



**Omondi v Republic (Criminal Appeal 169 of 2017)
[2023] KECA 1083 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1083 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 169 OF 2017
W KARANJA, F TUIYOTT & JM NGUGI, JJA
SEPTEMBER 22, 2023**

BETWEEN

DENIS ODONGO OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

*((An appeal from the judgment of the High Court of Kenya at Homabay
(H.A. Omondi, J.) dated 21st July, 2017 in HCCRA No. 06 of 2017))*

JUDGMENT

1. This second appeal comes with a whopping 22 grounds when the appellant raised only 4 grounds at the first appeal before the High Court. As will be apparent presently this is an attempt to expand the scope of the appeal without leave of court, unacceptable and to be frowned upon.
2. Denis Odongo Omondi (the appellant) is serving life imprisonment after he was convicted by the trial court (Hon. B.R. Kipyegon SRM (as he then was)) for the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act*. The trial court and the first appellate Court believed the following evidence offered by the prosecution.
3. The victim, EAO, was aged 9 years at the time of the offence. She lived with her parents in West Kwabwai and the appellant is a neighbor, known to her. On 20th May, 2016 she walked back from school in the company of her classmates M and CCO when they met the appellant near a sugar cane plantation. He began to chase after them. Afraid, the children screamed but the appellant caught up with them and threatened to behead them if they continued raising alarm.
4. Indeed, he assaulted the other two before asking them to leave. Alone with the complainant, he led her into a sugar cane plantation still armed with a panga and ordered her to remove her underwear. When she declined, he slapped her on the back of the head and she fell to the ground whereupon he removed



- her underwear, pulled up her skirt and defiled her. The victim told her mother, SA (PW3), about her ordeal and led her back to the scene.
5. PW3 noticed that her daughter's clothes were dirty and stained with mud and she took her for treatment at Lwanda Hospital where she was referred to Ndhiwa Hospital. AOL (PW4), a head teacher of [Particulars Withheld] Primary where the victim was a pupil, felt the compulsion to follow the mother and victim to the dispensary where he found the latter being attended to. She looked dirty and noticeably frightened.
 6. Dr. Thaddeus Owiti (PW1) then attached to Ndhiwa Hospital, examined the victim on 22nd May, 2016. He examined the patient's genitalia and found that it was not intact and was torn. The vagina showed hypoglycemia or recent penetration.
 7. On receiving the report of the crime, Rose Nyaolo (PW5), then serving as an assistant chief of Kasirime Sublocation, directed the youth in her area of jurisdiction to trace the appellant. Upon his arrest on the night of 21st May, 2016, she called the police who came and re-arrested him.
 8. Both courts below disbelieved the sworn defence of the appellant. He had denied the charges he faced and said they were trumped up because of a disagreement he had with his village elder one John Oyugi. This is because, the appellant claimed, the wife of Oyugi had attempted to persuade his (the appellant's) wife to get married to her brother-in-law.
 9. Our role as a second appellate Court has statutory restrictions prescribed by section 361 of the [Criminal Procedure Code](#). Of this remit, this Court in *Karani v R* [2010] 1 KLR 73 stated:

“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.” See also *Karungo v R* (1982) KLR 213.
 10. Where there has been concurrent findings of fact by the two courts below, like here, then we are enjoined to pay deference to those findings, save where they are shown to be based on no evidence or that the conclusion drawn is perversely at odds with the evidence (see for example the case of [Wanjiru v. Republic](#) (Criminal Appeal 23 of 2019) (2021) KECA 330 (KLR) (17 December 2021) (Judgment); [Obedi Kilonzo Kevevo v. Republic](#) (2015) eKLR)
 11. Of the grounds argued at the first appeal, the following are again raised before us by the appellant;
 - a. Documents the prosecution was to rely on were not supplied to the appellant at the trial.
 - b. There was no medical evidence linking the appellant to the complainant.
 - c. The trial Magistrate disregarded his defence.
 - d. That the life sentence imposed on him was harsh.
 12. This Court will not entertain the many other grounds which were not raised in the first appeal. For instance, those questioning the legality of the charge. A second observation is that whereas severity of sentence on a second appeal is regarded as a matter of fact, it is common knowledge that there has been jurisprudential development on the effect of minimum sentences under the [Sexual Offences Act](#) since



the first appeal was determined and it is only for that reason that we shall consider the appellant's plea that the sentence imposed was harsh against the current jurisprudence.

13. The appellant who appeared in person submits that during trial he pleaded on several occasions for crucial prosecution documents which, notwithstanding, were not availed to him. He makes reference to page 7 line 3 of the proceedings. The appellant contends that his rights under Article 50 (2) and (b) of the *Constitution* were abridged.
14. In answer, Mr. Okango, learned counsel for the respondent, submitted that the first appellate court addressed the matter and that the appellant proceeded with the hearing as he was ready having previously sought an adjournment for lack of documents.
15. The trial court's proceedings of 30th August 2016 show that the appellant informed the court that he was yet to be supplied with copies of the P3 Form upon which the court ordered that it be availed to him. Hearing was then rescheduled to 14th September 2016. On that day the accused indicated that he was ready for the hearing and the evidence of two witnesses was taken. The appellant did not complain about non-availability of the P3 form or of any other document and we have little difficulty endorsing the following holding of the first appellate Court:

“I concur with Mr. Oluoch that the only inference to be drawn is that the appellant now had all the documents which is why he said he was ready to proceed and did not raise a complaint”
16. There is no basis to hold that the appellant's constitutional right to fair hearing was violated and this ground fails.
17. We are then urged by the appellant that the prosecution case was not proved as required by Article 36 (must have meant section 36) of the *Sexual Offences Act*. The appellant argues that it is only fair and the duty of this Court to enforce the provisions of the law, otherwise there would be no reason for having the provision in the first place.
18. The respondent makes the old response that DNA testing is not a mandatory requirement.
19. Section 36 of the *Sexual Offences Act* provides:

- “36. Notwithstanding the provisions of section 26 of this Act or any other law,
 - (1) where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test in order to gather evidence and to ascertain whether or not the accused person committed an offence.
 2. The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.
 3. The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.
 4. The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.



5. Where a court has given directions under subsection (1), any medical practitioners or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.
 6. An appropriate sample or samples taken in terms of subsection (5) (a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as it reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and
 - (b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.
 7. Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against-
 - a. the State;
 - b. Any Minister; or
 - c. Any medical practitioner or designated persons, in respect of any detention or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.
 8. Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both”
20. This statutory provision is underpinned by an acknowledgement that science can be a useful tool for ascertaining whether an accused person has committed a sexual offence. Yet there will be occasions when the prosecution is able to prove that an accused person has committed an offence without subjecting the accused to forensic or other scientific testing. And by use of the word ‘may’, the requirement for testing is not mandatory. The question here has to be, not so much whether or not the appellant was subjected to the testing contemplated in section 36 of the Act, but whether the prosecution was able to prove his guilt even in the absence of forensic proof.
21. Regarding the evidence that is said to have proved the offence, the two courts below believed the following evidence; yes, there were differences between the parents of the victim and appellant but nevertheless; the findings of the doctor from which he concluded there had been vaginal penetration of the child; the child's evidence that she was defiled by the appellant was consistent and honest; the child knew the accused well as a village mate and the child sought help immediately she was let go. The first appellate court in affirming the findings of the trial court was emphatic;
- “A part from the minor's graphic description of the sexual act, how the appellant inserted his male organ into hers, and would pull it out and put it back several times, gives clarity



without doubt that the minor underwent that traumatizing experience; and she stated she felt a lot of pain.”

22. The appellant before us now submits that there were contradictions in the prosecution case and points to two. He argues that the complainant’s testimony was that she never saw blood after the incident while the clinical officer’s evidence was that the skirt was stained with mud and blood. The second is that PW3 gave the date of the commission of the offence as 2015/2016 at 9.30am yet the P3 reads 20th May, 2016 at 9.00hours and that the investigation officer only gave evidence as to when she was assigned the case.
23. Yet as correctly pointed out by Mr. Okongo for the respondent, these apparent contradictions were never raised before the High Court and are not available at this second appeal. It being so, the appellant is unable to demonstrate that the concurrent findings of the two courts below are so pervasive as to deserve interference by this Court.
24. On sentence, the respondent concedes that it should be set aside. The concession is well taken because the proceedings both at the trial and first appeal were concluded prior to the application of the reasoning in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR) in sentences under the *Sexual Offences Act* (see for example in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) and *Wachira & 12 others v Republic & 2 others* (Petition 97, 88, 90 & 57 of 2021 (Consolidated)) [2022] KEHC 12795 (KLR) (31 August 2022) (Judgment).
24. While defilement is an objectively repulsive offence, we can think of more depraved circumstances than that before us. Say where the assault is repeated, where the assault leaves the victim with a sexually transmitted disease, where the assault causes permanent psychological trauma to the victim, where the assault results in extensive damage to the genitalia of the victim. These aggravating circumstances are not present in the matter before us. However, we observe that the appellant assaulted the victim, a girl of 9 years before defiling her and his aggressive, violent and wicked conduct must be appropriately punished. In the end, we think that a prison term of 30 years to be proportionate to the offence committed. The prison term shall run from the date when the appellant was sentenced by the trial court and any time spent by the appellant in custody during trial shall be taken into account (See section 333 (2) of the *Criminal Procedure Code*).
26. Save for the limited success on sentence, the appeal is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

W. KARANJA

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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



DEPUTY REGISTRAR.

