



**Ouso v Republic (Criminal Appeal E028 of 2020)
[2025] KECA 797 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 797 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E028 OF 2020
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MAY 9, 2025**

BETWEEN

THOMAS COLLINS OUSO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay
(J.R. Karanjah, J.) dated 26th November 2020 in HCCRA No. 52 of 2018)*

JUDGMENT

1. Thomas Collins Ouso, the appellant herein, was charged in the Principal Magistrate’s Court at Mbita, with the offence of defilement contrary to section 8(1) & (3) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 1st and 7th April 2016 at [Particulars Withheld] Village within Homa Bay County, the appellant defiled BAO¹ a child aged 13 years, or in the alternative committed an indecent ¹ Initials used to protect the minor’s identity act with the said child contrary to section 11(1) of the *Sexual Offences Act*. The appellant denied the charge; was tried and convicted of the offence in the main charge and was sentenced to twenty years (20) imprisonment.
2. Aggrieved by both conviction and sentence, the appellant appealed to the High Court, which affirmed and upheld the decision of the subordinate court. Being dissatisfied and aggrieved with the judgment of the High Court, the appellant has now filed this appeal before this Court.
3. 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 will not interfere with concurrent findings of the two courts below on facts unless the same was 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 *Karingo & 2 Others vs. Republic* [1982] eKLR.



4. The evidence before the trial court; and which was subjected to re-evaluation and analysis by the High Court was as follows: the complainant BAO who testified as PW1 stated that she and the appellant were known to each other as neighbours and that the appellant was a herds boy. On the material month the appellant met the complainant in the company of her siblings and requested them to assist him graze some cattle. The complainant accepted but her siblings declined. The complainant was left with the appellant who then directed her to a bush and defiled her. That was the first time but the appellant did subsequently on two later occasions engage in sexual assault of the complainant who did not report these incidents to her parents until her teachers discovered that she was pregnant.
5. CAO, the complainant's mother testified as PW2; she confirmed being notified by the teachers about the pregnancy. The complainant on being questioned informed her that the appellant was responsible for the pregnancy. The matter was reported to the police and PW4 Inspector Kilonzo, was in charge of the investigations.
6. John Wekesa, PW3, a clinical officer at Ogongo dispensary examined the complainant and discovered she was pregnant.
He also confirmed that she had been defiled. He also produced the P3 form as exhibit.
7. Peter Lutta Kweyu, the government analyst testifying as PW5, confirmed through DNA test that the appellant was the father of the complainant's child, who conceived as a consequence of the defilement.
8. In his defence, the appellant denied the charge contending that the allegation against him was a lie.
9. 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 and that the conviction and sentence of the trial court was proper as the prosecution's burden of proof had been discharged.
10. The appellant raised 10 grounds of appeal in the High Court which the court considered. The learned Judge found that it was evident the appellant had engaged in sexual escapades with the complainant; that the appellant argued that the complainant was a willing participant. The court found that despite the appellant knowing that the complainant was a minor, he still went ahead to indulge in the alluring attraction of the complainant; and exploiting her naivety and innocence to indulge in multiple sexual engagements with her, resulting in the birth of a child; and that despite denying the charge, after conviction the appellant asked for parental obligations over the complainant's child. The learned judge was convinced that the evidence against the appellant was overwhelming, and that it was immaterial that the complainant consented as she was a child in the eyes of the law.
11. With regard to the lament about sentence being harsh and excessive, the court found that the same was in line with section 8(3) of the *Sexual Offences Act*; and therefore a valid and legal sentence. The learned judge thus upheld the conviction and sentence and dismissed the appeal.
12. Aggrieved by that outcome, the appellant has filed this second appeal before us, raising 3 grounds. Firstly, the appellant submits that the prosecution did not prove its case beyond reasonable doubt. The appellant submits that the date of the alleged offence is not clear as the particulars of the offence state that: "on diverse dates between 1st and 7th April 2016", to argue that the framing of the particulars brings into doubt the gestation of the pregnancy and when conception occurred. The appellant questions why the DNA samples were stored for up to 5 months. He asserted that the DNA results were doctored. The respondent on the other hand submits that the issue of the framing of the particulars was never raised before the first appellate court; that in any event, the framing of the particulars was not improper and created no ambiguity or prejudice to the appellant, as he knew well all along that he was being charged for the offence of defilement between the period stated.



13. The respondent drew our attention to the evidence of PW1, which was described as cogent and un rebutted to the effect that she first met the appellant in April 2016 when he first defiled her and she bled. She then mentioned two other occasions when she was defiled within that period and that the final incident was on 7th August 2016. We were thus urged to find that the description of the diverse dates, well captured the dates when the offence was committed; that the prosecution case was that on 'various occasions' between the said dates, the appellant defiled the complainant, and the evidence confirmed that much.
14. In support of this submission, the respondent relied on the case of *Wabwire vs. Republic* (Criminal Appeal E032 of 2023) [2024] KEHC 1989 (KLR) (29th February 2024) (Judgment), where the High Court stated as follows:

“The fact that the particulars supporting the charge in the main count referred to diverse dates does not by itself make the charge duplex given that the particulars were clear that the appellant allegedly committed the offence of defilement on the dates stated therein. No other offence was expressly or impliedly stated in the main count. The court record also reveals that the appellant clearly understood the charge levelled against him and strenuously defended himself accordingly.”

The respondent urges that although this is a decision from the High Court, we consider it as persuasive. We have considered the arguments on this limb, and concur with the learned judge that there was no ambiguity or vagueness in the particulars contained in the charge sheet; and no prejudice was occasioned to the appellant, the particulars clearly communicated to him what the complaint was about.
15. The respondent also points out that as regards the issue of the samples being doctored and/or contaminated, the appellant had a chance to cross-examine the government analyst on this issue which the appellant did not do.
16. We have perused the record and we are in agreement with the respondent that this ground of appeal was never raised in the first appellate court; as such we cannot deal with at this stage. Still on the same issue, we take note that the appellant did not cross-examine the government analyst on these allegations. On the issue of the gestation of the pregnancy as 10 months, this Court takes judicial notice of the fact that the gestation of a human pregnancy is 9 months; and while we acknowledge that some babies overshoot the 9 months' period, while others make an early or even premature entry into the world; there is nothing to suggest that this matter fitted within the exceptions of the otherwise accepted medical standard. This ground of appeal therefore fails.
17. On the second ground the appellant argues that the prosecution witnesses' testimonies were marred by contradictions and inconsistencies, raising the main issue of who informed who about the pregnancy, where the complainant was examined and the age of the complainant. The respondent on the other hand argues that any contradiction if at all were not prejudicial to the appellant's case; that it did not matter who was informed of the pregnancy as it was a fact that the complainant was pregnant.
18. With regard to medical treatment the respondent submits that PW1 was categorical that she first visited Lambwe Hospital, later Ogongo and the Homa Bay District Hospital. The P3 form from the record was filled at the said Ogongo sub-district hospital and produced by PW3 and as such the medical evidence was properly produced before court and there was no contradiction and/or material contradiction.



19. On the age of the complainant, the respondent argued that even though the birth certificate indicated that the complainant was born on 8th October 2002 making the complainant 13 years at the time of defilement and the complainant's mother stated that the complainant was born on 13th September 2002 making her 12 years at the time, the age of the complainant at defilement as rightly found by the first appellate court was between 12-13 years which fell within the confines of section 8(2) of the [Sexual Offences Act](#), as it was not disputed that the complainant was below 18 years of age at the time of the offence hence a minor.
20. This Court in *Richard Munene vs. Republic* [2018] eKLR, stated with regard to contradiction or inconsistency in the evidence of the prosecution witnesses that contradictions, discrepancies and inconsistencies in evidence of a witness discredits that witness as unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of an accused person.
21. It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to the prosecution's case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it. In *Dickson Elia Nsamba Shapwata & Another vs. The Republic*, (Criminal. Appeal. No. 92 of 2007), the Court of Appeal of Tanzania addressed the same issue of discrepancies and stated; In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements.

The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.

22. Similarly, in *Erick Onyango Ondeng' vs. Republic* [2014] eKLR, the Court of Appeal cited *Twehangane Alfred vs. Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated: With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.
23. We have combed through the record of the trial court and reanalyzed the evidence. We are unable to note significant contradictions that would necessitate this court to overturn the trial court's decision on this ground. The witnesses recounted what happened and what they knew and therefore, they were consistent in their testimonies before the trial court.
24. As to whether the sentence meted out is excessively harsh, this Court notes that the recent decision by the Supreme Court is to the effect that sentencing under the [Sexual Offences Act](#) is valid and constitutional for as long as section 8 of The [Sexual Offences Act](#) remains in our statute books. The Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (Petition E018 of 2023 [2024] KESC 34 (KLR) (12 July 2024) (Judgment) when tasked with determining whether the imposition of mandatory sentence under the [Sexual Offences Act](#) was constitutional and in compliance with Articles 25, 27, 28 and 50 of [the Constitution](#), held that the imposition of minimum mandatory sentences did not interfere with the independence of the Judiciary under Article 160 of [the Constitution](#), nor did it undermine judicial discretion. The apex Court went on to hold that any sentence that is imposed by a trial court and affirmed by the first appellate court is lawful under the [Sexual Offences Act](#) as long as section 8 of the [Sexual Offences Act](#) remains valid. The Court of Appeal has no jurisdiction to interfere with any such sentence.



25. This Court is well guided by the Mwangi case (supra) and finds that it has no jurisdiction to interfere with the sentence as affirmed by the High Court.

The upshot of the foregoing is that the appellant’s appeal lacks merit and is dismissed.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

