Omuteki v Republic (Criminal Appeal E008 of 2023)
[2025] KEHC 3226 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3226 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL E008 OF 2023

F GIKONYO, J

FEBRUARY 14, 2025

BETWEEN

GIDEON KULUNDU OMUTEKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment by S. MUNGAI, (CM) delivered on 16.8.23 in SOA Case No. 52 of 2018 at Narok)

JUDGMENT

Defilement

1. The appellant has appealed against his conviction and sentence of 15 years imprisonment for defilement of a girl aged 15 years.

2. According to the five (5) grounds of appeal stated in the Memorandum of Appeal dated 28th August, 2023

    a. Age and penetration of the girl were not proved; and

    b. His alibi exonerated him from the crime.

Appellant's submissions

3. The appeal was canvassed through written submissions.

4. The appellant submitted that the age of the girl was not proved to be 15 years as no certificate of birth was produced and her mother only stated that the child's age was assessed to be 15 years. In addition, he submitted that PW1, the clinical officer only stated that he had treatment notes for a child aged 15 years. The age assessment is a public document within sections 79, 80 and 83 of the *Evidence Act*. But,

its maker was not called to give evidence which denied him an opportunity to question the maker of the document. According to him, therefore, the age of the girl was in doubt.

5. He also argued that penetration was not proved in accordance with section 2 of the *Sexual Offences Act*. According to him, evidence on penetration was shaky and was not corroborated by PW1 as was found by the trial court. And, broken hymen is not conclusive evidence of penetration. He was of the opinion that, the trial court erred in basing its findings on defilement on broken hymen- the cause of which was not associated with him. P.K.W vs. Republic [2012] eKLR.

6. The appellant argued that the sentence imposed on him was not only excessive but also unconstitutional. He gave his reasons; that the sentence prescribed and imposed was a mandatory sentence which deprives the judge the discretion to impose appropriate sentence in the particular case. Mandatory sentence also compromises proportionality of sentence to the circumstances of the case. Daniel Kipkoskei Letting vs. Republic [2021] eKLR.

7. The appellant also submitted on Juliet-Romeo situation that was discussed and dramatized in the case of Evans Wanjala Silibi vs. Republic [2019] eKLR.

8. The appellant coupled this with the defence in section 8(5) of the *Sexual Offences Act*; that he reasonably believed the girl to be an adult as she did not tell him he was a student. He urged the court to bring him within the framing of this defence and acquit him.

9. He cited the cases of: Gillick vs. West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402, Eliud Waweru Wamboi [2019] eKLR, Malindi HCCRA NO. 32 OF 2015.

Respondent's submissions

10. The respondent submitted that all the three elements for the offence of defilement were proved beyond reasonable doubt. These are; age, penetration and that the appellant was the one who caused penetration of the girl.

11. PW2 testified that she was born on 12.7.2003 which confirmed that she was 15 years old at the time of the offence. Her evidence was corroborated by PW3, her mother. PW4, the Investigating Officer, produced the certificate of birth for PW2 as exhibit 5. According to the respondent, it was proved that the girl was a child within the meaning of the *Children Act*.

12. On penetration, PW2 confirmed that they had sex with the appellant while she was a child. She gave the circumstances leading to the sexual intercourse. She was introduced to the appellant by the appellant's sister who is her friend in church. On the material day, she went to the appellant's house at 2pm and stayed until 4pm when the appellant escorted her. But, on the way the appellant told her that they should go back to his house. Both of them went back to the appellant's house and they had sex. She stated that he penetrated her vagina using his penis.

13. Pw1 stated that upon examination it was confirmed that she had been penetrated. Medical evidence shows that she was penetrated.

14. In the overall, the respondent submitted that penetration was proved, and was by the appellant who she had known for 10 months as her youth friend at church. They used to fellowship with him. Therefore, there is no mistaken identity that the appellant defiled her.

15. On sentencing, the respondent was of the firm view that the trial court exercised discretion in imposing 15 years rather than the prescribed minimum sentence of 20 years' imprisonment. Therefore, the appellant cannot purport the sentence was excessive and unconstitutional.

16. In any case, they submitted further, that the sentence provided in section 8(3) of the *Sexual Offences Act* was lawful and constitutional. They cited Abdalla vs. Republic]2022] KECA 1054 (KLR)as well as Republic vs. Joshua Gichuki Mwangi and Others [2024] KLR.

17. The respondent urged the court to dismiss the appeal on conviction and sentence.

Analysis And Determination

18. Two broad issues arising from the appeal and submissions by the parties, are: -

    a. Whether the prosecution proved its case beyond reasonable doubt. Under this issue, the defence in section 8(5) of the *Sexual Offences Act* shall be discussed, evaluated and its application in this case shall be determined; and

    b. Whether the sentence imposed on the appellant is excessive and unconstitutional.

Proof beyond reasonable doubt of defilement

19. Defilement is a sexual offence committed upon a child- a person who has not attained the age of 18 years (*Children Act*). It involves penetration of the child- 'partial or complete insertion of the genital organs of a person into the genital organs of another person'.

20. Therefore, a successful prosecution of the offence of defilement proves beyond reasonable doubt that; a) the victim was a child; b) was penetrated; and c) the appellant caused the penetration of the child.

21. PW2 testified that she was 15 years at the time of the offence having been born on 12th July 2003. Her mother, PW3 confirmed that PW2 was born on 12th July 2003, and was 15 years at the time of the trial. PW4 produced the age assessment report which showed that PW2 was 15 years.

22. Although her mother stated that PW2 did not have a certificate of birth and that the clinic card got lost, evidence by the complainant, her mother and age assessment report prove beyond reasonable doubt that PW2 was 15 years old at the time of the offence.

23. Was there penetration?

24. PW2 stated that she had known the appellant for 10 months. She had been introduced to the appellant by the appellant's sister, Sarah, who was her friend from church, And, from that time she and the appellant became friends. They fellowship in the same church with the appellant.

25. On 1st March, 2018, she went to the house of the appellant at 2pm and stayed there until 4pm. The appellant escorted her but on the way the appellant asked her that they go back to his house. They went back and stayed with the appellant. After he had read the bible, both experienced feelings for each other; according to her, this was the urge to have sex. They moved from the seat to the bed where they had sex. They slept together.

26. She told her brother about the sexual encounter with the appellant; who admonished her not to engage in sex as she was a child and in school. She also told her mum about the sexual encounter with the appellant; her mum also admonished her to stop engaging in sexual activity as she was a child and should finish school first.

27. Medical evidence also confirmed penetration of PW2.

28. The appellant argued that the medical evidence is not conclusive evidence of penetration because; a) the broken hymen which was longstanding is not proof of penetration; b) that there were no spermatozoa seen; and c) there was no DNA testing done on the whitish discharge.

29. The evidence by PW2 was categorical that the appellant penetrated her vagina with his penis. Medical evidence confirmed penetration. It is not a requirement of the law that there must be spermatozoa to found penetration. For instance, in cases of partial penetration or where a person did not complete the ejaculation, there may be no release of sperm cells and seminal plasma from the male reproductive system. In other instances, the report may be made late and there may be no trace of spermatozoa. Therefore, absence of spermatozoa does not mean that there was no penetration.

30. Similarly, lack of DNA testing of the spermatozoa or whitish discharge is not fatal as it is not a strict requirement of the law.

31. Evidence herein established beyond reasonable doubt that there was penetration of PW2.

32. Was the penetration caused by the appellant?

33. Identification of the appellant as the perpetrator must be established beyond reasonable doubt.

34. The complainant had known the appellant as her youth friend in church for 10 months. She described how the two had sex with assuring details that it was the appellant who caused penetration of her- inserted his penis into her vagina.

35. She stated in cross-examination that she had sex twice with the appellant at his home. After she took a P3 Form she went back and had more sex indulgence with the appellant.

36. His defence was that on 1st March, 2028, he was working with other workers at the shamba of Paratoi as a casual labourer. He worked in the shamba until 6pm.

37. In his examination in chief, he stated that he knew the complainant because they attended the same church. He denied any relationship with the complainant.

38. But, in cross-examination, he said that he did not know the complainant by name although he used to attend the same church with her. He also stated that he was informed after he had been charged in court that he used to attend the same church with the complainant.

39. In cross-examination he stated further that there was a church youth group. But, he never shared a group with her. He could not understand why she framed him for defilement charges. But, according to him, it happens that strangers frame other strangers.

40. His defence was full of material contradictions. The alibi that he was in the shamba is routed by the evidence by the prosecution witnesses which places him at the scene of crime together with the complainant. It is an afterthought and offers no reprieve. It is rejected.

41. There was no mistaken identity on the perpetrator. The appellant caused penetration of PW2- a child on 1.3.2018.

Of the defence under s.8(5) of SOA

42. The appellant claims the defence in section 8(5) of the *Sexual Offences Act*. The section provides that: -

> 5. It is a defence to a charge under this section if—
>
> a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> b. the accused reasonably believed that the child was over the age of eighteen years.

6. The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

43. The appellant introduced this defence in his submissions. It was not part of his defence. It, therefore, lacks context. Thus, a red herring and unfounded.

44. Accordingly, his conviction was properly grounded in evidence-proof beyond reasonable doubt. His appeal on conviction fails.

Mandatory sentences

45. The appellant submitted that section 8(3) of SOA prescribes mandatory sentence. Thus, depriving the trial court discretion in sentencing. Making, the section unconstitutional.

46. The prosecution submitted that the sentence prescribed in section 8(3) of SOA is lawful and constitutional. They cited Republic Vs Joshua Gichuki Mwangi and Initiative for Strategic Litigation in Africa (ISLA) and 3 Others Supreme Court Petition No. E018 of 2023

47. The discourse on mandatory or minimum sentences has not left our backyard. It is raging on, and incorporating other or new nuances.

48. The new jurisprudence from the Supreme Court is that: 'Minimum sentences set the floor rather than the ceiling when it comes to sentence. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute'. Republic Vs Joshua Gichuki Mwangi and Initiative for Strategic Litigation in Africa (ISLA) and 3 Others Supreme Court Petition No. E018 of 2023.

49. But, the Supreme Court did not foreclose interrogation of constitutionality or otherwise of minimum sentences in 'a proper case', or whether trends elsewhere in dealing with the subject could apply to Kenya. It may profit the debate to have a discussion around; the teleological exercise of discretion towards 'the ceiling'; whilst limiting the exercise of discretion below 'the floor' in sentencing; whether such an approach fits within the constitutional concept of least severe sentence; as well as what it means or entails that, 'it is Parliament...that sets the parameters of sentencing for each crime in statute'; setting the stage for proper situating of the legislative function to prescribe penalty for an offence in a contest between judicial sentencing, and 'legislative sentencing'.

50. The 'proper case' should not also be taken to mean that, there is no work that has been done on the subject of minimum or mandatory minimum sentences by courts, lawyers, and other multi-disciplinary eminent scholars and practitioners in Kenya. And, the wisdom in tapping into such a body of work as we craft the final touches on the dress.

51. Be that as it may, whereas punishing the offence as well as deterring others from committing similar serious offences are important objects of punishment, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free person at some point of meaningful days of life

52. In this case, the prescribed sentence is 20 years. The trial court after considering all mitigating as well as aggravating factors, sentenced the appellant to 15 years' imprisonment. The trial called for and considered victim impact assessment report. In the circumstances, the 15 years' imprisonment sentence is neither unconstitutional nor excessive. It is upheld.

53. In the upshot, the appeal on conviction and sentence is dismissed. Right of appeal explained.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 14TH DAY FEBRUARY, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Kerubo for DPP

Appellant

Makori C/A