INW v Republic (Criminal Appeal E004 of 2024)
[2025] KEHC 1957 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1957 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E004 OF 2024

MA ODERO, J

FEBRUARY 21, 2025

(FROM THE ORIGINAL MCSO NO. E007 OF 2022 OF THE PMS MAGISTRATE'S COURT AT KARATINA)

BETWEEN

INW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant Ibrahim Ndoge Wamae has filed this appeal challenging both his conviction and sentence in the lower court.

2. The Appellant had been charged at the Karatina Law Courts 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 of the charge were that

> " On the 28th day of January 2022 at around 0600 hrs at Mathira-West Sub County in Nyeri County intentionally caused his penis to penetrate the vagina of LWA a child aged 14 years."

3. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *sexual offences act* No. 5 of 2006.

4. The Appellant entered a plea of Not Guilty to both charges. His trial commenced on 4th May 2022 at which trial the prosecution called a total of six (6) witnesses.

5. The complainant LWA told the court that she was fourteen (14) years of age. She stated that she lives in [Particulars withheld] Village with her grand- parents and a younger sister.

6. The complainant testified that on 28th January 2022 at about 6.00am she escorted her grandmother to the gate. The grandmother was heading to a nearby clinic to receive a COVID Vaccination. Upon returning to the room which she shared with her sister, a man grabbed the complainant by the waist, threw her onto a sofa and removed her panty. That the man who held her mouth to prevent her from calling for help then proceeded to defile her. The complainant told the court that she recognized the attacker as her grandfather.

7. Upon completing the act of defilement the man warned the child not to divulge what had happened to anyone.

8. Later on 27th April 2022 the complainant began to feel unwell. She then divulged to her grandmother what had happened to her. Upon being taken to the clinic the complainant was informed that she was pregnant. The matter was reported at Kiamachimbi Police Station. The complainant was taken for medical examination at Karatina Sub-County Hospital.

9. Police carried out investigations into the matter leading upto the arrest of the Appellant.

10. Upon the close of the prosecution case the Appellant was ruled to have a case to answer and was placed onto his defence. The Appellant gave an unsworn statement and called no witnesses. He denied having defiled his grand-daughter and instead accused her of being a truant child. The Appellant claimed that the child was in the habit of entertaining various men causing the Appellant to discipline her. That when the complainant fell pregnant she decided to blame her grand-father.

11. Vide a judgment delivered on 13th December 2023 Hon. V. S. Kosgei Senior Resident Magistrate convicted the Appellant on the main charge of Defilement. Following mitigation the trial court sentenced the Appellant to serve Forty five (45) years imprisonment. 12. Being aggrieved by both his conviction and sentence the Appellant filed this Memorandum of appeal which was premised upon the following grounds;-

> " 1. That the Learned Trial Magistrate erred in points of law and fact in failing to appreciate that the instant matter was not proved to the required standards.
>
> 2. That the learned trial magistrate erred in both fact and law in failing to appreciate that the charge as laid out was incurably defective contrary to section 214 of the *Criminal Procedure Code* hence based on quick sand occasioning a serious dereliction of justice.
>
> 3. That the learned trial magistrate erred in both law and fact in failing to appreciate that the critical elements of defilement were not proved to the required standards occasioning a prejudice.
>
> 4. That the learned trial magistrate erred in both law and fact when she convicted me to a harsh sentence despite my mitigating factors.
>
> 5. That again the learned trial magistrate further failed to appreciate that the instant matter was riddled with material discrepancies capable of unsettling the verdict and further misdirected herself on very pertinent issues including reliance on the accused defense to fill in the glaring gaps in defense occasioning a serious dereliction of justice."

13. The Office of Director of Public Prosecution [ODPP] opposed the Appeal. The matter was canvassed by way of written submissions.

Analysis and Determination

14. I have carefully considered the appeal before this court, the record of the proceedings before the trial court as well as the written submissions filed by both parties.

15. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424]

16. In SELLE and Another -vs- Associated Motor Boat Company LTD & Others [1968] I E.A 123 it was stated as follows:-

> "……this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

17. Likewise in Gitobu Imanyara & 2 others -vs- Attorney General [2016] eKLR, the court of Appeal stated thus;-

> "An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

18. Therefore the appropriate standard of review in cases of appeal can be summarized in the following three principles:-

    1. On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.

    2. In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.

    3. It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.

19. The Appellant faced a charge of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* 2003.

    These provisions of the law provide as follows:-

> "8
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) ……

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years."

20. From the above definition it is clear that the age of the victim is a critical aspect of the charge of Defilement. Therefore the age of the child must be proved beyond reasonable doubt.

21. In Hadson Ali Mwachongo -vs- Republic [2016] eKLR the court stated that

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

22. In the case of Mwalango Chichoro Mwanjembe -vs- Republic [2016] eKLR the court in discussing the question of age stated as follows.

> " The question of proof of age has finally been settled by recent discussions of this Court to the effect that it can be proved by documentary 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."

23. In the same case the court went to conclude this;-

> " .....we doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt.....we think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable." [own emphasis]

24. In this case the complainant told the court that she was aged fourteen (14) years having been born on 11th October 2007. The complainant produced as proof of her age a copy of her birth certificate serial No. 5273206 (PEx1). The said exhibit confirms the complainant's statement that she was born on 11th October, 2007.

25. A birth certificate is an official document issued by the Government of Kenya. It provides irrefutable proof of the person's date of birth and therefore age. I am therefore satisfied that the age of the complainant was proved beyond reasonable doubt.

26. The next aspect of the charge of Defilement which requires proof is the fact of penetration. Section 8(1) defines the act of defilement to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

27. In this case the complainant gave a clear concise and cogent narration of the events of that day and what was done to her. She stated that

> " He slept on top of me. I could not get out. I heard a zip opened and inserted a penis since I was feeling pain in my vagina."

28. As is the norm in sexual offences which are often committed in secret, there was no eye witness to the defilement. As such the question of "corroboration' arises. Section 124 of the *Evidence Act* Cap 80

Laws of Kenya allows a court to receive and act on the evidence of a sole witness in a sexual offence where that sole witness is the victim.

29. Section 124 provides as follows;-

> " 124 Corroboration required in criminal cases.
>
> 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." [Own emphasis]

30. As stated earlier the complainant gave a graphic account of what was done to her. She clearly stated that her attacker penetrated her vagina using his penis which is a Sexual organ.

31. The complainant remained unshaken under cross-examination. Even after being re-called to testify after several months the complainant did not vary or alter her testimony in any way.

32. In the judgment at Page 13 line 10 the learned trial magistrate stated that

> " The court believed that the complainant told the court the truth as her evidence was not contradicted and the same well corroborated."

33. This was the observation of the trial magistrate who saw and heard the child testify. Corroboration of the fact of penetration was provided by the evidence of Pw6 Dr Martin Nderitu a medical officer who was attached to Karatina Sub-County Hospital. Pw6 told the court that he examined the complainant and noted that her hymen was missing. In a child so young the missing hymen would be proof of penetration.

34. The question may arise as to why the Doctor did not note any injuries or abrasions on the child's private parts which would point to forced penetration. However it must be noted that the defilement is said to have occurred on 28th January 2022. Due to threats from the perpetrator the child did not immediately report the incident to her grandmother. The Doctor examined the child in March 2022 (almost three months after the defilement) and obviously by this time any wounds/abrasions would have long healed and would no longer have been visible.

35. Finally on this point of corroboration evidence was given that upon examination the complainant was found to be pregnant. The fact of pregnancy is an indication that penetration had occurred.

36. Based on the evidence adduced in the trial court I am satisfied that the fact of penetration was proved beyond reasonable doubt.

37. The next element of a charge of Defilement which requires proof is the identity of the perpetrator. The complainant asserted that the Appellant who is her grandfather was the man who defiled her. She stated that the only people who lived in that compound were herself,her younger sister (who was asleep), her grandmother (who had gone to the clinic and her grandfather (the Appellant).

38. The complainant stated that she was able to see and identify her attacker from the natural light coming into the bedroom from outside. The incident occurred at about 6.00am. It was already daylight.

39. Moreover the attacker spoke to the child during the incident. She was able to recognize the voice as that of her grandfather, - a man she knew very well. Thus there is evidence of 'recognition' on the part of the complainant.

40. In the case of Anjononi and Others -vs- Republic [1976- 1980] KLR, the court held that when it comes to identification, the recognition of an assailant is "more satisfactory, more assuring and more reliable" than identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

41. I am satisfied that the complainant properly recognized her assailant because she knew him as a family member with whom she lived in the same compound. The complainant testified that at the time the defilement occurred she had been living with the appellant for a period of five (5) years – from when she was in class 3. She was in class 8 when the defilement occurred. Furthermore the act of defilement took some time thus the child was with her attacker for several minutes. I find that she had ample opportunity to see and recognize the Appellant.

42. In his defence the Appellant claimed that the child had merely identified him as a way to get back at him because the Appellant had disciplined her over her movements with boys in the neighbourhood. The defence is not persuasive at all.

43. Secondly the Appellant sought to rely on an alibi by claiming that he was away at his workplace on the material date and time.

44. It is not in any doubt and indeed was conceded by PW1 and PW2 that the Appellant worked as a security guard at Ruthagati Secondary School.

45. Pw4 John Mugera was in charge of security at the school whilst PW5 Geoffrey Kariuki Mugera also worked as a security guard at the school. The two witnesses told the court that on 28th January 2022, the Appellant reported to the school at 5.45 am. He then sought permission to return home ostensibly to prepare the children for school as his wife had gone to the clinic. Permission was granted and the Appellant left his workplace and returned home. He later returned to the school at about 8.00am.

46. Both PW4 and PW5 were independent witnesses who were not involved in the case. They gave clear evidence and corroborated each other. Both remained unshakable under cross-examination.

47. From the evidence of PW4 and PW5 it is clear that the Appellant did go to work on the material day but sought permission and sneaked back home knowing fully well that his wife was away and the children were alone. Appellant used this opportunity to defile his grand-daughter. Indeed the complainant stated that this was not the first time the Appellant had defiled her. Therefore the Appellants alibi defence was disproved and he could not rely on the same.

48. Lastly the Appellant faulted the fact that no DNA test was conducted to establish whether he was the biological father of the child the complainant was carrying. Firstly the Appellant had not been charged with impregnating the complainant. He faced a charge of Defilement.

49. Section 36(1) of the *Sexual Offences Act* provides that a Court may in appropriate cases direct that a DNA test be conducted for purposes of ascertaining whether the Accused person had committed an offence. The operative word is "may" means at the discretion of the court. Therefore failure to conduct a DNA test does not negate a charge of Defilement.

50. In the judgment at Page 11 line 17, the trial magistrate relied on the case of Robert Mutungi Mumbi -vs- Republic [2014] eKLR where the court of Appeal stated as follows;-

> Section 36 (1) of the [Sexual Offences] Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of the court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved." [Own emphasis]

51. The trial magistrate also cited the case of Williamson Sowa Mwanga -vs- Republic [2014] eKLR where the court of Appeal in discussing the issue of paternity and defilement observed as follows:-

> "……..It is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM. That is not the only evidence by which defilement of PM. Can be proved. The fact, as happens in many cases that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the Appellant would at most determine whether he was father of PM's child, which is a different question from whether the Appellant had defiled PM. As the court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured. (see Twehangare Alfred V. Uganda CR. App No. 139 of 2001." It is partly for this reason that Section 36(1) of the sexual offence Act is couched in permissive rather than mandatory terms allowing the court, if it deems necessary for the purposes of gathering evidence to determine whether or not the accused person committed the offence to order that samples be taken from him for forensic, scientific, or DNA testing" [Own emphasis]

52. Therefore the fact that no samples were taken from the Appellant for DNA testing does not mean that the charge of defilement was not proved.

53. All in all the defence raised by the Appellant was not convincing. Thedefence did not in any way controvert the prosecution case and in my view the trial court rightly dismissed said defence.

54. Based on the foregoing I am satisfied that the prosecution presented a watertight case. The conviction of the Appellant for the offence of Defilement was sound and I uphold that conviction.

55. Following his conviction the Appellant was granted an opportunity to mitigate. The trial magistrate thereafter sentenced the Appellant to a term of imprisonment of forty five (45) years without the option of fine.

56. Section 8(2) of the *Sexual Offences Act* provides for a mandatory minimum sentence of twenty (20) years if one is convicted of Defilement where the victim is aged between the age of twelve (12) and fifteen (15) years. In this case the victim was aged fourteen (14) years old.

57. In imposing a sentence higher than the legal minimum sentence, the trial magistrate noted that the child had been subjected to great psychological trauma and humiliation and had been deprived of her childhood. That the Appellant showed no remorse despite defiling and impregnating his own grand-child.

58. In the case of Bernard Kimani Gacheru -vs- Republic [2002] eKLR, the court of Appeal in discussing the question of sentencing 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 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." [own emphasis]

59. The trial court followed all due procedures in sentencing. The Appellant was allowed to mitigate and the victim impact statement report was considered by the court. It is a fact that the defilement caused the child extreme trauma and that it resulted in her bearing an unwanted child.

    This is a fact the child will have to deal with all her life. The learned trial magistrate properly exercised her discretion and the sentence imposed was lawful. I have no inclination to interfere with the same.

60. Finally this appeal is dismissed in its entirety. The conviction of the Appellant is upheld and the sentence imposed by the trial court is confirmed.

DATED IN NYERI THIS 21ST DAY OF FEBRUARY 2025.

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MAUREEN A. ODERO

JUDGE