Mukitu v Republic (Criminal Appeal E243 of 2023)
[2025] KEHC 2739 (KLR) (Crim) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2739 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E243 OF 2023

AB MWAMUYE, J

FEBRUARY 13, 2025

BETWEEN

JOHN MWANZA MUKITU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the original conviction and sentence by Hon. A. Mwangi (PM) in Makadara CM Sexual Offence Case No. 329 of 2021, Republic -vs- John Mwanzia Mukitu)

JUDGMENT

1. The Appellant, John Mwanzia, was charged with the offence of defilement contrary to Section 8(1), as read together with Section 8(3), of the *Sexual Offences Act*. The Appellant also faced on alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. It was alleged that on diverse occasions between May 2021 and 29th November 2021 at Nairobi County the Appellant intentionally and unlawfully caused his penis to touch and to penetrate the vagina of M.M.M., a female child of fifteen (15) years.

3. The Appellant pleaded 'not guilty' to both counts and the matter proceeded for trial. The prosecution called a total of five witnesses in support of their case against the Appellant. At the close of the prosecution's case, the Trial Court was satisfied that the prosecution had established a prima facie case against the Appellant; and consequently, put the Appellant on his defence.

4. The Appellant took the stand and gave an unsworn testimony and did not call any witness. At the close of the Appellant's case, the Trial Court convicted the Appellant and sentenced to serve 60 years imprisonment for the offence of defilement.

5. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion. I have considered the Trial Court's proceedings, the undated Petition and Grounds of Appeal and the Appellant's undated submissions. I note that by the time of writing this ruling, the Respondent have not filed any response and or submissions to the Appeal.

6. From the filings on record, the issues of determination can be narrowed down to two; whether the prosecution proved its case to the desired threshold and whether the sentence meted upon the Appellant was lawful.

Whether the prosecution proved its case to the desired threshold.

1. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) 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 am offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

2. The ingredients that ought to be established in an offence of defilement are: the age of the complainant, proof of penetration and the positive identification of the assailant as set out in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013.

i. Age of the Complainant

3. In a charge of defilement, the age of the victim is important for two reasons:

   a. defilement is a sexual offence against a child; and

   b. Age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

4. The Court of Appeal in Edwin Nyambogo Onsongo v Republic [2016] eKLR stated as follows in respect of proving the age of a 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."

5. On this element, the prosecution produced the complainant's immunization card which showed that the complainant was born on 9th April, 2006 hence at the time of the alleged offence in May 2021 she was 15 years old.

6. This evidence was not challenged by the appellant and age of the minor was therefore proved beyond reasonable doubt.

ii. Penetration

7. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person.

8. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.

9. The complainant in this case testified that the Appellant came with a cloth, covered her mouth and removed her clothes and raped her. When she woke up in the morning and found her clothes were bloody. The appellant also raped her again the following night and he continued doing so on several occasions. The complainant also testified that as a result, she got pregnant and gave birth to the appellant's child.

10. Further the medical reports corroborated this. PW3, a clinical officer confirmed through her testimony that she examined PW1 on 6th December 2021 and found that she was 7 ½ months pregnant and that she had old tears on her hymen at the 4, 5 and 7 O'clock positions. PW4 conducted a DNA analysis on samples picked from PW1, the appellant and the baby. Through the analysis, PW4 established PW1 was the mother and the appellant the father to the child.

11. I find that the evidence of penetration was proved beyond reasonable doubt.

iii. Identity of perpetrator

12. From the evidence adduced it was not disputed that the appellant was well known to the victim. The appellant was the minor's step father and the appellant and the minor's mother took the minor from her grandmother's home to stay with them at their home.

13. From the foregoing, it is crystal clear that all the elements of the offence of defilement were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional

14. The Court of Appeal while dealing with the issue of sentence in the case of Bernard Kimani Gacheru v Republic [2002] eKLR restated as hereunder: -

15. "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 states is shown to exist."

16. The charge against the appellant was under Section 8 (3) of the *Sexual Offences Act* which provides sentence to a term of not less than 20 years imprisonment.

17. I take note of the fact that the aggravating factors of the case. The appellant was the complainant's step father, a person entrusted with the minor's care and protection but violated the trust in the most abhorrent manner. The minor is even having the appellant's child who will always be a reminder of the unfortunate events that bedevilled her.

18. The appellant deserved deterrent sentence. However, I find that the 60 years imprisonment sentence was rather harsh in view of the fact that the appellant was 53 years old at the time of his conviction; which means at the time of completion of the sentence if he is to live to that age, he would be about 113 years. From the foregoing; I am inclined to set aside the 60 years imprisonment and sentence the appellant to 20 years imprisonment.

19. Final Orders: -

i. Appeal on conviction is hereby dismissed.

ii. The 60 years imprisonment sentence is hereby set aside.

iii. The appellant is sentenced to 20 years imprisonment.

iv The period served in remand & prison to be considered in sentence.

DATED, SIGNED, AND DELIvERED vIRTUALLY THIS 13TH DAY OF FEBRUARY, 2025.

.....

BAHATI MWAMUYE

JUDGE