



**Gitari v Republic (Criminal Appeal 68 of 2018)
[2023] KEHC 24037 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 68 OF 2018
FN MUCHEMI, J
OCTOBER 24, 2023**

BETWEEN

KENNEDY CHOMBA GITARI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence in the Principal Magistrate Court in Gichugu by Honourable G. K. Odhiambo (RM), in Criminal Sexual Offence Case No. 18 of 2018 on 4th December 2018)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Resident Magistrate Gichugu where he was convicted of the offence of defilement contrary to Section 8(1) as read with 8(3) of the [Sexual Offences Act](#) No 3 of 2006. He was sentenced to twenty (20) years imprisonment.
2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 7 grounds of appeal which can be condensed as follows:-
 - a. The learned trial magistrate erred in law in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof;
 - b. The learned trial magistrate erred in law and in fact in failing to take into account the appellant's defence.
3. Parties disposed of the appeal by written submissions.



The Appellant's Submissions

4. The appellant submits that the prosecution did not prove its case beyond reasonable doubt. He argues that the element of penetration was not proved by the prosecution. The appellant further argues that he wore a condom before having sexual intercourse with the minor and thus the bacteria infection did not emanate from him. It was further argued that the medical evidence showed that the minor was sexually active and therefore she could have not gotten the infection anywhere. He thus states that the medical evidence consisting of the broken hymen, bacterial infection and foul smell are not sufficient proof of penetration and further the medical evidence does not link him with the offence.
5. The appellant submits that the prosecution failed to call crucial witnesses particularly one David Mwendia who was his roommate. He further states that they had a sour relationship as the said David Mwendia had a grudge against him which was a good cause to lie to the minor's mother. Further that the said Mwendia and the victims mother implicated him with the offence. The appellant further states that David's evidence was vital in the case and that he would have wanted to cross-examine him.
6. The appellant argues that the investigations were shoddily done as the investigating officer did not interrogate the medical evidence. Furthermore the appellant submits that the prosecution's case was filled with material contradictions and inconsistencies for the medical evidence was contrary to the fact that he used a condom. As such, the appellant argues that the minor could not have gotten a bacterial infection considering the evidence given by the minor.
7. The appellant submits that the trial court did not consider his defence particularly that there was a grudge between him and his roommate who implicated him in the offence. Furthermore, the appellant argues that the trial court did not consider his mitigation and hence meted out the mandatory minimum sentence.

The Respondent's Submissions

8. The respondent relies on the case of *Bakare v State* {1987} 1 NWLR and submits that the prosecution proved its case beyond reasonable doubt. The respondent states that PW1 positively identified the appellant as the perpetrator of the crime as he was well known to her and confirmed that he was her boyfriend. Furthermore, PW1 knew the kind of work the appellant did. The respondent further submits that the medical evidence given by PW2 indicated that the minor had been sexually molested multiple times. Further, PW3, testified that the matter was reported to the police vide OB No 15/5/2018 on 16th May 2018.
9. The respondent submits that the minor was born on 28th August 2004 as indicated in the Birth Certificate which was produced by PW4, the investigating officer. Thus the prosecution proved that the minor was 14 years old at the time the offence occurred.
10. On the element of penetration, the respondent submits that PW2 testified that PW1's hymen was broken which indicated that penetration had occurred.

Issues for determination

11. The two issues for determination are as follows:-
 - a. Whether the prosecution proved its case beyond any reasonable doubt;
 - b. Whether the trial court considered the defence evidence;



The Law

12. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

13. Similarly in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.” This was also set out in the case of Kiilu & another v Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt.

14. Relying on the case of Charles Wamukoya Karani v Republic, Criminal Appeal No 72 of 2013 where it was stated that:- “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
15. The Court of Appeal in Edwin Nyambogo Onsongo v Republic (2016) eKLR, stated as follows in respect of proof of age of the victim in cases of defilement:

“...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.

16. PW1 testified that she was 14 years old at the time of giving the testimony having been born on 28/8/2004. PW4, the investigating officer produced the minor’s birth certificate which indicated that she was born on 28/8/2004 thus confirming that the minor was 15 days shy of 14 years at the time of the commission of the offence. The oral evidence of PW1, PW4 and the birth certificate, in my view, were sufficient proof of the age of the complainant.



17. 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.”

18. On the element of penetration, PW1 testified that on 13th May 2018, she went to church at Karumandi Catholic Church and on her way back home she met the appellant who was at his place of work and that she later went to his house and spent the night there. PW1 further stated that she had sexual intercourse with the appellant on Sunday and she further explained that he removed her trousers, underwear and biker then he removed his trousers and underwear. The appellant then took a condom and wore it on his penis. The appellant then inserted his penis into PW1’s vagina. It was PW1’s further evidence that after the sexual intercourse the two slept till the following day when she PW1 returned to her parent’s home. The minor testified that she did not find anyone at their home. She therefore decided to go to church and afterwards went to Karumande to see the appellant at his place of work and that they talked with the appellant till 3pm and then she went to her parent’s home. PW1 further testified that the next day, she went to the appellant’s place of work and they chatted. It was PW1’s evidence that she went to church and then went back to the appellant’s place of work and then she went home. On Wednesday, the minor testified that she was from church when she met one David, who had a relationship with her sister, and he took her to the appellant’s house. PW1 further testified that she was in the house with the appellant when they were arrested by the police.

19. Dr. Favour Kemunto, PW2 testified that she examined PW1 on 17/5/2018 and found that her hymen was broken but not freshly broken and that she had a foul smell from her private parts. The doctor did a high vaginal swab and found a high number of epithelial cells and bacteria. The witness testified that the presence of epithelial cells indicated that an infection whereas bacteria signified that one had frequent sexual intercourse or multiple sexual partners. PW2 testified that she could not conclusively say that there was sexual assault but the presence of bacterial infection and large number of epithelial cells indicated that there was penile penetration on the minor’s vagina. She produced the P3 Form, Post Care Rape Form and the lab request form as exhibits.

20. The appellant argues that the medical evidence did not link him as the perpetrator of the offence and therefore the prosecution did not prove this element to the required degree. As the Court of Appeal noted in *Geoffrey Kioji v Republic Nyeri Criminal Appeal No 270 of 2010 (UR)*:-

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

21. The evidence of PW1 in regard to penetration was corroborated by the medical evidence of PW2. It was pointed out that the presence of bacterial infection and the large number of epithelial cells indicated that there was penile penetration in the minor’s vagina. Thus the inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration did occur.

22. PW1 testified that the appellant was her boyfriend and that he washed cars and often visited him at his place of work at Karumande. The minor explained in her testimony that she met the appellant on 16th



May, 2018 on a Wednesday, on her way from church. PW1 said she met David who took her to the appellant's house. PW1 further testified that she was in the appellant's house alone with him when the police arrested them. PW3, a police officer attached at Karumande AP Post testified that on 16/5/2018, the minor's mother reported that PW1 went missing on 13/5/2018 vide OB No 15/5/2018 and that the minor's mother received information as to where her daughter was staying. The mother went with other people to Karumande shopping centre behind Kula Hapi Hotel and found the minor inside the house with the appellant. On arrival at the appellant's house, the appellant refused to open the door and thus they broke the window to gain access.

23. In my view, the testimony of PW1 and PW3 positively identified the appellant as the perpetrator. This evidence was sufficient to positively identify the accused who was well known to the witnesses.
24. The appellant argues that the prosecution did not call crucial witnesses to prove its case, in particular his roommate David to accord him a chance to cross-examine him. It is trite law that the prosecution is required to avail to court all relevant evidence to enable the court make an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact.

Section 143 of the [Evidence Act](#) (Cap 80) Laws of Kenya provides:-

No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.

25. Similarly in [Keter v Republic](#) [2007] 1 EA 135 the court held *inter alia* thus:-

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

26. The prosecution called four (4) witnesses in this case who included the complainant, the doctor, the investigating officer and another civilian witness. These witnesses in the wisdom of the independent office of the Director of Public Prosecution were sufficient to prove their case. The defence on the other hand has the liberty to call any witness to testify in their favour, including any witness that the prosecution left out. The appellant ought to have called the said David, his roommate as his witness for he was not called to testify by the prosecution. I find no substance in this ground of appeal.

Whether the trial court considered the defence evidence.

27. The appellant submits that the trial court did not consider his defence. He denied committing the offence and stated that his roommate, one David framed him and implicated him for the said offence so that he could take his job. He testified that he only saw the minor on 16/5/2018 when he was arrested. He further testified that he was not arrested with the minor and the police lied to the court.
28. The trial magistrate in his judgment considered the defence and observed that he was not convinced that PW1 had any basis to frame up the appellant. The magistrate further observed that the appellant's defence amounted to mere denial and did not rebut the evidence tendered by the prosecution. Moreover, from the submissions of the appellant herein, he seems to have admitted to having sexual intercourse with the minor as he insists that since he wore a condom, he could not have given her a bacterial infection. The court further noted that PW1 was a child aged 14 years and had no capacity to consent to the sexual overtures by the appellant even if the act of sexual intercourse was consensual.
29. It is therefore my considered view that the trial court exhaustively considered the defence of the appellant but found it not plausible.



Whether the sentence meted against the appellant was lawful.

30. Section 8(3) of the *Sexual Offences Act* No 3 of 2006 provides that:-

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 not less than twenty years.

31. The Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017]eKLR declared the mandatory nature of death unconstitutional in murder cases and went further to state that courts have the discretion to mete out sentences that commensurate with the gravity of the circumstances surrounding the commission of the offence. There are numerous Court of Appeal decisions which hold that the provisions of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing

32. The Court of Appeal applied the same principle in *Evans Wanjala Wanyonyi v Republic* [2019] eKLR and *Christopher Ochieng v Republic* [2018] eKLR in holding that the mandatory minimum sentences deprive courts of their legitimate jurisdiction to exercise discretion not to impose these sentences where circumstances dictate otherwise. The only caution to be taken by the court is that such discretion must be exercised judiciously and not capriciously. The trial court must subject its mind to sound legal principles and take account of all the relevant factors while eschewing extraneous or irrelevant factors. An appellate court will therefore only interfere with the sentence where it is shown that the sentence imposed is either illegal or is either too harsh or too lenient in the circumstances of the case.

33. The aggravating factors in this case are that, the minor was a child of 14 years, a minor who had no capacity to consent to having the sexual intercourse with the appellant. The appellant said in mitigation that he was a first time offender and a father of two children. However, this court cannot lose sight of the seriousness of the offence. The trauma that goes with the offence of defilement is detrimental to the child's mental and physical health and may even affect the future of the child on performance in life generally and finally define who the said child will be. These factors ought to be considered in sentencing.

34. I have analysed the evidence of the prosecution as a whole as well as the defence of the appellant. It is my finding that the prosecution satisfied the court on all the ingredients of the offence of defilement. The conviction was therefore based on cogent evidence and is hereby upheld.

35. The appellant was sentenced to twenty years imprisonment which is the minimum sentence provided by the law. With the development of jurisprudence, the appellant is entitled to benefit from a lesser sentence which is commensurate with the offence and taking into account all the other factors surrounding the commission of the offence.

36. I have considered all the factors herein and those prescribed by the Judiciary Sentencing Policy.

37. Consequently, the sentence of twenty (20) years imprisonment is hereby set aside and substituted with one of twelve (12) years imprisonment.

38. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 24TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 24TH DAY OF OCTOBER, 2023

