



REPUBLIC OF KENYA



**Oruwo v Republic (Criminal Appeal 138 of 2019)  
[2025] KECA 66 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 66 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 138 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JANUARY 24, 2025**

**BETWEEN**

**JOSEPH OMBURE ORUWO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Sentence of the High Court of Kenya at Siaya  
(Makau, J.) dated 26th November 2015 in HCCRA No. 21 of 2015)*

**JUDGMENT**

1. Joseph Ombure Oruwo, the appellant herein, was charged and convicted in the Principal Magistrate's Court at Siaya for the offence of defilement contrary to section 8(1) & (2) of the *Sexual Offences Act*. The particulars of the offence being that on 19<sup>th</sup> January 2014 in Siaya County, he intentionally caused his penis to penetrate the vagina of MA<sup>1</sup> a child of 7 years. He also faced the alternative charge of committing an indecent act Initials used to protect her identity with a child contrary to section 11 of the *Sexual Offences Act*. The appellant denied the charges; was tried and convicted of the main charge and was sentenced to life imprisonment.
2. The appellant, dissatisfied and aggrieved with both conviction and sentence appealed to the High Court, which affirmed and upheld the decision of the subordinate court.
3. The evidence before the trial court; and which the High Court reevaluated and analysed was as follows. MA, the complainant, testified as PW1 that on the date in question, the appellant called her and told her to go to his house which was nearby. The appellant held her hand and led her to his house where he undressed completely and also completely undressed the complainant. The appellant then pushed PW1 onto the mattress and laid on top of her and did 'bad things' to her; after which he ordered her to

<sup>1</sup> Initials used to protect her identity



- go away. She went home and later on told her mother what had happened; and was taken to Rambwa health center where she was treated. They, thereafter, proceeded to the police station and made a report.
4. In the trial court, MA stated that the man she referred to as Ombure was the one sitting in the dock; and although she initially stated in her evidence in chief that she did not know him prior to the material date, on cross examination, MA clarified that this was not the first time the appellant was doing 'bad manners' to her further stating that she did not report the first incident. MA also stated that the appellant used to live in her mother's house; and that it was not the first time she was meeting the appellant, as she knew him from the past.
  5. EAO, (PW2) MA's aunt testified that the girl was 8 years old born in the year 2006; the birth certificate was produced as PEX1. She also testified that on the material date in question at around 6.30pm, MA left to pick PW2's baby who was playing with other children, but she did not return immediately. PW2 went to search for MA at the neighbours' and her uncle's place, but did not find her. At around 8pm PW2 was informed that PW1 was at her grandmother's. PW2 proceeded there and on arrival questioned MA as to where she had been; to which MA described how the appellant had taken her to his house and defiled her. PW2 identified the appellant as the man sitting at the dock; and further stated that she knew him as at one time he rented a house at her mother in-law's residence. PW2 then contacted the chief who came and picked MA, and they all headed to the appellant's house. On 20<sup>th</sup> January 2014, PW2 went to the police station, and Rwambwa Health Center where MA was treated, and issued with a P3 form as well as treatment notes. On cross examination, PW2 stated the MA had told her that the appellant had sex with her and that she found MA's under wear wet.
  6. Felix Dan Oloo, PW3 the assistant chief of Nyadorera B sublocation, in Usonga location, testified that on 19<sup>th</sup> January 2014 at around 10 00 am he received a phone call informing him of the arrest of somebody who had defiled a minor. PW3 proceeded to the homestead of the appellant and found that the appellant had escaped. PW3 testified that the appellant was well known to him and that he had no grudge with the appellant.
  7. Lameck Sagwe, PW4 a Clinical officer at Siaya District Hospital, referred to the P3 form for the complainant, which gave a history of being defiled by a person known to her and that on examination her underwear was wet and stained. On examination of her genitalia, it was noted that the labia was inflamed, the hymen was not intact and there was a whiteish creamy discharge. The conclusion was that there were physical signs of vaginal penetration. The P3 form was produced as exhibit.
  8. The appellant, in his sworn defence, testified that on 20<sup>th</sup> January 2014 at around 9.30pm he was on his way home when he met two men dressed in black. They stopped him and asked him his name; when the appellant asked them who they were, they grabbed him by the collar; and demanded he produces everything in his pockets. They searched his pockets, and made away with Kshs.600 and a Nokia Phone 110; removed the SIM card; broke the phone and threw it away. He was then arrested and taken to a homestead whose occupants he did not know as it was dark. The appellant further testified that he was beaten and forced to strip and give his blood-stained t-shirt, forcefully dressed in another t-shirt and taken to the police station at around 11pm. The appellant maintained that he was a stranger to the offence he was charged with.
  9. On cross examination, the appellant stated that he did not know MA, nor had he met the witnesses who testified, save for when they testified against him; and that he knew nothing of the offence on the material day. The appellant called no witnesses.
  10. The High Court observed that the trial court, having considered both the prosecution and appellant's case was satisfied that the ingredients of the offence of defilement had been proved by the prosecution. PW1 gave clear testimony describing in graphic detail what the appellant did to her which amounted



- to penetration; pointing out that penetration was corroborated by the stained underwear belonging to the complainant and the medical testimony of PW4, as evidenced by the P3 and treatment notes all produced at the hearing.
11. The court was also satisfied that the complainant's age was 7 years at the date of offence as confirmed by the birth certificate showing that the complainant was born on 6<sup>th</sup> May 2006.
  12. With regard to the identity of the appellant the court was satisfied that the identification was proper and not a case of mistaken identity. PW1 testified that she knew the appellant from the past and when the appellant led the complainant to his house it was around 6.30pm, it was not dark and PW1 could see the appellant clearly and she identified the appellant as Ombure to PW2, as well as in her evidence. The High Court thus affirmed and upheld the conviction and in sentencing considered the mitigation of the appellant and dismissed the appeal.
  13. Aggrieved by the outcome, the appellant has filed his appeal before us. At the hearing he only pursued the appeal on sentencing, on the grounds that the sentence was excessive, harsh, unconstitutional and unlawful, praying for leniency in the sentence, urging us to consider the mitigating factors. He pleads with us to consider the testimonial demonstrating his achievements whilst in custody since conviction.
  14. In his written submissions the appellant argues that he ought to have benefitted from the least available sentence; and consider that the appellant is remorseful, and conduct a balancing act between aggravating and mitigating circumstances during sentencing.
  15. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, we must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See *Samuel Warui Karimi vs. Republic* [2016] eKLR, where it was stated that:

“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.”
  16. The appellant questions the exercise of discretion by the trial court in sentencing him, and the nature of the sentence that was imposed upon him, contending that although infliction of punishment is a matter for discretion of the trial court, many courts in Kenya have already changed tides in as far as mandatory statutes/sentences are concerned regarding the recent judicial developments that have taken effect in various instances when attacking the unconstitutionality of the mandatory sentences and in enhancing the delivery of justice; and promoting confidence in the judicial process. In this regard, the appellant refers to the case of *Maingi and 5 Others vs. Republic* in Criminal Petition No. E017 of 2021 (2022) KEHC delivered by Odunga, J. (as he then was) to urge us to consider substituting the sentence to a more lenient one.
  17. The appellant is thus not just questioning the severity of the sentence imposed upon him, but has raised issues of law that calls for determination by this Court. We take note that the issue regarding the constitutionality of the sentence was not raised before the High Court, and is being raised before us for the first time. It follows therefore that this issue has not been preserved for appeal and we lack the jurisdiction to consider it. See *Republic vs. Joshua Gichuki Mwangi* (Petition No. E018 of 2023)



[2024] KESC 34 (KLR). In regard to the discretion in sentencing, as stated by the Court of Appeal in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR:

“It is now settled law, following several authorities by this Court and by the High Court, 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 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.”

18. The trial court in meting out the sentence of life imprisonment stated that there was only one minimum mandatory sentence setfor an offence under section 8(2) of the Sexual Offences, a position reiterated by the High Court on appeal. The appellant’s contention regarding emerging jurisprudence in the recent past is not a wild card, as indeed following the Supreme Court’s pronouncement of the unconstitutionality of the mandatory death sentence in so far as it interfered with the court’s discretion in the case of *Francis Karioko Muruatetu and Another vs. R* [2017] eKLR, courts, including this one, extended the reasoning in that decision to all mandatory minimum sentences with the necessary adjustment. This position has since shifted following the clarification by the Supreme Court, to the extent that mandatory sentences are clearly provided for in the *Sexual Offences Act*, and the trial court has no option, but to impose it. This was stated in *Republic vs. Mwangi*:

Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) that:

“Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the court to impose a harsher sentence.”

19. It thus follows that Section 8(2) of the *Sexual Offences Act*, curtails the court’s exercise of discretion, and both the trial court, and the High Court had no alternative, other than to pronounce the sentence as provided. The upshot is that the appeal lacks merit and is dismissed.

**DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2025**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**



I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

