



REPUBLIC OF KENYA



**Obunge v Republic (Criminal Appeal E032 of 2021)  
[2025] KEHC 941 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E032 OF 2021  
RE ABURILI, J  
JANUARY 31, 2025**

**BETWEEN**

**CHARLES OTIENO OBUNGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction & sentence meted out by the Hon. Onzere E.M. in Sexual Offences Case No. 14 of 2020 in the Principal's Magistrate's Court at Tamu)*

**JUDGMENT**

1. The appellant herein was charged with the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence are that on the 21<sup>st</sup> May 2020 at Muhoroni sub-county within Kisumu County, he intentionally caused his penis to penetrate the vagina of M.C. a child aged 6 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.
3. The prosecution called a total of 7 witnesses in support of its case. The appellant upon being placed on his defence, he gave sworn testimony denying that he committed the offence. He was found guilty of the offence of defilement as charged and was sentenced to serve life imprisonment after his mitigation and pre-sentence report were considered.
4. Aggrieved by the sentence imposed, the appellant filed this appeal on the 29<sup>th</sup> July 2021 raising the following grounds of appeal:
  1. That the trial court failed to observe that the investigation tendered was shoddy.
  2. That the trial court failed to consider that the prosecution evidence was full of contradictions hence unsafe to base a conviction upon.



3. That the trial court failed to consider that the sentence imposed was against the weight of the evidence adduced.
  4. That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.
  5. That I be served with the certified copy of the trial court records to enable me erect more grounds of appeal.
5. The appeal was heard by way of submissions as summarised herein below.

### **The Appellant's Submissions**

6. The appellant submitted that the complainant's evidence was solely based on contradictions and that the exact place the offence allegedly took place was not ascertained. The appellant further impugned the testimony of PW1 on the grounds that she was not a straight forward witness as was evidenced in cross-examination. It was his submission that the contradictions in the complainant's testimony were not minor regardless of her age.
7. The appellant relied on the medical evidence as adduced by PW4 which he alleged provided that the age of the injuries sustained by the complainant happened 11 days prior to the date of the incident thus disapproving the evidence raised by other prosecution witnesses.
8. The appellant further impugned the evidence presented by the prosecution and submitted that the case against him was a conspiracy from other people to fix him. It was further submitted that the evidence of both doctors from different facilities was contradictive in terms of examination and the results found showing that the compliant was coached by her mother to incriminate him.
9. The appellant submitted that he was convicted on the evidence of a single identifying witness which the trial court did not warn itself prior to considering the same and further backed by the flimsy investigation tendered that did not reveal the truth of the matter.
10. The appellant further submitted that the trial court failed to consider the mitigating factors he presented and proceeded to render the mandatory minimum sentence. It was his submission further that the trial court failed to consider the provisions of section 333 (2) of the Criminal Procedure Code that provides that a sentence should include the time spent in custody. He further submitted pleading that his sentence be reduced.

### **The Respondent's Submissions**

11. Mr. Marete for the respondent submitted that the state opposed the appeal on conviction and sentence as the trial court was right in convicting the appellant.
12. Mr. Marete submitted that there was overwhelming evidence of age of the child as being 6 years as she was born on 27.4.2014. It was further submitted that penetration was proved through the testimony of the complainant who identified the accused.
13. Mr. Marete submitted that the doctor confirmed that there was semen in the urine of the child and injured genitalia and further that the hymen was broken.
14. It was further submitted that a DNA profile was done on the complainant's blue dress which had white stains matching the DNA profile of the appellant.
15. Mr. Marete submitted that the sentence was lawful.



## Revisiting Evidence Before the Trial Court

16. The complainant gave unsworn evidence that on the 21.5.2020 her mother had gone to work and left her at home. She testified that in the afternoon after the other children had gone to their house, the appellant called her to his house tied her mouth with a piece of cloth then threatened to kill her if she told anyone what he had done to her. The complainant testified that the appellant removed her clothes and also removed his trouser and did bad manners to her by taking his 'siri' which he uses to urinate and putting it into her 'siri' which she uses to urinate. The complainant testified that she started bleeding and the appellant took her to the farm where she was later found by Mama Chele (PW3).
17. In cross-examination, the complainant testified that she had put on a dress on the date of the incident and that prior to that day she once fell from a guava tree and was injured. She reiterated her testimony regarding the defilement. When questioned by court, the complainant stated that the appellant defiled her inside his house then took her to the farm and left her there. The complainant was later recalled and identified a blue dress (PEXh 9) and underpant (PEXh 10) that she had put on on the day she was defiled.
18. PW2, the complainant's mother testified that on the material day she had left the complainant at home and proceeded to work. She testified that at around 6pm, Daisy (PW3) called her and informed her to rush home as the complainant had been injured. It was her testimony that she went home and found the complainant bleeding private parts. She testified that the appellant was present and informed them to wash the complainant's private parts with water and salt which they did. PW2 testified that the complainant was not talking and that the following morning she took her to Muhoroni Hospital where the complainant was examined after which she was informed that the complainant had been defiled and referred her to JOOTRH where she underwent surgery and after her discharge, the complainant revealed to her that the appellant had defiled her. In cross-examination, PW2 testified that on the date of the incident the complainant had a blue dress on which was removed by PW3 and placed on the rooftop.
19. PW3, Daisy Cherotich, a neighbour to the complainant testified that on the date of the incident PW2 left her kids amongst hers as she proceeded to work. It was her testimony that at around 3pm she gave the children food and left to go to the river to wash clothes and on her return her children reported to her that the complainant was at the farm crying. It was her testimony that she went to the farm where she noticed the complainant bleeding from her private parts and carried her to the house, called PW2 and informed her what had happened. It was her testimony that they could not take the complainant to hospital as it was already past curfew hours. She further testified that the appellant came to PW2's house and informed them to wash the complainant with salty water. She testified that they took the complainant to hospital the following morning and discovered that she had been defiled.
20. In cross-examination, PW3 denied that they bathed the complainant so has to hide evidence and reiterated that it was the appellant who told them to wash her with salty water. She reiterated that the complainant was not talking when she found her nor could she eat or drink anything but instead was just crying.
21. PW4 Jared Olala, the clinical officer testified that he was the first to attend to the complainant at Muhoroni Hospital and despite the fact that PW2 informed him that the complainant had fallen from a guava tree, her examination led him to believe that she had been defiled. He testified that the laboratory tests carried out showed there was a lot of blood in the urine and further numerous sperm cells were seen when a vaginal swab was done. He testified that the complainant had bruises on the labia majora and minora, her hymen was broken and there was mucus plug on the vaginal walls. He testified that he referred the complainant to JOOTRH. In cross-examination PW4 testified that following his



examination of the complainant he concluded that the complainant had not fallen from a tree but that she had been defiled.

22. PW5 Corporal Simon Bett testified that when the matter was reported he made an entry in the OB then referred it to CPL Ruth Ondu who deals with gender-based violence cases. He testified that on the 25.5.2020 in the company of other police officers they proceeded to the complainant's home and when they arrived, they saw the appellant working at a farm. He testified that they requested the appellant to allow them enter his home but the appellant retreated and ran away. He further testified that they did a search of the house and recovered a blood-stained blue dress and maroon piece of cloth which were handed over to CPL Ondu.
23. PW6, CPL Ruth Ondu was the investigating officer, she reiterated the testimony by the previous prosecution witnesses. She testified that on interviewing PW3 who rescued the complainant, she revealed where she had put the blue dress which the complainant had on the day of the incident and the piece of cloth, she used to wipe the complainant which were taken to the government analyst for examination.
24. PW7, Polycarp Lutta Kweyu an analyst working at the Government Chemist in Kisumu testified that on 2.6.2020 a blue dress that had white and red stains, a maroon piece of cloth with red stains and a white under pant with red stains were submitted for analysis. He testified that on the 26.6.2020 buccal swabs were obtained from the appellant. He testified that it was found that the red stains on the dress, pant and maroon cloth was human blood and it was the complainant's blood. He further testified that the white stains on the blue dress were sperms which matched the DNA profile of the appellant.
25. When placed on his defence, the appellant gave an alibi that he left Koru on the 18.5.2020 and went to visit one James Kabongo in Kisumu where he stayed until 22.5.2020 when he returned to Koru. He testified that he was arrested on the 25.5.2020 on allegations of having defiled the complainant. The appellant poked holes into the complainant's testimony stating that she denied that he had called her to his house. He further stated that the complainant had reported that she fell from a tree and was injured an indication she was not defiled. The appellant also faulted the testimony of PW7 on account that he was not the one who collected the buccal swab and thus could not testify on the contents of the DNA report.

### **Analysis & Determination**

26. As a first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See *Njoroge v Republic (1987) KLR, 19* & *Okeno v Republic (1972) E.A, 32*.
27. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following broad issues for determination.
  - i. Whether the prosecution proved their case beyond reasonable doubt; and
  - ii. Whether the sentence was manifestly harsh and excessive
28. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* which provides:

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



8(2) 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.”

29. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
- i. Age of the complainant;
  - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
  - iii. Positive identification of the assailant.
30. On these elements; “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.” (see Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013).
31. As to the age of the complainant, in a charge of defilement, the age of the victim is important for two reasons:
- i. defilement is a sexual offence against a child; and
  - ii. age of the child has been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
32. A child is defined as a person under the age of eighteen years. Is the victim herein a child?
33. In the *voire dire* carried out by the trial court, the complainant testified that she was 6 years old and in PP2. In her unsworn testimony she told the court that when the incident occurred, she was in PP1. PW2, the complainant’s mother testified that the complainant is 6 years old. PW6 produced the complainant’s birth certificate as PExh. 1 which showed that the complainant was born on the 27<sup>th</sup> April 2014 and was thus 6 years old at the time the offence happened. I find that the complainant’s age was proven beyond reasonable doubt.
34. On the issue of penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
35. The complainant, despite her young age, testified vividly how the appellant lured her into his house and defiled her and subsequently threatened her with death if she revealed what had happened. She testified that when he noticed that she was bleeding from her private parts he took her to the farm and left her there where she was found by PW3 who corroborated this testimony stating that she noticed the complainant was bleeding from her private parts.
36. The element of penetration was further proven and the complainant’s testimony further corroborated by the evidence of PW4 who testified that on examination of the complainant he noticed bruises on her labia minora and majora and further that there was lots of bloods in her urine and numerous sperm cells seen in the vaginal swab all indicative of defilement and not injuries sustained following falling off a tree as earlier stated by the complainant’s mother and alluded to by the appellant.
37. The above medical evidence and witness testimonies all prove that there was penetration however the question is by who.



38. PW7 testified that upon examination of the items submitted to the Government Chemist for analysis, it was found that the red stains on the dress worn by the victim during the ordeal, pant and maroon cloth were all human blood and it was the complainant's blood. He further testified that the white stains on the blue dress were sperms which matched the DNA profile of the appellant.
39. The appellant submitted that he was wrongly convicted on the evidence of a single identifying witness. He offered up a defence that he was away from Koru from the 18<sup>th</sup> to 22.5.2020 and that on the 25.5.2020 he was arrested.
40. It is not lost to this court that the appellant was well known to the complainant having been a neighbour for some time. Furthermore, in Sexual Offences an accused can be convicted solely on the evidence of the victim as provided in Section 124 of the Evidence Act that provides:
- “ 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
- Provided 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.”
41. The complainant's testimony was aptly corroborated by the medical evidence adduced by PW4 as well as the testimonies of other prosecution witnesses.
42. I further reiterate that PW7 testified that on analysis of the clothing recovered as having been worn by the victim, on the day of the incident, it was found that the white stains on the said dress matched the appellant's DNA profile. Yet this was not the only evidence of proof of penetration and positive identification of the appellant as the perpetrator.
43. From the evidence above it is clear that it was proved beyond reasonable doubt that it was the appellant who defiled the complainant.
44. Contrary to the appellant's assertions and vehement denials, I find no contradictions or inconsistencies in the evidence presented by the prosecution.
45. In sum. I find that the prosecution proved beyond reasonable doubt that the appellant penetrated PW1, a child aged 6 years. Therefore, the conviction was proper, sound and safe. The appeal on conviction therefore lacks merit and is hereby dismissed.
46. On the sentence of life imprisonment meted out on him, the appellant claimed in his petition of appeal and submissions the same was unconstitutional. was unconstitutional due to its mandatory nature and that the trial court failed to take into account that the same was against the weight of evidence adduced.
47. Under the Sexual Offences Act, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age of the victim of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing.



48. In this case, the complainant was of the age of 6 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:
- “ 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.”
49. Sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo v R., and Wilson Waitegei v Republic [2021] eKLR)
50. Was there anything vitiating exercise of discretion by the trial court in imposing a sentence of life imprisonment?
51. Of important consideration: first, the victim of the offence is a child of 6 years. Second; the said child suffered physical injuries. Third, the manner of commission of the offence was cruel and violent in that the appellant tied her hands and covered her mouth, violently penetrated her as evidenced by the injuries after which he proceeded to dump her at the farm. The appellant brutally defiled the victim. Fourth, the traumatic experience will linger in her life forever- and as she grows older to know exactly the violation she went through, she will live with the shame and great mental trauma caused to her by this savage act of sexual debauchery. Fifth, this is a serious offence of which extreme societal desire to get rid of society of such wickedness and sexual perversion has been expressed publicly and formally through the Sexual Offences Act. See James Okumu Wasike (2020) eKLR.
52. It should also be noted that the appellant took an unfair advantage to secure and satisfy his sexual desires on a child of only 6 years. The Court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the Sexual Offences Act reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.
53. Seriousness of the offence is a relevant factor in sentencing and in sexual offences. Generally, it is worth of note that, the assault leaves the innocent victim with eternal and time-explosive dent on the integrity of the person as a human being. For a girl, the assault destroys the beauty of a woman which is encapsulated in the pride, self-esteem, confidence, integrity and honour of the person. To say the least, their self-worth and innocence is irreparably damaged by the beastly act. They are left with deep and chronic trauma which will affect them psychologically, emotionally and physically for the rest of their lives. These things must be said to dramatize what it real means to rape or defile a person. I have stated before, and I will state it again without fear of contradiction, that whomever admires and defiles the prohibited; a child; will tremble in the right place; the prison. No wonder the legislative intent which is a reflection of the societal detestation of defilement exclude sexual offences from settlement through alternative dispute resolutions, traditional methods of dispute resolutions, plea bargaining, probation, community service order et al.
54. What mitigating factors were offered up by the appellant, he claimed to be the only provider for his wife and five children however the pre-sentencing report that the wife had abandoned him in 2019, a year before the incident and that she went away with the children. From the record it appeared that the appellant was not remorseful as he kept on blaming other people for framing him although he could not elucidate in what manner he was being framed.



55. The appellant has further faulted the mandatory nature of his sentence as being unconstitutional. This is an issue that has been considered and determined by the courts. The Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR clarified the position and stated inter alia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the Penal Code, which was the case before the Supreme Court. Accordingly, it is clear that the mandatory sentence provided in section 8 (2) of the *Sexual Offences Act* is lawful but not necessarily mandatory.
56. In this case, the aggravating factors weigh heavily against the mitigating factors of the appellant. In an appeal on sentence, the court may sustain or reduce or enhance or alter the nature of sentence. The circumstances of this case do not warrant an interference with the sentence meted out.
57. Furthermore, the Supreme Court, quite recently, on 12 July 2024, in a landmark case of Republic versus Joshua Gichuki Mwangi SC Pet E018 of 2023 while restating the principles of sentencing set in the Francis Karioko Muruatetu & Another, the Supreme Court (Koome CJ&P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ) allowed the petition of appeal to the extent of setting aside the judgment by the Court of Appeal in Nyeri in which it declared [mandatory] minimum sentences (as they were then referred) for sexual offences unconstitutional in that they limit the discretion of the court. The Supreme Court also ordered that the Respondent should complete his 20-year sentence from the date of imposition by the trial court.
58. The Supreme Court considered the following factors in allowing the petition to enhance the sentence to accord with the mandatory minimum sentence provided for under section 8(3) of the *Sexual Offences Act*:
1. Gravity of Sexual Offences  
In the judgment, the Supreme Court reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act*, or any other statute. The court agreed with the submissions of the amici curiae that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. The court went ahead to cite the amici's submissions on instances where courts have been influenced by myths, including that: attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and the alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability. The court proceeded to highlight the comparative lessons from different jurisdictions as submitted by the amicus.
  2. Sentencing in Sexual Offences are Constitutional  
In addition, the Supreme Court faulted the Court of Appeal for its declaration of [mandatory] minimum sentences unconstitutional since that was not an issue that had been raised by any of the parties before court and it was therefore a violation of the principle of stare decisis. The Court of Appeal also failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, thereby leaving the declaration ambiguous, vague, and bereft of specificity. Further, the Supreme Court held that although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute.
  3. Impact of the Judgement for Victims of Sexual Violence



This judgement recognizes the importance of the judicial processes including sentencing for victims of sexual violence as a limb of their right to access to justice. The Court in its judgement highlights the need for certainty in sentencing as essential for restoring the public's trust in the justice system. In conclusion, this judgment ensures that Courts must consider and center the victims in their analysis of the cases before them and the sentencing of perpetrators of sexual violence.

59. The appellant was sentenced to serve the mandatory life imprisonment which is lawful and constitutional, having regard to the tender age of the victim child. This sentence is lawful. I find no reason to interfere and neither does section 333(2) of the Criminal Procedure Code apply here since it is not a term sentence.
60. Accordingly, I find and hold that the appeal against conviction and sentence were safe and sound. I uphold the same and dismiss the appeal.
61. The judgment to be uploaded and the lower court file be returned with a copy of certified judgment. Signal to issue to prison.
62. This file is closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI VIA MICROSOFT TEAMS  
THIS 31<sup>ST</sup> DAY OF JANUARY, 2025.**

**R.E. ABURILI**

**JUDGE**

