Murangiri v Republic (Criminal Appeal E152 of 2022)
[2025] KEHC 4649 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E152 OF 2022

LW GITARI, J

MARCH 7, 2025

BETWEEN

ALEX MURANGIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1 . Amended Supplementary Grounds Of Appeal

1. That, the learned trial magistrate erred in both matters of law and facts by failing to NOTE that there was need of identification parade to be conducted to prove beyond reasonable doubts that the perpetrator is the appellant herein.
2. That, the learned trial magistrate erred in matters of law and facts by failing to note that the key witness was not called to prove that the accused person was the culprit of this charge.
3. That, the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution did not prove their case to the required standards of proof as required by the law. Since the evidence of hymen broken is not prove of defilement.
4. That, the learned trial magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under Section 8 (4) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (4) of *the Constitution* of Kenya. Hence, the sentence imposed on the appellant is unlawful.
5. That, the trial magistrate erred in both matters of law and facts by failing to note that clinical report was questionable.

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

Background

2. The appeal arises from the proceedings and Judgment in Sexual Offences Case No. E005/2022 at Tigania Law Courts. The appellant was charged with defilement contrary to Section 8(1) (4) of the *Sexual Offences Act* No 3/2006. It was alleged that on 20/2/2021 at Tigania Central Sub-County within Meru county, unlawfully and intentionally caused his penis to penetrate the vagina of HK a child aged seventeen (17) years. He was charged with an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* in that on 20/2/2021 he unlawfully and intentionally touched the vagina of HK a child aged seventeen (17) years.

3. The appellant denied both charges. After a full trial the learned Magistrate convicted him on the main charge of defilement and sentenced him to serve fifteen (15) years imprisonment. He filed this appeal praying that the conviction and sentence be set aside and he be acquitted.

Prosecution's Case

4. The complainant (PW1) was a girl aged fifteen (15) years old. She testified that on 20/2/2022 at 2.00pm she had been sent to buy milk and, on the way, she met the appellant who posed a question to her and she kept quiet. The appellant then asked her why she kept quiet. He then told her that he could rape and kill her. The appellant then used his jacket and tied her neck. She screamed but there was no one on the road to help her. The applicant led her to a nearby farm, knocked her down and raped her after removing her trouser and panty. She screamed and a lady went to her rescue. The appellant ran away. The lady screamed saying "There is Kaibi" and that is when she came to know his name. she did not tell the woman what had happened.

5. On reaching home, she told her mother that a boy had held her but she did not tell her that the boy had raped her. The next day she went to school but she was sent away because of school fees. On Tuesday a certain woman went and asked her whether the appellant had done something to her. She answered in the affirmative. She went to hospital and also took the matter to the Police.

6. PW2 E.M is the complainant's mother. She testified that the complainant was born in 2006 and was fifteen years old in 2022. On 20/2/2022 at 2.00pm she was at home when she sent the complainant to go and buy some milk. She returned after and she did not look okay. On enquiring the complainant informed her that she met one boy called Kaibi who told her that if he does not rape her he will stab her. She asked her whether Kaibi did anything and she said no. Later a report came from school asking whether what appended to her was true. The complainant said something happened and she was taken to hospital and to the Police. She told the court that she was aware that the doctor said in his report that the complainant was seventeen years old and the birth certificate had an issue.

7. In cross-examination she told the court that she had known the appellant that day but she knew his grandfather before.

8. Absolom Wabua (PW3) was the Clinical Officer in Charge Mulika Hospital. His testimony was that she examined HK the complainant in this who gave a history of defilement. He examined he complainant on 22/2/2022 on allegation of defilement. On examination the neck had marks that were painful and reddish. The hymen was torn. There was laceration of the vaginal wall and it was reddish. The injuries were two days old. She treated her. She concluded that she was defiled. She filled and signed the P3 form which she produced as exhibit. She told the court that there was forceful penetration by

a male reproductive organ. The complainant had not engaged in sex before, it was the first time she engaged in sex.

9. On age assessment the clinical officer found that she was seventeen years. She produced the PRC Form, treatment notes, lab report, P3 form and the age assessment as exhibit 1-5.

10. Elijah Mwema, Police Constable NO. 107600 of Mulika Police Station, PW5 testified that on 22/2/2022 the complainant reported that she was defiled by a man called Kaibi. Investigations were carried and the appellant was arrested and charged.

Defence Case

11. The appellant was put on his defence and opted to keep quiet. He said he had nothing to say and left the court to decide the matter. The appeal was canvassed by way of written submissions. The appellant faults the learned Magistrate for failing to find that there was need for an identification parade. He cited the case of Charles O. Maitanyi -vs- R where the court held that it was necessary to test the evidence of witness's identification and that great care should be exercised in the absence of corroboration. He also relies on the case of Kariuki Njeru & 7 Others -vs- Republic:

> " No citation given where the court held that the law on identification is well settled and this court has said that the evidence relating to identification must be scrutinized and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility or error."

12. The appellant further submits that there was no positive identification of the perpetrator and relies on Charles Wamukonya Karani -vs- Republic Criminal Appeal No. 72/2013 the appellant stated that the charge was not proved beyond any reasonable. On sentence, the appellant submits that the sentences as extremely harsh and excessive. He prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

13. The respondent through Ms. Mukagu Senior Principal Prosecution Counsel submits that in the in the case of Charles Wamukoya Karani -vs- Republic (Supra) the court held that:

> " The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the perpetrator."

The respondent discharged the burden to proof the charge beyond any reasonable doubts. She urges the court to find that the appeal fails.

14. I have considered the grounds of appeal and the submissions by both counsels. I have also considered the proceedings before the lower court. I find that the only issue for determination is whether the appellant was identified as the perpetrator. This is a first appellate court. The duties of this court have been laid down under the Law and the decisions of this court and the court of appeal.

15. Section 354 of the *Criminal Procedure Code* provides as follows:

> " Appeal to the High Court
>
> 1. Save as is in this part provided-
>
> a. A person convicted on a trial held by a sub-ordinate court of the first class or second class may appeal to the High Court, and

2. An appeal to the High Court may be on a matter of fact as well as on a matter of law"

Thus, an appellant on a first appeal to the High Court may file an appeal on facts and the law. The first appellate court is mandated to re-evaluate the evidence before the trial court as well as the Judgment and arrive at its own independent finding. In Charles Muita -vs- Republic Court of Appeal criminal Appeal No. 248/2003 the Court of Appeal held that:

"In Okeno -vs- Republic (1972) EA 32 at page 36 the predecessor of this court stated: An appellant on a 1st appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination Pasya -vs- R 1957 EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion."

16. Shantilal M. Ruwala -vs- R (1957) EA 570 it is not the function of the first appellate court to merely scrutinize he evidence to see if there was same evidence to support he lower court's finding and conclusion. It must make its own findings and draw its own conclusions. Only then can it decide whether he magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See Peters -vs- Sunday Post (1958) EA 424. This decision sets out the duty of the first appellate court. The court has the duty to re-evaluate the evidence and come up with its finding or uphold the decision of the trial court.

17. The appellant has challenged the evidence of identification of the appellant which he says was not sufficient as no identification parade was conducted to rule out the possibility of a mistaken identify. The law requires that where an appellant is charged is charged with defilement, one of the ingredients of the charge being positive identification of the perpetrator, the prosecution should prove the identity of the perpetrator beyond any reasonable doubts. The prosecution's case is the identification of the appellant by the complainant. The complainant testified it was on 20/2/2022 at 2.00pm on a Sunday. She was sent to go and buy milk and on the way, she saw one boy the accused. He by passed her. He then questioned her but she kept quiet. He asked her why she was keeping quiet then told her he can kill and rape her. The appellant then tied her on the neck with a jacket and pulled her to a nearby farm. He then undressed her and raped her. All this happened in broad daylight. There appellant cross-examined the complainant and from the analysis of that cross-examination there is nothing to suggest that he appellant was not identified by the complainant. In evidence of identification, what the court has to determine is whether the circumstances favoured a positive identification.

18. The learned Magistrate when analyzing the evidence of identification stated as follows:

" The consistent evidence by the state has proved beyond any reasonable doubts that it is the accused who committed this offence.

The descriptive evidence by the complainant proved that she was defiled by the accused. She narrated how the accused met her as she went to the shops. She had been sent by her mother. He then dragged her into a farm and defiled her. Her evidence was credible since it was not impeached on cross-examination at all. Though she had not known the accused before, she had heard of his name Kaibi. She informed the court how the lady who went to her rescue shouted the name of Kaibi, he accused ran away. That is when she discovered that he was the assailant. The offence itself occurred at 2.00pm. the complainant could see the accused clearly at that time. the defilement took some time. It started with the accused dragged her

on to a farm, removing her clothes, removing his own clothes and then defiling her. He was at very close proximity as he did so. Throughout that ordeal the complainant was able to see and identify the accused."

19. From this analysis, it is clear that the complainant saw the appellant for sometime in circumstances which favoured positive identification of the assailant. Courts when dealing with the evidence of identification have addressed the question whether circumstances favoured positive identification. In R -vs- TurnBull (1976) ALL ER 549. The court stated that:

> " Such interrogatories and enquiry as to how long did the witness have the accused under observation? At what distance? In what light, whether the observation was impended in any way. Had the witness seen the accused before? How often? If only occasionally had he any reason for remembering the accused? How long time elapsed between the original observation and subsequent identification to the police..."

20. These are some of the principles the court has to consider when relying on the evidence of a single identifying witness to leave no doubt that the accused is the one who committed the crime. In Wamunga -vs- Republic (1989) KLR 426 the Court of Appeal stated that:

> " It is trite law that where the only evidence against a defendant is identification or recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of a conviction."

21. In this case the learned Magistrate considered the evidence and the circumstances under which it was made. The circumstances favoured a positive identification as it was in broad daylight and of this crime the complainant had considerable time to see the appellant. The learned Magistrate formed the opinion that the complainant was a credible witness. He had the chance to see the complainant when she testified. He was best placed to assess the demeanor of the witness and this court has to leave room for that. I find that the appellant was positively identified as he perpetrator. The applicant has faulted the prosecution for not conducting an identification parade. The Court of Appeal in Samuel Kilonzo Musau -vs- Republic (2014) eKLR expounded on the issue of an identification parade and stated:

> " ...the identification parade is not a scientific test and cannot be treated as one. Instead, it is merely the best practical method of achieving an identification without confrontation."

The purpose of an identification parade as explained in Kinyanjui & 2 Others -vs- Republic (1989) KLR 60 is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion. In John Mwangi Kamau -vs-Republic (2014) eKLR. The court considered the essence of identification parade and stated: "Identification parade are meant to test the correctness of a witness identification of a suspect."

22. In this case the appellant was not known to the complainant. It was her testimony that she used to see the appellant but did not know his name. The purpose of the parade is to test the correctness of the identification of the assailant. In this case the appellant was known to the complainant by the time she went to report. The appellant was positively identified in circumstances that favoured positive identification. Failure to conduct the identification parade was not fatal to the prosecution's case. The appellant cross-examined the complainant. There was nothing to suggest that the appellant was mistakenly identified. The identification of the appellant was safe and reliable. There are no doubts

in the evidence of the prosecution. The prosecution case is firm that the appellant was placed at the scene at the material time. the appellant was positively identified as the perpetrator and the contention that the charge was not proved cannot stand. The prosecution case was not weakened by the failure to conduct the identification parade. The appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* which 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.
>
> (3) A person who commits an 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.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
>
> (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.
>
> (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the Children's *Act, 2001 (No. 8 of 2001)*.
>
> (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."

23. It is well settled that the ingredients of the offence are:

    1 . Penetration.

    2. Age of the complainant.

    3. Positive identification of the perpetrator.

24. The appellant as well as the respondent have relied on the case of Samuel Wamukoya Karani -vs- Republic Criminal Appeal No. 72/2013 where the Judge held that the critical ingredients forming the offence of defilement are which the prosecution should prove beyond any reasonable doubts in order to clinch a conviction in a charge of defilement are "penetration, positive identification of the perpetrator and the age of the victim."

25. On the age of the victim the court of Appeal has held that the age of the victim should be proved with credible evidence. The age of the victim may be proved with production of a birth certificate, a baptism card, immunization card and any other cogent evidence. Thus, whatever the prosecution relies on to proof the age it must be credible. See the court of Appeal decision in Joseph Kieti Seet -vs- Republic (2014) eKLR H.C at Machakos Criminal Appeal No. 91/2011 persuasive decision, the court held that:

> " It is trite law that the age of the victim can be determined by medical evidence and other cogent evidence and other credible evidence."
>
> In the case of Francis Omuroni -vs- Uganda Court of Appeal No. 2/2000, it was held thus: "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim parents and guardian and by observation and common sense."

26. In this case the Charge Sheet states that the age of he victim is seventeen (17) years old. The prosecution relied on age assessment report by the medical superintendent Miathene Sub-County Hospital dated 25/02/2022 which was produced in court as exhibit 5. The age assessment confirms that according to the complainant's dental formation, she is seventeen (17) years old.

27. Section 8(3) of the *Sexual Offences Act* makes it an offence for any person to commit an offence of defilement with a child between the age of twelve and fifteen years. Under Section 8 (1) (4) a person commits an offence of defilement if the victim is between the age sixteen and eighteen years. The particulars of the charge were amended to read that the age of the complainant at the time was seventeen years. The respondent did not amend the charge even after the particulars were amended. The question that arises is whether the appellant was prejudiced. I note that the complainant and her mother had stated that the complainant was fifteen years old.

28. The prosecution proved the age of the complainant with a medical report on the age assessment. The appellant has not raised the issue that the charge was preferred under a wrong provision of Law.

Section 382 of the *Criminal Procedure Code* (Cap 75 Law of Kenya) provides as follows:

> " Finding or sentence when reversible by reason of error or omission in charge or other proceedings
>
> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The Section applies to cure any defect on the charge and information.

29. In the case of Sigilani -vs- Republic (2004) 2 KLR it was held that:

> " The principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and

unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

30. Article 50 of *the Constitution* which deals with right to fair trial provides:

50(2)

(b) "Every accused person has the right to fair trial, which includes the right to be informed of the charge with sufficient details to answer it."

The Court of Appeal in the case of Nyamai Musyoka -vs- Republic (2014) eKLR the Court of Appeal stated:

"where the accused was charged with defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* and not Section 8(1) as read with Section 8(3), "This was evidently a misdirection of the section of the section creating the offence and is apparent to us that this was a minor technical defect and it is clear from the record that all other procedures were followed to the latter and the appellant was accorded a fair hearing and he understood the charge that was facing him. His full participation in the process vindicated that position."

31. I find that failure by the prosecution to amend the charge sheet to include Section 8(4) of the *Sexual Offences Act* did not affect the substance of the offence. The appellant participated fully in the proceedings. In deed he has not painted this defect as one of his grounds of appeal, an indication that he was not prejudiced in any way. The learned Magistrate imposed the minimum sentence provided under Section 8(4) of the *Sexual Offences Act*. In the end I hold that the defect is cured under Section 382 of the *Criminal Procedure Code* (Supra).

32. I find that the age of the complainant was proved with credible evidence. She was seventeen years old and so, the particulars of the charge were proved beyond any reasonable doubts.

Penetration

33. The fact of penetration is supposed to be proved by the evidence of the complainant and corroborated by medical evidence. In this case the complainant gave evidence on how the appellant led her to a farm and defiled her. The learned Magistrate believed the complainant and stated that her testimony was credible. The fact of penetration was corroborated by medical evidence adduced by PW3 who testified that the neck had marks that were painful and reddish. The hymen was torn. There was laceration on the vaginal wall which was also reddish. The age of the injuries was two (2) days. She concluded that there was defilement. The cause of penetration according to PW3 was the male reproductive organ. It was forceful penetration.

34. I find that the evidence adduced proves penetration beyond any reasonable doubts. Section 2 of the *Sexual Offences Act* defines penetration as, "the partial or complete insertion of a person's genital organ into the genital organs of another person." The medical evidence proves that the penetration was complete as the hymen was broken and there was laceration on the vaginal wall.

35. On sentence, Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (Supra) provides for a minimum sentence of fifteen years. The learned Magistrate passed the minimum sentence provided. The sentence was not in any way laugh and excessive when you consider the circumstances of the case and the attendant trauma and pain which the complainant has to endure for the rest of her life.

36. I find that the sentence passed was lawful. For the reasons I have stated in this Judgment, I find that the charge against the appellant was proved beyond any reasonable doubts.

Conclusion

37. This appeal is devoid of merits. I dismiss the appeal.

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

HON. LADY JUSTICE L. GITARI

JUDGE