



REPUBLIC OF KENYA



KENYA LAW
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**Oungo v Republic (Criminal Appeal E124 of 2022)
[2025] KECA 2280 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2280 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E124 OF 2022
MS ASIKE-MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
DECEMBER 19, 2025**

BETWEEN

CALEB OKUMU OUNGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at
Kisumu (J. Kamau, J) dated 29th March, 2019 in HCCRA No. 20 of 2019)*

JUDGMENT

1. The appellant, Caleb Okumu Oungo, was in the main count charged with the offence of defilement contrary to section 8[1] as read with section 8[2] of the *Sexual Offences Act*. The particulars of the charge were that on 3rd August 2015 at Kisumu East Sub- County within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of MAA ¹a child aged four and a half years. Arising from the particulars in the main charge, the appellant was charged with an alternative charge of indecent act with a minor contrary to section 11[1] of the *Sexual Offences Act*.
2. He pleaded not guilty on both the main and the alternative charges and the matter proceeded to full trial with the prosecution calling six witnesses in support of its case. The Appellant gave sworn evidence and called six witnesses. At the conclusion of the trial, the Appellant was found guilty of the offence of defilement, convicted, and sentenced to life imprisonment.
3. Aggrieved, the appellant appealed against both conviction and sentence before the High Court at Bungoma whose appeal was unsuccessful.

¹ Initials used to protect the identity of the minor



4. The appellant is now before this Court in this second appeal in which he has appealed against both conviction and sentence faulting the learned judge for failing to find that the ingredients of the offence were not proved, failing to evaluate the evidence, and disregarding his defence.
5. Briefly, the prosecution's case was that on the said date the appellant whom MAA, PW1 referred to as 'uncle' called her and informed her that he was going to buy her chips. MAA followed the appellant who, true to his word, bought her chips then took her to his house and slept on her. MAA stated that she felt pain. In the morning, the appellant prepared for her tea, bread and potatoes. MAA identified the appellant as the uncle who bought her chips and slept on her.
6. SO², the complainant's father, who testified as PW2 told the trial court that on 3rd August 2018, around 6:30 p.m., his wife informed him that their child was missing. After failing to find her, they reported the matter at Nyalenda Police Post (OB No. 17th March 2010). The next day, while searching with his brother, he saw MAA crying about three meters away. When he inquired, she told him that the appellant had taken her to buy chips and soda, then defiled her. Upon returning home, the mother discovered that the child had no pants and had been defiled. They reported the incident, and the appellant was arrested.
7. CA³, the complainant's mother confirmed the evidence of MAA's father, and testified that when she examined the complainant's private parts, she noticed that there was a tear. She further testified that MAA informed her that the man who took her bought her chips, washed her and placed her on the mattress where he slept on her.
8. Collins Omondi, PW4 a clinical officer at Moi Teaching and Referral Hospital attended to MAA. On physical examination, he noted lacerations on the vagina and the hymen was broken. He concluded that she was defiled.
9. Dr. Peter Odhiambo, PW 4, examined MAA and filled the Post Rape Care (PRC) Form and P3 Form at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOORTH) in Kisumu where he had worked as a doctor for three (3) years. It was his contention that the medical evidence revealed that MAA had injuries on the vagina, the hymen was broken, there were lacerations on the vagina and the presence of white discharge which proved that she had been defiled.
10. Placed on his defence, the appellant denied the charges and testified that it was a Saturday while washing his clothes, when a man went to his residence and informed him that he was looking for his child. He testified that MAA was found outside the gate; that he was assaulted, arrested and taken to the police station; and that it was at the police station that he learnt of the allegation that he had slept with a child in his house. He denied committing the offence and was the sole defence witness.
11. In support of the appeal, the appellant contends that the prosecution's case was not proved to the required standards. As regards penetration, the appellant submits that the same was not established as the court failed to note that the MAA's genitalia was normal, there was no discharge or blood. The absence of the hymen alone cannot implicate the appellant as the perpetrator.
12. Regarding identification, the appellant contended that the court relied on the evidence of MAA a minor of tender years and the evidence was not corroborated by a DNA report therefore contravening the provisions of section 36 of the *Sexual Offences Act*. Relying on the case of Mutonyi vs. Republic [1982] KLR 203, the appellant argues that since there was no corroboration, his conviction was not safe.

² Initials used to avoid tracing the identity of the minor

³ Initials used to protect tracing the identity of the minor



13. On sentence, the appellant contends that he was sentenced to a mandatory life sentence which is unconstitutional. The life sentence meted out against the appellant does not promote the objectives of sentencing, which are deterrence and retribution.
14. Opposing the appeal, the respondent submits that all elements of the offence were proved through credible and reliable evidence. MAA was four and a half years old at the time of the offence. PW2 testified that the child was born in May 2013, and PW3, the minor's mother, produced the birth certificate as Exhibit 2. The first appellate court found that MAA was four years old at the time and that her age had been properly proved. The Court was urged to uphold this finding.
15. Regarding penetration, it is submitted that MAA was categorical on the appellant's her chips lure, resulting in taking her to his house, and that he "slept" on her, causing pain. Her father (PW2) reported her missing on August 3, 2018, and later found her. MAA narrated to him how the appellant had taken her with him after promising chips and soda; and she pointed him out to her father. Her evidence was corroborated by her mother's evidence that when she examined her, she noted that MAA had no panty and her private parts had a tear. On interrogating her, she informed her that the appellant bought her chips, washed her, put her on a mattress and slept on her. This corroborated the evidence of PW3, PW4, and PW5, Dr. Peter Odhiambo who opined that she was defiled. The appellant also contends that the MAA's evidence needed corroboration in terms of the DNA testing to prove the charge as per Section 36 of the *Sexual Offences Act*.
16. On sentence, it is submitted that the life imprisonment sentence meted out is the statutory mandatory sentence for an offence under section 8(2) of the *Sexual Offences Act*. That in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition No. E018 of 2023) [2024] KESC 34 (KLR) the Supreme Court reaffirmed the legality of the mandatory minimum sentences in the *Sexual Offences Act*, holding that for as long as section 8 of the *Sexual Offences Act* remains valid, the various mandatory minimum sentences therein remain lawful.
17. This being a second appeal, this Court is restricted under Section 361(1) (a) of the Criminal Procedure Code to considering matters of law only as stated by this Court in Stephen M'Irungi & Another vs. Republic 1982 – 88 1KAR 360:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”
18. Having considered the record, the grounds of appeal, the submissions of both parties and the Court's mandate, the main issue that falls for determination is whether the prosecution proved its case to the required standard and whether the sentence was proper.
19. As to whether the offence was proved, it is trite that to reach a finding of defilement, the prosecution must establish three main ingredients, which are: the age of the victim, penetration and the proper identification of the perpetrator.



20. Regarding the first element of age, this Court in the case of Justin Kubasu vs. Republic [2020] eKLR cited Edwin Nyambogo Onsongo vs. Republic [2016] eKLR in which the Court cited with approval Mwolongo Chichoro Mwanyembe vs. Republic, Mombasa Criminal Appeal No. 24 of 2015, that;
- “... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”
21. In the instant case, MAA’s father told the court that she was four and a half years having been born in May, 2013; her mother, produced her birth certificate in support consistent with the age of 4 and a half years. This was sufficient credible evidence that proved the age of MAA as four and a half years.
22. As to whether penetration was proved, penetration is defined under Section 2 of the *Sexual Offences Act* as “the partial or complete insertion of the genital organs of a person, into the genital organs of another person.” To establish the charge of defilement against the appellant, it must be proved that there was an act of penetration that is, either partial or complete insertion of male genital organs, into that of MAA, that MAA was a child under eleven years of age and that the appellant had been positively identified as the person who committed the act of penetration.
23. In Bassita vs. Uganda S. C. Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held that:
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim’s own evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond a reasonable doubt.”
24. MAA’s evidence that the appellant sexually assaulted her, and she felt pain, was consistent with that of Dr Omondi who attended to her and on examination he noted that there were lacerations on the vagina and the hymen was broken and that of Dr Odhiambo who examined her and filed the P3 form which confirmed that there were injuries on her vagina. The trial court found her testimony to be cogent and consistent as was corroborated by the medical reports which indicated that she had bruises on her and the hymen was torn. There was, therefore, sufficient credible evidence that penetration had taken place.
25. The appellant also contends that MAA’s evidence needed corroboration in terms of the DNA testing to prove the charge as per Section 36 of the *Sexual Offences Act*. However, the absence of a DNA test does not negate the prosecution’s case. see IMA vs. Republic [2019] eKLR.
26. As regards the identity of the person who committed the offence, the appellant was identified by MAA. She was categorical that the appellant asked her to follow him so that he could buy her chips. The appellant took her to his house and defiled her. When she was found, he informed his father that she slept in the appellant’s house pointing to the appellant who was washing clothes in the plot.



Identification was therefore by recognition. In *Waingwe vs. Republic* (Criminal Appeal 142 of 2016) [2023] KECA 401 (KLR) (31 March 2023) (Judgment) this Court held that:

“It is commonplace that recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

27. The identification was proper and thus this element was also established to the required standard. In view of the foregoing findings, the offence was proved to the required standard and the first appellate court properly reconsidered and re-evaluated the evidence and came to the correct conclusion that the charge of defilement was proved to the required standard against the appellant, and his defence was properly rejected. His conviction is safe.

28. Turning on sentence, the appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

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

8(2) “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

29. The appellant was sentenced to life imprisonment as provided by the law. He, however faults the trial court and the first appellate court for imposing a mandatory minimum sentence which is unconstitutional as it is contrary to Article 25 of *the Constitution*.

30. Sentencing is a discretionary exercise by the trial court. An appellate court will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in *Bernard Kimani Gacheru vs. Republic* (2002) eKLR stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, a sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist.”

31. In addition, the Supreme Court in *Petition No. E018 of 2023, Republic vs. Joshua Gichuki Mwangi*, in regards to minimum sentences prescribed by section 8 of the *Sexual Offences Act* stated that:

“66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in the Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions,



sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed....

(68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.”

32. Even though the appellant argues that the mandatory minimum sentence imposed is unconstitutional, this Court lacks jurisdiction to interfere with the sentence. Further, from the record, it is evident that the appellant did not before the High Court challenge the constitutionality of the sentence meted by the trial court and hence cannot raise it at this stage. In *Republic vs. Mwangi* [supra] the Supreme Court stated that:

“The record also shows that the issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the Respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the respondent’s sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.

33. In the circumstances, the appellant has not established any grounds upon which the Court can interfere with his sentence. We therefore find that the appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

