Ayodo v Republic (Criminal Appeal 213 of 2020)
[2025] KECA 1066 (KLR) (13 June 2025) (Judgment)

Neutral citation: [2025] KECA 1066 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 213 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

JUNE 13, 2025

BETWEEN

PAUL OCHIENG AYODO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Homabay, (Karanjah, J), dated 31st day of July 2018 in HCCRA No. 58 of 2017)

JUDGMENT

1. The wheels of justice often turn on the delicate balance of evidence and the law, as seen in this case of Paul Ochieng Ayodo, "the appellant" whose actions on May 2, 2016, in Rachuonyo East District within Homa Bay County, brought him face to face with the full force of the law. The appellant was accused of defiling a 15-year- old girl, EAO., (full name withheld) contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that, on 2nd May, 2016, at Kawuor Location in Rachuonyo East District within Homa Bay County, he unlawfully caused his penis to penetrate the vagina of EAO. Alternatively, he was charged with committing an indecent act with a child. However, since he was neither convicted nor sentenced on this alternative count, we need not rehash the particulars.

2. The case unraveled months later when EAO discovered that she was pregnant and reported to her mother. She provided a vivid account of the events, detailing the alleged defilement and the subsequent discovery of her pregnancy months later. The clinical officer corroborated this with medical evidence, confirming the pregnancy though no DNA test was conducted to establish paternity of the would-be offspring. The assistant chief added weight to the timeline and circumstances, emphasizing the community's response to the allegations. EAO's mother further bolstered the narrative by recounting her daughter's disclosure of the incident, lending credence to EAO's account. Finally, the investigating

officer pieced together the evidence, detailing the steps taken during the investigations, including interviews and the eventual arrest of the appellant.

3. On the foregoing facts and evidence, the trial court convicted the appellant on the main count and sentenced him to 20 years imprisonment. Dissatisfied with the conviction and sentence, the appellant appealed to the High Court at Homabay, arguing that the prosecution failed to prove the case beyond reasonable doubt, citing inconsistencies in the prosecution's evidence and the lack of a DNA test. The High Court, upon reviewing the evidence and submissions, upheld the conviction and sentence, emphasizing the credibility of EAO's testimony and the corroborative evidence provided by the other witnesses.

4. The appellant once again dissatisfied with the judgments of both lower courts, mounted the instant appeal contending that the medical evidence tendered during the trial was inconclusive and failed to establish key elements of the alleged offence beyond reasonable doubt; that the lack of DNA testing and discrepancies in medical findings did not sit well with his conviction; that both courts did not comply with Section 19(1) of the Oaths and Statutory Declaration Act, as they neglected to ascertain whether EAO understood the nature of an oath or the duty of telling the truth before her testimony was received; and that the ingredients of the offence were not adequately analyzed. He further claims that his mitigation was not considered, and that both courts failed to weigh the degree of blame, resulting in an unduly harsh sentence. The appellant also complained that his alibi defence was not given due consideration and therefore impacted negatively on the fairness of the eventual sentence imposed.

5. In his written submissions in support of the appeal, the appellant raised concerns about the severity of the mandatory minimum sentence of 20 years' imprisonment imposed on him arguing that it was excessive given his status as a youthful first-time offender and his demonstrated remorse and commitment to reform. He provided evidence of his positive transformation during incarceration, including certificates for completing rehabilitation programs such as Biblical Studies and the Prisoners Journey, as well as maintaining exemplary discipline. He also mentioned his deteriorating health condition, including impaired vision, as a further reason for seeking leniency in sentencing. The appellant also raised contradictions in the age of EAO. That from the evidence, it was not clear whether she was aged 14 or 15 years.

6. The appellant contended that these contradictions ought to have been resolved in his favour. The appellant also contended that penetration was not proved as the medical evidence did not show that EAO had suffered broken hymen or were spermatozoa seen as a result of the incident. That pregnancy per se was no proof of penetration by the appellant of EAO. The appellant also complained that since EAO was a child of tender years, she ought to have been subjected to voire dire examination in terms of Section 19 of the *Oaths and Statutory Declarations Act*; and that even if it was conducted, it did not meet the threshold. The appellant also lamented in his submissions that the sentence imposed was manifestly harsh and excessive. The appellant concluded by requesting the court to allow the appeal as prayed.

7. In submissions, in opposition to the appeal, the respondent emphasized that the appeal was a second appeal, and as such, the jurisdiction of the Court was strictly limited to consideration of matters of law only as set out in Section 361 (1)(a) of the *Criminal Procedure Code* (CPC). He cited the case of Njoroge v Republic [1982] KLR 388, to assert that this Court should focus solely on legal issues, but accepting and being bound by the concurrent findings of fact by the two courts.

8. It was submitted that the two courts below found that EAO was a child being under the age of 18 years. She was determined to be 15 years old based on the evidence both oral and documentary, which included a baptism card. The respondent therefore dismissed the appellant's claims of contradictions

regarding the age of EAO as lacking merit. That the trial court according to the respondent correctly applied Section 8 of the *Sexual Offences Act*, which establishes age brackets for sentencing purposes. He cited as the correct position, the trial court's reasoning that any variation in age within the stipulated bracket did not affect the legality of the conviction or sentence of the appellant. It did not matter therefore whether EAO was 14 or 15 years old at the time of the incident as that age fell within a stipulated age bracket under Section 8(3) of the *Sexual Offences Act*.

9. On penetration, it was argued that the prosecution had proved penetration beyond reasonable doubt. It was asserted that EAO's pregnancy, which was confirmed through medical evidence, was sufficient proof of penetration. While acknowledging that the incident was reported three months after its occurrence, the respondent contended that this delay did not undermine the evidence presented, as physical signs such as a freshly broken hymen or spermatozoa could not be expected after such lapse in time. The respondent agreed with the trial court's finding that pregnancy served as undeniable proof of penetration, barring exceptional circumstances.

10. Regarding Section 19(1) of the Oaths and Statutory Declaration Act, the respondent refuted the appellant's claim that the trial court failed to properly evaluate EAO's understanding of the nature of an oath and the need to tell the truth. It was clarified that EAO, aged 16 at the time of testifying, was not a child of tender years, and therefore, a voire dire examination was not even necessary. The respondent supported this submission by citing the case of Langat v Republic, [2023] KEHC 26909 (KLR) which opined that such an examination is only required for witnesses classified as children of tender years.

11. On sentence, the respondent submitted that it was both lawful and appropriate under Section 8 (3) the *Sexual Offences Act*. He referred to the Supreme Court's decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 9 (KLR), which upheld the legality of mandatory minimum sentences under Section 8 of the *Sexual Offences Act*. The respondent emphasized that the appellant was sentenced to the minimum statutory term of 20 years' imprisonment as stipulated by law for the offence of defilement involving a victim aged 15 years. The sentence was therefore neither excessive nor unjust.

12. In conclusion, the respondent urged that the appeal was devoid of merit and should be dismissed it in its entirety.

13. This appeal is a second appeal and as such, the jurisdiction is confined to consideration of matters of law only in terms of Section 361(1)(a) of the *Criminal Procedure Code*. Further, that the second appellate court should not ordinarily interfere with concurrent findings of fact by the trial and first appellate courts unless it is demonstrated that such findings were unsupported by evidence, were based on a misapprehension of evidence, or were made on wrong principles of law. The foregoing was aptly captured in the case of Njoroge v Republic [1982] KLR 388, thus:

> " On second appeal, the Court of Appeal is only concerned with points of law. It will not interfere with concurrent findings of fact by the two courts below unless they are shown to have not been based on evidence at all or to have been arrived at on a misapprehension of the evidence or to have been made on wrong principles."

14. Having carefully considered the record, the submissions presented by both parties, and the applicable legal principles, two main issues emerge for our determination: First, whether the prosecution adequately proved the offence of defilement against the appellant beyond reasonable doubt, and second, whether the sentence imposed as a consequence was excessive in the circumstances of the case.

15. We note that the two courts below arrived at concurrent findings of fact that the appellant committed the offence as charged. Both courts were satisfied that the prosecution proved to the required standards

the following elements of the offence: the age of the complainant; penetration; and the appellant as the perpetrator of the offence. These are the main ingredients of the offence that the prosecution is required to prove in order to secure a conviction. On age, both courts relied on the EAO's baptism card that was tendered in evidence. As was held in Francis Omuroni v Uganda, Court of Appeal, Criminal Appeal No. 2 of 2002,

> " In defilement cases, Medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

16. Baptismal card as well the evidence of EAO and her mother was sufficient to establish the age of EAO. Though the appellant questioned the exact age of EAO due to the contradictions in the evidence over the issue, in particular whether she was aged 14 or 15 years at the time of the incident, the trial court opted to go and rightly so in our view, by the Baptismal card and the evidence of her mother. In any event, it did not matter whether EAO was 14 or 15 years old at the time of the incident as that age fell within a stipulated age bracket under Section 8(3) of the *Sexual Offences Act*. We accordingly find no fault with the concurrent findings of the lower courts on this aspect.

17. On penetration, the appellant argued that the medical evidence presented was inconclusive and did not therefore prove the offence of defilement. Specifically, he pointed out the absence of DNA testing to establish paternity of the offspring and the lack of physical signs such as spermatozoa or a freshly broken hymen as evidence that there was no penetration. He was also of the view that pregnancy per se did not connote penetration. However, the trial court relied on EAO's pregnancy as prima facie proof of penetration, reasoning that pregnancy, barring exceptional circumstances, was sufficient evidence of sexual activity. In the persuasive authority of the High Court of Wayu Omar Dololo vs Republic [2014] eKLR, with which we agree with, Mutuku. J surmised that "At the time of examination by the doctor, the complainant was heavy with a child and the pregnancy was visible as observed by the trial court. Indeed, at the time of the hearing the complainant said that she was nine months pregnant. A pregnancy is a biological condition that results from a sexual activity, unless there is evidence that there was artificial implanting of a fertilised ova into the uterus of a female human being..... I am satisfied that the evidence of the pregnancy of the complainant is sufficient proof beyond reasonable doubt that penetration, whether partial or complete took place..."

18. In the circumstances of this case therefore and given that EAO tied the pregnancy to the appellant, there is no doubt at all that there was penetration. The consequences or aftermath of the escapade was all too obvious

19. Turning to DNA testing, the High Court emphasized and rightly so in our view, that DNA testing to ascertain paternity was not necessary in proving the offence of defilement under the *Sexual Offences Act*. What is pertinent is proof of penetration whether complete or partial. Therefore, the absence of DNA evidence did not negatively impact the prosecution's case. In other words, the offence of defilement does not hinge on establishing paternity but rather on demonstrating the act of penetration.

20. Having considered the reasoning of the two courts below, we are satisfied that the prosecution sufficiently proved the element of penetration beyond reasonable doubt.

21. In light of the foregoing, we find no reason to interfere with the concurrent findings of the two courts below on this issue.

22. On the identification of the appellant, the record shows that the appellant was a person well known to EAO. Indeed, he was her paternal uncle. His identification as perpetrator of the offence was therefore

by way of recognition. The two courts below found that EAO's testimony was credible and consistent with regard to the identification of the appellant. This is a finding on the demeanor and credibility of a witness which this Court has to pay homage to. Given further the proviso to Section 124 of the *Evidence Act* which allows the trial court to convict an accused solely on the evidence of the victim, provided that certain conditions are met, we are satisfied just like the two courts below that the identification of the appellant was never in doubt.

23. As to sentence, the appellant argued that the mandatory minimum sentence of 20 years' imprisonment imposed on him under Section 8(3) of the *Sexual Offences Act* was excessive and failed to take into account his status as a first offender, youthful age, and his efforts towards reformation.

24. In Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (supra), the Supreme Court of Kenya held that the mandatory sentences prescribed under the Sexual Offences Act were and are still valid and should be invoked until such time that there is intervention from whichever quarter.

25. In the instant case, the trial court imposed the statutory minimum sentence of 20 years' imprisonment. While the appellant's mitigation, including his remorsefulness and efforts at rehabilitation, are commendable, this Court is bound by the law as it currently stands. The sentence imposed was lawful and cannot therefore be said to be excessive in the circumstances of the case.

26. All said and done we are satisfied that the appellant's conviction was based on sound evidence. The sentence imposed was lawful and appropriate. Consequently, the appeal is for dismissal in its entirety.

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