



**Gathirwa v Republic (Criminal Appeal E101 of 2021)  
[2023] KEHC 22797 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E101 OF 2021  
PM MULWA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**SIMON WAWERU GATHIRWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in  
Gatundu criminal case no. E006 of 2021 by the Hon. L. M. Wachira)*

**JUDGMENT**

1. Simon Waweru Gathirwa the appellant herein was charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on diverse dates between the month of December 2020 and January 21, 2021 in Gatundu North Sub-County within Kiambu county did an act which caused penetration of his genital organs namely the penis to penetrate the vagina of EW a child aged 10 years.
2. In the alternative charge the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on diverse dates between the months of December 2020 and January 21, 2021 in Gatundu North sub-county within Kiambu County, intentionally and unlawfully touched the buttocks of EW a child aged 10 years.
3. The accused pleaded not guilty to the main and alternative charges. At the hearing, the prosecution called 7 witnesses to prove its case. The appellant was put on his defence, denied that he committed the alleged offence and did not call any witness.
4. In her judgment, the trial magistrate convicted the appellant for the offence of defilement. In the absence of any mitigation by the appellant the trial court sentenced the appellant to serve 30 years imprisonment.



5. Dissatisfied with the trial court's judgment the appellant filed the current appeal citing the following grounds:
  - i. That the trial court convicted and sentenced the appellant of the offence charged, notwithstanding, that the prosecution failed to prove the case beyond reasonable doubt.
  - ii. That the trial court convicted and sentenced the appellant of the offence charged notwithstanding that the charge sheet was defective.
  - iii. That the trial court convicted and sentenced the appellant of the offence charged notwithstanding, the crucial prosecution witnesses were not availed.
  - iv. That, the trial court convicted and sentenced the appellant of the offence charged notwithstanding, the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.
  - v. That the trial court convicted and sentenced the appellant of the offence charged, notwithstanding, the plausible defence of the appellant was not given due consideration.
  - vi. That the trial court convicted and sentenced the appellant of the offence charged, notwithstanding, no eye witness was pointing at the appellant.
  - vii. That the trial court convicted and sentenced the appellant of the offence charged notwithstanding the vital ingredients of the offence charged were not proved as stipulated by law.
  - viii. That appellant applied for copies of court proceedings to enable him to raise more relevant grounds.
6. The appellant prayed that the appeal be allowed, the conviction quashed and the sentence set aside.
7. The appeal was heard by way of written submissions. Both parties filed their submissions.

### **Appellant's Submissions**

8. The appellant submitted that the medical documents adduced in evidence by the prosecution were not marked for identification before production as exhibits. According to the appellant, the evidence of Pw5, Pw6, and Pw7 failed to mention that Pw1 was taken to the hospital and therefore the evidence of the clinical officer was foreign. The evidence was obtained through un-procedural means and not tested. The medical evidence failed to link the appellant to the said offence.
9. The appellant submitted the prosecution failed to prove the elements of defilement to the required standards. The prosecution failed to prove penetration. The evidence of Pw1 was not corroborated.
10. The appellant submitted the case was instigated by malice meant to settle family scores, the initial report made to the police was that of a missing child, only to be found and a suit ensued against the appellant.

### **Respondent's Submissions**

11. In opposing the appeal, the respondent submitted that crucial elements to sustain a conviction for the offence of defilement were proved by the prosecution at the trial court. According to counsel, the complainant was 10 years of age which was proved by the birth certificate which indicated she was born on April 18, 2010.



12. Counsel contended that the issue of penetration as alleged by the victim was corroborated by the P3 form, the PRC form, and the treatment notes produced by Pw4.
13. On the issue of identification counsel submitted the appellant was well known to the victim as they were related and lived not far from each other. According to the testimony of Pw1, the appellant called the minor to accompany him to the farm in the two instances when the defilement took place.
14. Counsel contended that the prosecution called only crucial witnesses in support of its case and the appellant had a chance to cross-examine all the seven prosecution witnesses.
15. The appellant failed to demonstrate to the trial court how he was framed. According to counsel, the charges were pegged on the evidence of Pw1 and the findings of Pw4.
16. Counsel urged the court to find that the sentence of thirty (30) years imprisonment was not excessive considering the appellant defiled a child aged 10 years. Further counsel pleaded with the court to affirm the conviction and uphold the sentence.

### **Analysis of The Trial Court Evidence.**

17. The complainant testified as Pw1 after a *voir dire* was conducted and the court was satisfied that she was a truthful witness. Pw1 told the court she lived at [Partuclars Withheld] and is a student at [Partuclars Withheld] Academy in grade 4. She told the trial court she knew the appellant who did bad manners to her. According to Pw1, the appellant had requested her to accompany him to the farm to pick mangoes. They picked and ate the mangoes before the appellant defiled her. She told the court she had dressed in a skirt, stockings and a top. The appellant removed her skirt and stockings then removed his trouser and underwear before he lay on her and inserted his penis into her susu. She told the court that in the first instance, there was no one present, but in the second instance her cousin Bernard found them having sex in the bush and he informed her mother.
18. During cross-examination she told the court that Bernard found them at the farm while the appellant was doing bad manners to her and she ran away from home for fear of being beaten and slept at the chicken house when her mother inquired about it. She denied being told to lie in court.
19. Pw2 - PC Absalom Owino testified he is stationed at Miteero Police Post for general duties. On January 22, 2021 he was informed by PC Kyalo about a reported case of a missing child. They proceeded to the area and was informed the appellant was the person seen with the child. In the process of arresting the accused, the minor emerged from the chicken pen. He stated that there was an allegation of defilement but he had no details of the same.
20. In cross-examination he confirmed he only assisted PC Kyalo in arresting the appellant.
21. Pw3 - PC Timothy Kyalo testified he was in the office on January 22, 2021 when Patrick Ngige reported a case of a missing child on the evening before and the appellant was the last person seen with the minor. He told the court that together with Pw2 he accompanied the reportee to his home and while there the child emerged from the poultry house and informed them that she had run away for fear of being beaten by the mother for having sex with the appellant. Pw3 arrested the appellant.
22. In cross-examination he told the court that he was not aware if the case involved a land dispute.
23. Pw4 - George Kimani testified he was a clinical officer at Igegania Level 4 hospital. He adduced a P3 form he filled on January 22, 2022 for a minor aged 10 years with a history of defilement. Upon examination the genitalia was injured, there was normal vaginal external genitalia, no lacerations, the



- hymen was absent and the vaginal orifice was open and reddened. The minor was in pain. The appellant was also tested and his urine test showed blood traces. In his conclusion, the minor was defiled.
24. In cross-examination Pw4 stated that the examination confirmed the minor was raped as there were injuries and the hymen was broken.
  25. Pw5 testified that the complainant is her daughter. On January 21, 2021, she went to work and returned home at around 8 pm, when she asked Pw1 where she had been, the girl ran away. She looked for her and did not find her that evening. The following morning after reporting the matter she was found at the chicken pen.
  26. She told the court that Pw1 confessed that she had sex with Simon and they had been found by Bernard. She told the court she had no grudge against the accused as they were related. She adduced the minor's birth certificate which confirms she was born on April 18, 2010.
  27. Pw6, the father of Pw1 testified that on January 21, 2021 at about 8.00pm he was informed that Pw1 was missing. He reported his missing daughter at the police station. In the company of police officers, they found the minor who emerged from the chicken pen. That the minor said she had gone hiding for fear of being beaten by her mother after she had had sexual intercourse with the accused. The accused was arrested. He confirmed there was no grudge between his family and the appellant.
  28. Pw7 a police officer confirmed that a first report of a missing child was made on January 22, 2021. Then the accused was brought in with an allegation of defiling the minor. She interrogated the minor who confirmed having sex with the accused. The child was taken to the hospital for examination.
  29. Having been placed on his defence the accused gave sworn evidence and did not call any witness.
  30. In his defence Dw1 testified that on January 22, 2021, he was from the shopping centre when a motorbike carrying 2 passengers stopped and asked his name, he was told to board the motorbike and they went to the complainant's home where he was interrogated but he knew nothing. Shortly, after 5 minutes, the minor emerged from the chicken pen. He was arrested by the police officer and taken to the Miteero Police Post with Pw1 and her mother. He told the court that together with Pw1 they were taken to the hospital for examination. He denied having sex with Pw1.
  31. In cross-examination he told the trial court it was a frame-up, as the family intends to have him jailed.
  32. The trial magistrate in her judgment found that the main evidence was from Pw1 which was corroborated by the medical evidence. That the defence failed to challenge the evidence adduced by the prosecution and therefore the prosecution had established that the accused had defiled the minor. The trial court found the accused guilty and convicted him on the main count of defilement.

### **Issues For Determination**

33. Having reviewed the record, the grounds of the appeal and the submissions filed by the respective parties, I frame the following issues for determination:
  - i. Whether the offence of defilement was proven to the required standard.
  - ii. Whether the failure to call witnesses by the prosecution is crucial.
  - iii. Whether the appellant proved a frame-up by the complainant.
  - iv. Whether the sentence is excessively high.
34. In a charge of defilement, the prosecution must prove 3 elements being, the age of the victim, proper identification of the perpetrator, and penetration. In *Charles Wamukoya Karani v Republic*, criminal



appeal No 72 of 2013 the court stated that: “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and identification of the assailant.”

35. On the first ingredient of age, Pw5 the mother to the minor adduced a birth certificate that showed the minor was born on April 18, 2010. The birth certificate confirms Pw1 was a minor aged 11 years at the commission of the offence.
36. On the second ingredient of penetration, section 2(1) of the *Sexual Offences Act* defines penetration as: “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
37. In the instant case Pw1 testified that the appellant requested her to accompany him to the farm to pick some mangoes on two occasions which she did and on both occasions, the appellant had sex with her. It was her testimony that on the first instance, they were not found but on the second instance a cousin called Bernard found them in the bush and he informed the complainant’s mother.
38. Equally Pw4 testified that on examination of the minor the genitalia was injured, there was a normal vaginal external genitalia, no lacerations, the hymen was absent and the vaginal orifice was open and reddened. The minor was in pain. He filed the P3 form which in his conclusion stated the minor was defiled. The appellant was equally examined and his urine showed blood traces.
39. This court finds the evidence of Pw1 was corroborated by the evidence of Pw4 and the P3 form, which establishes inevitable proof that there was penetration.
40. The last element is that of proper identification of the perpetrator. Pw1 testified that the appellant was a neighbour and lived close to home. She told the court she frequently visited the appellant’s home to play with the siblings. Pw4 and Pw5 testified the appellant was a relative. In the circumstances, there is no doubt that the appellant was well-known to the complainant.
41. This court thus finds that the prosecution proved beyond reasonable doubt the elements of defilement.

#### **Whether the failure to call crucial witnesses by the prosecution is fatal**

42. The appellant submitted that the respondent failed to call Bernard who was a crucial witness. The respondent in response contended that it only called crucial witnesses in support of its case and the appellant had a chance to cross-examine all prosecution witnesses.
43. The court recognizes that Bernard was referred to by Pw1 and Pw5 as having found the appellant and the minor in the act and reported the matter to the complainant’s mother. The court further confirms that the evidence which Bernard would have adduced was tendered by Pw1 and supported by the medical reports and the P3 form. The P3 form established the existence of defilement on the minor. Failure by the prosecution to call Bernard did not affect the credibility of the evidence adduced.

#### **Whether the appellant proved a frame-up**

44. The appellant submitted that the charges were framed up. But he failed to inform the court of how this came about. He testified that he had no blood relationship with the complainant. I am in agreement with the trial court’s finding that the appellant did not prove that this case was framed against him by the complainant or her family.

#### **Whether the sentence imposed was excessive**

45. The penalty for the offence of defilement with a child less than 11 years is provided under section 8(2) of the *Sexual Offences Act* which states that:



- (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.
46. In the instant case, the trial court noted the appellant was not remorseful and in the absence of mitigation was sentenced to 30 years imprisonment. The trial court exercised its discretion in imposing the sentence which it considered serious and calling for a deterrent sentence. The sentence was appropriate in the circumstances.
47. In the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR it was stated as follows: “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, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor 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 any one of the matters already stated is shown to exist.”
48. I have noted that the trial magistrate did not mention whether she took into consideration the time spent by the appellant in custody as required by law. Section 333(2) of the *Criminal Procedure Code* provides that:
- (2) Subject to the provisions of section 38 of the *Penal Code* every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
- Provided that where the person sentenced under subsection (1) has, before such sentence, been held in custody, the sentence shall take account of the period spent in custody.
49. Further, the Judiciary Sentencing Policy Guidelines (2014) provides as follows:
- “The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
50. From the trial court record, the appellant was arrested on January 22, 2021 and judgment was delivered on September 21, 2021. He was in custody throughout the trial period.
51. In the upshot, the appeal herein lacks merit and is dismissed. The conviction and sentence by the trial court are upheld. Considering the time spent in custody by the appellant, the 30-year prison sentence will run from the day of his arrest, that is January 22, 2021.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

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**P.M. MULWA**



## **JUDGE**

### **In the presence of:**

Kinyua/ Duale – Court assistants

Appellant – present in person (virtually from Kamiti Max.)

Mr. Gacharia - for the State/Respondent

