



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwirigi v Republic (Criminal Appeal E018 of 2021)  
[2022] KEHC 540 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 540 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E018 OF 2021  
PJO OTIENO, J  
MAY 25, 2022**

**BETWEEN**

**PAUL MWIRIGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Paul Mwirigi ('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* No. 3 of 2006. The particulars were that on 8<sup>th</sup> September 2019 at Mathangiro area Buuri Sub-County within Meru County, he intentionally caused his penis to penetrate the vagina of BMN a child of 6 years.
2. He faced a second count of sexual assault contrary to Section 5(1) (a)(i) as read with Section 5(2) of the *Sexual Offences Act* No. 3 of 2006 whose particulars were that on the same day and place, he unlawfully used his finger to penetrate the vagina of BMN.
3. He faced 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 were that on the same day and place, he intentionally touched the vagina of BMN a child aged 6 years.
4. There was a third count of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 whose particulars were that on the same day and place, he intentionally caused his penis to penetrate the vagina of FM a child aged 8 years old.
5. A fourth count was of sexual assault contrary to Section 5(1) (a) (i) as read with Section 5(2) of the *Sexual Offences Act* No. 3 of 2006 it being alleged that on the same day and place, he unlawfully used his finger to penetrate the vagina of FM.



6. He faced a 2<sup>nd</sup> alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006 on the allegations that on the same day and place, he intentionally touched the vagina of FM a child aged 8 years.
7. After denying the charges, he was subsequently tried, convicted on the first count of defilement and sentenced to life imprisonment. Counts 2, 3 and 4 were held in abeyance.
8. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 4 grounds which I have collapsed into 2 as follows: -
  - a. The trial court erred in law and fact by convicting and sentencing the appellant based on the untested evidence of PW7 (the clinician) and the other prosecution witnesses, which fell short of proof beyond reasonable doubt.
  - b. The trial court erred in law and fact by disregarding the facts raised by the appellant in his defence of alibi.

### Submissions

9. The submissions by appellant was to the effect that the mandatory sentence of life imprisonment did not conform to the tenets of a fair trial that accrued to him under Article 25(c) of [the Constitution](#) and cited the decision in [Dennis Kinyua v Republic](#)(2017)eKLR, [Evans Wanjala Wanyonyi v R](#)(2019)eKLR and [Gideon Majau Gitire Alias Kombo](#)(2019)eKLR. He submitted further that the clinician did not prove penetration beyond any iota of doubt, and thus his conviction was unsafe.
10. Thirdly, he faulted the prosecution for failing to call one Flora to testify and relied on [Ramson Ahmed v Republic](#)(1955) EA VOL 22, [JMN v R](#)(2021)eKLR and [Bukenya & others v Uganda](#)(1972) EA 549, where the need by the prosecution to call all vital witnesses was emphasized. He faulted the trial court for disregarding his defence of alibi and reverted to the case of [Joseph Munyoki Kimatu v Republic](#) (2014)eKLR, for the proposition that, where an alibi defence is raised at the onset of the trial, the prosecution is given adequate warning as regards the need to rebut the same. He further cited [Kibale v Uganda](#)(1999) EA 148, for the proposition that, “an accused puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of providing that answer and it is sufficient if an alibi introduces into the mind of a court a doubt.” He urged the court to scrutinize the whole testimonies tendered by the prosecution witnesses together with his defence in order to arrive at a different and independent conclusion.
11. The prosecution’s submissions were to the effect that the conviction and sentence should be upheld and the appeal dismissed because it had proved beyond reasonable doubt all the ingredients of the offence of defilement as enlisted in [Irene Atieno Ochieng v Republic](#)(2017)eKLR. It added that there was no margin of error as to the identity of the assailant as he was very well known to the victims and concluded that the sentence meted out to the appellant was fair and lenient and the evidence adduced was solid.

### Summary of the evidence

12. The prosecution in advancing its case against the appellant called 7 witnesses in support thereof. PW1, BM, a class one pupil at [particulars withheld] said that she was going to buy milk when she was called by the appellant, who bought for her a lollipop and did tabia mbaya on her. The appellant then sent her to go and bring other children and she came with PW2, FM and Flora. The appellant gave them Ksh.10 to buy Juice and when they returned to his house, he gave them cookies and honey. He then removed



- their dresses, inserted his fingers in their vaginas and told them not to tell anyone. The appellant had on an earlier occasion bought for her BG and then inserted his fingers into her vagina. The appellant tried inserting his penis into her vagina, but when it could not penetrate, he inserted his fingers instead. The appellant, who lived next to their home, was the witness' mother's friend.
13. During cross examination, she stated that she knew the appellant and he had previously done *tabia mbaya* to her, while she was alone, but she did not tell anyone. The appellant took her, PW2 and Flora to his bed and did *tabia mbaya* to them after which she was taken to the hospital.
  14. PW2, FM, a pre-unit pupil at [particulars withheld] was with PW1 when the appellant, whom she knew, gave them money. They then went inside his house where he told them to undress and lie on his bed. The appellant then told them to close their eyes and he inserted his penis into their vaginas and did *tabia mbaya* to them until 1.00 pm.
  15. During cross examination, she reiterated that she was with PW1 and Flora in the appellant's house. She told her mother that the appellant had done *tabia mbaya* to her and PW1.
  16. PW3 CW and PW4 EK, PW1's and PW's mothers, said that they were at work on the material day. On her way from work, PW4 learnt that her child had been defiled. When PW3 on her part returned home, and found PW1, who appeared unhappy, watching T.V. PW1 informed PW3 that the appellant had done *tabia mbaya* to her, PW2 and Flora. PW3 went to the appellant's house but she did not find him. PW3 informed mama Mwendwa, the appellant's employer, of what had transpired. On her way out, PW3 met with PW4 and they both reported to Gachero police station, but were referred to Timau police station. They then took the victim to Nanyuki general hospital, recorded their statements with the police and the appellant was arrested the following day. The two mother told the court that PW1 was aged 7 years while PW2 was 9 years old at the time of the incident and produced their birth certificates.
  17. During cross examination, PW3 stated that she was working with the appellant in the same company and that PW1 had informed her that it was the appellant who had defiled her. PW1 had never disclosed to PW3 that she had previously been defiled, because the appellant had threatened her. On the previous occasions, the appellant inserted his fingers and not his penis. PW3 denied framing the appellant because there was no bad blood between them. PW1 told PW3 that she cried and she was feeling pain in her vagina. PW4 knew PW3 and the appellant when the incident occurred.
  18. PW5 PC Hasaan Kiptum attached at Nanyuki police station went with Cpl Francis Reparayi to arrest the appellant and took him to Timau police station.
  19. During cross examination, he stated that he was only tasked with arresting the appellant and not investigating the case.
  20. PW6 PC Angeline Naru attached at Timau police station and the investigating officer, was on the material day at the station when the report of the incident herein was made by the complainants. She issued the arrest order for the appellant to be arrested and charged.
  21. During cross examination, she stated that their investigations established that the complainants had been defiled by the appellant. The appellant was not taken to the hospital together with the complainants because he had not yet been arrested and that he had lured the complainants with money.
  22. In re-examination, she affirmed that she took the children to hospital and the report confirmed that they had been defiled.
  23. PW7 Dr. Dominic Muthui, a clinician at Nanyuki filled the complainants' PRC and P3 forms, and produced them as exhibits. He reported having been told by PW1 that she had been previously defiled



in January and September 2019. On examination, PW1 had a whitish discharge and the hymen was broken. The laboratory investigation revealed the presence of bacterial cells. On examining PW2, her vagina was red, inflamed and there was pain indicative of use of force and the hymen was broken. There was a whitish discharge, bruises and epithelial cells.

24. During cross examination, he stated that he was the one who had examined and treated the complainants, that PW2's clothes was tainted with both soil and blood while those of PW1 had only soil. The whitish discharge was due to an infection.
25. In re-examination, he stated that the injuries were only on the complainants' genitals.
26. Put on his defence, the appellant gave sworn testimony that on the material day, PW1, PW2 and Flora were sent to his home by PW3. On their way to where PW3 was, he gave them Ksh.10, to buy sweets. PW3, who was his wife, requested him for Ksh. 3,000 for a self help group. When he told PW3 that he had no money, PW3 threatened to report him to the police station. He walked away and continued with his normal work until 10.00 pm, when a police officer knocked at his gate. He was then arrested and taken to Timau police station. He was taken to the hospital the following day and later informed that he had defiled two children. The case was fuelled by a debt that he allegedly owed PW3 and he knew both PW3 and PW4.
27. During cross examination, he admitted that he worked in the same company with PW3. He had an intimate relationship with PW3 for 2 years and their homes were about 300 meters apart. He owed PW3 Ksh.3,000 and his refusal to marry her as a 2<sup>nd</sup> wife was the cause of the bad blood between them.

### **Analysis and determination**

28. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See *David Njuguna Wairimu v R* (2010) eKLR.
29. On whether the prosecution proved its case beyond reasonable doubt, the birth certificates serial numbers xxxxx and xxxxx for the complainants produced as exhibits established that PW1 and PW2 were aged 7 years and 10 years respectively.
30. PW1 and PW2 narrated how the appellant allured them to his house where he told them to undress, lie on his bed and close their eyes. The appellant then inserted his finger into their vaginas and defiled them. The appellant also admitted that the complainants came to his house on the material day. It is clear from the P3 and PRC forms and the evidence of PW7 that the complainants were defiled, as PW1 had a whitish discharge, the hymen was broken and there was presence of bacterial cells. In addition other hand, PW2's vagina was inflamed, the hymen was broken, and there was a whitish discharge, bruises and epithelial cells.
31. It is irrefutable that the complainants, PW3 and PW4 all knew the appellant. PW1, PW3 and the appellant concurred that they lived 300 meters apart. There is thus no strip of doubt in my mind that the appellant was the perpetrator of the offence herein.
32. It is therefore my finding that all the ingredients of the offence of defilement were proved beyond reasonable doubt and that the conviction of the appellant was therefore safe and proper.
33. I find the fault on the trial court of non - consideration of the appellant's alibi defence, to be completely misconceived, as no such defence was raised by the appellant during trial.



34. I find the fault on the prosecution to call Flora to testify to fall by the wayside, because the 7 witnesses called by the prosecution in support of its case were more than satisfactory. In any event no specific number of witness is necessary to prove an offence. In sexual offences even a single witness in the complement may suffice.
35. On the propriety of the sentence meted out to the appellant, the same rests on the discretion of the trier of facts as was encapsulated in *Bernard Kimani Gacheru v Republic* [2002] eKLR where the Court of Appeal stated that;
- “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, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with 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.”
36. Section 8(1) (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.” That is the sentence the trial court, after due observation of the demeanor of the witnesses, a benefit this court lacks, meted out to the appellant, and it cannot be faulted for doing so.
37. On the whole, I find the appeal on both conviction and sentence to be bereft of merit and I order it dismissed.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25<sup>TH</sup> DAY OF MAY 2022**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Appellant in person

Miss Nandwa for the Respondent

Court Assistant: Mwenda

