WLO v Rebublic (Criminal Appeal E029 of 2024)
[2025] KEHC 9163 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9163 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E029 OF 2024

DK KEMEI, J

JUNE 30, 2025

BETWEEN

WLO ..... APPELLANT

AND

REBUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. L. Simiyu (SPM) delivered on 16/5/2024 in Siaya Chief Magistrate's Court S.O. Case No. E036 of 2022)

JUDGMENT

1. The Appellant herein, WLO, was charged with four counts. In the first Count, he was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 20th December 2020 and June 2022 at East Gem location, Gem Sub County within Siaya County intentionally caused his penis to penetrate the vagina of E.A.O a child aged 14 years.

2. He was likewise charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 20th December 2020 and June 2022 at East Gem location, of Gem Sub county within Siaya County intentionally touched the vagina of E.A.O a child aged 14 years with his penis.

3. The second count was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 20th December 2020 and June 2022 at East Gem location, of Gem Sub County within Siaya County inserted his penis into the mouth of DOO and commanded him to suck it to his satisfaction against his will.

4. In count three, he was likewise charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 20th December 2020 and June 2022 at East Gem location, of Gem Sub County

within Siaya County inserted his penis into the mouth of JLO and commanded him to suck it to his satisfaction against his will.

5. In count four, he was again charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 20th December 2020 and June 2022 at East Gem location, of Gem Sub county within Siaya County inserted his penis into the mouth of COO and commanded him to suck it to his satisfaction against his will.

6. After a full trial, the trial court found him guilty and convicted him on all counts and sentenced him as follows: count one to 20 years' imprisonment, count two to 10 years' imprisonment, count three to 10 years' imprisonment and count four to 10 years' imprisonment. The trial court likewise ordered that the sentences were to run consecutively, starting from the date of arrest, namely 27/7/2022.

7. Aggrieved, the Appellant first filed a Petition of Appeal against sentence only on 14/6/2024 wherein he raised the following grounds of appeal:

    i. That the trial magistrate erred in law and in fact by imposing a mandatory minimum sentence in all counts without considering the Appellant's mitigation.

    ii. The trial magistrate erred in law and in fact by imposing a harsh sentence without considering that the Appellant is a first offender.

    iii. That trial magistrate erred in law and in fact by ordering the sentences to run consecutively without considering the provisions of section 333(2) of the *Criminal Procedure Code* and section 38 of the *Penal Code* as read with Article 27 of *the Constitution* that the said sentences ought to commence from the date of their pronouncement.

8. The Appellant later filed an amended Petition of Appeal on 16/3/2025 wherein he filed amended grounds of appeal as follows:

    i) The learned trial magistrate grossly erred in law and in fact by presiding over a trial that previously violated his constitutional rights to fair hearing contrary to Article 50(2)(g) and (h) of the Consti6ution.

    ii) That the learned trial magistrate erred in law and fact by convicting him on an incurably defective charge contrary to section 214 of the *Criminal Procedure Code*.

    iii) That the learned trial magistrate erred in law and fact by failing to reconcile discrepancies, contradictions and inconsistencies in the prosecution's case.

    iv) The learned trial magistrate erred in law and fact by failing to note and consider that the aggregate sentence from the imposed consecutive sentence would result into harsh and excessive punishment to a first offender.

9. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court in order to arrive at its independent findings and conclusion. (See Okeno vs. Republic [1972] EA 32). In doing so, it must take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that regard as was held in Ajode v. Republic [2004] KLR 81.

10. The prosecution called a total of six witnesses in support of its case.

11. DO (PW1) aged nine years old tendered a sworn testimony after a voire dire examination was conducted by the learned trial magistrate. He testified that he currently stayed at the Peace Children's

Home. That initially when they stayed at their home, their biological father used to put his manhood in his mouth. That he would ask him to go light a fire using firewood then go insert the thing he uses to urinate into his mouth. That his father who is the Appellant herein would abuse all his siblings too in the same manner.

On cross examination, he insisted that indeed the father would insert his penis in his mouth. That he did that even before their mother left and that after she left it got worse. That he disclosed the ordeal to a neighbor who brought the issue to the authorities and court.

12. PW1 ‘s testimony was corroborated by that of his sister EO (PW2) aged 14 years who gave a sworn statement. She testified that the Appellant is the only parent they have since their mother died. That the Appellant would isolate them and abuse them separately. That he would insert his penis in the mouth of her brothers. That one day her father (Appellant) caned her brother C and that C yelled saying “you put your penis in my mouth, I will report you” That on another day her brother J also confided in her that the Appellant inserts his penis into his mouth and his anus and that is how she learnt that her brothers were likewise being sexually abused by their father. On her part, she testified that her father did more than inserting his penis into her mouth. That her father who is the Appellant would start by touching her buttocks, breasts and her private parts (child points at her vagina), then ask her to sleep with him and that he would give her five shillings. That the Appellant did that many times even before the death of their mother. In having sex with her, PW2 testified that the Appellant would insert his penis inside her vagina.

On cross examination, she reiterated her evidence in chief adding that even if the doctor fails to prove that there was abuse by their father, Supa’s mother should come to court as she is a neighbor they had informed on what was continuously happening.

13. JL(PW3) aged 10 years gave an unsworn testimony after a voire dire examination. His evidence corroborated the evidence of his two siblings. He testified that he was beaten by his father (Appellant) and that his father would insert his penis into his mouth and anus. That the Appellant did that to him twice. That indeed the abuse was also done to his siblings. That the Appellant would isolate them and abuse them separately.

On cross- examination, he said that he did not report to anybody because his mother had already died and that the same continued until their headmaster came to take them to the police.

14. CO (PW4) aged 16 years testified on oath after a voire dire examination that the Appellant who is his father would isolate a victim among them by sending the rest away and if you are unfortunate to remain with him, he would insert his penis in the child/victim’s mouth. That the Appellant started this when their mother was alive and that he reported to his mother and that the mother reported to FIDA Kisumu. That the Appellant abused him sexually many times that he has lost count. That he informed a neighbor who inquired as to why he used to scream. That he informed their aunties who are wives to the Appellant’s brothers but they did nothing.

On cross- examination, he stated that they were five siblings all of whom the Appellant abused them. That they are C, D, J, E and B who works at Sinaga. That the Appellant would threaten to kill them if they reported. That he just got annoyed and reported to teacher Jane. That apparently, each one of them reported separately.

15. No. 112539 PC Volin Wekesa (PW5) testified that she is attached to DCI Gem. That she was the investigating officer in the matter. That the complainants were four namely, EO, DOO, JLO and COO. That E reported defilement by her father as captured in the charge sheet and who alleged that the Appellant would call her into his bedroom and defile her after their mother died and that the Appellant threatened to kill her if she reported. In June 2022, she shared the matter with her brother

and they agreed to share with a local volunteer and a teacher. That the matter was reported vide OB No. 2/22/7/2022 at Yala.

The three boys C, D and J alleged that after the death of their mother, the Appellant would call them separately in his bedroom and command them to suck his penis. They reported to a teacher who took them to hospital.

That J and C were treated at Yala Sub County Hospital while D and E were treated at Siaya County Referral Hospital. That the arrest was done on the date of reporting. None of the children had a birth certificate so they made an application to do age assessment on them vide Miscellaneous application on 26/7/2022. That the age assessment revealed that C is 16 years old, D 9years, Js 15 years and E 14 years. That P3 forms were filled and that the medical notes and PRC forms were in court.

On cross –examination, she stated that she took the minors to hospital. That E had difficulty in walking. That the officer was informed that the Appellant smoked cannabis and that he was violent and thus she went with eight police officers for back up during his arrest. That the age assessment reports for the four minors were produced as follows: PEXB 1(a), 1 (b), 1(c) and 1(d); X-ray report produced as PEXB 2(a), 2(b), 2(c) and 2(d).

16. Eunita Nyakundi (PW6) testified that she worked at Siaya County Hospital for 5 years. She had three P3 forms and four PRC forms. That the documents for D and E were made by Isaak Imbwaga who left the facility and could not be traced to come and testify. That the P3 and PRC form and treatment notes or C and J were made by Jackline Kerubo.

For D aged 9 years, he was brought by a volunteer social worker and that he alleged to have been sodomised severally by his father. That the genitalia was normal with no laceration or bruises. Analysis was that lacerations on anal on fixed at six o'clock area. HIV was negative, VDRL negative and that on urinalysis test there was no abnormality. The medic concluded that due to the lacerations in the anus, they prove that there was anal penetration. Documents made on 21/7/2022 by Isaack Imbwaga were stamped and signed. The P3 form produced as P exhibit 3, PRC form as Exhibit 4, Lab request as exhibit 5 while treatment notes produced as Exhibit 6.

For E aged 14 years, her out patient card No. was 017672/2022. That the examination revealed whitish discharge, broken hymen that is old. HIV test was negative, VDRL negative. The urinalysis test revealed that pus cells could be seen. HUS- Nary epithelial cells showing a lot of shedding of vaginal wall. That the conclusion was that from the history and examination, the same showed past vaginal penetration. The P3 form in favor of E was produced as Exhibit 7, PRC form as P Exhibit 8, lab request and records were produced as P Exhibit 9 while treatment card was produced as P Exhibit 10.

For C, there was no laceration as the age of injury was months. HIV not done, while VDRL and Hepatitis were negative. His P3 form was produced as Exhibit 11, PRC form as Exhibit 12, lab request as Exhibit 13 and treatment notes were produced as P Exhibit 14.

JLwas aged 10 years as per the outpatient card. VDRL and hepatitis were negative while Nalan was positive. His documents were stamped at Yala hospital. PRC form produced as Exhibit 15, outpatient card Exhibit 16, treatment notes exhibit 17 and lab test as exhibit 18.

On cross- examination by the Appellant, she stated that it is only D who knew the person that penetrated the anus. On E, the whitish discharge, broken and torn hymen with old scar evidenced that defilement had happened for long and on diverse dates. That the child C had no injury. That the child J was a normal child and had no mental problem.

That marked the close of the prosecution's case.

17. The trial court later ruled that a prima facie case had been established against the Appellant who was subsequently placed on his defence. He opted to tender an unsworn statement and called three witnesses.

18. WLO (DW1) gave an unsworn statement and called three witnesses. It was his case that he was arrested on 21/6/2022 without explanation, and that the complaint was false and instigated by a stranger. That he was surprised to be arrested over child molestation yet he was not a pedophile. That he can never defile his children and that they know it.

19. JOO (DW2) testified that he was the brother in-law to the Appellant. He stated that he knew that the brothers to the Appellant were envious of him and probably instigated the case. That the Appellant is a single parent and that his children are stranded.

20. MAO (DW3) stated that she was only informed that her brother was in custody and was not aware of the offence until when he visited the Appellant in custody.

21. WAW(DW4) stated that the Appellant is her brother in law. That she did not know the reason for his arrest as she was not home during the arrest.

    That marked the close of the Appellant's case.

22. The appeal was canvassed by way of written submissions. Both parties duly complied.

23. The Appellant submitted that the prosecution has not proved the case beyond reasonable doubt and that the sentences imposed were equally very harsh and excessive. He submitted that the appeal should be allowed.

24. The Respondent submitted that the evidence against the Appellant was water tight and that all the counts had been proved beyond reasonable doubt and prayed that the appeal be dismissed, conviction upheld and sentence affirmed.

25. I have considered the record of appeal, the rival submissions and the authorities relied upon by the parties and find that the issues for determination are firstly, whether the Respondent proved its case against the Appellant beyond reasonable doubt and secondly, whether the sentences imposed were harsh and excessive.

26. It is noted that the first count that the Appellant faced was that of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual offences Act* No. 3 of 2016. The said sections provide thus:

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

    (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

27. There are three elements that must be proved in a case of defilement. One is the age of victim- it must be proved that the victim is a child aged below 18 years, thus a minor. The investigation officer (PW5) stated that none of the children had a birth certificate and hence they made an application to do age assessment on them vide Miscellaneous application filed on 26/7/2022. That the age assessments revealed that CO was aged 16 years old, DOO 9years, JLO 15 years and EO 14 years. This therefore confirms that the victim of defilement being EO was aged 14 years and therefore a child in accordance with the Act as she was below the age of 18 years old. I find this ingredient proved by the Respondent beyond any reasonable doubt.

28. The second element to be proved is penetration. Section 2 of the *Sexual Offences Act* defines penetration as follows:

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

29. The sworn evidence of the complainant of defilement EO (PW2) was that 'her father did more than inserting his penis into her mouth. That her father who is the Appellant would start by touching her buttocks, breasts and her private parts (child points at her vagina), then ask her to sleep with him and that he would give her five shillings. That the Appellant did that many times even before the death of their mother. In having sex with her, PW2 testified that the Appellant would insert his penis inside her vagina.'

Her evidence was corroborated by that of the doctor (PW6) who stated in cross examination that 'on E, the whitish discharge, broken and torn hymen with old scar evidenced that defilement had happened for long and on diverse dates'. The said doctor duly produced the P3 form, PRC form, lab request and treatment notes.

I am therefore convinced that this element was proved beyond reasonable doubt by the Respondent.

30. The third element to be proved is the identity of the perpetrator. The complainant was clear that it was the father who used to defile her. This therefore is a case of recognition and not identification. In the case of Reuben Taabu Anjononi & 2 others vs Republic (1980) eklr by the Court of Appeal in Nairobi held that:

> " .... recognition not identification of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant..."

The complainant had no difficulty at all regarding the identity of her father as the person who molested her for a long period. There is therefore no way she could forget her own father with whom they lived together even after the death of her mother. The Appellant in his defence evidence did not dispute the fact that she was his daughter. Iam satisfied that the identification of the Appellant as the perpetrator was proved beyond reasonable doubt.

31. Even though the Appellant in his defence claimed that the charges were false, the evidence tendered regarding this first count of defilement was quite overwhelming against him. I find that it is highly unlikely for the complainant to frame her own father who was her benefactor after her mother died. I find the Appellant's defence did not shake the evidence of the Respondent in any way. In light of the foregoing, I am convinced that the offence of defilement was proved by the Respondent against the Appellant beyond any reasonable doubt. The finding on conviction by the trial court was sound and must be upheld

32. As regards the sentence imposed on count one, the trial magistrate passed a sentence of 20 years' imprisonment. Considering the age of the child, section 8(3) of the Act provides for not less than 20 years' imprisonment. It is noted that the Appellant took advantage of his young and vulnerable daughter to be his object of sexual gratification yet he was supposed to be her protector. He literally turned into a predator yet the hapless victim had nowhere to seek refuge as her mother had already died. I find the sentence in count one quite legal and appropriate as the same is the minimum possible in law. The same is affirmed.

33. The remaining counts two, three and four are hereby analysed together as they are under the same section of the law namely section 11 (1) of the *Sexual Offences Act*. The same provides as follows:

    1. Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

34. "Indecent act" is defined under section 2 of the *Sexual Offences Act* as any unlawful intentional act which causes—

    (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

    (b) exposure or display of any pornographic material to any person against his or her will.

35. DO the complainant in count two, testified that initially when they stayed at their home, their biological father used to put his manhood in his mouth. That he would ask him to go light a fire using firewood then go insert the thing he uses to urinate into his mouth. That the father who is the Appellant herein would abuse all his siblings too.

    On cross examination, he insisted that indeed the father would insert his penis in his mouth.'

36. JLthe complainant in count three, gave an unsworn testimony corroborating the evidence of his two siblings. "That he was beaten by the father who is the Appellant and that his father would insert his penis into his mouth and anus. That the Appellant did that to him twice."

37. CO the complainant in count four, testified on oath "that the Appellant who is his father would isolate a victim among them by sending the rest away and if you are unfortunate to remain with him he would insert his penis in the victim's mouth. That the Appellant started this when their mother was alive and that he reported to his mother and then his mother reported to FIDA Kisumu. That the Appellant abused him sexually many times that he has lost count."

38. The above testimonies were corroborated by the medical evidence of PW6 to wit that acts of committing indecent acts with the minors and produced the relevant medical documents upon examination of the complainants.

39. From the foregoing, all the evidence of the minors point to be in line with the definition of indecent act. It is my view that it is highly unlikely for the three complainants to frame their father who is the only surviving parent after their mother passed on. It is clear that the Appellant had turned into a sex pervert and turned on his children to satisfy his sexual gratification. Iam satisfied that the complainants spoke the truth about what happened to them and which was confirmed by the doctor. The Appellant's defence that he had been framed is not convincing. Hence, I find that the charges on counts two, three and four were equally proved beyond reasonable doubt. Indeed, the trial magistrate found the evidence of the minors more believable as compared to the defense which was full of mere denials. The learned trial magistrate had the opportunity to observe the demeanour of the witnesses and came to the conclusion that they were speaking the truth. Iam in agreement with the trial magistrate's finding that the defense case did not shake the overwhelming evidence of the prosecution. In light of this analysis, the I am convinced that from the totality of the evidence of the victims and the circumstances of the case, the offence of committing an indecent act with a child was well proved in all the three counts against the Appellant beyond reasonable doubt. The conviction in the three counts was quite sound and must be upheld.

40. As regards sentence, section 11(1) of the *Sexual Offences Act* No. 3 of 2006 provides a mandatory minimum sentence of 10 years' imprisonment upon conviction. This is what the trial court imposed. It is noted that the Appellant being the only surviving parent turned from being the protector into a predator against his own children and made them objects of his sexual gratification. The children had nowhere to run to for refuge and had to undergo such ordeals day in day out. The conduct of the Appellant was therefore abhorrent. A deterrent sentence is called for to enable the Appellant to undergo a comprehensive custodial rehabilitating before being released back to the society. I find the sentences to be legitimate and must be upheld.

41. The Appellant has contended that the trial magistrate erred in law and in fact by going contrary to Article 50(2)(g) and (h) of *the Constitution*. Article 50(2)(g)(h) of *the Constitution* is about the constitutional right to legal representation by an Advocate of one's choice. These provisions are about being entitled to legal representation by an Advocate of one's choice, or at State expense, in case of being indigent, and being informed of those rights, in either case. Article 50(2)(g)(h) makes it a fair trial right for an accused person to be informed of his right to choose an Advocate to represent him in the proceedings; and where he cannot afford one, to have one assigned to him, if substantial injustice would otherwise occur. The provision places a burden on the trial court, before it commences the trial, to ensure that the accused person is informed of his rights, including that to appoint an Advocate of his own choice, and where he cannot afford one, to have one assigned to him at State expense. Whether or not an accused person can afford to instruct an advocate of his own choice, is a matter to be addressed when he is first arraigned.

    Upon perusal of the record, I find that the Appellant was actually informed of this right by the trial magistrate before the commencement of the trial. This ground, therefore, fails.

42. The only thing that I find the trial court erred is by ordering that the sentences should run consecutively. Indeed, the offences are said to have been committed within a span of a long period. However, what is not in doubt is that the charges have been presented by the Respondent in one file. Ordinarily, offences that occur within the same transaction should attract concurrent sentences. It is trite that the trial court has the discretion to impose the appropriate sentences in any particular matter. Given that the Respondent has proved all the four counts, I find that it is fair and appropriate that the said sentences should run concurrently instead of consecutively. Further, as the Appellant remained in custody throughout the trial, the sentences shall commence from the date of arrest. To that extent, the trial court went into error and thus the order that the sentences shall run consecutively must be interfered with.

43. In the result, the Appellant's appeal on conviction lacks merit and is dismissed. The appeal on sentence succeeds only to the extent that the sentences imposed by the trial court shall run concurrently and to commence from the date of arrest, namely 22/7/2022.

    It is so ordered.

DATED SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF JUNE, 2025

D. KEMEI

JUDGE

In the presence of:

WLO.....Appellant

M/s Kerubo.....for Respondent

Okumu.....Court Assistant