical that the appellant sexually assaulted her.

4. According to PW1, the complainant left the house on the material date at about 5.00 p.m. to take bath at nearby river. She however did not return back home until 8.00 p.m. On arrival, the complainant informed her that the appellant had taken her to his house and defiled her, and that she managed to escape after some people intervened. PW3, Fredrick Lale Oguta, escorted PW1 and the complainant to the Chief's office the following day, where they reported the incident. The chief referred them to Bondo Police Station. The complainant was later taken to hospital for treatment.

5. PW4, Dominic Adede, the area assistant chief, testified that he was on patrol on 30th July 2009, together with the Community Policing Chairman, when they spotted the appellant at Wichlum Beach. He recalled that the appellant had been accused of defiling a minor in June, 2008. They arrested the appellant and handed him over to the police at Amoyo Chief's Camp. He testified that the appellant had fled to Suba Island after the complainant reported the incident.

6. The investigating officer, P.C. Nixon Rukwa (PW5), told the Court that on 30th July 2009, he received a report that the appellant had been arrested in connection to a case of defilement he had been accused of committing on 13th July 2008. He stated that the appellant had been accused of defiling the complainant, after taking her to his home, on the pretext that he was going to give her some money. That some young boys heard the complainant screaming. They threw stones at the appellant's house, which gave the complainant the chance to escape. The following day, a paralegal (PW3) assisted the complainant and her aunt to report the incident to the police. He stated that the complainant was ten (10) years old at the time. She was treated at Bondo District Hospital. He testified that the appellant after the incident, went into hiding, and resurfaced a year later when he was arrested.

7. PW6, Dr. Peter Omondi Oyiro, from Bondo District Hospital, gave evidence on behalf of Dr. Tanui who examined the complainant. He produced the complainant's treatment notes and P3 form in evidence. It was his testimony that the complainant was examined at the hospital on 15th July 2008. He stated that she had bloodstains on the entrance of her vagina, lacerations inside her vagina and bruises on her thighs. There evidence that she has been penetrated.

8. The appellant was placed on his defence. He gave an unsworn statement. It was his evidence that he owed the complainant's mother Kshs.2,200/=. That on 30th July 2009, he was working at the beach when she asked him to pay the debt. He informed her that he did not have the money. He stated that at 10.00 a.m., the assistant chief accompanied by a village elder came to his place of work and questioned him regarding the debt. They subsequently arrested him and took him to the chief's camp. He was later escorted to Bondo Police Station.

9. The learned trial magistrate, at the end of the trial, found the appellant guilty as charged on the principal charge, convicted him, and sentenced him to life imprisonment.

10. The appellant, aggrieved by this decision, filed an appeal before the High Court at Siaya. He challenged his conviction and sentence on grounds that: his fundamental rights were violated by the police under Section 72(3); the prosecution failed to prove its case beyond all reasonable doubt; no eye witness or independent witness was availed by the prosecution to testify in the case; no direct evidence linked him to the offence; the trial magistrate failed to acknowledge the existence of a grudge between him and PW1; and, that the trial magistrate failed to consider his defence which was cogent.

11. The first appellate Court, after re-evaluating the record of the trial court and the evidence tendered before it, affirmed the conviction and sentence of the appellant by the trial court.

12. The appellant is now before this Court seeking to overturn the decision of the High Court. He has proffered thirty-three (33) amended grounds of appeal challenging his conviction and sentence. In summary, the appellant challenges the decision of the first appellate Court on grounds that: his conviction was based on a defective charge; the prosecution failed to establish the ingredients forming the offence of defilement; material witnesses were not called by the prosecution to adduce evidence; the evidence by the prosecution witnesses was marred with contradictions; the first appellate court failed to warn itself of the dangers of convicting the appellant based on the uncorroborated evidence of the complainant; no voire dire was conducted by the trial court before PW2 gave her testimony; he was not accorded fair trial as the two courts below were biased against him, and that he was not provided with all the documents relied on by the prosecution during trial; his alibi defence was not considered; the learned Judge ignored the fact that there existed a grudge between the appellant and PW1; and that the life sentence imposed on him was unlawful, unconstitutional, harsh and excessive in the circumstances.

13. The appeal was canvassed by way of written submissions of both the appellant and respondent. The appellant appeared in person. In his amended written submissions, the appellant addressed only four issues. It was his submission that the charge as drafted was defective, as the charge sheet did not display an official stamp, the date of the appellant's arrest was not indicated, and the section of the law cited is non-existent. He urged that even though he participated in the trial, he was highly prejudiced by the defect in the charge sheet, and that the defect was not curable under Section 382 of the Criminal Procedure Code. He submitted that no voire dire was conducted before the complainant gave evidence to ascertain whether she understood the nature of an oath, and further, the trial court record failed to indicate whether the complainant gave sworn or unsworn evidence. He explained that vital witnesses, that is Dr. Tanui and Dr. Ogutu, were not availed by the prosecution to adduce evidence, thereby violating his constitutional right to a fair trial. In the premises, the appellant urged us to allow his appeal, quash his conviction, and set aside his sentence; or in the alternative, order that the life sentence be substituted with a determinate sentence.

14. In rebuttal, Learned Prosecution Counsel, Mr. Okango, submitted that a second appellate court is mandated to only consider points of law that were first raised before the first appellate court. It was his submission that the appellant did not raise the issue of the defective charge sheet before the first appellate court. He urged that the defect pointed out by the appellant was not fatal, and did not prejudice the appellant, as he understood the nature of the charges he was facing. On the question of whether voire dire exercise was undertaken, Mr. Okango explained that similarly, this issue was not raised by the appellant before the learned first appellate Judge. It was his submission that failure to conduct the voire dire was not fatal to the prosecution's case, as the complainant gave sworn evidence, and was duly cross-examined by the appellant. He maintained that the prosecution laid proper basis for PW6 to give evidence on behalf of Dr. Tanui and Dr. Ogutu, and that penetration was proved by the evidence of PW6 as well as the P3 form. He stated that the appellant was properly identified by the complainant as he was well known to her, and that the fact that the complainant was ten years of age was not disputed.

15. Regarding the sentence, Mr. Okango urged that the Supreme Court in R vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment) reaffirmed the legality of the mandatory minimum sentences prescribed under the *Sexual Offences Act*. Counsel submitted that the sentence meted out by the trial court was legal and commensurate with the offence. In the premises, he urged us to dismiss the appeal for lack of merit.

16. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or

failed to consider matters they should have considered or looking at the entire decision, it is perverse. See Kaingo v. Republic [1982] KLR 213.

17. We have carefully considered the record of appeal, the submissions by both parties, and the law. The issues arising for our determination can be summed up as follows:

    i. Whether the charge as drafted was fatally defective;

    ii. Whether voire dire was conducted;

    iii. Whether the prosecution established the elements of the offence of defilement beyond any reasonable doubt;

    iv. Whether the prosecution failed to avail material witnesses; and,

    v. Whether the appellant's sentence was unlawful, harsh and excessive, in the circumstances of the case.

18. The first two issues, as correctly observed by learned prosecution counsel, were not raised by the appellant before the trial court or the first appellate Court. They have been raised for the first time on second appeal. No opinion was formed by the two courts below relating to the said issues and they are therefore improperly before us. This Court in AT v Republic (Criminal Appeal 63 of 2022) [2023] KECA 1393 (KLR) (24 November 2023) (Judgment) when faced with a similar situation had this to say:

> " The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant's grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof."

19. That being said, we shall briefly address the two issues as follows. On whether the charge sheet was fatally defective, the appellant was charged under Section 8(2) of the *Sexual Offences Act*, which provides for the sentence upon conviction for the offence of defilement involving a child aged eleven (11) years and below. It reads as follows:

> " Any person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment."

20. The offence is created by Section 8(1) which provides thus:

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

21. The appellant ought to have been charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. Did the defect occasion a failure of justice and thereby prejudice the appellant? We think not. A perusal of the trial court proceedings show that the appellant was aware of the charges laid against him. The charge and particulars therein sufficiently disclosed the nature of the offence the appellant was facing, and the appellant was aware of the exact offence he was alleged to have committed. The substance and particulars of the charge were read to the appellant to which he pleaded not guilty. He cross-examined the prosecution witnesses at length. He therefore understood

the nature of the charges against him. We hold that error in the charge sheet is curable under Section 382 of the Criminal Procedure Code.

22. As regards the voire dire examination, a perusal of the trial court record does not indicate whether the trial magistrate administered voire dire examination before the complainant gave evidence. The complainant, at the time of adducing evidence, was eleven (11) years old, and therefore a child of tender years. She gave sworn evidence. The law is that absence of voire dire examination is not lead automatically to the disqualification of the evidence of a witness. This was the observation made by this Court in Maripett Loonkomok v Republic [2016] eKLR where it was held that:

> " It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;
>
> "In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

23. Was the evidence on record sufficient to support the appellant's conviction? The prosecution was required to establish three elements to support the charge of defilement: age of the complainant; proof of penetration; and a positive identification of the assailant. On the age of the complainant, in the case of Francis Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, the Court observed that:

> " In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

24. The complainant stated that she was eleven (11) years old at the time of giving evidence before the trial court on 7th December, 2009. The particulars of the offence alleged that she was ten (10) years old at the time the offence was committed on 13th July, 2008. The P3 Form produced in evidence indicated that the complainant was ten (10) years of age. The letter from her school, produced as prosecution exhibit 3, indicated that the complainant was admitted to the said school on 10th September, 2007, and that according to their records, the complainant was born in 1998. She was therefore ten years of age when the offence was committed. From the foregoing, we are satisfied that the complainant's age was proved to the required standard.

25. On penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

26. The act of penetration, as was held by this Court in Kassim Ali v. Republic [2006] eKLR, can be proved by the oral evidence of a victim of rape or defilement, or by circumstantial evidence. The complainant gave a narration of how she went to the river to take a bath. She met with the appellant who asked her to accompany him to his house, with the promise that he would give her some money. When they got to his house, the appellant pushed her on to his bed, removed her skirt and panties, and undressed himself, before penetrating her vagina with his penis. The complainant stated that she screamed. Some

children who were outside started throwing stones at the appellant's house, and when he opened the door to check on who was throwing the stones, the complainant got a chance to escape.

27. The medical evidence adduced by PW6 as well as the P3 Form established that indeed the complainant was penetrated. According to the P3 Form, the complainant had blood stains on the entrance of her vagina, lacerations on her labia minora and bruises on her thighs. It is our considered view that the evidence of the complainant, taken together with medical evidence, conclusively established that the complainant was penetrated.

28. The third ingredient is whether penetration was occasioned by the appellant. The complainant stated that the appellant was well known to her as he used to visit their home. She used to see him around. She identified him by name as the perpetrator when she reported the incident at the first instance to PW1, and the following day to PW3. The incident occurred in broad daylight. There was no possibility of mistaken identity. The evidence on record further showed that the appellant went into hiding after the incident occurred, and re-appeared in 2009. He was immediately arrested by PW4. As was held by this Court in Kennedy Wesonga Kwoba v Republic [2013] KECA 64(KLR), the appellant's conduct of going into hiding for a considerable period of time after the offence was committed was incompatible with the behaviour of an innocent man.

29. The appellant in his defence did not speak of his whereabouts on the material date the complainant was defiled. Rather, he attributed his arrest to a debt of Kshs.2200/= which he claimed that he owed PW1, and that PW1 bribed PW4 and the elder who arrested him, to ensure that they took him to Bondo Police Station. We are not persuaded that that the appellant was framed by PW1 due to the alleged debt. We say so because when PW2 told PW1 that the appellant had defiled her, she did not immediately report the incident to the police. She reported the incident the following day, after PW3, a paralegal, offered to assist PW1 by escorting her and the complainant to the chief's office to report the sexual assault. PW3 had no reason to implicate the appellant in an offence that he did not commit.

30. From the foregoing, and going by the circumstances of this case, we hold that the prosecution established its case against the appellant on the charge that he was convicted to the required standard of proof. The conviction was not vitiated by failure to conduct voire dire examination. The complainant's evidence was cogent and credible, even upon cross-examination, and was corroborated by medical evidence as well as the evidence of PW1 and PW3, and further by the appellant's conduct of going into hiding after the incident.

31. The appellant contended that Dr. Tanui and Dr. Ogutu, who examined the complainant, were not availed by the prosecution to adduce evidence and be cross-examined by the appellant, which violated his right to a fair trial enshrined under Article 50 of *the Constitution*. The provisions of Section 77 of the *Evidence Act* dictate as follows:

Reports by Government analysts and geologists.

1. "In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it."

32. This Court in Joseph Mahende vs. Republic [2019] eKLR held thus: -

> "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."

33. In the instant case, the prosecution tried to procure Dr. Tanui, who examined the complainant and prepared the treatment notes, as well as Dr. Ogutu who filled the P3 Form, as a witnesses before the trial court. A look at the trial court record shows that summonses were issued to Dr. Tanui to attend court. PW6, the medical superintendent at Bondo District Hospital, where the complainant was treated, explained to the trial court that Dr. Tanui had been transferred to a different hospital, and that he was on leave at time, hence his attendance to court could not be procured in good time. He further testified that Dr. Ogutu had gone back to school to pursue his masters degree. PW6 stated that he was conversant with their signatures and handwritings. Further, he was cross-examined by the appellant as to the contents of the medical reports. The provisions of Section 33 of the *Evidence Act* give leeway for the production of expert evidence in cases where the author's attendance cannot be procured without unreasonable delay. We hold that the prosecution laid proper basis for PW6 to produce the said medical reports. Accordingly, there was no reason for the trial Court to reject the said evidence.

34. The final issue for determination is whether the sentence imposed upon the appellant was harsh and excessive, and whether it was unlawful for taking away the trial court's discretionary power. The appellant was sentenced to serve life imprisonment, which is the prescribed penalty under Section 8(2) of the *Sexual Offences Act*.

35. As correctly observed by the learned prosecution counsel, the Supreme Court in R vs. Mwangi; Initiative for Strategic

> Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment) affirmed the mandatory minimum sentences provided for under the *Sexual Offences Act*. The Court held that imposing the mandatory minimum sentences does not, of itself, deprive the sentencing court power to exercise judicial discretion. The Supreme Court further observed that the sentences imposed under the *Sexual Offences Act* are lawful, and remained lawful, as long as the penalty sections remained valid. We find that the sentence meted upon the appellant was not harsh or excessive, looking at the circumstances of the case, and was in accordance with the law.

36. The appeal lacks merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH,2026.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR