



**Odhiambo v Republic (Criminal Appeal 151 of 2019)
[2026] KECA 772 (KLR) (24 April 2026) (Judgment)**

Neutral citation: [2026] KECA 772 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 151 OF 2019
MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA
APRIL 24, 2026**

BETWEEN

FREDRICK OYOO ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Siaya,
(Makau J), dated 9th March 2016 in HCCR Appeal No. 34 of 2016)*

JUDGMENT

1. This is the second appeal of Fredrick Oyoo Odhiambo who was charged, tried and convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (SOA), before Hon. M. Obiero, learned Principal Magistrate at Bondo, on 6th April 2016.
2. The particulars of the charge were that between 18th May, 2014 at midnight and 19th May 2014 at 8p.m., at (Particulars withheld) Village (Particulars withheld) sub-location, in (Particulars withheld) sub-County within Siaya County, he intentionally caused his penis to penetrate the vagina of one M.M.A, a child aged three and half years. He faced an alternative charge of committing an indecent act with the child contrary to section 11(1) of the SOA, on the same day and place, by touching her vagina with his penis.
3. The appellant pleaded not guilty to the offence prompting a full trial, in which the prosecution called three witnesses to prove its case, while the appellant testified without oath and called no witnesses.
4. The prosecution's case was that on 18th May 2014 at 11p.m, A.A.O PW1, the father to the victim, baby M.M.A., was in his house with his four children including the victim, when the appellant came to visit him. PW1 lit a lamp and sat with the appellant, to partake of the sachets of alcoholic drink the appellant had brought. Upon consuming the contents from two of the sachets, PW1 was overpowered



- by the drink. He excused himself and went to bed leaving the appellant to continue drinking alone. In the bed he slept next to his baby M.M.A. and fell asleep while the other children slept on the floor.
5. When PW1 woke up at 6.00 a.m. the baby was not in bed or in the house. He searched for her in the neighbourhood up to 7.00 p.m. without success. He went to the appellant's home but the appellant was not there and his house was locked. He reported the matter to Wangarot Police Post and at Lwala Kotiende Police Station where he was referred. The police from Wangarot came to his home to help search for the victim.
 6. The victim was found in the bush close to PW1's house later in the evening. She was taken to Aluru Dispensary and on to Bondo District hospital for medical attention. Dr. Jane Atieno, of Bondo District hospital examined her and filled a P3 form in that regard, confirming that she had been defiled. The P3 form was produced in evidence by Maruti Lawrence PW3, a Clinical Officer who had worked with Dr. Jane Atieno.
 7. No. 62604, Corporal Geoffrey Ngaira PW2, was the Investigating Officer. He recalled that they received information that the appellant had been arrested and proceeded to the scene with other police officers to rescue him from the members of public who wanted to lynch him. PW2 produced a statement made by Wilfred Ochieng Onyango who had initially testified as PW3 before an order for the case to be heard de novo was made, and he passed away in the intervening time.
 8. In his statement Wilfred Ochieng Onyango stated that on 19th May 2014 at 4.00 p.m he learnt of the disappearance of both the victim and the appellant. Later at about 7.00 p.m. at (Particulars withheld), he saw the victim emerge from the bush walking towards her grandmother's home. He asked her where she had been and she told him that she was with the appellant and that he had taken her into the bush. He went and fetched PW1 and accompanied him to where the appellant was hiding. Upon seeing them, the appellant tried to flee but he was soon surrounded and arrested by members of the public who wanted to lynch him. He was rescued by the arrival of the police.
 9. PW2 also produced in evidence the victim's Child Health Card which indicated that she was born on 10th November 2009.
 10. In his defence, the appellant denied committing the offence. His story was that on the 18th May 2014 at around 10.00.a.m he heard PW1 quarreling with his wife. He went to their house and PW1's wife told him that her husband wanted to cut her with a machete. Upon asking PW1 what the quarrel was about, PW1 turned against him and the appellant left. At about 8.00 p.m., PW1 went to the appellant's house accompanied by his neighbours searching for his wife. The appellant's answer that he did not know where she was, irked them and they started beating him. He was rescued by his neighbours. He found himself in the hospital and from there, he was taken to Bondo Police Station where he was charged for this offence. He denied the charge.
 11. Upon considering the evidence before him, Hon. M. Obiero, the learned Principal Magistrate, found that the prosecution had proved its case beyond reasonable doubt. He convicted the appellant on 6th April 2016 and sentenced him to life imprisonment as provided by the law.
 12. The judgment displeased the appellant and he filed an appeal in the High Court of Kenya at Siaya against both conviction and sentence, based on five grounds that: he pleaded not guilty; he was not supplied with witness statements during the trial; Ochieng Odhiambo who was listed as an eyewitness did not testify and his place was taken by the Investigating Officer; the doctor who testified was not the one who examined the complainant; and, the investigation was shoddy to the extent that the appellant was not taken to hospital or his finger prints to be taken as required by law.



13. Upon considering the appeal, Makau J. found that it had no merit. He rendered a judgment on 9th March 2017, in which he dismissed the appeal, upheld the conviction and affirmed the sentence of the trial court.
14. That judgment too displeased the appellant and he filed the instant appeal. The grounds of this appeal are that: the sentence of life imprisonment imposed by the trial court and affirmed by the High Court is harsh and excessive; the court failed in not ensuring the availability of the doctor who examined the minor to ascertain the truth of the matter; there was a lot of inconsistencies, contradictions and irregularities in the matter; and, that the Court erred in not considering that the investigation was shoddy.
15. The appellant filed undated submissions in person and urged that section 8(2) of the SOA is unconstitutional as it fetters judicial discretion not to consider the appellant's mitigating circumstances. That mitigation is an integral part of fair trial which ought to be considered prior to passing a just and proportionate sentence. He submitted that the sentence imposed on him is harsh and excessive and was applied in mandatory terms as provided by statute. Thus the courts below failed to appreciate that he was a first-time offender and did not consider his mitigation.
16. He contended that an indeterminate life sentence is inhuman and violates the right to dignity under Article 28 of *the Constitution* of Kenya. Further, that it is a principle of international law that all prisoners should be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.
17. It was his submission that as much as he did not object to PW3 producing the medical report in place of its maker Dr. Jane, it was upon the Court to consider the evidence of the two medical officers.
18. On the inconsistencies, contradictions, and irregularities said to be in the prosecution's case, the appellant posed questions including: how the victim was sleeping in the same bed with PW1 in the absence of her mother; how the victim could still manage to walk if indeed she had been defiled by an adult such as himself; and, why the victim's mother did not testify. He submitted that there were other people in the house who would have known the victim's whereabouts and that it was not clear when the victim's hymen was broken.
19. He urged that the prosecution had failed to prove its case beyond reasonable doubt and his appeal should be allowed.
20. In rebuttal, Ms. Munyolo, learned Principal Prosecution Counsel, filed submissions dated 30th June 2025 on behalf of the respondent and urged that the jurisdiction of this Court on second appeal is purely on points of law, and new matters not raised before the first appellate court ought not to be raised.

She pointed out that the ground on the harshness of the sentence was raised for the first time in this appeal, and should be dismissed for being improperly before the Court.
21. That notwithstanding, it was his submission that the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024)* affirmed the mandatory sentences in the SOA holding that, for as long as Section 8 remains in our statutes unattended, the mandatory sentences therein are legal.
22. Counsel urged that the issue of PW3 testifying instead of Dr. Jane who examined the complainant was correctly determined in the High Court. That Dr. Jane's absence was fully explained in compliance with the legal requirements based on section 33 of the *Evidence Act* and the appellant did not object to



PW3 producing the medical record on behalf of Dr. Jane. That as a matter of fact, he cross examined PW3. Failure to call Dr. Jane did not therefore, prejudice the appellant.

23. Regarding the alleged inconsistencies, contradictions, and irregularities in the evidence of the prosecution, counsel contended that this ground was also raised for the first time on second appeal and should be dismissed for being improperly before the Court. Nevertheless, she argued that nothing was placed before this Court to suggest that the prosecution's case was riddled with material contradictions, discrepancies and inconsistencies that go to the core, so as to dent the prosecution case. To buttress this argument, he relied on this Court's decision in *Richard Munene vs Republic* [2018] eKLR.
24. Counsel submitted that in the first appeal, the appellant focused on having not been taken to hospital, or his fingerprints taken, which issues were correctly determined by the first appellate court. In the instant appeal, the appellant attempts to raise a fresh issue concerning proof of penetration, which was nevertheless adequately handled by the first appellate court, and which was proved by oral evidence corroborated by documentary evidence.
25. The appeal came before us for plenary hearing on 1st July, 2025 on the virtual platform. The appellant appeared in person, while Ms. Munyolo learned Principal Prosecution Counsel was present for the respondent. They both elected to rely entirely on their filed written submissions.
26. This being a second appeal, we must confine ourselves to the consideration of points of law. Ordinarily, this Court will not interfere with the concurrent findings of the two courts below unless they are based on no evidence or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See- *Samuel Warui Karimi vs. Republic* [2016] eKLR, where this Court stated as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -vs- R*, [1984] KLR 611.”
27. We have carefully considered the record and grounds of appeal, the submissions of the parties, the authorities cited and the law and the issues that arise for our consideration as raised in the grounds of appeal are as follows:
 - i. Whether the sentence meted on the appellant was excessively harsh and unconstitutional;
 - ii. Whether the prosecution case was dented for lack of the testimony of the doctor who examined the complainant; and,
 - iii. Whether the prosecution case was irregular, inconsistent and contradictory and therefore insufficient to secure a conviction.
28. The appellant was charged under section 8 (1) as read with 8 (2) of the SOA which provides that:
 - “1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 2. 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.”



29. On whether the sentence of life imprisonment meted against the appellant was harsh and unconstitutional, we wish to state three things in short shrift. First, that this being a second appeal, our mandate under Section 361(1) of the Criminal Procedure Code, is limited to considering matters of law only and severity of sentence is a matter of fact and not law. Second, we note that the appellant's grounds on first appeal did not include the harshness or unconstitutionality of the sentence. The first appellate court did not determine this ground for us to assess his reasoning. Consequently, we find that this ground is not properly before us.
30. The question of new grounds which were not raised on first appeal being raised for the first time on second appeal has been discussed in a plethora of the decisions of this Court. For example, in *John Kariuki Gikonyo v Republic* [2019] eKLR this Court held that:
- “(17) ...We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in *Alfayo Gombe Okello v. Republic* [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:
- “... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”
- “(18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal”
31. That said, we state thirdly, that the law on sentencing under section 8 of the SOA is now settled. The Supreme Court's decision in *Republic v Mwangi* (supra) affirmed the constitutionality of the sentences under the said section and this includes mandatory life sentences under Section 8(2) of SOA.
32. On the second issue, the appellant argued that the prosecution did not prove its case to the required standard, having failed to call the doctor who examined the victim to testify. The respondent contended that the appellant brought this issue before the first appellate court and it was correctly determined.
33. On this, the first appellate court had this to say:
- “The appellant contends that the doctor who testified in this case was not the one who examined the complainant and as such he could not cross-examine him and verify his evidence accordingly. PW3, Maruti Lawrence, a clinical officer produced the P3 form made by Dr. Jane Atieno in respect of the complainant, MMA, aged 31/2 years; on the basis that he had worked with the same doctor for several years, was conversant with her handwriting, signature and she was out of hospital for further studies. He testified on her behalf and did so in accordance with the provision of section 33 of the *Evidence Act*.



The appellant when the witness was giving evidence, he stated he had no objection to PW3 giving evidence on behalf of Dr. Jane Atieno contrary to his submission on appeal that he did not cross-examine PW3 as he did so. I therefore find the appellant was not prejudiced by the prosecution invoking the provision of section 33 of the *Evidence Act*.”

34. From the foregoing, we find that the determination of the first appellate court on the appellant’s contestation that the testimony of PW3 should not have been relied upon in place of Dr. Jane Atieno who examined the victim was correct. Section 33 of the *Evidence Act* stipulates that:

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

Based on the evidence before court, we find no basis to interfere with finding of the first appellate court.

35. We evaluated the record to establish whether the elements that must be proved to sustain a conviction in a case of defilement were proved. These are the age of the victim, penetration and the identity of the assailant. The age of the victim as confirmed by the Child Health Card tendered in evidence and was not disputed.
36. On the identity of the perpetrator, there was no dispute that the appellant was in the home of the victim on the evening when she was last seen by her father. None of the prosecution witnesses however, witnessed the commission of the act of defilement. The prosecution’s case on what transpired is predicated on circumstantial evidence. We therefore, tested the analysis of the learned trial Judge to establish whether he examined the evidence of the surrounding circumstances properly to establish that it was sufficient to prove that the appellant was the one who defiled her.
37. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows concerning the place of circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

38. In the same case of *Ahamad Abolfathi Mohammed* (supra), the Court of Appeal outlined the criteria for assessing whether circumstantial evidence presented in court can uphold a conviction stated thus:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject



person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

‘It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.’”

39. The chain of events began on the night of 18th May 2014, when the father of the victim crawled into bed besides her in a drunken stupor leaving his drinking buddy, the appellant drinking alone. When he woke up the following morning, both his baby and his buddy were missing. The search went on the whole day and involved the neighbours but neither of the two was seen. In the evening a neighbour saw her emerging from the bushes near the appellant’s house. He enquired from her where she had been and she told him she was with the appellant and that he had taken her into the bush. The neighbour called PW1 and together with other neighbours they surrounded the bush and smoked out the appellant.
40. In our considered view, the circumstances from which the inference of guilt may be drawn in this case were cogently and firmly established, and they unerringly pointed towards the guilt of the appellant. Taken cumulatively, the chain of events was so complete as to lead to the conclusion that within all human probability, the crime was committed by the appellant and none else. We therefore, cannot fault the learned Judge’s conclusion that the appellant was the perpetrator of the offence.
41. On the element of penetration the appellant’s contestation was that it was not proved. The respondent on the other hand argued that penetration was established as correctly held by the first appellate court.
42. For a conviction to be secured in a defilement charge under the SOA, the prosecution must prove that there was penetration of the minor’s genitalia by the appellant. See- *John Mutua Munyoki v Republic [2017] eKLR* where this Court held as follows:

“For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:

- i. The victim must be a minor,
- ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice.”

43. On this, the first appellate court rendered itself as follows:

“In the instant case, the victim MMA could not talk properly due to her age and the only evidence as regards the penetration is that of medical officer. PW1 stated that when the child MMA was found in the bush, she was walking with difficulties and her clothes were wet, she did not have her pant and the child was injured. He stated that the doctor examined the child and confirmed that she was defiled. PW3 produced a P3 form filed by Dr. Jane Atieno who had formed an opinion that the child had tears on labia minora, which were fresh wounds; that the hymen was broken and there were bruises on her genitalia with whitish vaginal discharge, that she was bleeding and had infection. The doctor indicated there were



genital lacerations. The P3 form was produced as exhibit 2. I have carefully perused the P3 form exhibit 2 and I have noted the doctor indicated she found laceration bilaterally of labia minora, fresh wounds 1.5 cm, hymen broken: discharge as stated in the P3 form. I therefore find that penetration was achieved and the prosecution has proved penetration.”

44. We agree with the learned Judge that on the evidence before court, he came to the correct conclusion that penetration had been proved. We refer to this Court’s decision in MK V Republic [2017] eKLR, where the Court with approval quoted the Supreme Court of Uganda in Bassita v Uganda S.C Criminal Appeal No. 35 of 1995, as follows:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim’s own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

45. Turning to the final ground on alleged inconsistencies, contradictions and irregularities in the prosecution evidence, the appellant merely queried why the victim was sleeping in the same bed with PW1 in the absence of her mother; how the victim was able to walk if indeed she had been defiled by an adult such as himself; and, why the victim’s mother did not testify.

46. First, we find that no contradictions or inconsistencies were pointed out in the prosecution evidence since no evidence was tendered to the contrary. Secondly, and as stated elsewhere in this judgment, having not been raised on first appeal for the court to pronounce itself on it, this ground is improperly before this Court. See- John Kariuki Gikonyo (supra).

47. The upshot of our analysis is that this appeal is found to lack merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2026

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

