Kuria v Republic (Criminal Appeal E026 of 2023)
[2025] KEHC 5445 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5445 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E026 OF 2023

EN MAINA, J

APRIL 24, 2025

BETWEEN

EDWIN GITHUKA KURIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment by Hon. R.W.Gitau (RM) in Mavoko Chief Magistrate's Court in Cr. S.O No. E010 of 2022 Delivered on 7th September, 2022)

JUDGMENT

Background

1. The Appellant herein Edwin Githuka Kuria was charged with an offence of Defilement contrary to Section 8(1)(B) of the *Sexual offences Act* No.3 of 2006.

2. The particulars of the offence being that on 9th February 2022 at Athi River Sub-County of Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of VMP a child aged 13 years.

3. In the Alternative Charge it was alleged that the Appellant committed an indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No.3 of 2006 the particulars being that on 9th February 2022 at Athi River Sub-County Machakos County intentionally and unlawfully committed an indecent act by touching the vagina and breast of VMP a child aged 13 years.

4. After hearing and analyzing the testimonies of the four prosecution witnesses and also that of the appellant's witness, the trial Magistrate found the appellant guilty on the charge of defilement, convicted him and sentenced him to imprisonment for 15 years.

Appeal:

5. Aggrieved by the Judgment the appellant preferred this appeal which according to the Amended Petition is premised on the following grounds;

    1. That the Learned Magistrate erred in law and fact in making a finding that the offence of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act* Cap 63 A laws of Kenya had been proved against the appellant to the required standard of beyond reasonable doubt.

    2. That the Learned Magistrate failed in law and fact that the grudge between the complainant and the accused was the sole aim of the case

    3. That the Learned Magistrate erred in law and fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain a conviction and sentence of the appellant and convicting him against the weight of the evidence adduced.

    4. That the Learned Magistrate erred in law and fact in failing to find and rule that there was no cogent, substantial, credible and direct evidence connecting the appellant to the offence of defilement,

    5. That the Learned Magistrate erred in law by shifting the burden of proof from the prosecution to the appellant"

6. The Appeal was canvassed by way of written submissions.

7. The Appellant submitted that the prosecution did not prove the offence of defilement in that it did not adduce evidence of penetration by the appellant. He contended that the medical report was inconclusive and failed to establish that he was the perpetrator.

8. The Appellant also submitted identification was also not proved as the complainant's testimony was inconsistent and riddled with contradictions.

9. The Appellant also took issue with what he described as the court's failure to comply with Section 208 (3) of the *Criminal Procedure Code* and urged that the trial was procedurally defective. He urged this court to allow the appeal and set aside the judgement of the trial court.

10. For the Respondent it was submitted that the prosecution discharged its burden of proving the offence beyond reasonable doubt; that the three ingredients of the offence of defilement were proved.

11. On the issue of inconsistencies pointed out it was submitted that they were immaterial and could not vitiate the prosecution's case.

12. It is finally submitted that the sentence of 15 years was lawful and lenient taking into consideration the age of the complainant and the circumstance of the case.

Determination

13. I have considered the Appeal, the Trial Court record and the submissions of parties on record.

14. This is a first Appeal and in the case of Okeno v Republic [1972] EA 32 the court stated:

> " 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 v. R., [1957] E. A. 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 conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; it must make its own findings and draw its own 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 v. Sunday Post, [1958] E. A. 424."

15. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

16. The Appellant herein was found guilty and convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(3) of the *Sexual Offences Act*.

17. Section 8 (1) and (3) of the Act provide as follows;

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

18. The elements of defilement are thus age of the victim (must be a minor), penetration and the proper identification of the perpetrator. This was stated in the case of George Opondo Olunga vs. Republic [2016] eKLR.

19. The first element of age was elucidated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a 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."

20. Further, in the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held that:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

21. In this case, PW2 and PW4 stated that the complainant was 13 years According to the Child's Birth certificate her date of birth was 28th September 2009 and was thus 12 years and 4 months as at the time of the offence thus a child. A child is defined as a person under the age of 18 years old by the Children's Act. No 29 of 2002 under section 2.

22. Section 2 of the *Sexual offences Act* defines a child as "has the meaning assigned thereto in the *Children Act*".

23. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

24. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

25. In the case of DS v Republic [2022] eKLR, the court stated that;

> " Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

26. In this case, the victim PW1 testified that the accused held her by force put her legs apart and placed his dudu into her susu.

27. Medical evidence By PW3 the clinical officer revealed that PW1's genitalia and hymen were inflamed. The Hymen was found to have old hymenal tag which mean the hymen was broken but injury had healed. I find that indeed there was penetration.

28. The last ingredient is identification. The victim in this case testified that the accused was their neighbour which was corroborated by PW2 who stated that the accused was their neighbour. I find that identification was positive and thus this ingredient was proved.

29. As regards the issue of contradictions that have been raised by the Appellant, the way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic

(2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> "with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

30. Also, in the case of Joseph Maina Mwangi vs. Republic *CA No. 73 of 1992* (Nairobi) the Court of Appeal held that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

31. The discrepancies highlighted by the Appellant have been noted but they do not go to the core of the offence before the court. This court has subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the conviction and the same is upheld.

32. On the issue of sentence, the Appellant was sentenced to 15 years imprisonment.

33. In Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition 18 of 2023) [2024] KESC 34 (KLR) 12th July 2024) (Judgment) the apex court faulted the Court of Appeal's decision to reduce the sentence imposed on the appellant from 20 years to 15 years on the grounds of unconstitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and observed that:

> "The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter."

Disposition

1. This appeal is unsuccessful and is thus dismissed.

2. However, I note that the sentence of imprisonment for 15 years imposed by the trial court is blatantly illegal as the section under which the Appellant was convicted provides for a sentence of not less than twenty years. The sentence prescribed for the offence is a minimum sentence which the trial court was bound by the law to impose. Section 354(3) of the *Criminal Procedure Code* vests this court with jurisdiction to enhance such a sentence and accordingly the same is enhanced to twenty years imprisonment but so as to take into account the period spent into custody the sentence shall be computed to commence from the date of his arrest which is 13th February 2022.

   Orders accordingly.

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

E. N. MAINA

JUDGE

In the presence of:

Mr. Oduol for the Appellant

Miss Nyauncho for the state

The Appellant online from Kamiti Maximum Prison

Geoffrey - Court Assistant/Interpreter