Odago v Republic (Criminal Appeal 80 of 2020)
[2025] KECA 1018 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 1018 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 80 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 30, 2025

BETWEEN

SAMUEL OCHIENG ODAGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu (E.N Maina J.) dated 21st April 2016 in HCCRA No. 129 of 2014)

JUDGMENT

1. The appellant, Samuel Ochieng Odago, was charged with the offence of defilement of a child aged 1½ years, in contravention of section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The alleged incident occurred on 6th February 2014 at approximately 10:30 am in Tura Sub-location, Nyando District, Kisumu County, where the appellant is accused of intentionally and unlawfully causing his penis to penetrate the vagina of C.S.O (real name withheld).

2. The appellant denied the charge; however, following a full trial, the trial court adjudged him guilty, resulting in his conviction for the offence and a sentence of life imprisonment being imposed.

3. Aggrieved by this decision, the appellant filed an appeal in the High Court of Kenya at Kisumu. The first appellate court, upon hearing the appeal, dismissed it in its entirety in a judgment rendered on 21st April 2016, hence this 2nd and perhaps last appeal.

4. The prosecution proved its case through the evidence of four witnesses. HAO, (real name withheld), (PW1) and the mother of the CSO, was outside her house on laundry chores when she learned of her child's purported defilement. She rushed to the scene and found the child in distress, without an underwear, and Peter Akhumicha Ongoma (PW3) struggling with the appellant inside the premises. She examined the child and noted that her vagina exhibited signs of inflammation. She immediately

called her husband and the police. When the police arrived, the appellant was still confined within the house by members of the public from whence they arrested him. The child was subsequently taken to Ahero Sub-district Hospital, where she was examined by Clinical Officer Nicodemus Buge (PW2). His examination revealed a minor laceration on the lower part of the child's vagina, leading to a professional conclusion of forceful penetration.

5. PW3, on the material day at about 10.30 am, received a telephone call regarding a disturbance being caused by a young man at his house, whom he subsequently identified as the appellant. Upon arrival, he found the appellant in a compromising position with the child between his thighs and another boy nearby. The child had no clothes on from the waist down, while the appellant was naked. PW3 forcefully extracted the child from the appellant's grip and, together with the other boy, took them out of the house. He then locked the house with the appellant inside. Sergeant Rachel Chelenget (PW4) was at Ahero police station, crime section, when she was called by members of the public that a person who turned out to be the appellant had been detained in a house at Tura on suspicion that he had defiled a child. She proceeded to the house, found the appellant, and immediately arrested him and escorted him to the police station. She, thereafter, took PW1 and the child to the Ahero Sub-district Hospital for examination and treatment. Subsequent thereto, she issued the child with P.3 form that was filled by PW2. Upon concluding investigations, she charged the appellant with the offence.

6. Put on his defence, the appellant elected to give a sworn statement of defence without calling any other witnesses. He contended that he had no acquaintance with the child or her family and asserted that he was apprehended in relation to an allegation he knew nothing about.

7. As already stated, the trial court found the case against the appellant proved, convicted him, and sentenced him to life imprisonment. The appellant then preferred a first appeal to the High Court of Kenya at Kisumu. Upon merit hearing of the appeal, the first appellate court found the appeal to have no merit and dismissed it in its entirety.

8. Being dissatisfied with the results of the first appeal, the appellant is before this Court on a second appeal. In his memorandum of appeal, the appellant has raised seven grounds to wit that; the trial court failed to: conduct a DNA test; ascertain the degree of penetration; accord mitigation rights to the appellant; avail vital witnesses to court; consider hearsay evidence and contradictory statements; conduct an identification parade; consider the unconstitutionality of the mandatory sentence imposed; and failure to consider the appellant's defence.

9. The appeal was heard before us on 24th February 2025, on our virtual platform. The appellant, who appeared in person, opted to rely entirely on his homemade submissions. He submitted that the first appellate court failed in its duty to scrutinize the evidence in order to appreciate whether it supported the lower court's findings and to reach its own independent conclusion.

10. The appellant argued that his constitutional right to a fair trial pursuant to Article 50 (2) of *the Constitution* of Kenya 2010 was violated as he was not issued with the prosecution witness statements in advance of the trial or at all. The appellant pointed out that the first appellate court erred by failing to observe that no DNA test was conducted on the child and the other parties to provide a nexus between the alleged offence and the appellant, as required under section 36 of the *Sexual Offences Act*. The appellant cited the cases of Azemia v Republic (SCA 14 of 2012) [2014] SCCA 35 and Jon Cardon Wegner and 2 Others v Rep [2011] eKLR on the need for DNA testing in Sexual Offences.

11. The appellant submitted that penetration, a major component of the offence, was not proved to the required standard, as there was no active bleeding, discharge, or spermatozoa on the genitalia, as testified to by PW2.

12. The appellant also argued that he was not informed of his rights to mitigation, which fundamentally prejudiced him. He cited the case of Ndegwa Maragwa v Republic [1969] EA 156 for the proposition. The appellant further submitted that the prosecution failed to avail vital witnesses to court, specifically the children who were playing with the victim, which prejudiced his case. He cited the cases of Bukenya and Others v Uganda [1972] EA 549, where the court held that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be adverse to their case.

13. It was submitted that the failure to conduct an identification parade resulted in a miscarriage of justice for the appellant. Furthermore, the first appellate court failed to consider the appellant's defence, which was not rebutted by the prosecution, thus shifting the burden of proof onto the appellant. He supported this submission by referring to the case of Thomaso Bruno and Another v The State - Criminal Appeal No. 142 of 2015. Finally, the appellant challenged the constitutionality of the mandatory minimum sentence of life imprisonment imposed on him. He reverted to the Supreme Court decision in Francis Muruatetu and Another v Republic [2017] eKLR, in impugning the sentence and pleaded for reconsideration based on this precedent and his reformation in prison since 2012. The appellant ultimately prayed that the appeal be allowed. On his part, Mr. Okango, learned Assistant Director of Public Prosecutions, submitted that the failure to conduct a DNA test does not negate the prosecution's case nor render the conviction unsafe. That to sustain a conviction for defilement, the prosecution proved three essential ingredients: penetration, the victim's age, and the identity of the perpetrator. That DNA evidence was not required to establish the offence.

14. On the degree of penetration, counsel submitted that the law does not require proof of the degree of penetration but only that penetration occurred. Both the trial and first appellate courts correctly found that penetration was proved by the cogent and uncontroverted evidence of PW1 and the medical findings of PW2.

15. On mitigation, counsel submitted that the appellant was informed of his right to mitigation and was given a fair opportunity to present his mitigation. The record demonstrates that the trial court complied with the requirement to accord the appellant a right to mitigation.

16. Regarding crucial and vital witnesses, it was submitted that it is the prerogative of the prosecution to determine which witnesses are necessary to prove its case. The prosecution presented sufficient evidence to establish its case beyond reasonable doubt, and the absence of the two children who were allegedly playing with the child did not prejudice the appellant's defence. Turning to hearsay and contradictory evidence, counsel submitted that the alleged contradictions were nonexistent. The testimonies of PW3, PW1, and PW4 were consistent, direct, and corroborated each other, making the evidence reliable, credible, and not hearsay.

17. On identification parade, it was submitted that the appellant was positively identified by eyewitnesses by way of recognition, making a police identification parade unnecessary or even superfluous.

18. On the unconstitutionality of the mandatory life sentence, counsel submitted that the life imprisonment sentence meted out was the statutory mandatory minimum sentence for an offence under section 8(2) of the *Sexual Offences Act*; that the legality of the mandatory minimum sentences in the *Sexual Offences Act* has been reaffirmed by the Apex court. Lastly, on the failure to consider the appellant's defence, it was submitted that the trial court evaluated the defence but found it lacking in credibility. The first appellate court affirmed this position. Counsel, therefore, prayed that the appeal be dismissed in its entirety.

19. We have carefully considered the record of appeal, the judgments of the trial and the first appellate courts, the grounds of appeal, the respective submissions by the appellant and learned counsel, as well as

the authorities cited. From the outset, we must reiterate that, this being a second appeal, the jurisdiction of this Court is limited to consideration of issues of law only. Section 361 of the *Criminal Procedure Code* makes that jurisdiction abundantly clear. The essence of that provision is that in a second appeal, the issues of fact will have been settled by the trial and the first appellate court and that this Court will, except in exceptional circumstances,concern itself only with the application of the law to the facts as settled by the two courts below.

20. This Court has also consistently held that it will defer to and respect the findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis of the evidence presented in the trial court. The second appellate court operates without the advantage of having seen or heard the witnesses. Therefore, it will not interfere with the findings of fact by the lower courts unless it is demonstrated that the trial court and the first appellate court considered matters they should not have considered, failed to consider matters they should have considered, or that the evidence as a whole indicates that the lower courts were plainly wrong in their decisions. In such cases, these issues would be treated as matters of law. See Karingu v Republic [1982] KLR 219.

21. In the present case, the appellant's complaints revolve around the failure to conduct a DNA test, the degree of penetration, mitigation rights, the absence of vital witnesses, hearsay evidence, contradictory statements, the identification parade, and the constitutionality of the mandatory life sentence. All these grounds involve questions of law, such as the interpretation of legal principles and the application of statutory provisions.

22. That said, section 36(1) of the *Sexual Offences Act* stipulates that:

> " Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

23. Importantly, this section is framed in discretionary rather than mandatory terms. It was extensively discussed by this Court in the case of Robert Mutungi Mumbi v Republic [2015] eKLR, where the Court stated:

> " Section 36(1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not framed in mandatory terms
>
> ... DNA evidence is not the only form of evidence by which the commission of a Sexual Offence may be proved."

24. In the case of Chembe v Republic [2024] KECA 647 (KLR), this Court addressed the issue of whether the absence of a DNA test affects the prosecution's case. The court held that the absence of a DNA test does not necessarily negate the prosecution's case or render the conviction unsafe. The court emphasized that to sustain a conviction for defilement, the prosecution must prove three essential ingredients: penetration, the complainant's age, and the identification of the perpetrator.

25. It is therefore self-evident that the absence of a DNA test does not automatically weaken or impugn the prosecution's case. The evidence presented by the prosecution, in our view, was sufficient to establish the essential elements of the offence beyond reasonable doubt. Although the first appellate court did

not directly address this issue, it is clear that it considered all necessary ingredients for the offence and found that they had been proved beyond reasonable doubt. In the premises, we are satisfied that DNA evidence was not necessary in this case.

26. As stated and reiterated by this Court in John Mutua Munyoki v Republic [2017] eKLR, under the *Sexual Offences Act*, the main elements of the offence of defilement are as follows:

    i. The victim must be a minor, and

    ii. There must be penetration of the genital organ, and such penetration need not be complete or absolute. Partial penetration will suffice.

    iii. Identification of the perpetrator.

    As it is, the law does not require proof of the degree of penetration but only that penetration occurred. Both the trial and first appellate courts correctly found that penetration was proved by the cogent and uncontroverted evidence of PW1 and the medical findings of PW2. In Chembe v Republic (supra), the court emphasized that even slight penetration is sufficient to establish the offence of defilement. Similarly, in Patrick Kathurima v Republic [2015] KECA 539 (KLR), the court observed that the prosecution must provide credible evidence to prove that penetration occurred. The courts below correctly held that there was proof beyond a shadow of doubt that the child was defiled. This evidence came from both PW1 and PW2.

27. We agree with the concurrent findings of the two courts below on the issue and find the appellant's complaint on penetration or lack of it a zero-sum game. It is rejected.

28. Regarding mitigation, we appreciate that Mitigation plays a vital role in balancing justice and fairness, ensuring that while the punishment fits the crime, the offender's circumstances are also taken into account. The appellant contends that he was not informed of his rights to mitigation. However, we have gone back to the trial court's record and noted that on 26th September 2014, the judgment was delivered, and the appellant was given time to mitigate. He stated thus:

    " Accused: I am ailing. I have rashes on my body. I ask for forgiveness.

    Court: Mitigation noted. There is only one sentence as for the *Sexual Offences Act*"

29. From the above, it is clear that the appellant was accorded an opportunity to mitigate before sentencing. We, therefore, find the appellant's complaint insincere and dismiss it.

30. Turning to failure to summon crucial and vital witnesses, we doubt whether the two children whom the child was playing with could pass the test of vital or crucial witnesses. They were all small children who could not have testified, given their ages. It should never be forgotten that it does not require a plurality of witnesses to prove a fact, and the calling of witnesses is entirely at the discretion of the prosecution. See Bukenya v Uganda (supra): The two courts below noted that the evidence presented was sufficient to prove the offence and that the failure to call certain witnesses did not invalidate the trial. We entirely agree with this summation, and we see no reason to think otherwise.

31. As regards contradictions in the prosecution's case, other than the fact that the appellant did not point out any specific contradictions, this Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. In John Nyaga Njuki

& 4 Others v Republic, Criminal App. No. 160 of 2000, this Court expressed itself as follows on the issue:

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused....."

32. The discrepancies in the evidence in the matter before us, if at all, are in our view of a minor nature, considering the facts and circumstances of the case.

33. As to the necessity of an identification parade, PW3 testified that upon being notified by phone of a disturbance at his house, he arrived to find the appellant with some children inside. One child was a boy, and the other was the victim. The appellant was holding the child, who was without underwear, between his thighs, and had removed his trousers. PW3 struggled with the appellant to free the children and subsequently bolted the door from the outside, thereby imprisoning the appellant therein. The girl's mother (PW1) and the arresting officer (PW4) both confirmed finding the appellant inside the house, corroborating PW3's account. This incident took place at 10:30 am in broad daylight, allowing the witnesses to positively identify the appellant. Given the clear and positive identification of the appellant by multiple witnesses in broad daylight, an identification parade may not have been necessary, indeed, it would have been superfluous. In the case of John Mwangi Kamau v Republic [2014] KECA 168 (KLR), this Court held that an identification parade is not mandatory when the identification of the accused is clear and unequivocal. The court emphasized that the purpose of an identification parade is to test the witness's ability to identify the suspect, but when the identification is made under favourable conditions, such as in broad daylight and by multiple witnesses, the necessity of an identification parade is diminished.

34. Therefore, based on the evidence provided by PW3, PW1, and PW4, the positive identification of the appellant in broad daylight at 10:30 am was sufficient, and an identification parade was not required.

35. Regarding the appellant's defence, it was purportedly an alibi. However, this defence could not hold, as an alibi requires the accused to assert that he was not present at the scene of the alleged crime when it occurred. In this case, the appellant did not claim to be elsewhere at the relevant time; instead, he merely stated that he was arrested for something he did not understand. Furthermore, even if an alibi had been properly raised, it would likely have been insufficient against the strong evidence presented by the prosecution. He was literally found in the act. This Court has addressed the defence of alibi in several cases. In Kiarie v Republic [1984] eKLR, the court held that an alibi must be raised at the earliest opportunity and must be credible enough to cast doubt on the prosecution's case. Similarly, in Wang'ombe v Republic [1976-80] 1 KLR 1683, the court emphasized that the burden of proving an alibi lies with the accused, and it must be raised in a timely manner to allow the prosecution to investigate its validity. In this case, the appellant's failure to provide a credible alibi and the strong evidence presented by the prosecution rendered the alibi defence unsustainable.

36. On the constitutionality of the mandatory minimum sentence of life imprisonment imposed, the appellant, citing the Supreme Court decision in Francis Muruatetu & Another v Republic [2017] eKLR considered the mandatory nature of the life sentence imprisonment imposed on him unconstitutional. He, therefore, invited us to reconsider the sentence based on this precedent and his reformation since 2012.

37. The constitutionality of mandatory sentences has been a significant topic in Kenyan jurisprudence, particularly following the landmark decision in Francis Karioko Muruatetu & another v Republic (supra) by the Supreme Court of Kenya that declared the mandatory nature of the death sentence under section 204 of the *Penal Code* unconstitutional. The court emphasized that mandatory sentences deprive judges of the discretion to consider mitigating factors and the individual circumstances of each case.

38. However, the Supreme Court in Francis Karioko Muruatetu & Another v Republic, Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR clarified that its decision in the earlier Muruatetu case applied only in respect to sentences under sections 203 as read with section 204 of the *Penal Code*, and did not invalidate other mandatory or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.

39. In the context of defilement cases, this Court has addressed the applicability of the Muruatetu decision. In Simiyu v Republic [2025] KECA 153 (KLR), the appellant argued that the mandatory minimum sentences for defilement under the *Sexual Offences Act* were unconstitutional based on the Muruatetu decision. This Court, differently constituted (Okwengu, Omondi & Joel Ngugi, JJ.A), however, upheld the mandatory minimum sentences, stating that the Muruatetu decision did not apply to defilement cases and that the constitutionality of mandatory sentences for sexual offences must be specifically challenged and determined on a case-by-case basis.

40. In conclusion, while the Muruatetu case set a precedent for the unconstitutionality of mandatory death sentences, its applicability to defilement cases and other offences has subsequently been dealt a deathblow by the Supreme Court. The appellant's argument that the sentence imposed was unconstitutional or illegal is unfounded and must be therefore be dismissed. Additionally, the Court lacks the jurisdiction to reduce the mandatory life sentence, as this is the statutory minimum prescribed under section 8(2) of the *Sexual Offences Act*, which the trial court was obligated to impose.

41. In conclusion, justice must at all times be upheld and the statutory framework respected, ensuring the protection of society's most vulnerable. Accordingly, this appeal is without merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

ASIKE-MAKHANDIA

.....v

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR