



**Lougen v Republic (Criminal Appeal E115 of 2022)  
[2024] KECA 1095 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1095 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL E115 OF 2022  
F SICHALE, FA OCHIENG & WK KORIR, JJA  
AUGUST 21, 2024**

**BETWEEN**

**THOMAS BIWORR LOUGEN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Eldoret, (H Omondi J), dated and delivered on 31st July 2018 in HC. CRA NO. 125 of 2016)*

**JUDGMENT**

1. Thomas Biwott Lougen (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence that had been imposed by the Principal Magistrate's Court at Iten (Hon A.C Ndalo RM), on 3<sup>rd</sup> November 2016, for the offence of defilement of a girl contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on the 12<sup>th</sup> day of December 2013, at around 17:00 hours at (particulars withheld), he caused his penis to penetrate the vagina of V.J a child aged 10 years.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally touched the vagina of V.J, a child aged 10 years with his penis.
4. The appellant denied the charges after which a full trial ensued with the State calling a total of 5 prosecution witnesses while the appellant elected to give a sworn testimony and called no witness.
5. As stated above, in a judgment delivered on 3<sup>rd</sup> November 2016, the appellant was found guilty of the main charge and convicted. He was sentenced to life imprisonment.



6. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 31<sup>st</sup> July 2018, H. Omondi J (as she then was), found the same to be devoid of merit and dismissed the same in its entirety.
7. Unrelenting, the appellant has now filed this appeal vide a Notice of Appeal dated 12<sup>th</sup> August 2018 and a Memorandum of Appeal filed in Court on 19<sup>th</sup> February 2019, raising 6 grounds of appeal as follows:
  - “(a) That the appellate judge erred in law by failing to notice that the trial court acted out of ignorance and negligence by revising its order by failing to do what the law provides, contrary to Section 362 of the Criminal Procedure Code.
  - b. That the appellate court erred in law and facts by failing to consider that the alleged order issued by the trial court was defective or improper as any court cannot cancel or annul its order.
  - c. That the appellate judge erred in law by failing to consider that the right of the appellant of recalling and re-examining PW1, PW2, and PW3 was violated and prejudice (sic) in breach of Article 50 (2) (k) of *the Constitution*.
  - d. That the appellate court erred in law by not considering that the trial court acted out of bias and prejudice by revising its order in favour of the prosecution.
  - e. That the appellate court erred in law by upholding the conviction without observing that the trial was a nullity as the names of the person who testified as the complainant and that in the charge sheet is different and incurable under Section 382 of the Criminal Procedure Code.
  - f. That the appellate court erred in law by failing to consider that it was not sitting as a revisionary court when it acted on matter of revision which it had no authority.”
8. The relevant facts in this appeal as narrated by the testimony of the prosecution witnesses are as follows: V.J testified as PW1 and was the complainant in this case. She testified that she knew the appellant as a neighbour and that on 12<sup>th</sup> December 2013, she had gone to the river with Jemutai (PW2), to wash clothes.
9. That, at about 5.00pm when they were about to finish, the appellant came from Kaben with one Talus (Douglas) and sat down where they were, and when they finished washing clothes, they left for PW2’s home. That, when they got to the house, PW2 started preparing vegetables whereas she was left outside playing with Jeruto who was PW2’s sister.
10. That, they then entered the house with Jeruto and she heard PW2 tell the appellant to give her Kshs 300/= and herself Kshs 100/= and then went outside again to play. PW2 then went inside the house and brought her Kshs 100/= and pushed her into the house and locked the house.
11. The appellant then locked the house from inside and took her to PW2’s bed, removed her panty which he put in his pocket, opened his trouser and “did bad things to her.” It was her evidence that he put saliva on his penis which she put in her vagina and that she felt pain and cried but the appellant covered her mouth with his hands.



12. She then heard PW2 opening the door from outside and the appellant opened from inside and when she got outside, she told PW2 to tell the appellant to give her her panty but the appellant declined. She then went home and found no one and when she eventually saw her mother, she ran away and went to her uncle's home where she spent the night. Her mother then came and asked her what the problem was as she had not returned home. She told her mother that she had spent the night at her uncle's home. Her mother then asked her if she had been defiled by the appellant to which she replied in the affirmative. They later went to Tot police station and reported the matter.
13. JM testified as PW2. It was her evidence that she knew the appellant as a neighbour and that on 12<sup>th</sup> December 2013, she had gone to wash clothes with PW1 who was also a neighbour. That, subsequently thereafter, the appellant came together with his friend one Douglas and they were very drunk. They then left for home and the appellant followed them inside the house.
14. That, the appellant then said that he would give her Kshs 300/= which he showed her and she then went outside the house and left the appellant inside the house. That, PW1 then went inside the house and she saw the appellant lock the door from inside and that he stayed with PW1 inside the house for a long time.
15. It was her further evidence that when the door was finally opened, PW1 told her to help her look for her panty and Douglas told the appellant to give PW1 her panty but he refused and left for his home. That later on, she went home and that night PW1's mother came to their house and asked them what had transpired. She told PW1's mother that the appellant and PW1 had locked themselves inside the house. Later on, PW1 and her mother came to their home accompanied by policemen and interviewed her.
16. Faith Jeremiah, (PW1's mother) testified as PW3. It was her evidence that she knew the appellant as a neighbour and that on 12<sup>th</sup> December 2013, she was at Kaboror with other neighbours when she received a report of PW1 being locked in a house.
17. Together with PW2's mother they asked PW2 what had happened and PW2 told them that indeed the appellant had locked PW1 in the house and did bad things to her.
18. She then started looking for PW1 but she did not find her. The next day, PW1's uncle one Fred, told her that PW1 had spent the night in his house. It was her further evidence that when she eventually met PW1, she told her that the appellant had done bad things to her in PW2's house. They later proceeded to Tot police station and Tot District hospital where PW1 was examined.
19. PW4 was Esther Cheptoo, a clinical officer then attached to Tot sub county hospital. She examined PW1 on 14<sup>th</sup> December 2013. PW1 had a history of being defiled by someone well known to her. Upon examination, there was a whitish discharge from her private parts and there were tears on her vaginal walls bilaterally. A high vaginal swab revealed presence of spermatozoa. She concluded that the girl had been defiled.
20. PW5 was PC Peter Mwangi Mwaura then attached to Tot police station. On 14<sup>th</sup> December 2013, he received PW1 and PW3 who reported a case of defilement by someone known to PW1.
21. He took PW1 and the appellant to Tot Sub County District Hospital for examination and upon examination, the clinical officer confirmed to him that there was penetration.
22. It was his testimony that the complainant told her that the appellant had defiled her severally when she entered the house which evidence was further corroborated by PW2. He caused the appellant to be charged.



23. The appellant in his defence gave a sworn statement and denied having committed the offence. He further testified that he knew PW1 as a neighbour and that on the material day that is, 12<sup>th</sup> December 2013, he spent the better part of the day with his friends drinking alcohol in 3 different spots and that by 4.00pm, he was totally drunk. After the drinking spree he went home and recovered consciousness the following morning. He was subsequently arrested on the night of 14<sup>th</sup> December 2013.
24. When the matter came up for plenary hearing on 6<sup>th</sup> December 2023, Mr. Nyabuto learned counsel appeared for the appellant whereas Mr. Namasake appeared for the respondent. Both parties relied on their written submissions dated 27<sup>th</sup> April 2023 and 17<sup>th</sup> November 2023 respectively.
25. It was submitted for the appellant that the learned first appellate judge erred in law by failing to consider that the rights of the appellant were violated as the trial court failed to inform the appellant of his right to be represented by an advocate in breach of Article 50 (2) of *the Constitution*.
26. It was further submitted that failure to recall PW1, PW2 and PW3 for cross-examination by the appellant's counsel violated the appellant's right to a fair trial given that the said witnesses could easily be secured as their abodes were known.
27. It was the appellant's submission that no evidence was produced in court to show the efforts made to trace PW1, PW2 and PW3 before concluding that they were not available.
28. It was thus submitted that the court had a duty to inform the accused person of his right to be represented by an advocate before the beginning of his trial and that the court reneged on this duty and when he appellant finally enlisted the services of an advocate, the prosecution failed to avail witnesses for further cross examination by his counsel.
29. On the other hand, it was submitted for the respondent that the conviction of the appellant and the sentence imposed thereof was proper.
30. On the first ground of appeal where the appellant faulted the learned judge for failing to note that the trial court acted out of ignorance and negligence by revising its order, as it had earlier directed that the witnesses be recalled and later revised this order and had the prosecution close its case before the witnesses were recalled, it was submitted that this did not prejudice either the appellant's defence or invalidate the prosecution's case in anyway. The respondent's argument was that the trial magistrate's direction to recall witnesses was made without due consideration being given to the challenges and hardship that the prosecution had alluded to in recalling the witnesses.
31. Regarding the failure by the trial court to consider the right of the appellant to recall and re-examine PW1, PW2 and PW3, it was submitted that it was on record that PW1, PW2 and PW3 testified on 2<sup>nd</sup> July 2014; that counsel for the appellant sought to have them recalled on 19<sup>th</sup> May 2016, which was almost two years later; that the prosecution sought for time to confirm if they could be found; that on 25<sup>th</sup> May 2016, the prosecution opposed the application stating that these witnesses came from East Pokot and Baringo counties where there were inter-clan fighting between the Marakwets and the Pokots, thus making it difficult to trace them.
32. It was thus submitted that a request to have the case proceed from where it had reached was made save that the prosecution was overruled by the trial court citing provisions of Article 50 of *the Constitution* and allowed the recall and as fate would have it, only the clinical officer (PW4) could be found and he was recalled. That 4 months later, the trial magistrate revisited his decision and allowed the prosecution to close its case as the witnesses could not be traced.



33. It was submitted that though the three witnesses were to be recalled, every effort made to get them to attend court was in vain. It was thus submitted that as mentioned by the learned judge, it would have been pretentious of the court not to take judicial notice of the fact that inter clan fighting along the Pokot/Baringo border where PW1, PW2 and PW3 hailed from was a perennial occurrence and that due to the fighting, families had moved away from their homes; the witnesses with their parents included. It was submitted that every effort was made to recall the said witnesses.
34. We have carefully considered the record, the rival written submissions by the parties, the authorities cited and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code, we are mandated to consider matters of law only.
35. The above provision has been enunciated in several decisions of this Court. In *David Njoroge Macharia vs. Republic* [2011] eKLR the said mandate was summed up in the following terms:
- “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).”
36. Having carefully gone through the record and the rival submissions by the parties, we have framed the following 2 main issues for our determination:
- a). Whether the appellate judge erred in law by failing to find that the trial court erred in revising its order contrary to Section 362 of the Criminal Procedure Code which vests the power of revision upon the High Court.
  - b) Whether the appellate judge erred in law by failing to find that the appellant’s right to recall and examining PW1, PW2 and PW3 was violated and/or prejudiced in breach of Article 50 (2) (k) of *the Constitution*?
37. Before we address our minds to the first issue that we have framed for our determination, and having re-evaluated the evidence that was tendered in the trial court, we note that the evidence was overwhelming and remained largely unchallenged even under cross examination as the appellant barely cross examined PW1 who was the victim, PW2 who was said to have been present when the offence was committed and PW3 who was the victim’s mother.
38. Be that as it may and turning to the first issue, the learned judge was faulted for failing to notice that the trial court acted out of ignorance and negligence by revising its order by failing to do what the law provides contrary to Section 362 of the Criminal Procedure Code.
39. We have gone through the record and note that the appellant conducted his trial in person until 19<sup>th</sup> May 2016, when he appointed an advocate who made an application for the case to be reopened. The prosecution subsequently prayed for a mention date to respond to that application because the witnesses had testified two years prior. The matter was slated for mention on 25<sup>th</sup> May 2016.
40. On 25<sup>th</sup> May 2016, the prosecution opposed the application made by the defence, the reason being that the witnesses had testified over two years prior. In a ruling delivered on 30<sup>th</sup> May 2016, the trial court allowed the application by the defence and ruled that the prosecution’s case be reopened.



41. On 30<sup>th</sup> September 2016, hearing resumed, the prosecutor intimated to court that he had two witnesses namely, PW4 and PW5. Regarding PW1, PW2 and PW3, the prosecutor informed the court that they had relocated from Kaben location following inter clan clashes. In a short ruling, the court ordered the prosecution’s case closed essentially reviewing its earlier orders of 30<sup>th</sup> May 2016 which it had ordered the prosecution’s case to be reopened.
42. The learned judge while addressing herself on this issue stated as follows in her judgment:
- “I think the only blunder that the trial magistrate made was to revise his own order – he ought to have presented the file to the High Court for Revision.
- Did that result in prejudice – I do not think so, because were the order to be presented before me for revision I would have come to the conclusion that the trial magistrate direction for re-call was made without due consideration being given of the challenges and hardship prosecution had alluded to, and I would have set aside the order, so no prejudice was occasioned.”
43. We are fully in agreement with the reasoning by the learned judge and we have no reason to fault her for the finding that she arrived at for the following reasons: first of all, there was evidence on oath in the form of an affidavit sworn by the acting OCS Tot police station, indicating the efforts he had made in tracing PW1, PW2 and PW3 in which he inter alia stated that the said witnesses had relocated from Kaben location following inter clan clashes. Additionally, the prosecution made efforts to avail the two witnesses out of the 5 witnesses that had testified for the prosecution following the order to reopen the case. Thirdly, on 30<sup>th</sup> September 2016, the appellant who was the represented by Mr. Ngigi urged the trial court to order the case closed and “retire to write a ruling in (sic) the evidence on record.”
44. The trial court proceeded to order the prosecution’s case closed. The appellant did not appeal to the High Court against the said order.
45. From the circumstances of this case just like the learned judge, we are satisfied that the appellant was not prejudiced in anyway by the decision of the trial court to revise its own orders and we are of the considered opinion that this omission was not fatal to the prosecution’s case. Further, Section 382 of the Criminal Procedure Code CAP 75 of the Laws of Kenya provides:
- “
- “382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
- Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”
46. Suffice to state that the “revision” by the trial court did not occasion a miscarriage of justice. In the instant case, there was ample evidence that indeed the prosecution had made efforts to avail PW1, PW2



- and PW3 but their efforts proved futile. Consequently, we find no merit in this ground of appeal which we hereby dismiss in its entirety.
47. The learned judge was further faulted for failing to consider that the right of the appellant of recalling and re-examining PW1, PW2 and PW3 was violated and in breach of Article 50 (2) (k) of *the Constitution*.
  48. It is indeed not in dispute that PW1, PW2 and PW3 testified on 2<sup>nd</sup> July 2014, whereas the application for recalling of the witnesses was made on 19<sup>th</sup> May 2016, which was almost two years down the line. Additionally, there was ample evidence on record that the witnesses had moved from the area that they were initially residing and moved to unknown place and that they lived on the boundary of East Pokot and Baringo county where there was inter-clan fighting between the Marakwet and the Pokots. Further, there was an affidavit sworn by the acting OCS Tot police station indicating the efforts made in tracing the witnesses in which he inter alia stated that they had relocated from Kaben location following inter-clan clashes.
  49. The record further shows that 4 months down the line after the order of recalling the prosecution witnesses was made on 30<sup>th</sup> May 2016, 3 of the witnesses namely; PW1, PW2 and PW3 had not been availed owing to their unavailability and on 30<sup>th</sup> September 2016, the appellant through his counsel requested the trial court to order the case closed and retire to write a ruling based on the evidence already on record.
  50. From the above, we think we have stated enough to demonstrate why it would not have been tenable to have PW1, PW2 and PW3 recalled for further cross examination owing to their unavailability. Further the prosecution partially complied by the order given by the trial court on 30<sup>th</sup> May 2016, to reopen its case by availing 2 of the 5 witnesses that had already testified in the appellant's trial. Additionally, we are satisfied that failure to recall these witness did not prejudice the appellant in anyway owing to the overwhelming evidence on record that was never dislodged by the defence tendered by the appellant. Consequently, nothing turns on this point and we accordingly find no merit in this ground of appeal which we dismiss in its entirety.
  51. The appellant further faulted the learned judge for upholding his conviction without observing that the trial was a nullity as the name of the person who testified as the complainant and that indicated in the charge was different thus incurable under Section 382 of the Criminal Procedure Code. First of all, we note that the issue of the name of the complainant is a question of fact and an appeal at this stage by dint of Section 361 (1) (a) of the Criminal Procedure Code is confined to matters of law only.
  52. Be that as it may, we have gone through the record and note that the charge sheet indicates that the person who was defiled was V.J. whereas the person who testified as PW1 is equally V.J. When the prosecution sought to amend the charge sheet on 2<sup>nd</sup> July 2014, so that the name of the complainant reads D.J instead of V.J, the appellant indicated to the court that he had no objection. Further, PW5 who was the investigations officer testified that the name given to him at the station was D.J and that the complainant's peers called her Doris and that when he was finally given her birth certificate, the same indicated her name to be V.J. Consequently, nothing turns on this point.
  53. Lastly and even though the appellant has not raised this as a ground of appeal, we note that from his submissions, he seems to be alluding to the fact that he was not accorded the right to legal representation. This Court has severally stated that the right to legal representation is not automatic and is rather qualified and is on a case by case basis depending on the peculiar circumstances of each case.



54. In the instant case, we note that the appellant did not raise this issue before the trial court. As a matter of fact, towards the tail end of his trial, the appellant was duly represented. Additionally, this issue was not before the High Court for determination and hence cannot be subject of our determination. We will not make any further comment regarding the same.
55. Suffice to state that, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement.
56. We therefore find and hold that the appellant's conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.
57. Turning to the issue of sentence, the appellant was sentenced to life imprisonment which is the mandatory sentence provided under Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The sentence was therefore lawful.
58. The Supreme court of Kenya decision of Republic -vrs- Joshua Gichuki Mwangi Pet. No. E018 of 2023 precludes us from revisiting a lawful sentence meted out by a trial court and affirmed by the first appellate court. Accordingly we find no merit in this appeal and the appeal is hereby dismissed.

We so order.

**DATED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF AUGUST, 2024.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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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**

