Oburu v Republic (Criminal Appeal 1 of 2023)
[2025] KEHC 5446 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5446 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 1 OF 2023

JN KAMAU, J

APRIL 30, 2025

BETWEEN

OLIVER OBURU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of Hon W. K. Cheruiyot (RM) delivered at Vihiga in Principal Magistrate's Court in Sexual Offence Case No 33 of 2017 on 24th January 2018)

JUDGMENT

Introduction

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. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The Learned Trial Magistrate, Hon W. K. Cheruiyot (RM) convicted him on the main charge of defilement and sentenced him to life imprisonment.

3. Being dissatisfied with the said Judgement, he lodged an appeal herein. His Petition of Appeal was dated 5th March 2018 and filed on 30th November 2022. He set out five (5) grounds of appeal.

4. In his Written Submissions dated 15th August 2024 and filed on 11th September 2024, he incorporated his Amended Grounds of Appeal of even date. He set out eleven (11) Amended Grounds of Appeal.

5. The Respondent's Written Submissions were dated 26th November 2024 and filed on 27th November 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

8. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Appellant's right to legal representation was infringed upon;

    b. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

9. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Right to Legal Representation

10. Amended Ground of Appeal No (1) was dealt with under this head.

11. The Appellant submitted that the Trial Court failed to warn him of the fact that the charges he faced attracted a heavy penalty hence the need to be represented by an advocate. He pointed out that the failure to do so caused him substantial injustice hence he was prejudiced.

12. On its part, the Respondent submitted that the right to legal representation was not absolute and that there were situations where it could be limited. It argued that it must be established that the accused would suffer substantial injustice if not accorded legal representation. It added that for the appellant to benefit from the omission by the trial court to accord him state legal representation, he had to demonstrate that from the commencement of the trial he raised concern about his inability to afford legal representation and that substantial injustice may occur as a result as was held in the case of Charles Maina Gitonga vs Republic[2020]eKLR.

13. It was its contention that the Appellant did not raise the issue of legal representation during trial. It pointed out that he followed the proceedings keenly, participated in the trial by cross-examining the prosecution witnesses on very salient points related to the charges, he gave a detailed defence and understood the charges he was facing and the evidence presented. It was emphatic that there was no evidence that he was incapacitated during the trial due to a lack of legal representation and for which reason, the ground had to fail.

14. The proceedings showed no indication that the Appellant requested the court to give him time to instruct a counsel to represent him during trial.

15. Be that as it may, this court found and held that the Trial Court was under an obligation to have informed him of his right to be represented by counsel as was mandated by Article 50(2)(g) of *the Constitution* of Kenya, 2010.

16. Notably, Article 50(2)(g) of *the Constitution* of Kenya provides as follows:-

> " Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly."

17. Failure by the Trial Court to have informed the Appellant of this right was a great omission. Having said so, it was not always that such omission had to cause an accused person injustice as it could be remedied by way of a retrial if such accused person had completely been prejudiced.

18. In this particular case, the Appellant proceeded with the trial without ever having asked that the Trial Court to give him time to instruct counsel to represent him during trial. Provision of legal representation at the State expense was a progressive right which was currently accorded to persons who had been charged with capital offences only.

19. This court thus came to the firm conclusion that his constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform of his right of legal representation under Article 50(2)(g) of *the Constitution* of Kenya.

20. In view of the delays that would be occasioned by recalling witnesses due to failure by trial courts to promptly inform accused persons of their right to choose and be represented by an advocate and to be informed of this right promptly under Article 50(2)(g) and the right to have an advocate assigned to the accused person by the State and at State expense and bearing in mind substantial injustice that would otherwise result as provided in Article 50(2)(h) of *the Constitution* of Kenya, trial courts were called upon to comply with these provisions of the law when an accused person was first presented to court and before taking the plea as this was indeed the best practice besides being mandated by the law.

21. In the premises foregoing, this court found and held that Amended Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

II. Proof of Prosecution's Case

22. Amended Grounds of Appeal Nos (4), (5), (6), (7), (8), (9), (10) and (11) were dealt with under this head.

23. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

24. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

25. The Appellant submitted that the age of the Complainant, EO (hereinafter referred to as "PW 1" (sic)) was not proved. He argued that CN (hereinafter referred to as "PW 1") testified that PW 1's (sic) age was assessed at the hospital but no medical doctor testified to that effect. He added that PW 1 (sic) testified that she did not know her age. He faulted the Trial Magistrate for holding that age was not disputed. In this regard, he relied on the case of Burunyi & Another vs Uganda (1968) EA 123 without highlighting the holding he relied on therein.

26. On its part, the Respondent submitted that the victim was assessed at the hospital and the Clinical Officer who testified in court assessed the age of the minor to be between six (6) and ten (10) years old. It pointed out that the Appellant did not dispute her age during trial.

27. This court had due regard to the case of Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It can also be proved by the victim's parents or guardian and observation or common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR.

28. No 81xxx PC Irene Chepkonga (hereinafter referred to as "PW 4") tendered in evidence the undated Age Assessment Report from Emuhaya Sub-County Hospital. The same showed that PW 1 (sic) was aged between six (6) and ten (10) years as she had twenty four (24) teeth, normal external genitalia and no pubic hair.

29. As the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's (sic) age was proven using medical evidence and that she was a child at all material times.

B. Identification

30. The Appellant submitted that the case was poorly investigated and that crucial witnesses were not called to give evidence which he concluded could have been adverse to the prosecution's case. He pointed out that PW 1's (sic) mother, grandfather and the women who said to have been murmuring that a child had slept in his house were not called as witnesses in the case. In this regard, he relied on the case of Bukenya vs Another (1972) EA 549 where it was held that the failure by the prosecution to call the crucial witnesses to testify was a clear indication that the evidence if testified would have been adverse to the prosecution's case hence the benefit of doubt goes to the Appellant.

31. On its part, the Respondent submitted that PW 1(sic) testified that she was defiled by the Appellant and that he admitted to having hosted the minor.

32. A perusal of the proceedings showed that PW 1(sic) testified that on the material night of 16th June 2017, she slept at the Appellant's house and that he Appellant defiled her. She said that she felt pain. She stated that she knew him as a neighbour. She pointed out that in the morning she told her mother that he had defiled her but she did not take any action. She stated that she told CN (hereinafter referred to as "PW 1") who took her and her sister to her home and later, to Emuhaya Hospital.

33. Her evidence was corroborated by that of PW 1, a community worker volunteer who testified that on 18th June 2017, she was issuing out mosquito nets in her sub-location when she heard other women saying that there was a child who had slept in the Appellant's house. She developed interest and found out about the child who happened to be PW 1(sic) and who informed her that she slept at his house on 16th June 2017 and he defiled her. By the help of the Chief, she took her to hospital and later reported the incident to the police.

34. The Appellant and PW 1 (sic) were not strangers as they were neighbours. In fact, PW 1(sic) referred to him by name.

35. Without belabouring the point, this court came to the firm conclusion that the ingredient of identification was proven through recognition and the Appellant was positively identified by PW 1 (sic).

C. Penetration

36. The Appellant submitted that there were material contradictions on the medical evidence and the date when the incident happened. He pointed out that the Prosecution's evidence was that the hymen was partially torn and broken. He added that whereas the Charge Sheet indicated that the incident occurred on 16th June 2017, the Clinical Officer, John Shigali (hereinafter referred to as "PW 3") testified that he filled the P3 form on 20th April 2017, PW 4 testified that PW 1 (sic) was taken to the police station on 20th May 2017 and that she was defiled on 18th June 2017.

37. In that regard, he placed reliance on the case of Ramkrishan Denkerai Pandya vs Republic Application No 6 of 1990 EACA 93 where it was held that it was difficult to distinguish the truth from the untruthful and between who was telling the truth and who was telling a lie where evidence was contradicted. He also cited the case of John Mutua Musyoka vs Republic Criminal Appeal No 11 of 2016 (eKLR citation not given) where it was held that the contradictions were not minor and they went to the root of the case.

38. He also cited the case of Richard Aspela vs Republic Criminal Appeal No 45 of 1981 (eKLR citation not given) where it was held that two (2) contradictory statements could not be admitted in a court of law. He blamed the Trial Court for failure to put down in writing whether or not the Prosecution witnesses were telling the truth. To buttress his point, he relied on the case of Mohammed vs Republic [2008]eKLR where it was held that the court must be satisfied that the victim was telling the truth and it must record the reasons for such belief.

39. He faulted the Trial Court for contravening Article 49(1)(d) of *the Constitution* of Kenya, 2010 by holding that he admitted to have hosted PW 1 (sic) on the material night. He further blamed the Trial Court for failing to consider his defence that there was a grudge between him and PW 1 as she had wanted to lease their land and he declined. He faulted the Trial Court for having shifted the burden of proof on him hence prejudiced.

40. On its part, the Respondent submitted that the evidence of PW 1(sic) and PW 3 was proof that PW 1(sic) was defiled by the Appellant. It asserted that courts have held that the defence of alibi must be raised at the earliest opportunity as was held in the case of Isaiah Sawala Alias Shady vs Republic [2021]eKLR. It was categorical that the Trial Court was right in finding that the Appellant's defence was a mere denial and had no probative value. It added that the Appellant's defence was properly analysed by the Trial Court and found to be false.

41. It pointed out that the contradictions and inconsistencies raised by the Appellant did not go to the core of the case and that the variance in itself did not distort or dislodge the defilement of the material day subject of the charge. It was emphatic that the offence of defilement had been proved beyond reasonable doubt. It asserted that the court must consider the evidence adduced as a whole and not selectively as was held in S.O.O vs Republic [2018]eKLR.

42. PW 3, confirmed that on examining PW 1 (sic), she had injuries on the labia and a whitish vaginal discharge. He also indicated that she had pus cells which was an indication of an infection. He asserted that the Appellant was also examined and was also found to have had an infection. He opined that penetration had taken place and classified the injury as harm.

43. In his defence, the Appellant gave an unsworn statement and denied having committed the offence. He informed the Trial Court that the Prosecution evidence was conflicting and that PW 1 had framed him because there was a grudge between them concerning leasing of land.

44. Notably, the Charge Sheet indicated that PW 1 (sic) was defiled on 16th June 2017. The evidence of PW 1 and PW 1(sic) corroborated the said evidence that indeed she was defiled on 16th June 2017. This court noted that although PW 3 indicated that he filled the P3 form on 20th April 2017, a perusal of the P3 form indicated that the same was filled on 20th June 2017, thus PW 3's assertion was just an error that did not go to the core of the case. Thus, the contradictions and/or inconsistencies as raised by the Appellant were not material to outweigh the inference of guilt on his part.

45. Going further, although both parties referred to the Appellant's defence as that of alibi, this court was of the view that the said evidence was just a mere denial and not an alibi defence.

46. PW 1's (sic) evidence was therefore corroborated by the medical evidence of PW 3 and the offence of defilement had been proven beyond reasonable doubt.

47. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 (sic) on the material date.

III. Sentencing

48. Amended Grounds of Appeal Nos (2) and (3) were dealt with under this head.

49. The Appellant placed reliance on several cases among them the cases of Maingi & 5 Others vs DPP & Another[2022]eKLR and Edwin Wachira & Others vs Republic[2022]eKLR where the common thread was that mandatory sentences were unconstitutional and further relied on the case of Julius Kitsao Manyeso vs Republic[2023]eKLR where it was held that life imprisonment was unconstitutional. It was his contention that his sentence of life imprisonment was harsh, excessive, inhuman and degrading in nature.

50. On its part, the Respondent submitted that age in defilement cases was crucial as it determined the sentence to be meted out by the court. It pointed out that according to the charge sheet herein, the victim was eight (8) years old. It placed reliance on the case of Republic vs Joshua Gichuki Mwangi Supreme Court Petition No E018 of 2023(eKLR citation not given) where the Supreme Court overturned the Court of Appeal Judgment that had granted Judges and Magistrates power to hand sexual offenders lesser sentences and affirmed mandatory sentences as provided in the *Sexual Offences Act*.

51. It further cited the cases of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) and Wanjema vs Republic(1971) EA 493 where the common thread was that sentencing was at the discretion of a trial court and that a court would not interfere with that discretion in respect of sentencing unless it was evident that the trial court overlooked some material factors or took into consideration an irrelevant factor or the sentence was manifestly excessive in the circumstances of the case.

52. It was categorical that the Trial Court carefully considered the facts of the case, the severity of the offence, the principles of proportionality, deterrence, rehabilitation, the mitigating and aggravating factors and the scar the incidence left in the life of the victim in meting out the minimum prescribed sentence on the Appellant. It was emphatic that the Appellant's sentence was proper in law.

53. The Appellant herein was convicted under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. 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."

54. The Trial Court sentenced the Appellant to life imprisonment. This court could not therefore fault it in that regard as the sentence was lawful.

    1. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

    2. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

    3. Going further, there had been emerging jurisprudence that substituted life sentences with thirty (30) or forty (40) years pursuant to the holdings of two (2) separate benches of the Court of Appeal in Ayako *vs Republic (Criminal Appeal 22 of 2018*) [2023] KECA 1563 (KLR) (8 December 2023),(Judgment), and Manyeso vs Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) respectively.

    4. However, in its decision that was delivered in Petition No E013 of 2024 Republic vs Julius Kitsao Manyeso on 11th April 2025, the Supreme Court of Kenya overturned the decision of the Court of Appeal in Manyeso vs Republic (Supra) and rendered itself as follows:-

> " 68. Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, and it is both proper and imperative for them to recommend such measures to be to the appropriate authorities for adoption....
>
> 69. We therefore find no difficulty in finding that the Court of Appeal erred in substituting the life imprisonment with a 40- year sentence, thereby usurping the legislative power to define sentences....
>
> 72. Consequently our final orders are as follows:-
>
> a. The Petition of Appeal is hereby allowed.

b. The life imprisonment that was imposed by the trial court and affirmed by the High Court is hereby reinstated.

c. The Respondent, Julius Kitsao Munyeso shall therefore complete the life imprisonment imposed by the trial court."

59. Further, in its decision in Petition No E002 of 2024 Republic vs Evans Nyamari Ayako that was also delivered on 11th April 2025, the Supreme Court overturned the Court of Appeal decision in the case of Ayako vs Republic (Supra). It pronounced itself as follows:-

"52. In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso vs Republic Case, where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate sentence.

53. In the Muruatetu II Case we reiterated that the rationale of the Muruatetu I was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the *Penal Code*. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence…

54. It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter. Therefore, to the extent that the Court of Appeal did so, it has offended the principle of stare decisis.

58. Consequently, and for the reasons aforesaid, we make the following orders:-

1. The Appeal dated 1st February 2024 is allowed.
2. The Judgment of the High Court is hereby reinstated.
3. For the avoidance of doubt, the Respondent shall serve life imprisonment as sentenced by the Magistrate's Court…"

60. It was therefore abundantly clear that the Supreme Court had pronounced itself on the validity of the life sentence that had been prescribed for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

61. Given that this court was bound by the decisions of courts superior to it in the principle of stare decisis, this court had no option but to uphold the life imprisonment that was imposed by the Trial Court.

62. In view of the fact that the sentence herein was indeterminate, this court could now not consider the provisions of Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

Disposition

63. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Amended Grounds of Appeal dated 15th August 2024 that was lodged on 11th September 2024 was not merited and the same be and is hereby dismissed. The conviction and the sentence be and are hereby upheld as they were both safe.

64. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF APRIL 2025

J. KAMAU

JUDGE