



REPUBLIC OF KENYA



KENYA LAW
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**Ogitho v Republic (Criminal Appeal E076 of 2022)
[2025] KECA 1067 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1067 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E076 OF 2022
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
JUNE 13, 2025**

BETWEEN

WYCLIFFE OTIENO OGITHO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the judgment of the High Court of Kenya at Kisumu,
(Chemitei, J) dated 16th December 2015, in Kisumu CRA No. 101 of 2014)*

JUDGMENT

1. Wycliffe Otieno Ogitho, “the appellant”, was convicted of the offence of defilement and sentenced to life imprisonment by the Nyando Senior Principal Magistrate’s Court pursuant to Section 8(1)(2)(c) of the *Sexual Offences Act*. The case involved the defilement of a nine-year-old girl (P.O.), whom the appellant lured, along with her four-and-a-half-year-old friend, F, by offering them food. After having food and sending F away, the appellant carried PO on his shoulders into a sugarcane plantation where he defiled her. PO initially concealed the incident from her mother out of fear that she will be punished but later opened up to her. M.A.O. (PW2), her mother thereafter reported the incident to the police. Medical examination conducted ten days later revealed that PO had lost her hymen, consistent with penetration, as documented by clinical officer Nicodemus Mbuge (PW5). Investigating officers PC Caroline Mutai (PW3) and PC Kefa Kasaini (PW4) facilitated the appellant’s arrest and preferred the charges. The appellant in a sworn statement of defence denied the offence and ever meeting PO at any given time. He claimed he was therefore wrongly accused.
2. The trial court nonetheless found the appellant, guilty of the offence charged and convicted him accordingly. Consequent upon the conviction it sentenced him to life imprisonment. In doing so it relied heavily on PO’s testimony, which was deemed credible and consistent particularly with regard to the identification of the appellant, as well as the medical evidence by the clinical officer, confirming



penetration of PO's vagina. The court also accepted the baptismal card of PO as proof of her age, which indicated that she was nine years old at the time of the commission of the offence.

3. The appellant being dissatisfied with the trial courts findings, appealed to the High Court at Kisumu. The appellant raised three main grounds in the High Court: first, whether conviction under Section 8(1)(2) of the *Sexual Offences Act* justifies life imprisonment as a penalty; second, whether it was necessary to subject him to medical examination; and third, whether the age of PO was adequately proved.
4. The High Court re-evaluated the evidence from the trial lower court as required of it and confirmed that Section 8(1)(2) indeed mandates life imprisonment for the offence once proved. The court found no legal requirement for the appellant to be subjected to a medical examination and determined that PO's age was sufficiently established through the baptismal card and testimony from PO herself and her mother. The court emphasized the credibility of PO's testimony and stated that it met the threshold set by Section 124 of the *Evidence Act*, which allows conviction on the sole testimony of a sexual offence victim if the court is satisfied that the victim is truthful. It concluded that the prosecution's case was strong, the evidence compelling, and the appeal therefore lacked merit and dismissed it in its entirety.
5. Being aggrieved by the decision of the High Court, the appellant has approached this Court on second and perhaps last appeal, arguing that the 1st appellate court erred in law by failing to adequately consider the violation of his constitutional right to be arraigned in court within twenty-four hours of his arrest; failing to summon crucial witnesses; failing to appreciate that the medical evidence did not sufficiently corroborate the offence; and that the two courts below did not adequately consider that the appellant was a minor at the time of the alleged commission of the offence and therefore her evidence should have been considered with a pinch of salt. In light of all these grounds, the appellant prayed for the appeal to be allowed.
6. The appeal was heard on 29th April 2025 when the appellant appeared in person while Mr. Okango, learned Assistant Director of Public Prosecutions was present for the respondent.
7. The appellant, relying on his undated but unnecessarily lengthy written submissions, contended that his constitutional rights were violated when he was unlawfully detained in police custody for four days before being arraigned in court, contrary to the constitutional requirement that an arrested person must be presented in court within twenty-four hours of his or her arrest. He submitted that his prolonged detention in police custody beyond the prescribed period infringed upon his fundamental rights to liberty, fair trial, and due process, as enshrined in Articles 29 and 49 of *the Constitution*.

Despite the charge sheet clearly indicating the period of detention, the two courts below failed to adequately address this violation, instead shifting the burden to him to prove the circumstances surrounding his arrest.
8. Furthermore, the appellant argued that the trial court erred by failing to summon the investigating officer to explain the delay in his arraignment, thereby neglecting its constitutional duty to safeguard the appellant's constitutional rights. He asserted that this omission amounted to a grave miscarriage of justice, particularly as he was unrepresented during trial. He maintained that the violation of this right undermined the integrity of the trial process, warranting a declaration of a mistrial.
9. The appellant further submitted that the prosecution failed to call crucial witnesses whose testimony was necessary to establish the truth of the allegations against him. Two individuals, Roseline Awuor and Linet Akoth, who were mentioned in trial proceedings as having received the first report from PO, were never summoned to testify. Despite acknowledging their importance as witnesses, the prosecution did



not seek court's intervention to compel their attendance. The appellant contended that this omission severely weakened the prosecution's case thereby casting doubt on the credibility of the allegations.

10. Additionally, the appellant argued that the medical evidence presented during trial did not corroborate the offence of defilement. He highlighted that the medical examination was conducted ten days after the alleged incident, yet the medical officer reported no injuries on the P3 form. While the broken hymen was noted, the absence of signs of trauma or bleeding raised doubts about the reliability of the findings. The appellant submitted that in defilement cases, timely medical examination is critical in establishing penetration and supporting allegations with physical evidence such as injuries to the hymen or semen traces. The delay in examining PO, he argued, raised reasonable doubt regarding the conviction.
11. Moreover, the appellant asserted that he was a minor at the time of the commission of the offence and, as such, should have been accorded special legal considerations. During his mitigation, he informed the trial court that he was 17 years old, which implied that he was only 15 years old at the time of the commission of the offence. His assertion was further reinforced by PW2's testimony, when she repeatedly referred to him as a "boy."
12. In light of the foregoing, the appellant prayed that this Court allows the appeal in its entirety.
13. In opposition Mr. Okango submitted that the appellant's conviction and sentence was proper. That the first appellate court properly upheld the conviction and sentence. That no errors of law were noted warranting intervention by this Court. That the issue of long detention in police custody was addressed by the trial court and was never raised again in the first appellate court. Accordingly, this Court is barred from interrogating the issue.
14. Regarding crucial witnesses, the respondent argued that Roseline Awuor and Linet Akoth were not witnesses who actually saw the events as they unfolded. Therefore, their failure to testify did not prejudice the appellant's defence. In support of this proposition, counsel relied on the case of *Bukenya & Others v Uganda* [1972] EA 549. On medical evidence, counsel asserted that oral testimony alone can find a conviction for a sexual offence, in terms of Section 124 of the *Evidence Act* and as was also held in *DWM v Republic* [2024] KEHC 3952. Lastly, the appellant's age was conclusively assessed, confirming his status as an adult at sentencing, negating any claims of improper sentencing. Given the lack of legal errors noted in the judgment of the first appellate court, counsel urged this Court to dismiss the appeal in its entirety.
15. As this is a second appeal, our jurisdiction is strictly confined to consideration of matters of law only, as set out in Section 361(a) of the *Criminal Procedure Code*. And this Court generally does not interfere with concurrent findings of fact by the trial and first appellate courts unless those findings are not supported by evidence, based on a misapprehension of the evidence, or reached on wrong legal principles. See the case of *Karingo v Republic* [1982] KLR 213.
16. We consider the four grounds raised by the appellant to be issues of law worth of our consideration. The appellant contends that he was unlawfully detained for four days prior to being arraigned in court, contrary to Article 49(1)(f) of *the Constitution*, which stipulates that an arrested person must be presented in court within 24 hours. The trial court found that the appellant was first detained by members of the public on December 20, 2012, transferred to Chemelil Police Post the following day, and arraigned in court on 24, December 2012, which was a Monday, in explaining the delay. The appellant having been arrested over the weekend; it was not possible to arraign him before Monday which was the earliest possible working day since our courts do not offer services over the weekends. And this is what exactly happened. The first appellate court upheld this finding, stating that such delays are permissible when weekends or public holidays intervene.



17. In our view therefore the two courts below adequately considered the delay and found it justified. The appellant bore the burden of proving that the delay led to a miscarriage of justice, which he did not. The Supreme Court in *Murunga v Republic* [2020] eKLR held that a breach of fundamental rights, including illegal detention, does not automatically vitiate the trial unless it is shown that the violation prejudiced the accused and that the proper remedy is to seek redress through a constitutional petition rather than challenge a conviction. Accordingly, this ground lacks merit and is dismissed.
18. The appellant also argued that two key witnesses, Roseline Awuor and Linet Akoth, who were mentioned during trial, were not called to testify. The legal position on calling of witnesses by the prosecution was set out in the case of *Bukenya & Others v Uganda* [supra], where the court held that the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be adverse to their case, and that failure to call such crucial witnesses may lead to an inference that their testimonies would have been unfavorable to the prosecution.

Applying this standard, we note just like the 1st appellate court that, Roseline Awuor did not witness the alleged offence firsthand. She was just told about it. Her testimony at best would have been hearsay, adding little evidentiary value, while Linet Akoth was listed as a witness but refused to appear, despite several efforts by the prosecution.
19. The Supreme Court in *Republic v Malombe* [2021] eKLR, held that failure to call a witness does not automatically prejudice an accused unless it is demonstrated that their testimony was crucial to determining guilt or innocence and that courts must weigh the necessity of additional testimony against existing evidence. Since no adverse inference can be drawn from the absence of these witnesses for the reasons we have given, this ground lacks merit and is accordingly dismissed.
20. The appellant argues that medical evidence did not sufficiently corroborate the charge and that the delay in examination of PO undermined the prosecution's case. It is settled law that medical evidence is not mandatory for conviction for a sexual offence, provided the victim's testimony is credible. In *DWM v Republic (Criminal Appeal E044 of 2021)* [2024] KEHC 3952, this Court held that the absence of medical examination to support the fact of rape is not decisive, as the fact of rape or defilement can be proved by oral evidence or circumstantial evidence without medical evidence. Furthermore, Section 124 of the *Evidence Act* allows a court to convict an accused person based solely on the victim's testimony, provided the testimony is credible and truthful. In this case, PO's testimony was clear, consistent, and unrebutted, the clinical officer (PW5) confirmed penetration, and baptismal records confirmed PO's age. Thus, the absence of immediate medical examination does not invalidate the conviction. Indeed, the foregoing notwithstanding, the appellant seems to admit to the offence when under cross examination on defence he muttered: "It is true I asked PO if she was not happy about what I did to her. I asked her this because I did not know her"
21. The appellant also claimed that he was a minor at the time of commission of the offence and should have received different legal considerations. In *Nyasimi v Republic (Criminal Appeal E026 of 2021)* [2023] KEHC 20234, the Court emphasized that age assessments must be authenticated, and accused persons have a right to challenge them through cross-examination. In the present case, the trial court ordered an age assessment of the appellant which confirmed that he was at least 20 years old at the time of the commission of the offence. The appellant did not successfully challenge the assessment during trial. Accordingly, the sentencing provisions under Section 8(2) of the *Sexual Offences Act* were correctly and properly invoked. Thus, the appellant's claim to the contrary is unsubstantiated, and this ground is dismissed as well.
22. Having considered all the four grounds of appeal, we find no errors of law in the findings of the two courts below. Accordingly, the appeal is devoid of merit and is accordingly dismissed in its entirety.



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

ASIKE-MAKHANDIA

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

