



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Atieli v Rpublic (Criminal Appeal E004 of 2024)
[2025] KEHC 9146 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E004 OF 2024**

JN KAMAU, J

JUNE 26, 2025

BETWEEN

JACOB ATIELI APPELLANT

AND

RPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon W. K. Cheruiyot (SRM) delivered at Vibiga in the Principal Magistrate's Court in Sexual Offence Case No 21 of 2018 on 8th February 2019)

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 (SRM) 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 18th December 2023 and filed on 19th January 2024. He set out six (6) grounds of appeal. In his Written Submissions dated 2nd October 2024 and filed on 7th October 2024, he incorporated two (2) Supplementary Grounds of Appeal. The Respondent's Written Submissions were dated 7th January 2025 and filed on 8th January 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

4. 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.
5. 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.
6. Having looked at the Appellant's Grounds of Appeal and Supplementary 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 fair trial 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.
7. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Fair Trial

8. Supplementary Ground of Appeal No (1) was dealt with under this head.
9. The Appellant invoked Articles 25(c), 50(2)(g), (h) and (j) of *the Constitution* of Kenya 2010 and placed reliance on the case of *Lima & Another vs Republic* [1991]eKLR where it was held that every accused had the undoubted right to be defended by counsel failure to which the conviction would be quashed on appeal.
10. He also cited the case of *Republic vs Karisa Chengo & 2 Others* [2017]eKLR where it was held that Article 20(3)(b) of *the Constitution* of Kenya required courts to adopt the interpretation that most favoured the enforcement of a right or fundamental freedom. It referred to Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) and further relied on the case of *David Macharia Njoroge vs Republic* (eKLR citation not given) where it was held that substantial injustice resulted to persons accused of capital offences losing their lives if they did not have counsel during trial. He, however, disagreed with the said holding which limited the right to legal representations in criminal trials to cases where accused person had been charged with capital offences only.
11. He argued that the protection embedded in Article 50(2)(h) of *the Constitution* of Kenya went beyond capital offences as was held in the case of *Thomas Alugha Ndegwa vs Republic* Criminal Appeal No 2 of 2004(eKLR citation not given). He, however, also disagreed with the Court of Appeal's holding that the right guaranteed in Article 50(2)(h) of *the Constitution* of Kenya was progressive and that it could only be realised when certain legislative steps had been taken such as the enactment of the Legal Aid Act. He submitted that while that was true, the same could not be the case regarding to the right to legal representation.
12. He asserted that the right to legal representation at the State's expense, under the said Article was a fundamental ingredient of the right to fair trial. To buttress his point, he relied on the case of *Leonard*



- Maina Mwangi vs Director of Public Prosecution & 2 Others[2017]eKLR where it was held that a trial which was primarily aimed at ascertaining the truth had to be fair to all concerned.
13. He contended that the Trial Court did not inform him of his right to legal representation or accord him an advocate by the State and at the state's expense. He added that there was no full disclosure of the case by the Prosecution as he was not given the statements of the Prosecution witnesses and that his life imprisonment hence occasioned substantial injustice on his part and failed to accord fair trial.
 14. On its part, the Respondent submitted that the Appellant was accorded a fair trial. It pointed out that the Charge was read out to him in a language that he understood and that he responded to the same. It stated that the charge that he faced was proper as it complied with Section 134 of the Criminal Procedure Code.
 15. It cited Article 50 of the Constitution of Kenya and contended that the right to legal representation was not absolute and that there were situations it could be limited. It pointed out that it had to be established that the accused person would suffer substantial injustice if he was not accorded legal representation.
 16. It was emphatic that for the Appellant to have benefitted from the omission by the Trial Court to accord him legal representation provided by the State, he had to demonstrate that from the commencement of trial, he had raised concern about his inability to afford legal representation and that substantial injustice would occur if he was not given any as was held in the case of Charles Maina Gitonga vs Republic[2020]eKLR.
 17. It contended that the Appellant participated in the trial keenly by cross-examining the witnesses and rendering his detailed defence. It argued that there was no evidence that he was incapacitated during trial for lack of legal representation. It explained that he was also supplied with statements before the hearing commenced and was given sufficient time to prepare for hearing as a result of which he was accorded a fair hearing.
 18. Article 50(2)(h) of the Constitution of Kenya, 2010 provides that:-

“Every accused person has the right to a fair trial which includes the right to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly.”
 19. Article 50(2)(j) of Constitution of Kenya further states that:-

“Every accused person has the right to a fair trial which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”
 20. A perusal of the proceedings showed that when the Appellant herein was arraigned in court on 8th May 2018, the Charges were read to him in a language that he understood, Kiswahili, and he replied, “Si Kweli.” When the matter came up in court several times before the hearing commenced, he did not raise the issue of whether or not he needed to be supplied with statements and/or be given legal representation at the State's expense. When the matter came up for hearing on 9th July 2018, he cross-examined the Prosecution witnesses.
 21. After being found that he had a case to answer, he informed the Trial Court that he would adduce sworn evidence and would not call any witnesses. The defence hearing was adjourned several times but when it finally proceeded, he indicated to the Trial Court that he was ready to proceed and in fact,



testified. At no point in the proceedings did he request for counsel or time to instruct a counsel to represent him during trial. He could not therefore raise the issue of not having been accorded legal representation at the expense of the State at this appellate stage.

22. 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. 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.”

23. Failure by the Trial Court to have informed him 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.
24. 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.
25. This court thus came to the firm conclusion that the Appellant’s 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.
26. 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) of *the Constitution* of Kenya 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.
27. Going further, the proceedings did not indicate that the Appellant asked to be supplied with the statements. On the other hand, the Respondent was categorical that it supplied him with Prosecution witnesses’ statements. In the absence of any evidence to the contrary, this court was persuaded to find that at all material times, the Appellant had had access to statements by the Prosecution witnesses and thus had ample time to prepare his defence as was envisaged in *the Constitution* of Kenya. Consequently, this court found that in the absence of proof of violation of the Appellant’s right to fair trial, it was not persuaded to find that the trial was rendered a nullity necessitating a retrial.
28. In the premises foregoing, Supplementary Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

II. Proof Of Prosecution’s Case

29. Grounds of Appeal No (1), (2), (3) and (4) of the Petition of Appeal were dealt with under this head.
30. 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.



31. 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

32. The Appellant did not submit on this issue. On its part, the Respondent placed reliance on the case of *Musyoki Mwakavi vs Republic* [2014] eKLR where it was held that in a charge of defilement, age of a minor could be proved by medical evidence, baptism card, school leaving certificate, by the victim's parents and/or guardians, observation and common sense.

33. It pointed out that LAM (hereinafter referred to as "PW 2") testified that his son, the Complainant herein (hereinafter referred to as "PW 1") was born on 25th May 2012. It added that No 101xxx PC (W) Quinter Achieng (hereinafter referred to as "PW 4") produced PW 1's Health Book which confirmed his age.

34. 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 listed the same considerations of proving a child's age as had been stated in the case of *Musyoki Mwakavi vs Republic* (Supra) that was relied upon by the Respondent herein.

35. The Health Book that PW 4 produced in court as an exhibit confirmed that PW 1 was born on 12th September 2012. As the incident herein took place on 4th May 2018, PW 1 was five (5) years old when the offence was committed.

36. As the Appellant did not challenge the production of the aforesaid Health Book and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven using medical evidence and that he was a child at all material times.

B. Identification

37. The Appellant did not also submit on this issue. On its part, the Respondent submitted that PW 1 testified that he was defiled by the Appellant. It explained that PW 1 had seen the Appellant several times passing by the road near their home heading to a drinking den and that he also used to go to his home.

38. It argued that the Appellant was therefore well known to PW 1 and could not have been mistaken as to his identity. It submitted that the evidence of recognition was held to be more reliable and weightier than the identification of a stranger as was held in the case of *Anjononi & Others vs Republic* (1976-80) 1 KLR 1566, 1568. It was emphatic that there was proper identification in this case as the PW 1 had prior knowledge of the Appellant herein.

39. PW 1 testified that on the material day of 4th May 2018, he went to the road near his home to bask in the sun. He stated that the Appellant who was passing by the road called him but he refused to go. The Appellant then carried him on his back and took him to a nearby thicket, removed his short trouser and T-shirt. He added that the Appellant then removed his own trouser, made him lie on his back inserted and his "dudu" for urinating into his buttocks. He referred to this as "tabia mbaya." He said that he felt pain and cried but the Appellant covered his mouth with a cap. The Appellant then slapped him and told him not to tell anyone after which he left him and went away.



40. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.
41. Notably, the proviso of Section 124 of the *Evidence Act* states that:-
- “Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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 (emphasis).”
42. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person’s word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.
43. Notably, PW 1 stated that he knew the Appellant well as he used to go to their home. He further said that he used to see him passing on the road next to his home going to the drinking den. 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.

C. Penetration

44. The Appellant did not also submit on this issue. On its part, the Respondent cited Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed vs Republic[2020]eKLR where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant’s own testimony which was usually corroborated by the medical report presented by the medical officer.
45. It contended that the PW 1’s evidence on penetration was corroborated by that of that of the Clinical Officer, Evans Kavega (hereinafter referred to as “PW 3”) thus proving the ingredient of penetration.
46. It placed reliance on the case of Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013(eKLR citation not given) where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant. It was emphatic that all the ingredients of defilement were proved beyond reasonable doubt.
47. It further contended that pursuant to Section 211 of the *Criminal Procedure Code*, the Appellant chose to give a sworn statement and did not call any witness. It added that he gave a defence of alibi but never called any of his workmates to support his claim that he was at his place of work at the material time of the incident.
48. It submitted that the governing principle on alibi defence was that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by police was a factor which may be



considered in determining the weight given to it as was held in the case of Charles Kasena Chogo vs Republic[2019]eKLR.

49. It asserted that the Trial Court also warned itself on convicting him on the evidence of a single witness and more specifically, a minor, and had observed that the minor was calm and composed even on intense cross-examination making his evidence unshaken.
50. It was emphatic that the Appellant did not rebut the Prosecution's evidence. It added that the inconsistencies and contradictions, if any, did not go into the core of the case and that variance in itself did not in any manner distort or dislodge the commission of the offence as was held in the Tanzanian Case of Dickson Elia Nsamba Shapwata & Anothr vs Republic Criminal Appeal No 92 of 2007.
51. PW 3 confirmed that an examination of PW 1 revealed that he had bruises on anal region and there was pain on defecation. He explained that when he examined PW 1's stool, he found deposits of semen and blood stains. He concluded that there was penetration in the anal region. He produced the Out-patient book and P3 Form as exhibits in court. PW 1's evidence was therefore corroborated by the medical evidence of PW 3.
52. This court found that the Appellant's alibi evidence that he was at work on the material day of 4th May 2018 did not outweigh the inference of guilt on his part because he did not call any witnesses to confirm his alibi. Consequently, 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 on the material date.
53. In the premises foregoing, Grounds of Appeal No (1), (2), (3) and (4) of the Petition of Appeal were therefore not merited and the same be and are hereby dismissed.

III. Sentencing

54. Grounds of Appeal No (5) and (6) of the Petition of Appeal and Supplementary Ground of Appeal No (2) were dealt with under this head.
55. The Appellant referred to Articles 25(a) and (c), 27, 28 and 29(d), (e) and (f) and the case of Vinter & Others vs United Kingdom [Application No 66069/09, 130/10 and 3896/10] United Kingdom where it was held that a prisoner could not be detained unless there were legitimate penological grounds for that detention.
56. It also relied on the case of Muruatetu where he averred the court held that life sentence should not necessarily mean the natural life of the prisoner but that it could also mean a certain minimum or maximum time to be set by the relevant judicial officer. It asserted that Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* did not state that the minimum life sentence under that Section meant the whole life sentence or the natural life of the convicted person but that a court sufficing (sic) a certain minimum time serving as a minimum life sentence by the circumstances of the offender went hand in hand with the said section. He urged this court to prescribe a certain minimum sentence on his part and take into account the time he spent in custody.
57. On its part, the Respondent cited Section 8(2) of the *Sexual Offences Act* and Section 329 of the *Criminal Procedure Code* and argued that the Trial Court took into account the evidence, the nature of the offence, relevant factors and the legal principles before arriving at the appropriate sentence hence the sentence meted upon the Appellant was lawful and befitting of the offence committed. It urged this court to uphold the Appellant's sentence as it was lawful.



58. In this regard, it placed reliance on the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament and not Judiciary that set the parameters of sentencing for each crime.
59. The Appellant herein was convicted under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* Cap 63 A(Laws of Kenya). 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.”
60. The Trial Court sentenced the Appellant to life imprisonment. This court could not therefore fault it in that regard as the sentence was lawful. Previously, courts were sentencing persons who had been convicted of sexual offences sentences that were lower than the mandatory minimum prescribed sentences in the *Sexual Offences Act*.
61. However, in its decision of 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it had been 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. It stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.
62. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Appellant’s sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.
63. As his was an indefinite sentence, Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) was not applicable herein.

Disposition

64. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 18th December 2023 and filed on 19th January 2024 and his Supplementary Grounds of Appeal dated 7th October 2024 and filed on 7th October 2024 were not merited and the Petition of Appeal be and is hereby dismissed. His conviction and the sentence be and are hereby upheld as they were both safe.
65. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF JUNE 2025

J. KAMAU

JUDGE

