Kiptoo v Republic (Criminal Appeal 337 of 2018)
[2025] KECA 1379 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1379 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 337 OF 2018

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JULY 25, 2025

BETWEEN

JOSEPH KIPTOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (D. K. Kemei, J.) dated 4th September 2018 and delivered (O. A. Sewe, J.) on 14th November 2018inCRA No. 141 of 2015)

JUDGMENT

1. Joseph Kiptoo, [the appellant] was convicted of the offence of defilement contrary to section 8 [1] as read with section 8 [2] of the *Sexual Offences Act* [the Act] at the Chief Magistrate Court at Eldoret in Criminal Case No. 1 of 2013. It was alleged that on 28th December 2012 at Aturei Village in Wareng District within the Rift Valley Province, he unlawfully and intentionally caused his penis to penetrate the vagina of F.C., a child aged 8 years. He faced an alternative count of committing an indecent act with a child contrary to section 11 [1] of the Act. The accusation was that on the same day and location as in the main count, he unlawfully and intentionally caused his penis to come in contact with the vagina of F.C., a child aged 8 years.

2. The appellant pleaded not guilty to the said charges. In the ensuing trial, the prosecution called 6 witnesses, namely, PW1, [a doctor], the complainant [PW2], a neighbor to the complainant [PW3], the complainant's mother, [PW4], a neighbor who had been tasked by PW3 to take care of the children [PW5] and a Police Officer [PW6]. The defence case rested on his sole unsworn testimony. In a nutshell, the crux of the prosecution case was that the appellant defiled the complainant, a child aged 8 years, and that all the ingredients of the offence of defilement were proved to the required standard. The nub

of the appellant's defence was a complete denial of the offence. It is summed up in his own unsworn defence in which he stated:

> " The offence is not true. On the material day I was at Aldai. I had gone for a ceremony. When I returned at the centre I met people I did not know.
>
> They apprehended and took me to the police station. I was charged with the offence."

3. After considering the evidence tendered by both sides, the trial Magistrate was persuaded that the prosecution had proved its case against the appellant to the required standard and convicted him accordingly. While passing the sentence, the learned Magistrate stated:

> " ...The accused was entrusted with the children and took advantage to defile the girl of 8 years. Being a man of 65 years, he should have known better. It is beyond the court to exercise any discretion since the penalty is set by the law. The only sentence for that of [sic] life imprisonment. The accused is sentenced to life imprisonment."

4. The appellant appealed against conviction and sentence in Eldoret High Court Criminal Appeal No. 141 of 2015 citing the following grounds: [a] that the evidence adduced did not establish his guilt to the required standard; [b] that there was no medical evidence connecting him with the offence; and, [c] his defence was not considered. However, in the impugned judgment dated 14th November 2018, Kemei, J. dismissed his appeal both on conviction and sentence for being devoid of merit.

5. In his quest for justice, the appellant has appealed to this Court seeking to overturn the High Court decision both on conviction and sentence. In his undated grounds of appeal, he faults the learned Judge for: [a] upholding the conviction and the mandatory sentence of life imprisonment which he contends was passed without considering the circumstances under which the offence was committed and that his rights under Article 50 [2] [p] of *the Constitution* were violated; [b] finding that the ingredients of the offence were proved; [c] failing to consider his defence.

6. In his submissions in support of his appeal, the appellant who was unrepresented described the sentence imposed upon him as unconstitutional arguing that section 8 [2] of the Act is couched in mandatory terms depriving the trial court the discretion to impose an appropriate sentence depending on the circumstances of the offence and the accused person's mitigation, therefore, he was not accorded a fair trial nor could he benefit from a lesser severe penalty guaranteed by article 50 [2] [p] of *the Constitution*. This, he contended deprived him the right to access justice under article 48 of *the Constitution*.

7. The other ground urged by the appellant is that the ingredients of the offence were not proved. Specifically, the appellant maintained that the complainant's age was not proved conclusively because the charge sheet and the P3 form stated that the complainant was aged 8 years, the complainant said she was aged 9 years and identified her birth certificate, while her mother stated that she was born in 2005. The doctor said she was 8 years. He argued that since no age assessment was done, her age was not conclusively proved nor was the maker of the birth certificate called to produce it in court. To buttress his argument, the appellant cited Francis Omuroni v Uganda Criminal Appeal No. 2 of 2000 in support of the proposition that medical evidence is important in determining the age of a victim and the doctor is the only person who can professionally determine the correct age. He also cited Kaingo Elias Kasomo v Republic Criminal Appeal No. 504 of 2010 [unreported] and Alfred Gombe Okello v Republic [2010] eKLR to underscore that the age of the victim of a sexual offence is a critical component forming part of the charge and it must be proved.

8. In his bid to persuade this Court that penetration was not proved, the appellant cited the definition of penetration in section 2 of the Act and maintained that in absence of scientific evidence, it could not have been proved and added that the evidence tendered by the doctor did not prove this crucial element of the offence. To fortify his argument, he cited PKK v Republic [2018] KEHC 9260 [KLR] in support of the holding that absence of hymen does not necessary mean there was penetration because it can be broken by other causes.

9. The other ground argued by the appellant is that his defence was not considered. Citing Victor Mwendwa Mulinge v Republic and Ouma v Republic [1986] KLR 619, he argued that the prosecution bears the burden of proving the falsity of an accused person's defence.

10. Lastly, the appellant urged this Court to consider the period he was in custody pending trial and conviction.

11. The appeal was vehemently opposed by the respondent's counsel Ms Norah Limo, Principal Prosecution Counsel who maintained the prosecution proved its case to the required standard. In particular, counsel submitted that the complainant's evidence was sufficiently corroborated, and that the proviso to section 124 of the *Evidence Act* permits the admission of evidence of a single witness if the only evidence is that of the alleged victim of the offence, provided the Court for reasons to be recorded in the proceedings is satisfied that the alleged victim is telling the truth. She relied on J.W.A. v Republic 2014 eKLR in support of the said submission. Counsel pointed out that the complainant's evidence was corroborated by PW3, [her friend and neighbor] to whom she disclosed that the appellant had defiled her and that she was feeling pain in her private parts. Together with PW3, they reported the incident to PW5, who called the complainant's mother who had travelled to attend a funeral and informed her. Also, counsel argued that the defilement was corroborated by the P3 form, therefore, there were no contradictions at all, since the evidence adduced was coherent and cogent.

12. Regarding the complainant's age, Ms Limo maintained that it was proved to the required standard and cited this Court's decision in Richard Wahome Chege v Republic [2014] eKLR in support of the holding that there cannot be better evidence to prove the age of a child than that of the mother, and that age of a child is not solely proved by production of a birth certificate. Counsel maintained that the complainant's mother in her evidence was very clear that the child was aged 8 years. Further, PW6 availed the birth certificate which clearly indicated that the complainant was aged 8 years.

13. Regarding the element of penetration, Ms Limo submitted that the doctor's evidence was that the minor's hymen was torn, and a high vaginal swab disclosed numerous epithelial cells. These findings were recorded in the P3 form; therefore, this evidence corroborated the minor's evidence.

14. Addressing the question whether the appellant was properly identified, Ms Limo cited Ogeto v Republic [2004] KLR 19 in support of the proposition that the identity of an accused person can be proved by a single witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult. Counsel asserted that the appellant was not a stranger to the minor because he had worked in her home for two years, a fact the appellant admitted in his defence. She maintained that as she testified in court, the minor had no difficulty pointing out the appellant as the one who defiled her and added that the incident took place during daytime.

15. Regarding sentence, counsel stated that the sentence imposed is clearly provided at section 8 [2] of the Act, therefore, it is lawful. She urged this Court to uphold it and relied on the Supreme Court decision in Republic v Evans Nyamari Ayako, [2025] KESC 20 [KLR] in which the Court of Appeal had set aside the sentence of life imprisonment imposed by the trial court and upheld by the High Court and substituted it with the definite sentence of 30 years, but the Apex Court overturned the Court of

Appeal decision, and set aside the sentence of 30 years and restored the sentence of life imprisonment, which it maintained is the legitimate sentence.

16. This is a second appeal, therefore, our mandate under section 361 [1] of the Criminal Procedure Act is restricted to considering matters of law only, unless it is shown that the courts below considered matters that they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. On matters of fact, we must pay homage to the concurrent findings of the two courts below. We should not lightly interfere with their conclusions unless it is demonstrated that they considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the two courts below were plainly wrong in their decision, in which case such errors would be treated as matters of law. As was stated by this Court in David Njoroge Macharia v R, [2011] eKLR, under Section 361 of the *Criminal Procedure Code*:

> "Only matters of law fall for consideration and the court 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 also Chemagong v Republic [1984] KLR 213]."

17. Upon considering the evidence and the parties' submissions, we find that the following issues will resolve this appeal:

    a. Whether the prosecution proved its case to the required standard.

    b. Whether the first appellate court failed to consider the appellant's defence.

    c. Whether the appellant's rights under Articles 48 and 50 of *the Constitution* were violated.

    d. Whether the sentence imposed is unconstitutional.

18. Regarding the first issue, determining whether the prosecution proved its case to the required standard essentially entails examining whether the three ingredients of the offence of defilement were proved, which are: the complainant's age, penetration and whether the appellant was correctly identified as the offender.

19. The appellant deployed a lot of energy arguing that the complainant's age was not sufficiently proved and that the evidence tendered regarding age is contradictory. He argued that the charge sheet stated she was 8 years, the complainant gave her age as 9 years, the doctor also gave her age as 8 years, the P3 indicated that she was 8 years while the mother stated that she was 9 years. Therefore, the evidence on the question of age is contradictory. He contended that no age assessment was done, therefore, the complainant's age was not proved.

20. After considering the said evidence, the learned Magistrate was satisfied that the complainant's age was sufficiently proved. In agreeing with the learned magistrate, the learned judge had this to say:

> "As regards the aspect of the age of the complainant, a birth certificate was produced by the Investigating officer as exhibit No. 2. The said birth certificate indicated that the complainant's date of birth as 20/3/2005. Hence at the time of the incident on 28/12/2012 the complainant's exact age was seven years nine months and eight days. Even though the age indicated on the particulars of the charge is 8 years, I find the complainant's age was just about that age having celebrated her seventh birthday on 20/3/2012 and her next one was scheduled to be on the 20/03/2013. The failure to indicate the exact age on the charge sheet

is not at all fatal to the prosecution's case since the age is within the age bracket contemplated under Section 8 [1] [2] of the *Sexual offences Act* for purposes of sentencing which does not exceed 11 years. It is therefore not in doubt that the complainant's age was approximately 8 years old at the time of the incident and she was therefore a child as described by Section 2 of the Children's *Act No. 8 of 2001*."

21. Notably, the appellant has capitalized on the contradictions in the evidence as highlighted above. However, the complainant's birth certificate no. 0552891 marked as exhibit 2 clearly shows that she was born on 20th March 2005. The offence was committed on 28th December 2012. A Simple calculation shows she was 7 years as at the time of the offence. Much as the appellant deployed too much energy contesting the complainant's age citing the contradictions in the evidence, nothing turns on this argument for the simple reason that as the evidence clearly shows, the child was below 11 years, which is the age limit prescribed by section 8 [2] of the Act.

22. But, more important, it is settled law that the age of a victim of a sexual offence may be proved in various ways as was stated by this Court in Edwin Nyambogo Onsongo v Republic [2016] eKLR thus:

> "... 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."

23. We have looked at the birth certificate. It clearly states the date of birth as mentioned earlier. Notably, as at the date of the offence, she was 7 years, a fact confirmed by the birth certificate. Minor inconsistencies in evidence do not necessary render the evidence incredible unless the inconsistencies are substantial. There is ample evidence to confirm that as at the date of the offence, the appellant was aged 7 years. In any event, as mentioned above, all the evidence tendered clearly shows that the complainant's age was within the purview of section 8 [2]. Therefore, we find no reason to fault the two courts below regarding their concurrent findings on the complainant's age.

24. The next question is whether penetration was proved to the required standard. The appellant argues that penetration was not scientifically proved and that the hymen can be broken by other causes. The starting point in addressing this issue is to recall the definition of penetration at section 2 of the Act which states it means:

> "The partial or complete insertion of the genital organs of a person into the genital organs of another person."

25. Determining the question of penetration, the learned trial magistrate stated:

> "In her testimony Gladys said she traveled to attend a funeral leaving her two children Faith and Jepchumba at home with the accused. On 28.12.2015, Faith said the accused carried her from the kitchen and defiled her. The next day while herding cows with PW3 Jael, the child who is older than Faith was told that Malakwen [the accused] had done bad manners to her and she was in pain. She informed her mother who in later informed Faith's mother...

The incident is said to have happened on 28.12.2015, when she was examined on 30.12.2015, Dr. Yatich confirmed that Faith was found to have erythematous on the perineum, and hymen and also tears on the hymen at position 3 and 12 o'clock."

26. Addressing the same issue, the first appellate court stated:

> "On the issue of penetration, the complainant in her testimony stated that the Appellant inserted his penis into her vagina and she felt pain. The Complainant was later escorted to Moi Teaching and Referral Hospital for examination where the doctor confirmed that the Complainant's hymen had been torn. The P.3. form was duly produced as exhibit No. 1. The issue of penetration was thus established by the evidence of the Complainant and the doctor. Penetration need not be complete since by dint of Section 2 of the *Sexual Offences Act* No. 3 of 2006 penetration is the complete or partial insertion of the genital organs of a person into the genital organ of another. I am satisfied that the aspect of penetration was properly established by the prosecution."

27. We note that the complaint gave an account of how the appellant defiled her. Her evidence was supported by the medical evidence presented by PW1 and the testimony of PW3. The P3 Form clearly states the findings on examination listed earlier, therefore, we need not rehash the findings here. Upon considering the totality of the evidence adduced, we are satisfied, just like the two courts below that the evidence presented by the prosecution, successfully proved that the complainant was defiled. We therefore find no basis to fault the two courts below.

28. The other issue is whether the appellant was positively identified as the offender. It is not disputed that the appellant was working at the complainant's home so he was well known to the complainant. Regarding this issue, the trial court stated:

> "On identification, the same was by recognition in that PW2, PW4 and PW5 positively identified the appellant as the person who used to work for parents of PW2. PW4 stated that appellant had been left at home alone with the minor. He was positively identified. The appellant did cross examine all the witnesses and therefore, his ground that he was not given an opportunity has no basis."

29. The first appellate court captured this issue aptly when it stated:

> "As regards the aspect of identification of the perpetrator, it was the evidence of the complainant that it was the Appellant herein who got hold of her and tied up both her hands and legs then removed her clothes and defiled her and, in the process, covered her mouth with his hands to prevent her from screaming. The complainant was categorical that it was the Appellant who had defiled her as she had known him for he had been a worker at her family and knew him as "Malakwen." Indeed, the Appellant in his defence evidence admitted that indeed he had been working at the home of the complainant. The complainant mentioned to her neiqhbour that it was the Appellant who had defiled her. I find the identification therefore was by recognition. The Appellant who had worked at the home of the complainant for two years had thus became well known by the complainant and there was no issue of mistaken identity. The mother of the complainant stated that she had left her children under the care of the Appellant as she had left for a funeral. The trial court duly conducted a voire dire examination on the complainant and established that she was possessed with sufficient intelligence and knew the duty of speaking the truth. The trial court also noted that there was no eyewitness to the incident and came to the conclusion that

the complainant was truthful witness and believed her. I find the learned trial Magistrate did observe the demeanour of the complainant and had no doubt that she was telling the truth even in the absence of an eye witness. Indeed, under the provisions of Section 124 of the *Evidence Act* a trial court can convict on the evidence of a single witness who is a victim of a sexual offences as long as the court records that the said sole witness is speaking the truth. The trial court duly complied with this provision. Furthermore, it transpired from the evidence of the mother of the complainant that the Appellant had worked for her for two years and all this time she had no grudge against him. If that is the position then I find it is highly unlikely for the mother of the complainant to use her own daughter as a victim of sexual offence so as to settle any scores with the Appellant..."

30. We agree with the two courts below on the above issue. We are persuaded that the complainant knew the appellant who was working for them, therefore, the identification by way of recognition was free from error.

31. Regarding the ground that the appellant's defence was not considered, the learned Magistrate stated "the defence was a mere denial and did not shake that of the prosecution." The first appellate court had the following regarding the appellant's defence:

> " I have also looked at the evidence of the Appellant and note that the same was just a mere denial and it did not shake that of the prosecution which I find was quite overwhelming against him..."

32. Earlier in this judgment, we summed up the appellant's defence. As the learned magistrate correctly stated, it was a mere denial. It did not cast any doubts on the prosecution case. As was held by the Supreme Court of Canada in R v Lifchus [1997]3 SCR 320:

> " ...A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence... In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond reasonable doubt."

33. We are persuaded that the appellant's defence was considered by the two courts below and both courts were persuaded, as we are, that his defence did not dislodge or cast reasonable doubts on the prosecution evidence. We therefore affirm the finding by the two courts below on conviction.

34. The other ground urged by the appellant is that that section 8

[2] of the Act does not afford the trial court the discretion to impose an appropriate sentence depending on the circumstances of the case, therefore, the sentence is unconstitutional. The appellant also argues that sentencing is part of a fair trial process, therefore, his rights under Article 48 and 50 of *the Constitution* were violated because he was not afforded an opportunity to mitigate. We have carefully examined the entire record. We find that the trial both before the trial court and the first appellate court was conducted in accordance with the law. We find no process failures or anything to suggest that the appellant's rights under the above two articles were violated.

35. Regarding the legality of the sentence, the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 Others [Amicus Curiae] [2024] KESC 34 [KLR] clarified

that the sentences prescribed by Section 8 of the *Sexual Offences Act* are lawful and remain lawful so long as the said provision remains in the statute. It stated:

> " [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...
>
> [68] Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

36. Arising from the conclusions arrived at on each and every issue addressed above, it is our finding that this appeal is devoid of merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY, 2025.

J. MATIVO

JUDGE OF APPEAL

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M. GACHOKA CIArb, FCIArb.

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.