**Kiprono v Republic (Criminal Appeal 16 of 2020)**
**[2025] KECA 1241 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1241 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL 16 OF 2020**

**JM MATIVO, PM GACHOKA & WK KORIR, JJA**

**JULY 11, 2025**

**BETWEEN**

**ENOCK KIRUI KIPRONO .................................................................. APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Kericho (A.N. Ongeri, J.) dated 2nd October 2020 in CRA No. 29 of 2019)***

## JUDGMENT

1. Enock Kirui Kiprono, (the appellant) was convicted of the offence of defilement contrary to section 8 (1) as read with 8

   (2) of the *Sexual Offences Act* (the Act) at the Chief Magistrate Court at Kericho in Sexual Offence Case No. 11 of 2015. The particulars of the charge were that on 19th February 2015 in Kericho District within Kericho County, he intentionally and unlawfully caused his penis to penetrate the vagina of J.C., a child aged 5 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the Act. It was alleged 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 J.C, a child aged 5 years.

2. The prosecution case rested on the testimony of 4 witnesses, namely, (PW1), the complainant, (PW2), the complainant's sister, (PW3), the complainant's mother & (PW4), a clinical officer. The defence case rested on his sworn testimony and that of DW2 and DW3. In a nutshell, the essence of the prosecution case was that the appellant defiled the complainant and that by way of evidence, all the ingredients of the offence were established to the required standard. The crux of the defence case was in his own words was "I was fixed in a defilement case" essentially meaning the charges were fabricated. He gave a detailed account of his movements and whereabouts on the material day, basically dissociating himself with the

crime. However, at the conclusion of the case, the trial magistrate found that the alibi defence did not shake the prosecution case and that apart from the complainant's evidence, there was other existing cogent and incriminating pieces of evidence against him and proceeded to convict him as charged and sentenced him to serve life imprisonment.

3. The appellant's appeal against his conviction and sentence in Kericho HCCRA No. 29 of 2019 was dismissed by Ongeri, J. on 2nd October 2020 for being devoid of merit. Undeterred and in his quest for judgment, the appellant is now before this Court seeking to overturn the High Court decision both on his conviction and sentence. In his memorandum of appeal dated 8th December 2020, he faults the learned judge for failing to consider and subject the evidence to fresh scrutiny as required of it. In particular, he asserts that had the learned judge performed her duty as aforesaid, she would have discovered that:

   a. Essential witnesses especially investigating officer failed to give evidence.

   b. The medical evidence was tendered by a different doctor from the one who examined the complainant and made the report.

   c. The trial court proceeded without the appellant's advocate at the crucial stage when medical report was being produced, unfairly prejudicing his rights.

   d. the 1st Appellate Court Judge erred when she affirmed his appellant's conviction and sentence notwithstanding, that the same was founded on inconsistent, contradictory and failed to consider his defence that the complainant's evidence was uncorroborated.

   e. The 1st Appellate Court erred in law by failing to evaluate and examine his sworn alibi defence which was raised in the early stages and which was not rebutted but shifted burden of proof.

   f. The Judge erred in not finding the sentence excessive and unconstitutional, considering that the appellant was a first offender and could be given definite period of sentence.

4. During the virtual hearing of this appeal on 28th April 2025, the appellant appeared in person while the respondent was represented by Mr. Omutelema, Senior Assistant Director of Public Prosecutions. Both parties adopted their written submissions which they had filed.

5. In his undated written submissions, the appellant maintained that much as the sentence was lawful, the court did not apply its discretion which was a serious misdirection since the court was bound in law to explain the importance of mitigation to him and he was not accorded a chance to present his mitigation.

6. It was his submission that the offence of defilement was not proved to the required standard. He maintained that the complainant's age was not proved beyond reasonable doubt because the evidence regarding the age was contradictory nor was an age assessment report produced. Further, the police who preferred the charges and the P3 form did not possess the ability to determine her age. Relying on the decision in Chiroto Nyamawi Mumba [2010] eKLR, the appellant argued that in absence of medical evidence, PW1's age remained unproved.

7. Addressing the question whether penetration was proved, the appellant maintained that PW1's evidence that the appellant did "tabia mbaya" to her should be taken with caution bearing in mind that the complainant was very young and that "tabia mbaya" to children is sometimes used to mean any act which is not pleasing to the child or even where one just looks at the genitals or unwanted touches. The appellant also submitted that the first report from Central Hospital and PW3 did not show PW1 was defiled. Therefore, in light of the contradictory evidence, it is impossible to tell who between the expert

and the complainant was telling the truth. Relying on the case of K. W vs. Republic [2012] KECA 103 (KLR), he argued that the absence of a hymen is not conclusive proof of defilement.

8. The appellant further submitted that it was not possible for PW1 to be defiled by a grown-up person and fail to bleed or to cry and not have difficulty after being defiled. Relying on the High Court decision in Ben Maina Mwangi vs. Republic [2006] KEHC 974 (KLR) the appellant maintained that if an attempt was made to penetrate the complainant's genitalia, it would be expected that the complainant would have experienced excruciating pain and there is no way she could avoid bleeding.

9. Lastly, the appellant contended that he gave sworn evidence and called two witnesses who testified to the fact that he went to collect his driving licence at Rocky School at 2.00 pm and returned home at 6.30 pm and that he was arrested the next day. Relying on the case of Victor Mwendwa Mulinge vs. R, [2014] eKLR, he contended that the burden of proving the falsity of the accused person's defence lies on the prosecution and the required standard of prove must be satisfied before reaching a finding of guilt, and the burden of proof never shifts to the defence.

10. In opposition to the appeal, Mr. Omutelema in his written submissions dated 22nd January 2025 asserted that all the elements of the offence were proved and the trial court and the first Appellate Court arrived at the correct decision. Regarding failure by the prosecution to call the investigating officer who was a crucial witness, relying on section 124 of the *Evidence Act* and citing this Court's decision in Omumb*o vs. Republic (Criminal Appeal 80 of 2008*) [2008] KECA 315 (KLR) (5 December 2008) (Judgment), Mr. Omutelema argued that the evidence of a minor is sufficient to convict an accused person as long as the court considers such evidence as reliable, and maintained that in this case, the trial court was satisfied that the victim was telling the truth.

11. Responding to the appellant's argument that the medical report was not properly produced, Mr. Omutelema cited sections 33 (b) and 77 of the *Evidence Act* and submitted that PW4 produced the documents in accordance with the said provisions and added that PW4 said the author's attendance could not have been procured without unreasonable delay or expense.

12. On whether the appellant was prejudiced by the absence of his advocate during the hearing of PW4's evidence, counsel maintained that the appellant's advocate was aware of the hearing date, the court waited for him until 1250 HRS, and he failed to attend court and therefore no prejudice was occasioned since the advocate was allowed sufficient time to conclude his meeting before attending court. Be that as it may, the appellanthis advocate was always at liberty to move the trial court to recall PW4 when he attended court on 24th September 2018. However, no such an application was made implying that the appellant did not suffer any prejudice considering the nature of PW4's evidence. That notwithstanding, counsel argued that the said ground was never raised before the first Appellate Court to warrant reconsideration and evaluation of the evidence before this Court.

13. Regarding the alleged contradictions and inconsistencies in the prosecution evidence, Mr. Omutelema maintained that such allegations were baseless, because PW1's evidence was corroborated by the evidence of PW2 who confirmed the victim strayed to the veranda where the appellant resided together with "Isaiah." Further, PW1's evidence was corroborated by PW4's who stated that her hymen was torn, her vagina walls were bruised, her vagina had a smelly discharge with numerous pus and epithelial cells which were caused as a result of the defilement.

14. Responding to the appellant's argument that the trial court never considered his defence, Mr. Omutelema contended that both the trial court and the High Court noted that the defence raised could not outweigh the prosecution evidence since the appellant did not give a plausible reply to the cogent and incriminating pieces of evidence presented during trial.

15. On the constitutionality and excessiveness of the sentence, Mr. Omutelama cited the Supreme Court case in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) and stated that the Supreme Court has addressed the question of minimum mandatory sentences under the *Sexual Offences Act*, therefore, the life sentence meted upon the appellant was lawful and the court exercised its discretion within the parameters of the law.

16. This is a second appeal. By dint of section 361 (1) of the Criminal Procedure Act, our mandate is confined 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 and we will not 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. In David Njoroge Macharia vs. R, [2011] eKLR it was stated that 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 vs. Republic (1984) KLR 213)."

17. In Dzombo Mataza vs. Republic [2014] eKLR, this Court stated:

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first Appellate Court.... By dint of the provisions of section 361(1) (a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

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

    a. Whether the appellant's conviction was based on contradictory, inconsistent and uncorroborated evidence of a minor.

    b. Whether the first Appellate Court failed to consider the appellant's alibi which was never rebutted.

    c. Whether the failure to call the investigating officer and the doctor who prepared the medical report was fatal to the prosecution's case.

    d. Whether the failure to call the doctor who examined the complainant was prejudicial to the prosecution's case.

    e. Whether the appellant was prejudiced by the absence of his advocate during the evidence of PW4.

f. Whether the sentence imposed was excessive andor unconstitutional considering the appellant was a first offender.

19. We propose to start with the first issue. The appellant argues that the age of the complainant according to the P3 and the charge sheet was contradictory and in the absence of medical evidence confirming her age, the evidence in the P3 form and the charge sheet could not be relied upon since the police do not possess the ability to determine age. Addressing the above issue, the learned judge stated:

> "On the issue of whether i.e. age of the complainant was proved, I find that the complainant's mother produced the birth certificate which shows that the complainant was born on 2662010 and therefore on the material day on 1922015 she was 4 years old and some months."

20. Notably, the complainant's mother produced a birth certificate. It showed that she was born on 26th June 2010 and therefore at the time of the incident she was barely five years old. Consequently, in light of the existence of a birth certificate, there was no need of any medical evidence to prove the complainant's age. Therefore, the learned magistrate and the 1st Appellate Court properly considered the evidence before them and arrived at the correct finding that the complainant's age was proven.

21. The next question is whether penetration was proved to the required standard. Section 2 of the Act defines penetration as follows:

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

22. Determining the question of penetration, the learned trial Magistrate stated:

> "12. Penetration of a minor may indeed occur with or without physical or frictional injuries depending on various physical and natural factors such as previous penetrative acts or actual sizes of organs involved in penetration activity. Delay in examination of the victim at times may relatively affect the observations or findings of the clinical officer. The victim andor the suspect are again not necessarily unhealthy in all cases and neither do spermatozoa arise in every penetration activity...
>
> 17. In the case in hand, the minor indisputably suffered defilement on 190215 in the morning hours when the parent was away from home. According to the parentmother of the victim, she understood her child as having fairly attributed her disinterest in play and her vaginal dirt or discharge and stomach ache to sexual assault by Enock, a man who lived next door within the Unilever Tea Co. Workers' residence. The mother then swiftly engaged the members of the public, administrative organs and the police in this incident, necessitating arrest and prosecution of the accused person."

23. Addressing the same issue, the first Appellate Court stated:

> " I find that the testimony of the complainant was corroborated by the medical expert who filled the P.3 The medical report confirmed penetration and a smelly discharge. There were bruises on the vaginal wall. An earlier report showed hymen pus cells and epithelial cells."

24. We note that PW1 explained that the appellant called her, she then went to his house, he removed her clothes and defiled her on the seat, then the appellant dressed her up and she went back home. PW1's

evidence was supported by the medical evidence presented by PW4. The P3 form indicated that the complainant was examined on 21st February 2015 and it was established that her hymen was torn, she had a bruised vaginal walls and smelly vaginal discharge. Lab investigations at Unilever Hospital where the complainant's initial treatment was done showed that pus cells and epithelial cells. However, no spermatozoa were seen. It was concluded by the clinical officer that the complainant had been defiled. There was an attempt to controvert the evidence of PW4 by DW2. However, the said witness is not a doctor nor is he a clinical officer and he never prepared the P3 form or the PRC form. 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.

25. Regarding the ground that the trial court failed to consider the appellant' alibi, the learned magistrate stated:

> "It was not enough to merely allege absence at the time, without any credible test to witnesses' testimonies or without giving any plausible reply to the other existing cogent and incriminating pieces of evidence in the trial (if not his presence, then at the time of incident). It is evident in the end, that the accused person in this case too the advantage of the innocence of the little helpless J.C.M and defiled her in complete disregard of the child's vulnerable health, welfare and life."

26. Addressing the appellant's alibi, the first Appellate Court said:

> "22. On the issue as to whether the Appellant's alibi defence was considered, I find that the trial court dwelt on it at length and therefore the same was weighed against the prosecution evidence as required...
>
> 24. I find that the alibi by the Appellate was raised too late in the trial but the same was weighed by the Trail court and it did not dislodge the prosecution evidence."

27. An alibi defence arises when a person charged with an offence states that he was not at the scene of crime at the time the alleged offence was committed and was somewhere else and therefore was not the person who committed the offence. The burden of proving the falsity, if at all, of an accused's defence of alibi rests with the prosecution. Section 309 of the *Criminal Procedure Code* enjoins the prosecution to rebut any alibi raised by an accused person for the first time in his defence. Section 309 addresses evidence in reply during a trial. It allows the prosecution to present additional evidence to rebut new matters introduced by the defense that the prosecution couldn't have reasonably anticipated. It reads:

> "309. Evidence in reply If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

28. In Victor Mwendwa Mulinge vs. R, [2014] eKLR this Court stated the following on the issue of alibi:

> "It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v.R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it

can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

29. From the foregoing, it is evidently clear that there are two ways in which an alibi defence put forth by an accused person may be rebutted. One of them is for the presentation of evidence in rebuttal. The second is for the Court to weigh it against the totality of the prosecution's case. In this case, the prosecution opted to leave it to the court to weigh it against the totality of the prosecution case.

30. PW1 and PW2 in their evidence clearly placed the appellant at the scene of the incident and testified that the date was 19th February, 2015. The appellant did not controvert their evidence. Instead, he stated that he was at rocky driving school at 2.00 pm picking his interim driving licence. The appellant's defence in our view did not raise any doubts on the prosecution's case. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge. (See Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary). As was held by the Supreme Court of Cananda in R vs. 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."

31. We have evaluated the appellant's alibi and the prosecution's evidence. We have also considered the findings by the two courts below. We are persuaded that his 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 doubt on the prosecution evidence on the issue at hand. We therefore affirm the finding by the two courts below on the said issue.

32. Regarding the appellants grounds concerning: (a) failure by the prosecution to call the Investigating Officer; (b) presentation of the medical evidence by a doctor who did not examine the complainant and prepare the report; and, (c) whether the appellant was prejudiced by the absence of his advocate during PW4's evidence, we have carefully reevaluated the entire record. It is evidently clear that in his petition of appeal presented before the High Court dated 9th September 2019 found at page 39 of the record of appeal and his undated submission, the appellant did not raise the said issues before the first Appellate Court. Therefore, the said issues were never determined by the first Appellate Court. In Peter Kihia Mwaniki vs. Republic [2010] eKLR, the Court stated thus:

> "Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the Superior Court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter... By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit."

33. It follows therefore that this Court sitting as a second Appellate Court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower courts, and therefore not determined, then any decision made by the Appellate Court would not be considered a judgment on an appeal. Consequently, we are precluded from addressing the said issue.

34. Regarding the complaint that the sentence is excessive, this Court in MGK vs. Republic [2020] eKLR stated:

> " 16. As regards the sentence, under section 361 (1) of the *Criminal Procedure Code* severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal."

35. The other ground urged by the appellant is that the mandatory minimum sentence prescribed by the trial court is unconstitutional. However, the Supreme Court in Republic vs. 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. In conclusion, we find that this appeal is without merit and the same is hereby dismissed in its entirety.

**DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2025.**

**J. MATIVO**

**............................ JUDGE OF APPEAL**

**M. GACHOKA C. Arb, FCIArb.**

**............................ JUDGE OF APPEAL**

**W. KORIR**

**............................ JUDGE OF APPEAL**

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

Signed.

DEPUTY REGISTRAR.