**ABA v Republic (Criminal Appeal 106 of 2020)**
**[2025] KECA 1069 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1069 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 106 OF 2020**

**MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA**

**JUNE 13, 2025**

**BETWEEN**

**ABA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the judgment of the High Court of Kenya at Kisumu (F.A. Ochieng, J) dated 7th October, 2019 in HCCRA No. 59 of 2017)***

## JUDGMENT

1. ABA, the appellant herein, was charged before Maseno Principal Magistrate's Court with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* "SOA". The particulars of the offence were that on diverse dates between the 23rd and 24th days of February, 2015 within Vihiga County, he intentionally caused his penis to penetrate the anus of CM[1], a child aged 3 years.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the SOA. The particulars were that on the same day and place, he intentionally and unlawfully committed an indecent act with CM a boy aged 3 years, by touching his buttocks.

3. The appellant denied the charges leading to a trial in which the prosecution called 5 witnesses. The prosecution case was that on 26th February, 2015 at around 2:00pm PW1 HO [H] the complainant's paternal grandmother was at Luanda Market, when JAA the complainant's maternal grandmother who was staying with the complainant as his parents had separated, came and informed her that the complainant was unwell with the intestines protruding from his anus. She requested H to inform the complainant's father. The complainant's father was informed and on the following day he advised H to take the complainant to Highway Hospital in Luanda. Due to lack of facilities to handle the complainant's injuries, H was referred to Coptic Mission Hospital where the complainant was

admitted for a day where the injuries were managed through surgical intervention and medication. The doctor who attended to him informed H that the injuries sustained were as a result of being sodomized.

4. It was H's testimony that when the complainant was questioned by the doctor and the police officers in her presence about the person who sodomized him, the complainant stated that it was his grandfather who had committed the act on him.

5. PW2 TAM[T] a sister to the complainant's paternal grandmother corroborated Hs' testimony that the doctor explained to them the cause of the complainant's injury and that upon being asked who caused the injuries, the complainant told them that it was his grandfather the appellant herein. It was T's further evidence that the appellant is the complainants' step- grandfather as he had inherited J after the death of her husband.

6. PW3 JAA [J] the complainant's maternal grandmother and the one who was staying with the complainant as the parents had separated, on her part told the court that on 24th February, 2015 at about 5:00 pm while preparing to bathe the complainant, she noticed that his intestines were protruding from his anal opening. She informed H who asked her to take the complainant to her so that she could take him to hospital but did not accompany them to hospital. J further told the court that whenever the complainant played alot, the intestines could come out. When her evidence was inconsistent with her statement, the prosecution sought to declare her a hostile witness.

7. She further stated that she was latter arrested together with the appellant but released. On cross-examination, she admitted that the appellant was a brother to her late husband and termed the allegations against the appellant as false.

8. John Shigali a Senior Clinical Officer at Emuhaya Sub-County Hospital told the court that he examined the complainant on 28th February, 2015. On physical examination, he noted stitches on his back and both thighs. Relying on the medical report from Coptic Mission Hospital which indicated that the complainant had been found to have suffered rectal prolapse which caused the anal muscles to become loose, he concluded that the complainant had been defiled by way of sodomy.

9. Sergent Lydia Migwi investigated the case, arrested the appellant who is the complainant's grandfather and charged him with the present offence. She stated that as per the baptismal card, the complainant was 3 and 1/2 years at the time of the offence.

10. Upon being he placed him on his defence, the appellant gave a sworn statement and called one witness. He recalled that on 4th March, 2015 he woke up early and proceeded to his place of work. He later went to condole with the family of his classmate at Mwiyakho village where he assisted with digging the grave and at 5:00pm, he received a call from the Assistant Chief that police officers were looking for him and he was required. When he went back, he found four officers who handcuffed him and was bundled in a waiting police vehicle where he found J. They were taken to Luanda Police Station and was later charged with the present offence. The appellant admitted knowing the complainant as he was living with J but denied defiling him as there were many men referred as grandfathers. The appellant attributed the case to a grudge between her and H stretching from when he was a County Revenue Collection Officer for collecting taxes from her.

11. DW2 Zaddock Otieno Anyamba the assistant chief Ekamanji Sub-Location told the court that prior to his arrest, the appellant had gone to him and reported that the complainant's paternal grandparents wanted to take him for treatment which he advised the appellant to allow them do so. That he later learnt that J and the appellant had been arrested and got to learn the reasons later. DW2 further stated that the appellant was married with a wife with whom they had never separated and that he was a

person of good character as he had never received any complaints against him. He denied the appellant having inherited J and stated that all he knew was that the appellant is a cousin to J's deceased husband.

12. The trial Magistrate evaluated the evidence tendered and found the appellant guilty of the offence of defilement. He convicted him and proceeded to impose a life imprisonment sentence.

13. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. F. Ochieng, J. (as he then was) who re-evaluated the evidence on record and delivered judgment on 7th October, 2019 upholding the conviction and sentence meted on the appellant.

14. Dissatisfied with the decision of the High Court, the appellant preferred the instant appeal faulting the learned judge for failing: to note the contradictions in the prosecution evidence, to note that the identification was not proper, to evaluate the evidence tendered, the appellant was not accorded a fair trial and that the prosecution case was not proved beyond a reasonable doubt.

15. During the hearing of the appeal, the appellant appeared in person while Mr. Okango, the learned prosecution counsel, appeared for the State. Both parties had lodged written submissions which they relied on with Mr. Okango highlighting his.

16. The appellant faulted the learned Judge for failing to find that the ingredients of the offence of defilement were not proved to the required standards. The appellant contends that his identification was through recognition however, his name was not given in the initial report the reason why the complainant maternal grandmother was arrested. The appellant relied on the case of Francis Muchiri Joseph v Republic [2014] eKLR and in Criminal Appeal No. 97 of 2020 Alex Wenua Chituno v Republic

17. The appellant argued that the prosecution never established that the kuka referred to him and not any other person as no single feature of the alleged kuka was identified.

18. Regarding penetration, the appellant contends that the same was not proved as no forensic examination including DNA was conducted. Further, the date of the alleged offence was not consistent as the charge sheet indicated 23rd and 24th February, 2015, P3 Form indicated 28th February and was signed on 3rd March, 2015. It is further contended that by the time the complainant reached the doctor, he had taken a shower and thus penetration could have not been established. In support of this argument, reference is made to the case of Mark Ciruri M. Mose v Republic [2013] eKLR.

19. The appellant contends further that the prosecution evidence was not corroborated and was marred with material contradictions. First, the complainant never testified but the trial court only relied on the evidence of PW1, PW2, PW3, PW4 and PW5 whose evidence is not protected under Section 124 of the *Evidence Act*. Regarding fair trial, the appellant contends that the complainant did not tender evidence and that the law on intermediaries was not adhered to.

20. On sentence, the appellant complains that he was sentenced to a mandatory minimum sentence which is degrading and unconstitutional.

21. Mr. Okango, on behalf of the respondent, opposed the appeal, submitting that the appellants' identification was proper; that both PW1 and PW2 testified that the complainant stated that it was kuka who caused him the injury. Further, the doctor mentioned to them that the victim had been sodomized. Upon being arrested and brought to the station, the complainant pointed at the appellant as the kuka who had done bad manners to him.

22. It is further contended by the appellant that the failure by the 3-year-old to mention his three names in his statements to the police weakened the evidence on identification through recognition is without merit as the victim identified him as kuka which in their native language meant grandfather.

23. On penetration, the respondent contends that the testimony of the doctor together with medical documents concluded that the victim had been defiled by way of sodomy. That Dr. Shigali clearly stated in his evidence that the injuries sustained were consistent with forceful penetration of his anal opening with a blunt object such as a penis. The respondent maintains that penetration was proved by the medical evidence on record, there is evidence on record that the victim was bleeding from his anus with his intestines hanging out and had to undergo specialized surgery.

24. As regards the failure by the complainant to testify, the respondent submits that the record shows that the complainant did appear before the court but according to the prosecution he "fell apart" whenever he saw the appellant around and that efforts to make him feel comfortable so that he could testify failed to yield positive results. In his determination, the learned judge correctly found that the inability of the complainant to testify could not be a reason enough to disregard the overwhelming evidence tendered against the appellant. It is further contended that in any matter involving a child, the best interests of the child are always paramount and the child victim in this case having expressed discomfort facing the appellant, the court would have been wrong to compel him to testify.

25. Lastly, on sentence, the respondent argues that the sentence of life imprisonment meted out is the statutory mandatory sentence for an offence under section 8(2) of the SOA. In support, the respondent cited the decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) where the Supreme Court of Kenya, reaffirmed the legality of the mandatory minimum sentences in SOA holding that for as long as Section 8 of the SOA remain valid, the various mandatory minimum sentences therein remain lawful; that as correctly meted out by the trial court and upheld by the 1st appellate court, the life sentence is the legal and right sentence that appellant was sentenced to.

26. This being a second appeal, the mandate of the Court on such an 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 Section 361(1) of the *Criminal Procedure Code* (CPC). In the case of Kaingo v Republic [1982] KLR 213 this Court stated thus:

> " A second appeal must be confirmed to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did. See (Reuben Karoti S/O Karanja v Republic [1956 17EACA 146]."

27. Having considered the record, the grounds of appeal, and the rival submissions set out above and in light of this Court's mandate, the issues of law that fall for determination are whether the prosecution proved its case to the required standards and whether the sentence was proper.

28. As to whether the offence was proved, it is trite that to reach a finding of defilement, the prosecution must establish three main ingredients which are; the age of the victim, penetration and the proper identification of the perpetrator.

29. These ingredients are provided for under sections 8(1) and (2) of the SOA which stipulates;

    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".

30. Regarding the first element of age, this Court in the case of Justin Kubasu v Republic [2020] eKLR cited Edwin Nyambogo Onsongo v Republic [2016] eKLR in which the Court cited with approval Mwolongo Chichoro Mwanyembe v Republic, Mombasa Criminal Appeal No. 24 of 2015,

that;

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

31. In the instant case, the age of the complainant was not in dispute. The same was proved through the production of the Baptismal Card and the P3 form which indicated his age as 3 and 1/2 years at the time of the offence. In her evidence, H told the court that the complainant was 3 years and 8 months. This was sufficient credible evidence that proved the age of the minor complainant as 3 and 1/2 years.

32. As to whether penetration was proved, penetration is defined under Section 2 of the SOA as "the partial or complete insertion of the genital organs of a person, into the genital organs of another person." In order to establish the charge of defilement against the appellant, it must be proved that there was an act of penetration that is, the partial or complete insertion of male genital organs, into that of the minor complainant, that the minor complainant was a child under eleven years of age and that the appellant had been positively identified as the person who committed the act of penetration.

33. In Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995 the Supreme Court of Uganda held that:

> "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."

34. In her evidence, J the complainant's maternal grandmother told the court that on 24th February, 2015 at about 5:00 pm while preparing to bathe the complainant, she noticed that his intestines were protruding from his anal opening. She informed H who asked her to take the complainant to her so that she could take him to hospital. At the hospital, the senior doctor who conducted the surgical intervention on the complainant informed H and Truphosa that the complainant had been sodomized. Further, in his evidence, the clinical officer stated that the injuries sustained by the complainant were consistent with forceful penetration of his anal opening with a blunt object such as a penis, and concluded that the patient had been defiled by way of sodomy. There was, therefore, sufficient credible evidence that penetration had taken place.

35. As regards the identity of the person who committed the offence, the appellant was identified by the minor complainant who knew him well. The complainant was categorical that it was kuka who did ''bad manners'' to him. Indeed, while at Luanda police station, the appellant was brought in and the

complainant pointed at him as the kuka who had caused him the injuries. The complainant was staying with J who had been inherited by the appellant upon the demise of her husband. Identification was therefore by recognition.

36. This Court in *Longole & Another v Republic (Criminal Appeal 5 of 2016)* [2024] KECA 483 (KLR) (9 May 2024) (Judgment) cited with approval the decision in Rotich Kipsongo v Republic [2008] eKLR where the Court held that:

> " This Court had occasion to deal with the issue of identification by recognition in several cases, one of them being Kenga Chea Thoya v Republic Criminal Appeal NO 375 OF 2006 (Unreported) where it said,
>
> 'On our own re-evaluation of the evidence, we find this to be a straightforward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger – see Anjononi v Republic [1980] KLR 59."

37. Similarly, in Waingwe v Republic (Criminal Appeal 142 of 2016) [2023] KECA 401 (KLR) (31 March 2023) (Judgment) this Court held that

> " It is commonplace that recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

38. The identification was proper and thus this element was also established to the required standards. In view of the foregoing findings, the offence was proved to the required standard and the first appellate court properly reconsidered and re- evaluated the evidence and came to the correct conclusion that the charge of defilement was proved to the required standard against the appellant, and his defence was properly rejected. His conviction is safe.

39. In his submissions, the appellant alluded to contradiction on the dates of the alleged offence. It must be noted that the court's duty is to determine whether there were contradictions in the evidence tendered, and if so, whether the contradictions (if any), are so material that the trial Magistrate ought to have rejected the evidence as was held by the Ugandan Court of Appeal in Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6. It is not every contradiction that warrants the rejection of evidence. The court 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."

40. The appellant raised the additional grounds that touched on fair trial and failure to allow the complainant to testify through an intermediary. The issues were not raised before the trial court, nor were they among the grounds for appeal before the High Court. The appellant is, accordingly precluded from raising it in this appeal. In the case of John Kariuki Gikonyo v Republic [2019] eKLR

this Court differently constituted cited with approval the decision in Alfayo Gombe Okello v Republic [2010] eKLR Criminal Appeal No. 203 of 2009; where it was 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."

41. In regard to the appeal against sentence, Section 8(2) of the SOA provides the penalty of mandatory life imprisonment for the offence of defilement.

42. Having carefully considered the record and carefully considered the appellant's Petition of Appeal before the High Court, the appellant did not raise any complaint on the constitutionality of the life sentence before the High Court. Therefore, the constitutionality of the life sentence was not an issue placed before the High Court for its determination. Consequently, the first appellate court did not have the benefit of applying his mind on the said ground. Nevertheless, this being a matter of law, this Court can entertain it at this stage.

43. It is common ground that the Supreme Court recently affirmed the constitutionality of the mandatory minimum sentences prescribed by the SOA 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) (Judgment) when it held that:

> "(57) In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...
>
> (62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

44. In light of the finding by the Supreme Court, in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae (supra) affirming the lawfulness of penalties prescribed by the *Sexual Offences Act*, the Court cannot interfere with the sentence. The upshot is that this appeal lacks merit, and is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.**

**ASIKE-MAKHANDIA**

**.....**

**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**