



**EKL v Republic (Criminal Appeal 32 of 2018)  
[2024] KECA 1302 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1302 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 32 OF 2018  
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**EKL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kericho  
(Mumbi Ngugi, J.) dated 21st February 2018 in HC.CR.A. No. 11 of 2017)*

**JUDGMENT**

1. The appellant herein was charged with the offence of defilement 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 8<sup>th</sup> March 2016 within Kericho County, the appellant intentionally and unlawfully caused his genital organ (penis), to penetrate the genital organ (vagina), of DC a girl, aged 9 years.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
4. The appellant pleaded ‘not guilty’ to the charges. To advance its case against the appellant, the prosecution called six witnesses. At the end of the trial, the appellant was found guilty, he was convicted, and sentenced to life imprisonment.
5. Being aggrieved by the conviction and the sentence, the appellant appealed to the High Court. His appeal was dismissed and his conviction and sentence were upheld.
6. The prosecution’s case was that the complainant, who testified as PW1 was 9 years old and in class 3. In her unsworn testimony, the complainant told the court that she left school at about 4:00 pm on 8th February 2016 and went home. She then went to her friend, C’s home where she found C’s father,



- (the appellant) outside. When she went inside the house, the appellant followed her and asked her to undress but she refused. He then removed her underpants and slept on her using his manhood. She felt pain and cried but no one came. She went back home but did not tell her mother what had happened.
7. According to PW2, who is the complainant's mother, the complainant was born on 31st August 2007. She told the court that on 9th February 2016, she was informed by PW3 that the appellant had told PW3 that he had chased the complainant and another boy from his house and that PW3 had seen the complainant leaving while crying, walking with difficulty, and also trying to put on her biker. On asking the complainant what had happened, the complainant told her that she had gone to look for C when the appellant got hold of her and defiled her.
  8. She told the court that she noticed the complainant was walking with difficulty, and she took her to Ainamoi Health Centre. She then reported the matter to the Chief who then referred her to the police. Upon being issued with a P3 form, she took the complainant to Kericho District Hospital where the complainant was examined. She informed the court that the appellant and her husband were cousins, they had a good relationship with no disputes.
  9. PW3 told the court that she had been walking home on the material day and when she passed near the appellant's house, he asked her whether she had seen any boy going away. She told the appellant that she had not seen any boy but she had met the complainant a few meters from the appellant's house, walking while trying to put on her clothes and also crying. She informed the complainant's mother of this matter the following day. She told the court that the appellant was a distant brother-in-law with whom she had a good relationship.
  10. According to PW4, she had seen the complainant at the appellant's home on the material day. At first, she thought it was the appellant's daughter but the appellant told her that it was the complainant. She later learned that the appellant had defiled the complainant.
  11. PW5 was the Investigating Officer.
  12. PW6 was a clinical officer. He produced the P3 form which had been filled and signed by Yego Kirwa who had examined the complainant 13 days after the incident. The report showed that the complainant had a bruised labia majora and bruises on the vagina walls with a moderate amount of pus cells and red blood cells. Mr. Yego had formed the opinion that the complainant had been defiled.
  13. In his unsworn testimony, the appellant stated that the offence he knew about was not the one read to him in court. He told the court about 13th June 2016 when he was informed that PW2's cattle were on his farm. He had driven the cattle out of his home and PW2 later came to insult him. He was then arrested on 18th June 2016.
  14. The trial court held that the complainant fell within the age bracket provided for under section 8(2) of the *Sexual Offences Act* based on her birth certificate which indicated that she was born on 30th August 2007. The court also held that penetration had been proved through the evidence of PW2, PW3, PW4, and PW6.
  15. On appeal, the learned Judge held that the complainant was 8 years old at the time when she was defiled having been born on 30th August 2007 as per the birth certificate.
  16. The learned Judge further held that the appellant was someone the complainant knew as the father of her friend C, and she could not have made an error about his identity. The complainant had also been seen standing by the appellant's door by PW4 and PW3 had seen her walking away while crying near the appellant's house.



17. The learned Judge held that penetration had been proved by medical evidence and the testimony of the complainant that the appellant had followed her to the house, removed her biker, and defiled her.
18. The learned Judge found the contradictions in the dates mentioned by the witnesses, especially the complainant, not to be material.
19. Consequently, the learned Judge upheld the appellant's conviction and the sentence.
20. Being dissatisfied with the judgment, the appellant lodged the appeal herein in which he raised the following supplementary grounds of appeal:
  - a. The appellant pleaded not guilty.
  - b. The learned Judge erred in relying on medical evidence which was questionable and insufficient.
  - c. The learned Judge erred in failing to find that the appellant was not issued with witness statements.
  - d. The age of the complainant was not conclusively proved.
  - e. The complainant's mother was only suspicious that the complainant was defiled.
  - f. Section 124 of the *Evidence Act* was wrongly used without cogent reasons.
21. When the appeal came up for hearing on 9<sup>th</sup> April 2024, the appellant was present in person, whereas Mr. Omutelema, Assistant Deputy Director of Prosecutions was present for the respondent. The parties relied on their respective written submissions.
22. In his written submissions, the appellant submitted that the prosecution case was not proved beyond reasonable doubt as there was inconclusive evidence of penetration as the person who examined the complainant was his brother and he sent his friend to produce the P3 form and the appellant was not able to cross-examine him on the same.
23. The appellant submitted that he was prejudiced when he was not issued with witness statements as he was not able to adequately prepare for the trial and his right under Article 50(2)(c) of *the Constitution* was contravened.
24. He contended that the age of the complainant was not proven as the complainant was not subjected to an age assessment to confirm how old she was.
25. He attributed the case against him to a grudge between PW2 and himself. He also submitted that his defence was not considered.
6. The appellant submitted that the sentence against him was unlawful because the mandatory nature of the life imprisonment under Section 8(2) took away the discretion of the court in sentencing.
7. Opposing the appeal, Mr. Omutelema submitted that the appellant was allowed to cross-examine the complainant as opposed to his allegation that he did not cross-examine the complainant. Counsel further submitted that the appellant had requested for statements on 15<sup>th</sup> August 2016 and the court directed that he be given the same. Later, when the matter came up for hearing, the appellant informed the court that he was ready to proceed and he did not raise the issue of statements again.
8. In their written submissions, the respondent submitted that the age of the complainant was proved by the birth certificate. The respondent further submitted that the conviction of the appellant was founded on evidence and the right principles and not on suspicion as alleged by the appellant.



29. The respondent urged us to consider the indeterminate nature of the life imprisonment and substitute the same with a severe determinate sentence.

30. This is a second appeal. Section 361(1) of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts 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 matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

31. We have carefully considered the record of appeal, the written submissions by both parties, the authorities cited, and the law. The issue for determination is whether or not the prosecution proved the offence of defilement against the appellant beyond any reasonable doubt, and whether or not the mandatory minimum sentence meted against the appellant was lawful.

32. As grounds 2, 3, 5, and 6 were not raised before the first appellate court, we find that this Court has no jurisdiction to determine the said issues as 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.

33. In the case of *Peter Kihia Mwaniki v Republic* [2010] eKLR, this 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.”

34. Similarly, in the *John Kariuki Gikonyo v Republic* [2019] eKLR case, this Court held that:

“Similarly from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her” This Court when faced with a similar issue in [\*Alfayo Gombe Okello v. Republic\* \[2010\] eKLR Criminal Appeal No. 203 of](#)



2009; held as follows: “...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.” Page 11 of 20 [18] In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal.”

35. Section 8(1) of the Sexual Offences Act provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

36. Under the Sexual Offences Act, the elements of the offence of defilement are as follows: the victim must be a minor, there must be penetration of the genital organ, but such penetration need not be complete, partial penetration will suffice, and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above elements. In the case of *Charles Karani v Republic*, Criminal Appeal No. 72 of 2013, the court stated that:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant.”

37. It is trite that the burden of proof regarding the age of the complainant lies with the prosecution. According to Section 8(1) of the Sexual Offences Act, a person is considered to have committed defilement if they engage in an act that involves penetration with a child. The definition of a child is as outlined in Section 2(1) of the Children Act, which means any person under the age of 18 years.

38. In the case of *Kaingu Elias Kasomo v Republic*, Criminal Appeal No. 504 of 2010, the court emphasized the importance of proving the age of the victim of defilement, as the sentence imposed upon conviction depends on the victim’s age.

39. In this case, the complainant testified that she was 9 years old.

This evidence was corroborated by the evidence of PW2, the complainant’s mother, who testified that the complainant was born on 30th August 2007. PW2 also produced a birth certificate which showed that the complainant was born on 30th August 2007. All the evidence adduced pointed to the complainant having been 8 years old at the time when she was defiled. In the case of *Richard Wabome Chege v Republic, Criminal Appeal No 61 of 2014*, the court held that:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by the production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself.”

40. In the case of *Francis Omuron v Uganda*, Criminal Appeal No. 2 of 2000, the Court of Appeal of Uganda held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim



in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian, and by observation and common sense.”

41. We find that the complainant's age was proved beyond reasonable doubt to be 8 years at the time of the incident.
42. The complainant narrated to the court how she went to C's house and on arriving she found that C was not there but the appellant was outside. She then went inside the house to wait for C who had gone to Cheruto's house. However, while inside, the appellant came in and asked her to undress. When she refused, he removed her pants and defiled her.
43. This evidence was corroborated by the evidence of PW5 who produced the P3 form indicating that the complainant's vagina was bruised, and the officer who had examined the complainant, in his expert opinion, had concluded that there was penetration.
44. Furthermore, PW4 had seen the complainant at the appellant's home and even confused her with the appellant's daughter, and PW3 had met the complainant crying while trying to put on her biker a few meters from the appellant's house.
45. We are of the considered view that this evidence is sufficient proof of penetration.
46. As regards the identity of the appellant, the complainant knew the appellant as C's father, PW2 knew him as her husband's cousin, and PW3 knew him as a distant brother-in-law. When PW2 asked the complainant what had happened, the complainant mentioned the appellant as the person who had defiled her. This was not an issue in contention.
47. This is satisfactory proof that the appellant was well-known to the said witnesses. The risk of mistaken identity was non-existent. Therefore, this was a case based on recognition as opposed to identification by a stranger. In the case of *Anjononi & Others v Republic* (1976-1980) KLR 1566, the court held that:

“...when it comes to identification, the recognition of an assailant is satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”
48. In the circumstances, we find that the appellant was positively identified through recognition by the prosecution witnesses.
49. The appellant contended that his defence that PW2 held a grudge against him because he had driven her cattle out of his farm was not considered. This allegation was raised for the first time during the appellant's defence. We find this allegation to be an afterthought given that the issue of cattle came to be three months after the complainant had been defiled. In any event, the said defence does not in any way displace the prosecution case against the appellant.
50. In the result, we find that all the ingredients of the offence of defilement were proved beyond any reasonable doubt. We find no reason to interfere with the findings of fact by the two courts below. The appellant's conviction was safe.
51. As regards the sentence meted against the appellant, Section 8(2) of the *Sexual Offences Act* provides that:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”



52. As the issue of the sentence was not raised before the High Court as a first appellate court, this Court has no jurisdiction to interfere with the same, as was held in the case of Republic v Joshua Gichuki Mwangi, *Petition No. E018 of 2023*.

53. Accordingly, we dismiss the appeal in its entirety and uphold the appellant’s conviction and sentence. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**S. ole KANTAI**

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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.**

