



REPUBLIC OF KENYA



KENYA LAW
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**Annastacia v Republic (Criminal Appeal 68 of 2023)
[2025] KEHC 4842 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 68 OF 2023
FN MUCHEMI, J
APRIL 24, 2025**

BETWEEN

BENSON MANG'ONDU ANNASTACIA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable E. Riany (SRM), in Criminal Sexual Offence Case No. E061 of 2021 on 28th September 2021)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Thika where he was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of and sentenced to serve twenty years imprisonment.
2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing five (5) grounds of appeal summarised as follows:-
 - a. The learned trial magistrate erred in law and convicting the appellant whereas the prosecution had not proved its case to the required burden of proof;
 - b. The learned trial magistrate erred both in law and in fact by sentencing the appellant on a minimum mandatory sentence which is harsh, degrading and unconstitutional.
3. Parties disposed of the appeal by written submissions.



The Appellant's Submissions

4. The appellant relies on the case of *Maitanyi vs Republic (1986) KLR* and submits that the incident occurred at night. The complainant testified that she knew the appellant well that he used to ride a red motorcycle which was not sufficient evidence of identification given time of the alleged offence.
5. The appellant argues that the prosecution did not prove the element of penetration against him as he was not taken to hospital for tests and examinations to prove the allegations. He further refers to the case of *PKW vs Republic Criminal Appeal No. 186 of 2010* and argues that the absence of hymen upon examination of victims of sexual offences does not guarantee penetration and or defilement charges at all.
6. The appellant submits that the trial magistrate did not consider his mitigation and sentenced him to twenty years imprisonment which is harsh and excessive and not commensurate with the evidence tendered. To support his contentions, the appellant relies on the case of *Criminal Appeal No. 9 of 2019 Michael Kira Odhiambo vs Republic*.

The Respondent's Submissions

7. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent refers to Section 8(1) and 8(3) of the *Sexual Offences Act* and the case of *Kyalo Kioko vs Republic (2016) eKLR* and submits that it proved the ingredients of the offence of defilement. The respondent submits that PW1, the complainant, stated that she is 12 years old and a birth certificate was produced in court. To support her contentions, the respondent relied on the case of *Mwalango Chichoro Mwanjembe vs Republic (2016) eKLR* and submits that the victim's birth certificate revealed that she was 12 years old at the time of the offence.
8. Relying on Section 2 of the *Sexual Offences Act* and the case of *Mark Oiruri Mose vs Republic (2013) eKLR*, the respondent submits that PW1 testified that on 28th June 2021 at around 7pm she was home with her brother with their mother having gone out to sell githeri. The two were washing dishes and later her brother left home to join their mother selling githeri and PW1 went out to search for her brother when she met the appellant who ferried her using his motor bike. The appellant took her to the bushes, removed his trouser and his innerwear and then removed PW1's trouser. PW1 further testified that the appellant knelt down as she was standing and he lay her down and kissed her on the mouth. He then told her not to tell anyone about their encounter. The appellant then removed PW1's pant and lay on top of her as she was facing up. In that position, the appellant inserted his penis used for urinating in her vagina. The witness further testified that it was very painful but she could not talk.
9. The respondent further submits that PW3 confirmed on examination of the complainant that her hymen was broken and she had discharge from her vagina. Further, the complainant had bruises on her genitalia and perineum. The respondent thus submits that the evidence produced during trial clearly proved the element of penetration to the required standards.
10. The respondent submits that proof of participation of an accused person is crucial as it enables one to determine who to attach criminal responsibility to. The respondent submits that PW1 testified that she knew the appellant and he used to ferry her mother to work. The trial court in its judgment noted that the complainant was firm in her evidence and was not shaken during cross examination as she positively identified the appellant as the perpetrator, giving a clear account of her ordeal which was corroborated by the medical evidence. The respondent argues that from the evidence, it is clear that the appellant is the person who defiled the victim and there was no possibility of mistaken identity.



11. The respondent submits that the appellant's defence was analysed and considered by the trial court but the prosecution case was overwhelming against him hence he was unable to challenge the prosecution case which was proven beyond any reasonable doubt.
12. The respondent relies on the cases of Abdalla vs Republic KECA 1054 (KLR) and Supreme Court Petition No. E108 of 2023 Republic vs Joshua Gichuki Mwangi and submits that the sentence was legal and in line with Section 8(3) of the Sexual Offences Act.

Issues for determination

13. The appellant has cited 5 grounds of appeal which can be compressed into two main issues:-
 - a. Whether the prosecution proved its case beyond any reasonable doubt;
 - b. Whether the sentence meted out against the appellant was excessive.

The Law

14. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

15. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the 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 was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

16. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:
 - a. Whether there was conclusive evidence of all the ingredients of defilement;
 - b. Whether the trial court considered the defence evidence



Whether there was conclusive evidence of all the ingredients of defilement.

17. Relying on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013 where it was stated that:- “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
18. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR, the court stated as follows in respect of proving the age of the 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.
19. PW1 testified that she was 12 years old at the time of giving the testimony. PW5, the investigating officer produced the birth certificate of the complainant which indicated that she was born on 11th February 2009. This confirms that the minor was 12 years and 4 months at the time of the commission of the offence. I have perused the birth certificate as well as the court record and noted that the age of the minor has been established.
20. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“ The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
21. Briefly, the evidence of PW1 was that she was home with her brother at around 7pm while their mother had gone to the market. She testified that there was no electricity and they were washing utensils and she went to pour water out. When she came back she found that her brother had left for where their mother had gone. PW1 decided to go to look for her brother. On the way, PW1 met the appellant who ferried her using his motorcycle. She further testified that the appellant used to ferry her mother to work. PW1 further testified that the appellant took her to the bush removed his trousers and her trousers. The appellant then removed his inner wear without removing his sweater. The complainant testified that the appellant knelt down as she was standing and lay her down kissing her on the mouth and told her not to tell anyone. The appellant removed the complainant’s pant and lay on top of her as she was lying facing up. PW1 testified that the appellant inserted his penis in her vagina. The witness stated that it was so painful and she could not even talk. She further stated that she tried moving away but she could not as the appellant held her neck.
22. Dr. Emily Wangeci Njuna, a doctor at Thika Level 5 Hospital, PW3 testified that she examined the minor on 29th July 2021 and filled the P3 Form. She testified that the minor had bruises on the genitalia and penilum, her hymen was broken and she had a discharge oozing from her vagina. PW3 produced in evidence the Post Rape Care Form, the P3 Form and treatment notes.
23. The appellant argues that the absence of spermatozoa indicates that he did not defile the minor and therefore not proving this element to the required degree. On the issue of absence of spermatozoa, the court of Appeal in the case of Mark Muiruri Mose vs Republic [2013] eKLR stated as follows:-

Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed.



24. Thus it is evident that the evidence of spermatozoa is not necessary so long as the prosecution proved that there was penetration.
25. The key evidence relied on by courts in proof of the offence of defilement is the complainant's testimony usually corroborated by the medical evidence produced by the medical officer. Thus the evidence of PW1 is corroborated by the medical evidence produced by PW3 who pointed out that the broken hymen and bruises on the minor's genitalia and penilum indicated penetration of the penile. The inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration did occur.
26. PW1 further testified that the appellant had a motor bike he used to ferry her mother to work and that he had even left his gas cylinder at their place earlier when he picked her mother. He picked the cylinder from the home. PW1 was then sexually assaulted by the appellant. Her mother found her daughter crying. PW1 knew the appellant before the incident because her mother often used to ferry her and her food for sale and drop her at the market to sell her goods. The appellant was arrested from his house at around 9 pm he said in his defence. As for the complainant, the appellant admitted in his own evidence that the identification by PW1 and PW2 was by recognition. In my view, the appellant was positively identified as the perpetrator by the two key witnesses.
27. The appellant complained that the medical evidence did not implicate him and no tests were carried out which were necessary. As the Court of Appeal noted in *Geoffrey Kioji vs Republic Nyeri Criminal Appeal No. 270 of 2010 (UR)*:-

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

28. The appellant further submits that the trial court did not consider his defence. The appellant testified that he was a motor bike rider and on the material day he was at his house at around 5pm when he received a phone call from a customer but he declined to take up the assignment to pick and drop the customer. He further testified that he stayed at his home up to around 9pm his door was knocked and it was a customer well known to him with over twenty people who arrested him alleging that he had committed an offence. He was taken to the police station where he learnt of the offence he was alleged to have committed. On cross examination, the appellant said that PW2 used to pay him weekly for the services he rendered to her. On the material day, he had gone to her place of work to ask for his pay but she told him that she did not have money.
29. I have perused the court record and noted that the trial magistrate In the judgment, the magistrate said that the appellant's defence was not convinced that PW2 had any basis to frame up the appellant. The learned magistrate further noted that the appellant kept jumping from one story to another as he first alleged that he had refused to ferry PW2 over non payment hence her framing him up and at one point the appellant alleged that the victim's mother was interested in him sexually but when he refused her advances, she framed him. On further perusal of the record, the minor's testimony was not shaken during cross examination and she gave a clear account of her ordeal linking the appellant to the



commission of the offence. Thus the trial court was inclined to believe the evidence of the prosecution witnesses as opposed to the appellant's defence.

30. It is therefore my considered view that the trial court considered the defence but found that it was plausible. The court further noted that PW1 gave a very comprehensive testimony of what happened on the fateful day and that her evidence was consistent and cogent. Similarly, upon analysing the evidence on record, I find that it is sufficient to prove that the appellant defiled the complainant and that the elements of the offence were established. In conclusion, I find that the magistrate convicted the appellant on cogent evidence. The prosecution proved the case against the appellant beyond reasonable doubt. The conviction is hereby upheld.

Whether the sentence is harsh and excessive

31. The Court of Appeal, on its part in *Bernard Kimani Gacheru vs Republic* [2002] eKLR restated that:-

“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 stated is shown to exist.”

32. Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 provides that:-

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.

33. The Supreme Court decision in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023)* [2024] KESC 34 (KLR) (12 July 2024) (Judgment) held that:-

Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regards to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence.

The judgment of the Court of Appeal delivered on October 7, 2022 was one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remained lawful as long as Section 8 of the *Sexual Offences Act* remained valid. The court of Appeal had no jurisdiction to interfere with that sentence.

34. The appellant was sentenced to twenty (20) years imprisonment being the minimum sentence under Section 8(3) of the *Sexual Offences Act*. In that regard, taking into consideration the nature and circumstances of the offence, the mitigation given by the appellant and the ramifications of the appellant's actions on the minor, it is my considered opinion that the sentence of twenty (20) years



was lawful and commensurate to the offence. As such, this court has no basis of interfering with the sentence.

35. Consequently, I find the appeal lacking merit and it is hereby dismissed.

36. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE

