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**Okoth v Republic (Criminal Appeal E124 of 2023)
[2025] KECA 1458 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1458 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E124 OF 2023

PO KIAGE, LA ACHODE & JM NGUGI, JJA

JULY 31, 2025

BETWEEN

FRANCIS OUMA OKOTH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Ogembo, J.) dated 9th November, 2022)

JUDGMENT

1. The appellant, Francis Ouma Okoth, was the accused person in the trial before the Chief Magistrate's Court at Kibera in Sexual Offence Case No. 64 of 2015. He was charged with the offence of defilement contrary to "section 9(1) as read with section 9(1)(2) of the *Sexual Offences Act*, No. 3 of 2006." The particulars of the offence were that on the 1st day of November, 2015, at Kibera Katwekera, in Lang'ata Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LAA, a child aged 7 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as those in the main charge.

3. The appellant denied the charge, and the matter proceeded to a full trial. At the conclusion of the hearing, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment — the mandatory sentence under section 8(2) of the *Sexual Offences Act*. In delivering the judgment, the magistrate observed that, based on the age of the complainant, the charge should properly have been brought under section 8(1) as read with section 8(2) of the Act. While this was the formulation in the original charge sheet, it was later amended. Nonetheless, the magistrate held that, apart from the citation of the statutory provision, the remaining particulars in the charge sheet clearly disclosed

the offence of defilement, which was read to the appellant, enabling him to mount a proper defence. He concluded that the error was procedural and curable under section 382 of the *Criminal Procedure Code*, and that no prejudice had been occasioned to the appellant.

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

5. The High Court (D.O. Ogembo, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 8th November, 2022.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised six (6) grounds in his Amended Grounds of Appeal, which in summary are that: the prosecution did not establish a prima facie case; the evidence against him was insufficient to procure a conviction; his defense and mitigation were not considered; the mandatory/life sentences under the *Sexual Offences Act* are unconstitutional; and the sentence meted was disproportionate with the circumstantial evidence adduced.

7. A summary of the evidence that emerged at the trial through seven

   (7) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.

8. The (complainant), LAA, was aged seven (7) years and a class one

   1. pupil at Hope Academy at the time of the incident. She testified as PW1 and gave sworn testimony after she was subjected to voir dire. She told the court that on 1st November, 2015, she was playing with her friend, Duncan, outside the appellant's house. The appellant was her neighbour and lived just behind their plot. The appellant called her and sent her with Kshs. 10 to bring him "kangumu" which her mother used to sell. She did as she was told but when she got into the appellant's house, he locked the door, put her on a mattress which was on the floor, removed her clothes (a pair of trousers and shirt) and then his trousers, and put his penis in her vagina. PW1 referred to the appellant's penis and her vagina as "dudu". She described the appellant's "dudu" as "a thing used to urinate"; and she touched her private part to illustrate what she meant as her "dudu".

9. PW1 stated that she felt pain. Moments later, Doreen, a neighbour, went for her at the appellant's house and found her naked. The appellant then dressed her and she went home and told her aunt what had happened.

10. Tabitha Akinyi, the complainant's aunt, testified as PW2. She told the court that she resided with her sister, the complainant's mother and her family. However, on 1st November, 2015, while she was inside the house, she was called by some children who were playing outside. They told her that something had happened to the complainant at Doreen's house. She then went to Doreen's house, which was next to the appellant's house, and thereat Doreen informed her that she had gone for the complainant at the appellant's house and when she opened the door, she found her naked, whilst the appellant was trying to dress her.

11. Upon returning home, PW2 found the complainant crying and when she tried to check her, she refused and told her that she felt pain on her thighs. She took her to hospital where she was examined and treated. The following day, she reported the matter to the chief who took them to Kilimani Police Station. She stated that the complainant was born on 1st June, 2008, and produced her birth certificate as evidence.

12. PW3 was Maureen Awuor, the complainant's mother. It was her evidence that on 1st November, 2015, she had gone for a meeting and when she returned in the evening at around 6.30pm, she was informed that the appellant had "raped" the complainant and the matter had been reported to the chief. She immediately went to the chief's office and waited for him to return with the complainant and PW2. PW3 noticed that the complainant had difficulty in walking and was in pain. She confirmed that the complainant was born on 1st June, 2008; and that the appellant was their neighbour and used to visit them, as they were also friends.

13. Pacific Awuor Onyialo, a nursing officer stationed at Kibera South Health Centre, was PW4. She testified on behalf of Florence Maganga, who examined the complainant. She informed the court that the complainant was accompanied to the hospital by PW2 and reported that she had been defiled by a person known to her. Upon examination, it was found that there was redness and swelling on her vagina; and her pair of panties was dirty. A vaginal swab was taken for laboratory examination, and she was also tested for HIV, Syphilis and Hepatitis B.

14. Dr. Kizzie Shako, of Nairobi Surgery, was PW6. She informed the court that she examined the complainant on 2nd November, 2015, and found that: the anatomy of her external genitalia was normal; her hymen was bruised; and there was a notch in her vagina at 2 o'clock, which she stated was as a result of a healing wound. She also testified that the complainant was treated at Kibera South Health Centre, where her specimen was taken for analysis.

15. Sergeant Ruth Kioko was the investigating officer in the case. She testified as PW5 and told the court that on 2nd November, 2015, a report was made at the Kilimani Police Station by the complainant and her aunt. She also interrogated the appellant when he was taken to the Police Station by PC Makori (PW7). She investigated the case and made recommendations for the appellant to be charged.

16. PC Patrick Makori, was the last witness. He told the court that the appellant was arrested by a member of the public on the allegation of defilement and taken to Sara Ngombe AP post; whereat he re- arrested him and referred him to Kilimani Police Station for further investigation.

17. When he was placed on his defense, the appellant gave unsworn testimony and called no witnesses. He denied the charge against him and testified that on 2nd November, 2015, while at his house, he was arrested by a group of people who took him to the chief's camp and accused him of defiling a child. He claimed that he was framed by PW3 who had been threatening him that she would do something that he would regret.

18. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Vitswenga appeared for the respondent. Both parties relied on their submissions.

19. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. For purposes of this section, severity of sentence is defined as a matter of fact. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> "This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts

below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

20. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. We will now address them.

21. First, the appellant alleged that the prosecution "did not establish a prima facie case" and contended that the learned judge did not evaluate the facts and evidence as required by the law. The appellant submitted that the complainant's hymen was bruised, red and tender but still intact; and the PRC form was not conclusive on the issue of penetration. Thus, penetration was not proved, and neither was the age of the complainant nor the identity of the perpetrator. It was his contention that a bruise does not define penetration under the *Sexual Offences Act* and since the complainant testified that she had no blood stains, and there was no physical harm indicative of defilement. Rather, the prosecution did not properly investigate the case and opted to exaggerate issues in a trial that was not fair in order to secure an easy and quick conviction.

22. The appellant further submitted that the prosecution did not take him for DNA examination because the DNA evidence "would have backfired." According to the appellant, the same left a loophole as it meant that the prosecution did not discharge its legal burden of proof beyond reasonable doubt. He cited Republic vs. Francis Muniu Kariuki (2017) eKLR for the proposition that inconclusive medical evidence raises reasonable doubts especially when there are other factual contradictions in the case.

23. The respondent submitted that the prosecution had proved its case beyond reasonable doubt. It was argued that the complainant's age was conclusively established through the testimony of both PW1 and her mother, PW3, who produced a birth certificate confirming that PW1 was seven years old at the time of the incident — an age at which she could not legally consent to any sexual activity. The respondent further submitted that PW1, PW2, and PW3 all testified that the appellant was their neighbour, a fact the appellant did not dispute in his defence. Accordingly, the respondent contended that the identification of the appellant was by recognition, as the complainant and the witnesses were well acquainted with him.

24. The respondent also emphasized the consistency of PW1's testimony, noting that she recounted the same version of events to multiple witnesses—namely, PW2, PW3, PW4, and PW5—without material contradiction. Regarding the element of penetration, it was argued that PW1's account was detailed and was corroborated by uncontroverted medical evidence from PW4 and PW6. To support this submission, the respondent cited Mark Oiruri v. Republic, Criminal Appeal No. 295 of 2012 [2013] eKLR, where the Court held that penetration need not be deep; even superficial penetration satisfies the statutory definition of defilement. On this basis, the respondent maintained that the trial court correctly found that the prosecution had established a prima facie case warranting the appellant's being placed on his defence.

25. We have perused the trial record. We note that there were concurrent findings of fact by the two courts below on all the three ingredients of the offence of defilement: the age of the complainant; the identity of the perpetrator; and the fact of penetration.

26. As aforesaid, this Court should not interfere with concurrent findings of fact unless they are not supported by evidence or are based on wrong principles or if there has been misdirection or non-direction on a point of law, or where the conclusions are perverse or not supported by evidence. See Njoroge v Republic [1982] KLR 388 and Kaingo v Republic [1982] KLR 213. In the present case, we see no such reason to interfere with the concurrent findings of the courts below. Specifically, the two complaints related to factual findings made by the appellant are unavailing: penetration was proved

through the oral testimony of the complainant and medical evidence. Contrary to the appellant's arguments, even partial penetration is sufficient to prove defilement; and there is no legal requirement that DNA evidence be presented in order to secure a conviction on a charge of defilement. This is because sexual offences are proved by any admissible cogent and credible evidence. See AML vs. Republic (2012) eKLR and section 36 of the *Sexual Offences Act*. Section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including DNA testing to establish the linkage between the accused person and the offence. However, that provision is not couched in mandatory terms.

27. We also agree with the respondent that the two courts below sufficiently considered the defense of the appellant and were correct in dismissing it. On this question, the trial court rendered itself thus:

> "The accused denied the charges herein and told the court that the complainant's mother had been threatening him. He did not however state the reasons for the alleged threats and neither did he cross-examine the complainant's mother about the same when she testified. In fact, when the incident happened, the complainant's mother was away and only came to learn about the same later after returning to the house in the evening. It cannot therefore be true that she framed the accused as he alleges. I therefore find his defence not convincing and that the same only came as an afterthought."

28. On appeal, the High Court rendered itself thus:

> "On the defence of the appellant, the appellant denied the charge and pleaded that it is PW3, mother of PW1 who framed him on this matter. It is worth noting that when PW3 gave evidence in court, the appellant had the opportunity to cross-examine her. He did so. However, he did not raise this issue with the witness. At the same time, even in his defence, he gave no details of how he was framed, neither did he even give any explanation of what he really meant. I sincerely do not find any merit in his defence and I find that the trial court was spot on in dismissing the same."

29. It is our finding that the two courts below sufficiently considered the appellant's defence and we have nothing useful to add, and certainly have no reason to interfere.

30. With regard to mitigation, it is our finding that the record shows that the appellant was given an opportunity to mitigate and he indicated to the court that he had nothing to say. Therefore, the trial court had nothing to consider other than the aggravating factors of the case, and the fact that the appellant was a first offender. As such, the appellant cannot allege that his mitigation was not considered.

31. Lastly, the appellant submitted that the mandatory nature of sentences in the *Sexual Offences Act*, robbed the trial court's discretion to determine sentences in accordance with the circumstances of each case and violates Articles 25(c), 27, 28, 47, 50 and 159(2)(e) of *the Constitution* and sections 216 and 329 of the *Criminal Procedure Code*. He also complained that the sentence meted out was disproportionate with the circumstances of the case.

32. We acknowledge the submissions and authorities cited by both parties. However, a fairly recent decision by the Supreme Court in Republic vs. Joshua Gichuki Mwangi and 4 Others, Petition No. E018 of 2023, has settled the debate on whether minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional and whether courts have discretion to impose sentences below

those prescribed by the *Sexual Offences Act*. In short, the apex court has held that they are not unconstitutional thus:

> "56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.
>
> 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."

33. We are bound by the judgment of the Supreme Court and cannot interfere with the life sentence that was imposed on the appellant by the trial court and upheld by the High Court since the appellant was charged and convicted under section 8(2) of the *Sexual Offences Act*.

34. The upshot is that the appellant's appeal against both conviction and sentence is dismissed.

35. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

P. O. KIAGE

....

JUDGE OF APPEAL

L. ACHODE

.... JUDGE OF APPEAL

JOEL NGUGI

.... JUDGE OF APPEAL

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

Signed

Deputy Registrar