



REPUBLIC OF KENYA



KENYA LAW
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**Katsiloni v Republic (Criminal Appeal E005 of 2025)
[2025] KEHC 7002 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E005 OF 2025**

**J WAKIAGA, J
MAY 29, 2025**

BETWEEN

RODGERS MAKUYU KATSILONI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence in
Makadara Chief Magistrates Sexual Offence Case no 174 of 2019)*

JUDGMENT

1. The appellant was charged tried convicted and sentenced to twenty (20) years imprisonment and being aggrieved by the said conviction and sentence, he filed this appeal and raised the following grounds of appeal:
 - a. That the trial court erred in law and fact by failing to find that the prosecution case was not proved beyond reasonable doubt
 - b. That the court contravened Article 25(c) of the Constitution since the ingredients of the offence were not established
 - c. That the court erred in law and fact in convicting and sentencing the appellant without observing that the entire prosecution case was impeachable under section 163 (1) of the Evidence Act as PW1 and 2 were not credible
 - d. That the appellant was convicted on insufficient and contradictory evidence
2. This appeal was initially filed and admitted for hearing at the High Court Registry at Milimani as Criminal Appeal no E102 of 2024 and upon the establishment of this registry, the same was duly transferred.



Submissions

3. On the 3rd March 2025, directions were issued on the hearing of the appeal by way of written submissions and on behalf of the appellant who was unrepresented, it was submitted that essential witnesses were not called by the prosecution and should have been called by the court by dint of section 144 of CPC. It was submitted that those witnesses included Pastor Sogo Samson who allegedly left the appellant and PW1 and who would have enabled the court to make a determination on identification .
4. It was further contended that witnesses mentioned in the charge sheet including Philip Mujabe, Samson Wasongole Leah Muyama and Ann Namwalo and the mother and father of the victim, were never called to testify. The court was invited on the authority of *Bukenya and others v Uganda* [1972] EA 549 to make an adverse inference that those witnesses' testimony would have weakened the prosecution case.
5. It was further submitted that there were many witnesses mentioned or recorded including the children and women who met the victim immediately after the incidence who would have corroborated the prosecution case as was stated in *Mutonyi v Republic* [1982] KLR where the court stated that an important element in the definition of corroboration is that it effects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.
6. It was contended that the trial court shifted the burden of proof to the appellant contrary to the holding in *Boniface Okeyo v Republic* [2001] eKLR where the court stated that the appellant had no duty in law to raise a serious defence nor did he have a duty to elicit crucial evidence by cross-examination of the prosecution witnesses .
7. It was submitted that the sentence was harsh and excessive and that the court in passing the sentence did not consider the provisions of section 216 of the *Criminal Procedure Code* and the sentencing policy Guidelines and neither did the court consider the mitigating factors. It was contended that whereas the law provides that a convict is liable to a term of twenty years the same should be considered as merely a maximum and that the court may impose any lesser sentence below the limit as was stated in the case of *Kichanjele s/o Ndamungu v Republic* [1941] 8EACA 64.
8. It was contended that whenever a penal provision provides that a convicted felon is liable to the imprisonment term therein stipulated , the sentencing court is endowed with the discretion to meet a different sentence apart from that which is envisaged under the penal provision as was stated in the case of *Opoya versus Uganda* [1967] EA 32 and as confirmed in *Yawa Nyale v Republic* where the court substituted the original sentence of twenty years with ten years, *Stephen Githaiga v Republic* where the court substituted life sentence with 20 years despite the fact that the provision was couched in mandatory term "shall" and in *Evans Wanjala Wanyonyi v Republic* [2019] eKLR where the Court of Appeal substituted 20 years with ten years .
9. It was contended that section 354 of CPC empowers the court to reverse the finding and sentence and to acquit or discharge the accused or order him to be tried by a court of competent jurisdiction. It was submitted that being a first offender, the appellant should not have been subjected to the imposition of penultimate sentence unless and until all avenues with the sentencing policy Guidelines had been exhausted as was stated in *Charo Ngumbao Gugugu v Republic* [2011] eKLR.
10. The court was urged to consider the fact that the appellant was a first offender as was stated in the case of *Paul Eyanai Nakwanga v Republic* [2019] eKLR, the fact that the mother of the victim did not



testify even after several warrants were issued by the court and further that he was arrested when he was 25 years on 12 July 2019 and had been in prison for five years during which time he had demonstrated remorse and rehabilitation and should therefore be accorded a second chance as was stated in *Peter Mutua v Republic Nairobi Criminal Appeal number E069 of 2022* so that the sentence of twenty years be substituted with seven years.

11. On behalf of the respondent it was submitted penetration was proved through the evidence of PW1 that the while asleep in the church where she had gone for prayers she woke to find the appellant on her back ,who then flipped her ,closed her mouth using his hand ,removed her skin tight and pants to the knee level and had sex with her by force before locking and leaving her in the church. It was corroborated by the evidence of PW2 a clinical officer at MSF who confirmed that her genitalia were fully soaked in blood with afresh hymen tear .
12. It was contended further that PW3 Dr. S Adanje who produced the P3 form which confirmed that the victim had tenderness on her labia majora and minora , hymen had a tear and wound on posterior fourchette. PW5 Dr Boniface Nzioki who also examined the victim confirmed that she had a 2nd degree perennial and vaginal tear which were stitched.
13. It was submitted that the age of the victim was proved through the age assessment report as per the case of *Edwin Nyambogo Onsongo v Republic [2016] eKLR* and that the appellant was positively identified by the victim who knew him as they attended the same church where he was playing drums and sometimes preaches and that he attacked her at 11.00 am during daylight.
14. It was contended that the appellants defence that he was framed up by the victim's mother whom he had declined to have sexual relationship with was disregarded by the court as far fetched since the mother was not even called as a witness and that the defence was mere denial sand full of contradictions.
15. On sentence it was submitted that the court on the authority of *Ogola s/o Owuor v Republic [1954] E ACA 270* an appellate court should not interfere with the decision of the lower court unless the trial court acted on wrong principles or overlooked some material facts. It was submitted that the sentences what was provided for on law and therefore the conviction was safe .

Proceedings

16. This being a first appeal , the court is under a duty to re-evaluate the proceedings before the trial court and to come to its own determination thereon while giving allowance to the fact that it did not have the advantage of hearing and seeing witnesses unlike the trial court.
17. PW1 SW the complainant stated that she was 13 years and that on the material days she went to church with her sister who was not feeling well so she left to go back home, leaving her alone with the appellant in church who was a drummer inn the church. The pastor later on joined them and after offering prayers left for Eastleigh , she later on felt faint and decided to sleep on the mat on her stomach. She later felt something pressing on her back and when she checked, she noticed the appellant , who closed her mouth using one hand , removed her clothes and forced himself into her causing her to bleed from her vagina. He then locked her in the church and left her there crying.
18. She continued to bleed even when urinating , she then called her mother whom she informed having been defiled by the appellant who was at work who informed her father and asked her sister to look after he. Her father came home and with the assistance of members of the public arrested the appellant and took him to the police station. She was later on referred to the hospital for medical examination .



19. In cross examination she stated that she knew that the appellant was from Uganda and that all her blood-stained clothes were taken by the police and that she gave out his name as Rodgers which enabled him to be identified and arrested
20. PW2 Lorna Kerubo a clinical officer examined the victim at MSF who appeared shocked as at the time. Her external genital was shocked with blood, the hymen had fresh tear and the vagina had a big posterior tear, her clothes were shocked in blood, and were handed over to the police. She later on filed PRC form. PW 3 Dr Sarah Adanje of Mbagathi hospital presented P3 form on behalf of Dr Ocharo who examined the victim who was aged 14 years. She was sickly looking, genital examination noted bleeding, whitish vaginal discharge, tenderness in the labia majora and minora and the hymen had a tear confirming penetration.
21. PW5 Dr Boniface Nzioki Musila stated that the complainant was admitted on the 12th July 2019 for specialized treatment after a sexual assault, her genital area was swollen and had lost a lot of blood. The space between her vagina and anus had a tear which was repaired. She was discharged on 17th July 2019.
22. PW4 CPL Virginia Wanjiku recorded the statement from the witnesses and took the victim to hospital for medical examination where her age was assessed at 14 years. She took her blood-stained clothes to the government chemist but had not received the results as at the time of her testimony.
23. When put on his defence he stated that he was from Uganda and was employed in a textile company in Eastleigh. In 2019 he was appointed as a youth leader at a church in Kosovo located in Mathari, where he was also playing keyboard, led in praise and worship and sometimes would preach. He stated that he was in church when after service a woman called and asked if he was from Uganda as she was and asked for his number which he gave her.
24. Later in the night she called him and told him that she admired the way he used to sing and serve the lord and suggested that they meet the following day. He told her that he was not available due to work. The following Sunday early in the morning, she called him asking if he would be in church for service and whether he was married and he told her that he was but had left his wife in Uganda.
25. He later entered into a romantic relationship with her later the pastor advised him to cease communication with her and she started to stalk him. In July while he was heading to work the woman who is the mother of the complainant asked him why he had rejected her and when he told her that it was on the advice of the pastor, she got furious and started quarrelling him. She then threatened him of dire consequences. On 12th September 2019 while at work the mother of the victim came and sent for him in the company of some old man who grabbed him by his tie and started slapping him. He was joined by members of the public and was shocked to hear the mother of the victim tell them that he had defiled her daughter
26. It was his further evidence that when the mother of the victim arrived at the scene, she incited the people to beat him up creating a lot of commotion before he was rescued by the chief and taken to Muthaiga police station where he was locked for three days. In cross examination he stated that he used to play piano, sing and preach at the church and that he did not know that she was the complainant mother.

Determination

27. In this matter the following issues are identified for determination:
 - a. Whether the prosecution case was proved as required in law
 - b. Whether the sentence was excessive.



28. In convicting the appellant, the court found as a fact that the age of the complainant was thirteen (13) as per her testimony and that age assessment report indicated that she was below 18 years on penetration, she had a fresh tear in the hymen and the vagina had a big posterior tear which had to be repaired and that the appellants defence was farfetched.
29. On the proof of the prosecution case, the age of the victim as per her evidence on record was proved to be 13 years and was in class six at the material time as corroborated through the P3 Form produced by PW3. Penetration was proved through the evidence of PW2 who on examination of the victim, found her external genitalia fully soaked with blood, hymen had a fresh tear and virgin had a big posterior tear, this was corroborated by PW3 who assessed her injuries as grievous harm due to penetration. It was further corroborated by PW5 Dr. Boniface Musila who confirmed that the victim had 2nd degree perineal and vaginal tear which he repaired.
30. On the identification of the appellant, the same was identified by recognition. The complainant stated that she knew him as drummer in the church and gave his name as Rodgers and that they both came from Uganda, which he confirmed in his evidence in chief. The same was arrested by members of the public near the scene and the victim was able to identify him at the police station. This evidence was corroborated by the Investigating Officer PW4 CPL Virginia Wanjiku.
31. The appellants submission that the prosecution failed to call essential prosecution witnesses and therefore adverse inference should be made in his favour has no merit in view of the evidence on record, this being a sexual offence matter which may be proved through the uncorroborated evidence of a single witness.
32. The appellants defence of being framed up by the complainant's mother for rejecting her advances was considered by the court and rejected as farfetched based on the evidence on record and in particular the injuries sustained by the victim. I take judicial notice that there can not be framing up where the act of penetration is confirmed.
33. I therefore find and hold that the appellants conviction herein was safe and free from error and dismiss the appeal on this ground.
34. On the sentence, the appellant was convicted under section 8(1)(3) of the *sexual offences Act* which provides for a sentence of not less than twenty years where the minor is aged tween 12 and 14 years. I find and hold that the appellants submissions that the court had discretion to pass a lesser sentence has no merit in view of the warning from the Supreme Court in the case of Republic v Joshua Gichuki Mwangi & 3 others [2024] KESC 34 (KLR) where the court stated that the mandatory sentence under the sexual offence Act are valid and constitutional and warned the courts below from exceeding their mandate "under the erroneous view that they have been confronted by a jurisprudential moment"
35. The appellant submissions on discretion together with the authorities submitted in support thereof have come too late to be of benefit to himself in view of the Supreme Courts warning herein above and as emphasised in Republic v Evans Nyamari Ayako Petition No E002of 2024.
36. I will therefore not interfere with the sentence herein which I would not have even if the trial court had discretion in view of the injuries caused to the victim as per the evidence on record and her age at the time when the appellant instead of leading her to the Lord led her to the rod and the fact that the appellant used the trust created by the fact that he was a faithful member of the church to prey on the flock who happen to be from Uganda as he was and not only did he forcefully defiled the sheep but locked her up in church not withstand the damage and the pain caused.



37. I therefore find no merit on the appeal herein which I hereby dismiss and affirm the trial courts finding both on conviction and sentence .

38. The appellant has a right of appeal to the Court of Appeal. And it is ordered

DATED SIGNED AND DELIVERED AT MAKADARA THIS 29th DAY OF MAY 2025.

J. WAKIAGA

JUDGE

In the presence of :

