**Wamalwa v Republic (Criminal Appeal E004 of 2022)**
**[2025] KEHC 2604 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2604 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CRIMINAL APPEAL E004 OF 2022**

**REA OUGO, J**

**MARCH 13, 2025**

**BETWEEN**

**EDWIN MURUMBA WAMALWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal against the conviction and sentence by the Hon. S.O Mogute delivered on 18th January 2022 in the Chief Magistrate's Court at Bungoma CMC Criminal Case No. 3 of 2020)***

## JUDGMENT

1. The appellant, was charged with the offence of defilement contrary to section 8 (1) of the *Sexual Offences Act*. It was alleged that on diverse dates between the 1st day of January 2021 to 4th January 2021 within Bungoma County intentionally an unlawfully caused his penis to penetrate the vagina of F.F.W a child aged 14 years.

2. He pleaded not guilty to the charge and the prosecution called 4 witnesses to prove their case.

3. F.N.W (Pw1) testified that she was 14 years old and produced her birth certificate as evidence. She testified that on 0/1/2021 she went to watch football. It rained, and she started her journey home at 7:00 p.m. She met the appellant, who was known to her, and he took her to his home. She feared going back home and her father came for her after 4 days and the appellant was arrested. Pw1 testified that she slept with the appellant without a condom. She removed all her clothes, likewise, the appellant also removed his clothes and put his penis in her vagina. After the appellant was arrested, Pw1 was taken to Mecimeru Hospital.

4. Pw1's father, JWW testified as Pw2. He testified that the appellant is 14 years old. She disappeared from home on 26/12/2020 and found her on 05/01/2021. He reported the matter to the police. Pw1 was found housed by the appellant. He took her to hospital and the following day Pw1 left home again.

The village elder reported that the child was at the appellant's home. The appellant's father brought Pw1 on 7/1/2021 and the appellant was arrested on the same day.

5. The clinical officer, Robert Wanyonyi (Pw3), testified that he works at Mechimeru Hospital. On 5/1/2021, Pw1 was brought to the hospital by her father with a history of defilement. He examined her vagina and noted that there were bruises and the hymen was also broken. The labia minora and majora had no bruises. Pw3 produced the treatment notes.

6. No 233428 F.C Danson Munyere (Pw4) testified that he was working a Dorofu police post when Pw2 reported that his daughter was missing. He rescued the girl, who told her that she met the appellant by the road, and he took her to his house where she was defiled for several days. He referred them to the hospital and issued a P3 form. After the investigations, he arrested the appellant on 7/1/2021.

7. The appellant in his defence, gave sworn testimony. He testified that on 7/1/2021 at 7:00 a.m. he was headed for the market to buy milk when he was arrested and charged with this instant offence. The appellant denied committing the offence.

8. The appellant was found guilty of the offence of defilement and sentenced to 20 years.

9. The appellant aggrieved has challenged the finding of the trial magistrate on the following grounds:

    1. That the appellant pleaded not guilty to the charges

    2. That the trial magistrate erred in law and in fact in conducting proceedings that violated the rights of the appellant as per provisions of the laws of Kenya hence null and void.

    3. That the trial magistrate erred in law and fact in convicting the appellant without proper inquiry and investigation.

    4. That the trial magistrate erred in law and fact by failing to put into consideration the forensic evidence which did not corroborate as stipulated under section 36 of the *Sexual Offences Act*.

    5. That the trial magistrate erred in law and fact in arriving at a decision while ignoring the appellant's mitigation.

    6. That the trial magistrate erred in law and fact by applying wrong principles in convicting the appellant on the weakness of his defence thus failing to admit his defence that sufficiently created a reasonable amount of doubt in the prosecution case.

    7. That the sentence imposed on the appellant was harsh and excessive.

    8. That the trial court acted with bias by relying on the prosecution side in decision making.

10. The appellant in his submissions, argues that according to the birth certificate, the child was 11 years and 10 months. The charge sheet on the other hand indicated that the age of the victim was 14 years, therefore such a contradiction should be resolved in favour of the appellant thereby leading to a less severe sentence. The court in Alfayo Gombe Okello v Republic [2010] eKLR found that the age of a victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. The appellant's ability to prepare a defence was prejudiced because of the evidence on the contradictory age.

11. The appellant also faulted the trial court for failing to consider the period already spent in custody as from the date of taking plea while sentencing.

12. On penetration, it was submitted that it was not clear whether the appellant inserted his penis in the complainant's vagina since the evidence did not show that the hymen was freshly broken. Similarly, no bruises on the labia majora and minor were noted nor was any discharge detected.

13. The appellant in his submissions, also argued that he was 17 years at the time the crime was committed and his conviction and sentence ought to have been guided by the Children's Act.

14. The respondent on the other hand argue that the age of the victim was proved to the required standard. Pw1 testified that she was born on 15/2/2009 and this was corroborated by the birth certificate.

15. On penetration, the respondent submitted that the findings on the P3 form and the PRC were proof of penetration. The clinical officer Pw3 stated that the minor's hymen was broken and that she had been defiled severally.

16. The appellant was no stranger to the complainant and he defiled her for 4 days. She was able to see him and identify him well to the investigating officer and to the court.

17. On sentence, it was submitted that the minimum of sentence of 20 years was fair. The appellant took advantage of the complainant's vulnerability, and as a result, the victim suffered physical, mental, and long-term emotional effects of being deprived of innocence.

**Analysis And Determination**

18. I have considered the grounds of appeal, and the evidence adduced in the lower court and the rival submissions in my view, the main issues for determination in this Appeal are: whether the prosecution proved its case beyond reasonable doubt and whether the sentence was manifestly harsh and excessive. According to section 8(1) of the Sexual Offences the prosecution must specifically prove beyond reasonable doubt: the age of the complainant; proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and positive identification of the perpetrator.

19. The appellant has challenged the conviction on grounds that the prosecution evidence was contradictory in regard to the age of the child. According to the charge sheet the child was described as 14 years old. The treatment notes from Mechimeru Model Health Centre, the P3 form, the PRC form and the birth certificate were all consistent that the child was 14 years old. The child was born on 15/02/2009, the offence was committed between 1st – 4th January 2021 making her 14 years at the time of the offence. There were no contradictions regarding the child's age as argued by the appellant. Therefore, I find no fault on the trial magistrate's finding that child was 14 years old.

20. According to the treatment notes, the notes indicate that the hymen was broken and penetration took place. The P3 form similarly notes that the hymen was broken and that there were no bruises or laceration in the genitalia. This concludes that penetration took place.

21. Although the medical evidence did not indicate that the complainant had sustained injuries on her genitalia, her evidence was clear that there was penetration. Pw1 testified that she spent 4 days with the appellant during which time she slept with the appellant without a condom. She testified that the appellant would put his penis in her vagina. The Court of Appeal in Kigen v Republic [2025] KECA 131 (KLR) observed as follows:

> "In any event, Section 124 of the *Evidence Act* permits a court to receive the evidence of a victim of a sexual offence and convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth. The trial court was satisfied that the complainant was truthful. Indeed, the evidence on record puts the appellant at the scene of the crime. This critical evidence remains uncontested..."

22. In this case, the trial court in his judgment noted as follows:

> "I had occasion to observe the prosecution witness as they testified in this matter, I formed the opinion that the evidence adduced by the complainant was credible and truthful."

23. I therefore find that the trial court having satisfied itself that the complainant was truthful, there is no doubt the prosecution proved the element of penetration to the required standard.

24. Although the appellant did not make any submissions regarding identification, Pw1 testified that the appellant was well known to her. This was a case based on recognition as opposed to identification by a stranger. In the case of Anjononi & Others v Republic (1976-1980) KLR , the court held that:

> "...when it comes to identification, the recognition of an assailant is satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."

25. Pw1 testified that she spent 4 days with him and, therefore could identify him. Pw4 also testified that the child was found in the appellant's home where he lived. Therefore, the issue of identification was proved.

26. I now turn to consider the sentence meted by the trial magistrate. The trial court was guided by the age of the victim. Section 8 (3) of the *Sexual Offences Act* which provides as follows:

> "(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."

27. The prosecution having proved that the child was 14 years old, the trial magistrate was therefore correct to find that the appellant was liable to a 20-year imprisonment. The appellant argues that recent decisions from the High Court reveal that courts should have discretion while sentencing those convicted of offences that attract minimum sentences. However, the Court of Appeal in Shitula v Republic [2025] KECA 12 (KLR) stated:

> "35 ...In the instant appeal, the sentence imposed upon the appellant is the mandatory sentence provided under the law. In Republic vs. Gichuki Mwangi: Initiative for Strategic Litigation in African (ISLA) and 3 Others (amicus curie) 2024, 34 KLR, the Supreme Court asserted that:
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> > "Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law."
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> 36. Needless to state that in passing the sentence of life imprisonment on the appellant, the trial Magistrate as well as the 1st appellate court had no room to exercise any discretion in determining an appropriate sentence to be imposed on the appellant, owing to the mandatory nature of the penalty provided under the law. The Supreme Court has spoken clearly through the Gichuki case (supra) and we are bound by that decision-age, rehabilitation and remorse notwithstanding, the minimum life sentence meted out was legal and must be upheld, as we hereby do. The appeal thus fails in its entirety and is dismissed."

28. The appellant however argues that he was he was 17 years at the time the offence was committed and his conviction and sentence ought to have been guided by the Children's Act. I have carefully looked at the record and note that the appellant did not at any point before the trial court raise the issue that he was a minor. He did not raise it during his arraignment or defence. The court of appeal in Kanusu v Republic (Criminal Appeal 202 of 2020) [2024] KECA 288 (KLR) (8 March 2024) (Judgment) upheld the finding of the trial court that the appellant therein was 18 years after he failed to produce evidence to show that he was below 18 years at the time the offence was committed. The court stated:

> "Be that as it may, we are aware that without any documentary evidence to prove the appellant's age, the trial Court had only the appellant's physical appearance and, perhaps, reasoning and conduct during the trial as the basis of presuming that the appellant was above 18 years old. Additionally, from the proceedings, the appellant had ample time including during his defence to secure, adduce and produce evidence of his age to contradict the conclusion arrived at by the trial Court."

29. In this case, the appellant gave no evidence whatsoever to sway the trial magistrate that he was a minor and the same cannot therefore be raised now at submissions without any evidence to back up this allegation.

30. Therefore, the 20-year sentence meted out by the trial magistrate cannot be described as excessive. However, the appellant was held in remand from 8/1/2021 and his sentence shall consider the time spent in remand. Therefore, the sentence shall run from 8/1/2021.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF MARCH 2025**

**R.E. OUGO**

**JUDGE**

In the presence of:

Edwin Murumba Wamalwa/ Appellant

Miss Matere -For the Respondent

Wilkister -C/A