Gitonga v Republic (Criminal Appeal E020 of 2023) [2025] KEHC 4631 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E020 OF 2023

LW GITARI, J

MARCH 7, 2025

BETWEEN

STEPHEN GITONGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3/2006 in that on 31/8/2021 at Igembe South Sub-Country within Meru County he intentionally caused his penis to penetrate the vagina of F.M a girl aged ten years.

2. He was charged in the Senior Principal Magistrate's court at Maua Sexual Offences Case No. E048/2021. The appellant denied the charge. He was also charged with an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

3. He denied the charge. After a full trial he was found guilty of the charge of defilement and sentenced to life imprisonment. He was dissatisfied with both conviction and sentence and filed this petition of Appeal which initially raised nine grounds of Appeal but later reduced to three in the Amended Supplementary Grounds of Appeal. The grounds are:

    1. That, the learned trial magistrate erred in law by failing to consider that the mandatory life sentence under Section 8(2) of the *Sexual Offences Act* is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of *the constitution* of Kenya. Hence, the sentence imposed on the appellant is unlawful.

    2. That, the learned trial magistrate erred in matters of law and facts by failing to take into consideration the appellant plea that he has the problem of erection.

    3. That, learned trial magistrate failed to take into consideration the defense of the appellant.

4. He prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty.

5. The respondent opposed the appeal and prayed that it be dismissed.

Facts Of The Case

6. PW1 No. 240039 Police Constable woman who is stationed at Kanuni Police Post was the first witness to take to the stand to produce the blood stained clothes of the complainant before the blood on them could dry. She was the Investigating Officer who produced two dresses which the child was wearing. One was the inner wear and the other was a skirt. The inner wear was soaked in blood. The learned Magistrate noted that the inner wear was purple in colour with some white coloured flowers and was stained with blood. It was marked MF1-1.

7. Next was a maroon and white checked skirt which was also soiled with blood. It was marked PMF1-2. PW1 had the age of the victim assessed by a doctor and he confirmed that she was aged nine (9) years.

8. The complainant gave evidence without being sworn as the trial court, after conducting "voire dire" examination ruled that the victim does not understand the meaning of the oath. The complainant (PW2) gave her name as F.M and told the court that it was on 31/08/2021 when she was at the house of CN (PW3) when the appellant met her and told her to accompany him to his house and pick sweets for PW3's children. The complainant went to the house of the appellant who immediately held her and locked her inside the house. He then removed her dress and her pant and did bad manners to her by inserting his penis into her vagina. The appellant warned her not to scream and covered her mouth with his hand. The complainant identified the pant and the skirt which she was wearing. The complainant told the court that she bled and her clothes were soaked with blood. The appellant took her back to PW3's house and she immediately informed her what happened.

9. The complainant was escorted to Nyambene Sub-County Hospital where she was examined and a PRC Form was filled, treatment notes and her age was assessed. The complainant testified that she was bleeding and was in pain when the appellant took her to the home of PW2. She told the court that the appellant never gave her the sweet.

10. Pw2 testified that she is CN and at the material time the complainant was living in her house after the father requested her to stay with the child who was abandoned by the mother. On 31/8/2021 she left the complainant at home and went to the shamba and on coming back the complainant informed her that the appellant had defiled her. PW2 noticed that the child was bleeding from her private parts. PW2 reported the matter to the Sub-area Julius Mithika who went and arrested the appellant. They then proceeded to the Police Station and reported the matter.

11. PW3 Julius Mithika gave his evidence on oath and testified that on 31/8/2021 at 8.00pm CN (PW2) went to his house and told him that the appellant had defiled her child. PW3 testified that the appellant is married to his sister. PW3 went to the house of CN and talked to the complainant who informed him that he was defiled by the appellant.

12. Pw3 testified that he saw that the child's clothes were stained with blood and she was bleeding from her private parts. PW3 went and looked for the appellant. He met him in his neighbour's house who was a member of Nyumba Kumi. PW3 called the neighbor Jacob Muriithi and he confirmed that the appellant was in his house. Pw3 called two men Kimathi and Kalunge and they went to the house of the appellant Jacob Muriithi. They apprehended the appellant and tied him with a rope. He took him to the house of PW2 and the complainant confirmed that he is the one who defiled her.

13. PW3 took the appellant to the Police Station and he was told to take him to Nyambene General Hospital where he was examined and laboratory tests were conducted. He then handed him over at Kanuni Police Station.

14. On 1/09/2021 he went to the house of the appellant and saw a bloodstained mattress. He also saw a bloodstained bedcover. PW3 identified the mattress and the bedcover from the photographs MF1 – 3(a) & (b).

15. PW4 was David Maga a Clinical Officer at Nyambene Sub-County Hospital who gave evidence on behalf of his colleague Doris Makena who examined and treated the complainant. He testified that on being examined, the complainant had bloodstained clothes.

16. On examination of her genitalia, the clinical officer found that she had bruises on the labia and majora with visible blood clots from her vagina. The hymen was freshly broken and bleeding was visible. High vaginal swap showed same red blood cells and spermatozoa were also seen after laboratory tests. The clinical officer formed the opinion that the findings were consistent with penetration in the vagina of the complainant. The Post Rape Case (PRC) Form reported the same summary. He produced the P3 Form, PRC Form and treatment notes as exhibits 4, 5, & 6.

17. PW4 further testified that the appellant was escorted to the hospital by Police Officers on allegation that he had defiled a child. On examination, he had no visible injuries and the rest of the examination was normal. He produced the P3 Form and treatment notes as exhibit 8 & 9. The complainant's age was assessed and she was found to be nine (9) years. The age assessment was done by Doctor Ngugi Wachira and report was produced as exhibit 7.

18. PW5 Police Constable Woman Ivy Kinya of Kanuni Police Post under Maua Police Station. On 31/8/2021 she was called by the Corporal on duty who informed her of a defilement report OB 10/31/8/21. She met the child victim and the appellant who had been taken to the post by members of the public. She noted that the complainant was bleeding from her private parts. The child said she was defiled by a neighbour who she knew very well. She took the complainant and the appellant to Nyambene District Hospital where they were examined. She then proceeded to the house of the appellant where she recovered a blood stained mattress. She also recovered the clothes of the complainant which were stained with blood. She produced the pant, exhibit 1, the skirt exhibit 2 and photographs exhibit 3(a) – (h) and exhibit memo Form, certificate of photographic print exhibit 11, a bloodstained bedsheet exhibit 12 and mattress exhibit 13. She further testified that the appellant's house was twenty (20) metres from the house where the complainant was living. The appellant alleged that he suffered erectile disfunction necessitating the recall of the clinical officer who examined him.

19. PW6 Doris Makena testified that the appellant had no swelling and that even in the case of castration, a person can still rect. The appellant stated that he was contented with the evidence of PW6. Upon being put on is defence the appellant indicated that he would give an unsworn defence. He told the court that he was framed.

20. The learned Magistrate found the appellant guilty and sentenced him to life imprisonment. The appeal was canversed by way of written submissions.

Appellant's Submissions

21. The appellant filed supplementary grounds of appeal. On the 1st ground, he submits that the sentence under Section 8(1) & (2) of the *Sexual Offences Act* is unconstitutional and in breach of Article 27(1) (2) & 4 of *the Constitution* of Kenya and that the sentence imposed is unlawful. That the mandatory life sentence placed the trial court to impose a sentence are determined by the legislative contrary to

the doctrine of separation of powers of Judiciary and Parliament pursuant to Article 160(1) of *the Constitution* thereby depriving the Magistrate the exercise of discretion in sentencing. That indeed circumstances and mitigation called for consideration when imposing the sentence. He cited the Court of Appeal decision in Julius Kitsao Manyeso –vs- Republic (2023) eKLR, Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR and Jared Koita Injiri –vs- Republic Criminal Appeal No. 93/2014. where it was held that the mandatory sentences are unconstitutional. The appellant further submits that the trial court failed to consider his defence that he suffers from erectile disfunction. He submits that the prosecution failed to prove the case beyond any reasonable doubt.

Respondent's Submissions

22. The respondent submits that the sentence under Section 8(1) & 8(2) of the *Sexual Offences Act* is not unconstitutional. He relies on:-

> " Muruatetu & Another –vs- Republic; Katiba Institute & 4 Others (amicus Curiae) (Petition 15 & 16 of 2015 [2021] KESC 31 (KLR) (6 July 2021) (Directions)
>
> It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving he two petitioners who approached the court for specific relief. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.
>
> 15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40(3), robbery with violence under Section 297 (2), and attempted robbery with violence under Section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

23. It is the respondent's submission that the sentences under the *Sexual Offences Act* were enacted so as to try to cub the prevalence of Sexual Offences and to protect children from sexual exploitation by adults which is in line with Article 21(3) of *the Constitution* which provides: -

> " All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities."

24. He also relies on the case of Moatse –vs- The state, Motshwari and Others –vs- The state 12 (Criminal Appeal No. 26 of 202) (2003) BWCA (2004) BLR 1 (CA) (31) January 2003. The court stated that:-

> " ..."...It was submitted that as the court was obliged to impose the mandatory sentences laid down the court's independence was detrimentally affected and that, as the court was precluded from considering any mitigatory factors in respect of the accused persons, the latter did not have a fair hearing by the court. I have already expressed my acceptance of the view that when the Legislature fixes a mandatory penalty it does so in the public interest –to punish, to deter, to protect society – to the detriment of other aspects such as the offender's

interests. This is the inevitable concomitant of a mandatory penalty. It follows that I am of the view that the right contained in Section 10(1) must also, in an appropriate case, be subject to the limitations contained in Section 3 of *the Constitution*. In my opinion, this is such a case."

The special circumstances that affects cases of defilement and rape were considered in the Supreme Court of Namibia in the case of The State Vasco Kangulu Libangani23 (SA 68 OF 2013) [2015] NASC 5 Chief Justice Mohamed described the offence in the following terms;

> " Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, privacy and the integrity of every person are basic to the ethos of *the Constitution* and to any defensible civilization. Women in this country are entitled to protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community; We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade their rights."

The Court of Appeal of Botwana in S v Gakeinyatse (CLCLB-092-08) [2009] BWCA 107 (28 January 2009) grappled with this question, the appellant had been convicted of the offence of rape and had been sentenced to a minimum mandatory sentence. The appellant had challenged the constitutionality of that minimum sentence, in determining the issue the court referred to its earlier decision delivered by a five Judge bench in the case of Moatshe v. The State; Montshwari & Anor v. The State; 30 "(2) where it was held that;

a. The imposition of mandatory minimum sentences by the legislature was a legitimate function of the legislature in a modern democracy and had been recognized as such in courts in other liberal democracies. The legislature was aware of the necessity to take such steps to prevent the structure of its society from being undermined by those who commit prevalent offences and to ensure the law abiding citizens did not take the law into their own hands.

b. The intention of the legislature by enactment of the mandatory minimum sentences was in the public interest to curb the incidence of particular offences. The sections imposing such sentences were accordingly not in contravention of S95 of *the Constitution* per se.

c. Inhuman punishment would extend to punishments of imprisonment which, by reason of their excessiveness, must be held to be inhuman. Although a minimum sentence of imprisonment was therefore not per se unconditional, it would be regarded as unconstitutional as amounting to inhuman or degrading punishment if it was grossly disproportionate to the severity of the offence.

d. The decision as to whether a sentence was grossly disproportionate involved the exercise of a value judgement of the court. The value judgement was based on objective factors, regard being had to contemporary norms operating within Botswana and the conspectus of values in civilized democracies."

25. She submits that the sentence set out under Section 8(2) of the *Sexual Offences Act* is Constitutional. On the submissions that the court failed to consider that he was impotent. The respondent submits that there is evidence to prove that it is the appellant who defiled the complainant and the medical

evidence confirmed that the appellant was normal and did not suffer from erectile disfunction. The respondent submits that the charge was proved beyond any reasonable doubts.

Analysis And Determination

26. I have considered the proceedings before the lower court, the grounds of appeal and the submissions. The issues which arise for determination are:-

    1. Whether the sentence under Section 8(2) of the *Sexual Offences Act* is lawful.

    2. Whether the defence of the appellant was considered.

27.

    1) Whether the sentence under Section 8(2) of the *Sexual Offences Act* is lawful

    Section 8(1) (2) of the *Sexual Offences Act* provides as follows:-

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

28. The Section provides for a mandatory sentence of life imprisonment. The sentence provided under Section 8(1) (2) of the *Sexual Offences Act* (Supra) is a mandatory sentence of life imprisonment. In a recent decision of the Supreme Court of Kenya in Republic –vs- Joshua Gichuki Mwangi, Petition No. E018/2023, the court affirmed that the mandatory sentences provided in the *Sexual Offences Act*. The Supreme Court stated that mandatory minimum sentences do not deprive judicial officer of the power to exercise judicial discretion. In the Petition, the Supreme Court considered inter alia whether the mandatory minimum sentence as prescribed in the *Sexual Offences Act* are unconstitutional and whether courts have discretion to impose sentences below the minimum mandatory sentences as prescribed in the *Sexual Offences Act*.

29. The court stated with regard to Section 8(1) (3) of *Sexual Offences Act* minimum sentences, however, set the floor rather than the celling when it comes to sentences. What is prescribed is the least severe sentences court can issue, leaving it open to the discretion of courts to impose harsher sentence. Infact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although the term 'mandatory minimum' can be found used in different jurisdictions, including the United States and in a number of academic articles, it is not applicable as a legally recognized term in Kenya.

30. In this country a mandatory sentence and minimum sentences can either be used interchangeably nor in similar circumstances as they refer to two different set of meanings and circumstance." The court went on to rule that, "the minimum sentence imposed on the respondent under Section 8(1) (3) of the *Sexual Offences Act* was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid." This decision binds this court by dint of the common law doctrine of "Stare decisis" which holds that precedents set by the Supreme Court are binding on all other courts in the land. The Supreme Court in the above cited case stated that, "in Kenya Stare decisis" principle is a constitutional obligation meant to enhance the legal systems predictability and certainty. In the case of Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others S.C Petition No. 2B of 2014 (2014) eKLR we stated

that Article 163 (7) of *the Constitution* is the embodiment of the time hallowed common law doctrine of state decisis"

31. I am not only well guided by this decision but I am bound by it when making decisions on the issues which were determined by the Supreme Court. Based on the above decision of the Supreme Court I find that the sentence provided for under Section 8(2) of the *Sexual Offences Act* is not unconstitutional. The sentence is valid and lawful.

32.

2) Whether the defence of he accused was considered

It is a principle in criminal justice that an accused person is presumed innocent until proven guilty. Article 50(2)(a) of *the Constitution* provides:

Every accused person has the right to a fair trial, which includes the right—

a) to be presumed innocent until the contrary is proved…"

The burden of prove in criminal case rests in the prosecution backyard and never shifts. In this case the defence of the appellant was that he is importent as he suffers from erectile disfunction.

This defence was ably considered and addressed by the learned Magistrate. The record shows that the learned Magistrate summoned the Clinical Officer who examined he appellant, PW6 and she stated as follows:

I examined the accused on 1/9/2021. He had no swelling even in cases of castration a person can still erect" Accused – "I have no other questions. I am content." Page 21 of the record.

In her Judgment the learned Magistrate considered the defence and held that the said defence was just a way of trying to exonerate himself. She rejected the defence and found that the charge against the accused was proved beyond any reasonable. I find that this ground is without merits.

Conclusion

33 I find that this appeal is without merit.

Order:

34 The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF MARCH 2025

HON. LADY JUSTICE L. GITARI

JUDGE