Korir v Republic (Criminal Appeal E008 of 2021)
[2025] KECA 1354 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1354 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E008 OF 2021

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JULY 25, 2025

BETWEEN

VINCENT KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kericho (A.N. Ongeri, J.) dated 11th June 2021 in HCCRA No. 25 of 2020)

JUDGMENT

1. This is a second appeal from the conviction and sentence of the trial magistrate in Kericho CMC Criminal Case (SO) No. 23 of 2018 delivered on 13th March 2020 that was upheld by the first appellate court.

2. The appellant, Vincent Korir, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 24th March 2018 at [Particulars Withheld] Bureti Sub- County within Kericho County, the appellant intentionally caused his penis to penetrate the vagina of DC, a child aged 6 years old. He faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant intentionally touched the buttocks/vagina of DC, a child aged 6 years, with his penis.

3. The appellant was arraigned before the trial court. He pleaded not guilty to both counts. After a full trial, the appellant was convicted on the main charge. He was sentenced to 25 years imprisonment. Aggrieved by those findings, the appellant lodged an appeal before the Kericho High Court in HCCRA No. 25 of 2020. The first appellate court dismissed his appeal.

4. Undeterred, the appellant has approached this Court on a second appeal. He filed his notice of appeal dated 25th June 2021 and memorandum of appeal dated 17th June 2022 that raised seven grounds disputing the findings of the learned judge. We have taken the liberty to summarize those grounds as follows: that the learned judge failed to subject the evidence to fresh scrutiny and thereby arrived at an erroneous decision; that his alibi defence dislodged the evidence of the prosecution; that the investigations were shoddy; that the element of penetration was not proved beyond any shadow of a doubt; and that the sentence meted out was harsh and excessive. For those reasons, the appellant prayed that his appeal be allowed, the conviction be quashed and the judgment dated 11th June 2021 be set aside.

5. The appeal was heard on 30th April 2025. The appellant was present and represented by learned counsel Mr. Kipkoech. Representing the state, the respondent herein, was Senior Assistant Director of Public Prosecutions Mr. Omutelema. Before hearing the appeal, the appellant was notified of the respondent's notice of enhancement sentence dated 22nd April 2025. The Court gave the appellant a warning, cautioning him, that if he elected to proceed with his appeal, his sentence would be enhanced to a lawful sentence if this Court upheld his conviction. Conscious of the same, and confirming to the Court that he understood the meaning and tenor of the warning, the appellant elected to proceed with his appeal. We will revisit this issue later, if necessary.

6. The appellant relied on his written submissions dated 10th November 2022, which Mr. Kipkoech orally highlighted. Citing the case of Dominic Kibet vs. Republic [2013] eKLR the appellant submitted that all the ingredients of a charge of defilement, that is, penetration, the age of the complainant and the positive identification of the perpetrator, were not proved beyond reasonable doubt. On penetration, the appellant submitted that it was marred with contradictions and inconsistencies as to find that it was not proved in line with section 2 of the *Sexual Offences Act*. He submitted that since the complainant was seen four days later, while the P3 form was only filled out ten days later, the evidence amounted to distortion as to cast doubt on the veracity of the medical evidence adduced.

7. He further questioned the credibility of the medical evidence in totality by stating that since the P3 bore stamps from two medical practitioners, it was not credible. He argued that since there were no treatment notes, vaginal discharge or bleeding observed as well as DNA evidence, penetration was not proved.

8. On the identity of the perpetrator, the appellant submitted that since the complainant referred to the assailant as Cheruiyot, he was certainly not the offender. Further justifying this argument, the appellant relied on his alibi defence, corroborated by his witness, to contend that he was not the perpetrator as set out in the particulars of the offence in the charge sheet. He cited the case of Victor Mwendwa Mulinge vs. Republic [2014] eKLR to submit that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution. It was his view that PW1 was not a truthful witness while PW2 misled the trial court, leading to discrepancies and contradictions in the prosecution's evidence. In addition, he stated that the burden of proof was erroneously shifted to him.

9. The appellant took the view that the investigations done were too shoddy to create a direct linkage between the appellant and the commission of the offence. He complained that his mitigation was improperly rejected. He contended that since the first appellate court failed to re-examine and re-analyze the evidence afresh, he was denied the right to fair administrative action and fair hearing as couched in Articles 47 and 50 of the *Constitution* respectively.

10. Discounting the particulars of the offence as set out by the prosecution, learned counsel submitted that the appellant could not have committed the offence since the alleged date of commission of the offence fell on a Saturday and ordinarily, schools are closed on that day.

11. The respondent filed written submissions, a case digest and a list of authorities all dated 22nd April 2025. Learned counsel submitted that all the ingredients of the offence of defilement were proved beyond any shadow of a doubt. He urged this Court to take into account that the evidence of PW1 was taken by the trial court from her perspective as child of tender years. Her evidence, he opined, confirmed that the appellant sexually assaulted her in a school van on a Saturday. He denied that the burden of proof was shifted to the appellant maintaining that the prosecution ably discharged its burden of proof to the required standard.

12. On the medical evidence, the respondent submitted that the P3 form, coupled with the evidence of PW3, was unshaken as to establish that penetration had been proved beyond reasonable doubt. It urged this Court to consider that the delay by PW1 in reporting the offence was excusable and comprehensible since she may not have known what to do after the offence had been committed. Lastly, the respondent urged this Court to allow the notice of enhancement as set out.

13. As a second appellate Court, our jurisdiction is set out in section 361 of the *Criminal Procedure Code*. Our role was set out in the case of *Karani vs. R* [2010) 1 KLR 73 as follows:

> "This is a second appeal. By dint of the provision of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior court on fact unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."

14. The facts set out in the record before us are as follows: 6-year- old PW1 DC, the complainant herein, testified that on the morning of 24th March 2018, she was heading to her school called [Prticulars Withheld] Academy. It was a Saturday but PW1 informed the court that they normally went to school on Saturdays. Her mother PW2 MC, escorted her to the road so that she could board motor vehicle registration number KCF xxxP to take her to school. The said vehicle, ordinarily driven by the appellant, usually took her to school. PW1 had known the appellant by the name Cheruiyot.

15. After boarding the vehicle, PW1's mother returned home. PW1 stated that she was the only passenger aboard the vehicle.

    Describing the appearance of the vehicle, PW1 remembered that it had dark tinted windows. The appellant drove for a short while and parked the vehicle before he could pick other school children. The appellant then removed her clothes, removed his penis and sexually assaulted PW1. The complainant recalled that she felt pain when this happened. The appellant threatened her that if she cried, he would kill her. Resultantly, she did not cry.

16. During her testimony, the trial court noted that PW1 became emotional and had watery eyes. After the appellant was done, he once again cautioned that he would kill her if she reported the incident to someone else. The appellant then took PW1 to school. During the day, PW1 testified that though she played with other children and acted normal, she suffered pain in her right hip. Later in the evening, when she returned home from school, PW1 informed her mother what had transpired. She was taken to Kapkatet Hospital on 29th March 2018.

17. PW2's evidence was that on 28th March 2018, just before they all retreated to sleep, her daughter PW1 complained that she suffered pain in her right hip. PW2 instinctively checked the complainant's private parts. She noted that she had red bruises on the walls of her vagina. It was then that PW1 informed her what had transpired. PW2 recognized the appellant as Vincent Cheruiyot Korir, the driver who took the children to school on weekends only.

18. PW2 reported the matter to her husband who advised her to take the child to Kapkatet District Hospital. PW2 took PW1 to the said hospital the next day. Thereafter, the matter was reported at the police station. PW2 noticed that before PW1 informed her about what had occurred, PW1 would come home crying every day but would not explain why since 24th March 2018. Finally, she testified that she had known the appellant for two years and held not grudge against him. On the question of age, she confirmed that her daughter was born on 7th December 2011. Her birth certificate was adduced in evidence.

19. PW3 Dr. Clement Komu Kanyiri, a medical officer at Kapket District Hospital, testified that the complainant was brought to their facility three days after the offence had taken place. She was limping and complained of lower back pains. When observing her, PW3 noticed that PW1 had bruises on her labia majora and minora. Though there were was no discharge, PW1 had lacerations on her private parts consistent with blunt object penetration. The injuries were approximated as two to four days old. The P3 form and PRC forms were filled and produced in evidence. He explained that the P3 form was filled ten days later since the form was brought to the facility days after PW1 had been seen on 28th March 2018.

20. PW4 CPL Janet Tarus the investigating officer testified that the matter was reported at Litein police station on 30th March 2018. She then issued the complainant with a P3 form that was filled six days later at Kapket District Hospital. The appellant, known as Vincent Korir alias Cheruiyot, surrendered himself to the police station on 1st May 2018. After collecting the evidence and interrogating the witnesses, PW4 preferred the present charges against the appellant.

21. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. His sworn testimony was that at all material times to the suit, he was a driver of motor vehicle registration number KCF xxxP. He was employed to pick students of Bethel Primary School to ferry them to school. He testified that on the material date in question, he was herding his cattle at his home since he was off duty on that day, being a Saturday. While admitting that he knew the complainant, he denied that they were ever together in the vehicle alone. He confirmed that he used to take the complainant to school once a week during the weekdays. On those other days, Geoffrey, Roy, Denis and Brian were on duty. He denied meeting the complainant on 24th March 2018 irrespective of the fact that he was in possession of the vehicle. He further maintained that Cheruiyot was not his name. He denied committing the offence.

22. The appellant also called DW2 Philemon Koech the headteacher at [Particulars Withheld] Academy to the stand. His evidence was that PW1 was her student at grade 1. In support of this, he adduced his letter of appointment and TSC certificate. He was emphatic that in line with the Ministry of Education directives, the school remained closed on all Saturdays, including the date in question. However, the school remained open for boarding scholars. He confirmed that day scholars were transported to school by the school driver DW1. He was the sole school driver. He could not however recall the registration number of the vehicle.

23. He relied on the school attendance register to demonstrate that PW1 was not in school on that day. DW2 continued that the PW1 attended school on all weekdays after 24th March 2018 except 29th March

2018 when the school was closing. He then testified that he could not tell why she was absent from school that day. That the students later sat for their exams where PW1 performed very well. She was number 2 overall. He stated that PW1 never complained to the school that she had been defiled.

24. In his further evidence, DW2 stated that he would never show up in the school on weekends. He added that on Saturdays, students engaged in out of class activities where registers were not taken on those days. For that reason, he could not ascertain conclusively that PW1 was or wasn't in school on 24th March 2018. He added that day scholars were not permitted in the school's premises on Saturdays.

25. We have considered the record of appeal and the submissions by the parties. To prove the offence of defilement, the prosecution must establish the following three conjunctive ingredients: the age of the complainant, penetration and the identification of the perpetrator. On the age of the complainant, PW1 and PW2 both testified that the complainant was six years old at the time of the offence. This evidence was corroborated by the complainant's birth certificate. We therefore find that the complainant's age was proved beyond reasonable doubt and shall not interfere with those findings.

26. Was the appellant the perpetrator that caused penetration on the complainant in line with section 2 of the *Sexual Offences Act*? The evidence that was relied on was that of the victim PW1. It was her evidence that on the Saturday morning of 24th March 2018, the appellant picked her up to go to school. That it was not peculiar since the school had a propensity to open the institution on weekends and that on that day, the appellant was on duty as the driver of motor vehicle registration number KCF xxxP. She was emphatic that it was the same vehicle that ferried her to school that day and it had been driven by the appellant.

27. After picking the complainant, the appellant drove for a few minutes before electing to park the vehicle. The appellant took advantage of their solitary company. It appears that the appellant also exploited the tinted dark windows to sexually assault PW1. During the ordeal, the appellant threatened her that if she raised an alarm, he would kill her. The same threats were regurgitated after the ordeal. Fearing for her life, PW1 dissembled in the entire day until five days later when she disclosed what had transpired to her mother PW2.

28. The complainant was seen by PW3 on 28th March 2018, four days after the incident had taken place. PW3's observations were that the complainant presented two to four days age old injuries in her private parts. PW3 noticed that PW1 had bruises on her labia majora and minora. Though there were was no discharge, PW1 had lacerations on her private parts consistent with blunt object penetration. He explained that the P3 form was filled ten days later since the form was brought to the facility after such time irrespective of the fact that PW1 had been seen on 28th March 2018.

29. Section 124 of the *Evidence Act* provides that an accused person shall not be convicted on the evidence of a single identifying witness except in sexual offences so long as the victim is telling the truth. Looking at PW1's evidence, we find that she was deliberate with the truth. Her evidence was not dislodged even during her cross examination. She knew the appellant very well as the school's driver and there was no mistaken case of identity. In addition, this evidence was corroborated by PW2 as she is the one who took PW1 and left her in the company of the appellant. Like the first appellate court, we do not find any basis to hold that there was an element of a grudge existing between the two families.

30. During the hearing of the appeal, the appellant highlighted several contradictions that he thought were so grave as to cast doubt on the conviction against him. Firstly, he challenged that he was not called Cheruiyot but Vincent Korir. However, PW1 as well as PW2 were empathic that the appellant's third name was Cheruiyot. That in our view was not a contradiction.

31. Secondly, the appellant challenged that the medical evidence was incredible because the P3 form was only filled ten days later. However, PW3 explained that the complainant was seen on 28th March 2018 but did not accompany herself with the P3 form. In fact, PW4 explained that a blank P3 form was issued to her on or after 30th March 2018 when the matter was reported. Though the appellant sought to further challenge the P3 form to the extent that it bore stamps of two different practitioners, that did not discredit the contents thereof that the aspect of penetration had been visible from observing PW1's genitalia. We therefore do not find that the medical evidence was vitiated on account of filling the form several days later. The contents were clear that the minor had been sexually assaulted.

32. Thirdly, though the appellant purported to suggest that penetration was not proved beyond reasonable doubt on account of the fact that there were no treatment notes, vaginal discharge or bleeding observed as well as DNA evidence, that argument is rejected. In our view, penetration was proved beyond any shadow of a doubt from the evidence of PW1 who was a truthful witness. Furthermore, PW3 irresistibly concluded that the aged injuries found present in the complainant's private parts, were consistent with penetration.

33. Lastly, the appellant submitted that since schools in their ordinary course of business close on Saturdays, he could not have committed the offence. He furthermore relied on DW2's evidence who testified that the school was not open on weekends. It is instructive to note that though the appellant stated that there were five drivers within the institution, DW2 only testified that the appellant was the sole driver.

34. Looking at the evidence in totality, we agree with the two courts below that DW2 was being economical with the truth. For instance, he only produced the purported attendance register for a few days running up to the fateful date. It would have been incumbent on him to give a holistic picture of the school's activities. That did not occur. Secondly, how would DW2 have known that the complainant and the appellant were absent from the school premises when he was not there at all? Thirdly, though he stated that the school operated on Saturday, the attendance register for that day was mysteriously not adduced in evidence. Furthermore, it is certainly strange that as the headteacher of the school, he could not recall the school's motor vehicle registration number during the trial.

35. Contrary to the appellant's assertions, we find that there were no contradictions. Be that as it may, any contradictions subsisting was too minor as to affect the findings on conviction. We fortify that finding with reliance of the decision of the Court of Appeal in Uganda in *Twehangane Alfred vs. Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 that held:

> With regard to contradictions in the prosecutions case the law as set out in numerous authority.

36. Having said that, we do note that all these grounds of appeal were well considered and analyzed by the two courts below. The appellant has failed to demonstrate that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole the decision is were plainly wrong in which case such omission or commission would be treated as a matter of law. In *Adan Muraguri Mungara vs. Republic*, Cr. No. 347 of 2007 (Nyeri) this Court laid out the circumstances under which concurrent findings will be disturbed in the following terms:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no

reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

37. From our above analysis, we find that the findings of two courts below cannot be faulted. Accordingly, we do not hesitate to find that the appeal on the conviction lacks merit and it is hereby dismissed.

38. On sentencing, the appellant was sentenced to 25 years imprisonment. This sentence was upheld by the High Court. As stated earlier in the judgment, the Court, on at least two occasions, requested Counsel for the appellant to confirm whether the appellant understood the meaning and implication of the notice to enhance the sentence. Mr. Kipkoech affirmatively confirmed that the appellant understood the implication of the notice to enhance the sentence if the conviction was upheld and stated that "the appellant was ready to take a blow for the rule of law."

39. Section 8 (2) of the *Sexual Offences Act* provides that a convicted person shall be sentenced to life imprisonment. This Court is alive to the pronouncements of the Supreme Court in *Republic vs. Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) and *Republic vs. Manyeso* [2025] KESC 16 (KLR) where mandatory sentences were affirmed to be lawful sentences.

40. The respondent filed its notice of enhancement of sentence dated 22nd April 2025. It urged this Court to enhance the appellant's sentence for the reasons that the sentence meted out was not commensurate to the crime and was not in accordance with the law, which clearly states that when one is convicted for defilement of a child of less than 11 years, the prescribed sentence is life imprisonment.

41. The parameters of enhancement of a sentence were expounded by this Court in *JJW vs. Republic* [2013] eKLR which held as follows:

> "...However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross-appeal in which it seeks enhancement of the sentence and that cross- appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

42. The age of the complainant in this case was 6 years. Therefore, it is not gainsaid that the sentence meted out to the appellant was unlawful. The appellant was given a warning that should the appeal on conviction fail, his sentence would be substituted with a lawful sentence. The appellant understood the consequences of the warning and proceeded to prosecute his appeal. Having established that the appeal on conviction was unmerited, and which conviction is hereby affirmed, this Court will enhance the sentence. Accordingly, as per the notice of enhancement dated 22nd April 2025, the appellant's sentence of 25 years imprisonment is hereby set aside and substituted with a sentence of life imprisonment.

43. In conclusion, we dismiss the appeal on conviction and sentence in its entirety. Further, we set aside the sentence of 25 years and substitute it with a life sentence. Orders accordingly.

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

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR