



**Saidi v Republic (Criminal Appeal 69 of 2019)
[2025] KECA 1188 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1188 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 69 OF 2019
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
JULY 4, 2025**

BETWEEN

NJERU ABDALLA SAIDI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nakuru
(Prof. J. Ngugi, J.) dated 4th October, 2018 in CRA No. 236 of 2014)*

JUDGMENT

1. Njeru Abdalla Saidi, (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 Molo in S.O Criminal case No. 1741 of 2008. It was alleged that on 13th October, 2016 in Molo District within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of E.C., a child aged 11 years. Alternatively, the appellant faced a charge of committing an indecent act with a child contrary to section 11 (1) of the Act.

The allegation was that on the same day and location as in the main count, he unlawfully and intentionally touched the vagina of E.C, a child aged 11 years, with his penis.

2. The prosecution case rested on the testimony of 12 witnesses, namely, the complainant (PW1), the complainant's mother, (PW2), a class four pupil at the time (PW3), the complainant's sister, (PW4), a village elder (PW5), a neighbour to the complainant (PW6), a neighbour (PW7), a watchman at Baringo Primary School (PW8), the OCS Molo Police Station (PW9), the investigating officer (PW10), a doctor at Provisional General Hospital, Nakuru (PW11) and a Government analyst (PW12). The defence case rested on his own unsworn testimony. He did not call any witness in support of his defence.



3. At the conclusion of the trial, the learned magistrate held that the prosecution had proved its case to the required standard and returned a verdict of guilty on the main count and convicted the appellant accordingly. After considering the appellant's mitigation, the trial magistrate sentenced him to serve life imprisonment.
4. The appellant's first appeal to the Nakuru High Court, Criminal Appeal No. 236 of 2014, was dismissed on 4th October 2018 by Prof. Joel Ngugi, J. (as he then was), for want of merit. Undeterred, in his quest for justice, the appellant is now before this Court seeking to overturn his conviction and sentence citing the following grounds:
 - (a) the identification evidence was flawed;
 - (b) penetration was not proved;
 - (c) age was not proved, and, the learned judge failed to analyze his defence which was truthful. In his supplementary ground dated 24th June 2024, the appellant essentially challenges the legality of his sentence, presents his mitigation and seeks a review of his sentence.
5. During the virtual hearing of this appeal on 24th March 2025, the appellant appeared in person while the respondent was represented Mr. Omutelema, Senior Assistant Director of Public Prosecutions. Both parties adopted their respective written submissions filed in Court. The appellant's submissions are undated while the respondent's submissions are dated 2nd September 2024.
6. In his bid to persuade this Court that mandatory life sentences are unconstitutional, the appellant cited this Court's decision in Julius Kitsao Manyeso vs. Republic [2021] eKLR and argued that the life sentence contravenes Articles 27 and 28 of *the Constitution*. He cited Liyanage vs. The Queen [1967] A.C. where the Privy Council invalidated a Ceylonese law which provided for a minimum mandatory jail term of 10 years for particular offenders because of the disproportionality in sentencing that resulted. He also relied on the case of Dismas Wafula Kilwake vs. Republic [2019] eKLR and argued that courts should freely exercise their discretion in sentencing.
7. In mitigation, the appellant maintained that he is rehabilitated, and during the sixteen years he has been in custody, he has acquired various skills which will make him productive in building the nation.
8. In opposition to the appeal, Mr. Omutelema asserted that all the elements of the offence were proved to the required standard and both the trial court and the first appellate court correctly rendered themselves in the matter. Regarding penetration, he maintained that PW3 testified that he saw PW1 holding hands with the appellant while seated, he later saw them walking down hill and shortly thereafter he heard screams from the direction they had taken. PW4 who was the complainant's sister testified that she saw the appellant jump over the fence and on further enquiry, she found the complainant where the appellant was running from. PW8's testimony was that when he rescued the complainant she told him that "askari wa Hema" had done "tabia mbaya" to her. PW9 who interrogated the appellant immediately after his arrest confirmed that his yellow underpants were blood stained and his evidence was not challenged on cross-examination.
9. Regarding the failure to conduct an identification parade, Mr. Omutelema maintained that the learned magistrate correctly observed that the appellant was not a stranger to the community at Gacharage and therefore, there was no need for an identification parade.
10. Regarding the complainant's evidence who was a child of tender years, Mr. Omutelema maintained that the trial court conducted a voir dire examination and it was satisfied that the complainant was capable of giving sworn evidence and that she was telling the truth. Mr. Omutelema further maintained



that section 124 of the Evidence Act provides that if the only evidence is that of the victim, the court shall receive the evidence and convict if satisfied the complainant is telling the truth as the learned magistrate was satisfied in this case. Nevertheless, in this case PW1's evidence was corroborated by the evidence of PW2, PW3, PW4, PW7, PW8, PW9 and PW12.

11. Regarding the appellant's evidence, Mr. Omutelema submitted that his defence was that he was not the only officer at the camp and therefore any other officer may have committed the offence. It was Mr Omutelema's further submission that the learned magistrate did not believe the appellant since there was independent evidence implicating the appellant. It is therefore not correct for the appellant to state that his defense was not considered.
12. Regarding sentence, Mr. Omutelema maintained that the appellant was given an opportunity to mitigate. However, mitigation notwithstanding, the circumstance of the offence warranted the sentence of life imprisonment which was not only lawful. Mr. Omutelama also cited the Supreme Court decision 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) to buttress the lawfulness of the minimum mandatory sentence.
13. We have considered the record, the grounds of appeal, the submissions tendered by the parties and the law. By dint of section 361 (1) (a) of the Criminal Procedure Code the jurisdiction of this Court on a second appeal is confined to matters of law. Section 361 (1) (b) of the Criminal Procedure Code bars us from entertaining appeals against sentence unless the subordinate Court had no jurisdiction to pass the sentence or the sentence was enhanced by the first Appellate Court. Additionally, sentencing is a matter of the trial court's discretion. An appellate Court must not replace its views on sentence with those of the trial Court unless there are concrete grounds for doing so. This position of the law was recently restated by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) thus:

“ Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction.”
14. Upon considering the entire record, the grounds of appeal and the parties' submissions, we find that the following issues fall for determination:
 - (a) whether the ingredients of the offence were proved to the required standard;
 - (b) whether the appellant's defence was considered; and,
 - (c) whether the sentence of life imprisonment is lawful.
15. In order to properly determine the first issue, that is, whether the ingredients of the offence were proved, it is necessary we examine the evidence tendered in support of the three ingredients of the offence namely; identification of the assailant, penetration and age of the victim and whether they were proved. (See the case of George Opondo Olunga vs. Republic [2016] eKLR).
16. The complainant's evidence was that the appellant came to their home and asked her to accompany him to Sirikwa Court. However, the appellant instead blocked her mouth and led her to a maize plantation,



where he defiled her. She stated that she did not know his name but she identified him as the person who defiled her. During her cross-examination, she confirmed that in her statement she had stated that she was with one Chebet when the appellant came and she knew that he was a police officer. She also admitted that she told two versions of the event, when recording her statement with the police, and in her evidence in court. First, she stated that she knew the appellant as a police officer. Second, she said that she did not know the person who defiled her. She also confirmed that her mother used to sell “chang’aa” and that the police came to their home, damaged their drums and poured the “chang’aa”. Nevertheless, she maintained that her sister did not threaten to fix the appellant.

17. PW3 who was 11 years old at the time of the incident testified that he had accompanied his father to the farm to check on their potatoes when they saw the appellant holding hands with the complainant while seated. They greeted them and they moved on and while checking the potatoes they saw the appellant and the complainant going down to the maize plantation. Subsequently, they heard screams and ran to that direction to check what was happening. In cross-examination, PW3 confirmed that the complainant was not being dragged, and that they were going to cut posts and not potatoes and that in his statement he did not state that he saw the appellant holding hands with the complainant.
18. PW4 who is the complainant’s sister stated that the appellant had tried to make them accompany him to the camp but they refused, after which, the appellant beat them with a bamboo stick and started taking them away. She said they met Emily who asked the appellant where he was taking them, but the appellant asked them to go home because it was not them he was looking for. PW4 also testified that she left the complainant at home and went to the posho mill, but when she returned she did not find her. As she looked for her, she saw the appellant jumping over the fence and ran away leaving her sister crying. PW4 further testified that on their way home, they met the watchman. They told him that the complainant had been raped and they proceeded to the police station. On cross-examination, PW4 confirmed that Emily did not see them being beaten even though she had written in her statement at the police station that Emily saw them being beaten. PW4 confirmed that in her statement to the police she stated that Emily went to their house and told them there was a child crying in the forest. PW4 also confirmed that in her statement she did not indicate that she saw the appellant who then ran away nor did she know who arrested the appellant.
19. PW6 testified that he saw the appellant and the complainant going towards the forest while talking and that Charles Mutai also met the appellant and the accused going to the forest. On cross-examination, he stated that he did not witness the incident, nor was he ever called to identify the appellant whom he had not known previously.
20. PW7 testified that while accompanied by his son, he saw the appellant and the complainant seated down. PW7 also testified that he saw the appellant walking away and he went to the trading centre to raise alarm and on their way back they heard screams and they to the direction of the screams and found the complainant had been defiled and that is when they went to the camp and the appellant opened fire. On cross- examination, PW7 confirmed that he did not witness the defilement.
21. PW8 testified that he heard children calling the name of ‘Chepkorir’ and the complainant responded from the forest but her sound was muffled. He went to check what was happening, only to find the complainant crawling and bleeding from her private parts and when he asked her what was wrong, she told him that ‘askari wa hema’ had done ‘tabia mbaya’ to her. It was PW8’s testimony that the complainant told him she knew the officer and when they went to the IDP camp where the girl’s parents were residing, they did not find the appellant but when they went to the Police Camp they found him. On cross examination, PW8 confirmed that he did not go to the Police Camp with the complainant when they were looking for the appellant.



22. PW9, interrogated the appellant over the allegations and ordered him to remove his yellowish underpants which he established had blood stains and that he also retrieved the complainant's underpants which had blood stains and faeces.
23. PW12, a Government analyst testified that the blood from the appellant's under wear and that from the complainant's under wear were all blood group 'B' and his conclusion was that the blood was from the complainant. On cross-examination, he stated that he could not rule out the possibility of the blood as having come from another source.
24. Addressing the inconsistencies and contradictions in the complaint's evidence, namely, whether she named her assailant and the colour of the complainant's panties, the learned judge stated:

“Having looked at the trial Court record in its entirety and in context, I have come to the conclusion that the so-called inconsistencies in question in this case are not material at all; they can be ignored as they have no bearing on the veracity of the material evidence tending to demonstrate the guilt of the appellant. They do not relate to factors verging on the incredulity of the witnesses.”

25. As was stated by the Court of Appeal of Nigeria in *David Ojeabuo vs. Federal Republic of Nigeria* [2014] LPELR- 22555(CA):

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.” (Emphasis added).

26. The Court of Appeal of Uganda in *Twehangane Alfred vs. Uganda* (Criminal Appeal No. 139 of 2001) [2003] UGCA 6 (17 February 2003) was categorical that it is not every contradiction that warrants rejection of evidence. It subtly stated:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

27. In *Philip Nzaka Watu vs. Republic* [2016] eKLR this Court stated:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”



28. As the above decisions suggest, decided cases are in agreement that minor or trivial contradictions do not affect the credibility of a witness nor can they vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the Court and therefore necessarily create some doubt in the mind of the trial Court that an accused is entitled to benefit there from. The correct approach is to read the evidence tendered holistically. We have read the entire prosecution evidence. The bottom line is whether there is evidence that the complainant was defiled. Our answer to this is in the affirmative. First, there is the complainant's evidence as detailed earlier which is corroborated by the other evidence that screams were heard from the forest, and that, she was crawling and bleeding from her genitalia. These massive injuries were confirmed by the medical evidence.
29. Even if there was no corroboration, the proviso to section 124 of the *Evidence Act* clearly provides that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. We find nothing to suggest that the complainant was not telling the truth.
30. The other question is whether the appellant was properly identified as the offender. First, there is evidence that he went to the complainant's home and asked the complainant to accompany him to Sirikwa Court. All this was happening during daytime. There is evidence that the appellant and the complainant were seen sitting on the grass holding hands. He was seen leading her to a maize plantation. Later screams were heard from the forest and he was seen jumping over the fence, running away. He was followed to the AP camp. On the face of all this evidence, we find no reason to find that he was not properly identified.
31. On the challenge posed by the uncertainty of the complainant's age, the learned judge of the first Appellate Court held:
- “23. The Appellant complains that the age of the Appellant was not proved adequately because there were discrepancies: The Complainant stated that she was ten; the OCS claimed she was seven; while the P3 Form indicated that she was eleven. The Appellant believes that these discrepancies are material and should yield an acquittal for him. He is wrong. The ingredient of the defilement as charged in the Appellant's case was that the child be under the age of eleven. In my view this fact was adequately proved through the oral testimony of the Complainant and the P3 Form. There is no requirement to establish the age of the victim with mathematical precision; it is sufficient that the Court is satisfied that the child is below eleven years old.”
32. Rule 4 of the Sexual Offences Rules of Court provides that:
- “When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”



33. The *Sexual Offences Act* adopts the definition of a child in the *Children Act*. Section 2 of the *Children Act* defines "age" as, "Where actual age is not known means the apparent age". In *Mwalango Chichoro Mwanjembe vs. Republic* [2016] KECA 183 (KLR) on proof of age of a complainant this court stated:

"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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa Vs. R*, Cr. Appeal No.19 of 2014 and *Omar Uche vs. R*, Cr. App. No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni vs. Uganda*, Cr. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

34. In the charge sheet, the complainant's age was indicated as 11 years. In the P3 form it was indicated as 11 years. In her evidence, the complainant stated that she was 11 years old. We find that, the learned Judge properly considered the evidence before him and arrived at the correct finding that the age of the complainant was established. Age is an issue of fact which is proved by evidence. There are concurrent findings by the two courts below that age was proved as required. We are required to accord due deference to concurrent findings of fact by the two courts below. Although there can be rare exceptions to this practice (in particular, where there has been an error of law in relation to the findings of fact), an appellant must demonstrate to this Court that his or her case falls within exception(s). This has not been done.
35. Perhaps, it is worth clarifying that the practice of this Court (in not going behind the concurrent findings of fact of the two lower courts) imposes an added constraint on this Court. That is, it adds an additional hurdle for an appellant to overcome when appealing to this Court. This is for two main reasons. First, the trial court, given its opportunity to see and hear witnesses at first hand, is likely to be in the best position to make findings of fact. Where those findings of fact have been upheld by the first Appellate Court, there is no reason to think that a second Appeal Court is more likely to be correct about the facts than the two courts below. Secondly, this Court respects concurrent factual findings by the two courts below and appreciates that the trial court is very likely to be in a better position to assess such factual circumstances than is this Court. (See the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (Supra).
36. Regarding the ingredient of penetration, section 2 of the *Sexual Offences Act* defines penetration as follows:

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

37. Addressing the issue of, penetration the first Appellate Court stated:

"What about penetration? The Appellant raises no complaints about this. And it is just as well. There was overwhelming evidence of penetration. Indeed, according to the medical evidence contained in the P3 Form and the PRC Form, the penetration was so vicious that



the Complainant was bleeding profusely after her vaginal walls suffered massive tears. She required surgical repair of the vagina.”

38. PW1 in her testimony stated that the appellant knocked her down, removed her panties then raped her. PW11, who testified on behalf of Dr. Wainaina who examined the complainant on 30th December 2008 testified that the complainant had sustained 2nd degree perennial tear, her urine had blood and she had been admitted for repair of her genitalia. Having considered the evidence on record, we find that the evidence by the complainant that the appellant defiled her was not shaken. Consequently, the ingredients of the offence were therefore well established.
39. Lastly regarding the issues of the failure by the learned judge to consider the appellant’s defence which he claims was truthful and whether the life imprisonment sentence is lawful, we have had an opportunity to carefully reconsider the record. We note that in the appellant’s undated amended grounds of appeal and the submission filed thereto do not reflect the issue of the failure by the learned judge to consider the appellant’s evidence and whether the life imprisonment sentence is lawful. Therefore, the said issues were never determined by the first Appellate Court.
40. 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.”
41. Therefore, 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 Court, 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.
42. The above notwithstanding, regarding lawfulness of mandatory minimum sentences, it is important for us to mention that the Supreme Court in *Republic vs. Joshua Gichuki Mwangi & Others* (supra) was categorical that so long as the penalties provided under the *Sexual Offences Act* remain in our law books, courts are obligated to impose them unless and until a proper case is filed before the High Court challenging the constitutionality of the sentences and determined and the issue is escalated through the hierarchy of the courts. It stated:
- “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.”
43. Arising from our discussions on the issues determined herein above, the inevitable conclusion is that this appeal is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 4TH 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

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

