



**Njuguna v Republic (Criminal Appeal 99 of 2023)
[2025] KEHC 4838 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 99 OF 2023
FN MUCHEMI, J
APRIL 24, 2025**

BETWEEN

JAMES GATHUGO NJUGUNA APPELLANT

AND

REBUPLIC RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable O. M. Wanyaga (SRM), in Criminal Sexual Offence Case No. 1 of 2021 on 30th March 2023)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Thika where he was convicted of the offence of defilement contrary to Section 8(1) of the [Sexual Offences Act](#) No. 3 of 2006. He was convicted and sentenced to serve twenty (2) years imprisonment.
2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 6 grounds of appeal which are summarised thus:-

The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof;

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant relies on the case of George Opondo Olunga vs Republic (2016) eKLR and submits that the prosecution did not prove the ingredients of the offence of defilement beyond reasonable doubt.



On the element of identification of the offender, the appellant submits that the evidence given by the victim was not safe to warrant his conviction. The appellant submits that the complainant made her first report one year after the date of the offence. She did not have any description of the clothes he was wearing and only claimed to know him by name. It is further submitted that no one witnessed the incident and only the complainant testified that she was able to identify her perpetrator which is not sufficient to prove identification.

5. The appellant relies on the cases of *Wamunga vs Republic* (1989) KLR 42 and *Maitanyi vs Republic* (1986) KLR 198 and submits that the court is enjoined to examine evidence on identification or recognition carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error. The appellant argues that the evidence was to the effect that offence was committed in the evening in a bushy area and PW1 was grabbed by four men and taken to the bush while blind folded. The appellant submits that the trial court failed to correctly test the evidence of identification which made him reach a wrong conclusion. The appellant further relies on the case of *Mary Wanjiku Gichira vs Republic Criminal Appeal No. 17 of 1998* and submits that the only thing connecting him to the offence is suspicion which cannot be the basis for inferring guilt.
6. The appellant submits that the prosecution did not prove the age of the victim. The appellant submits that according to the charge the victim was aged 12 years. The clinical officer, PW4 testified that the victim was in class 4 and 12 years of age during the commission of the offence. No evidence was produced to support the age of the victim according to the appellant. It was further submitted that the trial magistrate relied on the evidence of the P3 Form which merely indicated that the victim was 12 years old.
7. The appellant relies on the case of *Christina Sila Mutuku vs Republic* (2021) eKLR and submits that the P3 Form could not establish the age of the victim as it was marked for identification and was not produced in evidence. The appellant further relies on the case of *Hillary Nyongesa vs Republic Cr. Appeal No. 123 of 2009* and submits that the investigating officer, PW5 did not independently investigate the age of the victim but relied on unknown sources of evidence. As such, the appellant argues that the charge was framed against him and was not proved. The magistrate erred in relying on non-existent evidence in form of a P3 Form.
8. On the element of penetration, the appellant submits that the alleged defilement occurred on 21st March 2020 and the medical examination was carried out on 3rd February 2021 after a duration of 1 year. The appellant submits that although the clinical officer, PW4 testified that the victim's hymen was broken, on cross examination, she said that the hymen could be broken through sports, riding a bike or inserting an object into the vagina. To support his contentions, the appellant relies on the case of *PKW vs Republic* (2012) eKLR. The appellant argues that the medical evidence produced did not provide any linkage to him and therefore the element of penetration was not proven. Thus the prosecution did not prove the offence of defilement beyond reasonable doubt as required by the law. To support his contentions, the appellant relies on the cases of *Woolmington vs DPP* (1935) AC 462; *Gerald Ndoho Munjuga vs Republic* (2016) eKLR and *R vs Lifchus*.
9. The appellant relies on the cases of *Tekerali son of Korongozi & Others vs Republic* (1952) EACA 259; *Kyiafi vs Woro* (1967) GLR 463 at 467 and *Jagir Singh vs State of Punjab* 22 and submits that the prosecution's case was marred with glaring inconsistencies coupled with the likelihood of the complainant being untruthful in her statements made in evidence as her oral testimony was coached.
10. The appellant refers to Section 134 of the *Criminal Procedure Code* and submits that he was charged with the offence of defilement under Section 8(1) of the *Sexual Offences Act* yet the prosecution did not clarify under which sub section he was charged. The court proceeded to sentence him to 20 years



imprisonment. The appellant refers to the case of Bernard Ombuna vs Republic (2019) eKLR and submits that the charge is defective.

The Respondent's Submissions

11. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent relies on the case of Mwalango Chichoro Mwanjembe vs Republic (2016) eKLR and submits that all the evidence presented in the trial court indicated that the complainant was a minor at the time of the offence. The documents presented to the court such as the PRC and the P3 Forms showed the complainant to be 12 years old. The respondent argues that the appellant has not brought any new material facts to dispute the fact of age.
12. The respondent refers to Section 2 of the [Sexual Offences Act](#) and the case of Mark Oiruri Mose vs Republic (2013) eKLR and submits that PW1 testified that on 21/3/2023 she was going for milk from Mama Ari who is her neighbour when she met the appellant. He told her that he loves her and that did not like him. On her way back home she met four men who grabbed her and took her to the appellant in a bushy area. The appellant asked the men to leave her with him and once they left, the appellant removed the complainant's clothes and all his clothes. The appellant then laid the victim on the ground and did bad manners to her. She further testified that she was made to face upwards and the appellant inserted his penis into her vagina. The appellant threatened to kill the victim if she told anyone. PW4, the clinical officer produced the PRC and P3 Forms both of which confirmed that the victim's hymen was broken. The witness further testified that the complainant said that she was defiled by a person known to her who even threatened her. Further that at the time of examination, the complainant was in class four and was 12 years old. The respondent submits that PW1's evidence was corroborated by the medical evidence which proved penetration which links the appellant to the offence.
13. The respondent submits that PW1 and PW2 testified that the appellant used to herd cattle and was well known to them. This was a case of recognition and not simple identification. At the time of the offence, the complainant's blind fold had been removed and she described how the appellant removed all his clothes thus she had ample time to see him. The respondent argues that from the evidence that was adduced during trial, it is clear that the appellant is the person who defiled the victim and there was no possibility of mistaken identity.
14. The respondent submits that the way the charge sheet was framed was not fatal to the prosecution case. The particulars of the charge indicated the complainant to be 12 years and was hence sentenced according to Section 8(3) of the [Sexual Offences Act](#). Thus the sentence was legal and the appellant has not been prejudiced in any way. Furthermore, the respondent submits that the same can be cured by Section 382 of the [Criminal Procedure Code](#).
15. The respondent submits that the omission "as read with 8(3)" did not in any way vitiate the trial or deter the appellant from understanding the charges against him or making his defence. In any event, the respondent submits that the omission of the said words is curable under Section 382 of the [Criminal Procedure Code](#).
16. The respondent refers to Section 134 of the [Criminal Procedure Code](#) and the cases of Peter Ngure Mwangi vs Republic (no citation given) and Bernard Ombuna vs Republic (2019) eKLR and submits that the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.



17. The respondent relies on Section 382 of the *Criminal Procedure Code* and the case of Daniel Oduya Oloo vs Republic [2018] eKLR and submits that the appellant in the instant case participated in his trial in a manner to suggest that he understood the charge. He cross examined the witnesses well and was able to put an appropriate defence which is an indication that the appellant understood the charge he faced. Furthermore, the appellant did not at the first instance raise an objection or rather contend that the charge sheet was defective. Thus, in the circumstances, the appellant cannot be said to have been prejudiced.
18. The respondent refers to Section 8(3) of the *Sexual Offences Act* and the cases of Abdalla vs Republic KECA 1054 (KLR) and Supreme Court Petition No. E018 of 2023 Republic vs Joshua Gichuki Mwangi and submits that the sentence was legal and lawful. Furthermore, the respondent submits that the trial court considered the time spent in custody according to Section 333(2) of the *Criminal Procedure Code* as it held that the appellant was sentenced to twenty years effective from 8th February 2021 when he was placed in custody.

Issue for determination

19. The appellant has cited 6 grounds of appeal which can be compressed into three main issues:-
 - a. Whether the charge sheet was defective.
 - b. Whether the prosecution proved its case beyond any reasonable doubt.
 - c. Whether the sentence meted is excessive and harsh.

The Law

20. 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.

21. 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 charge sheet was defective.

22. Section 134 of the *Criminal Procedure Code* provides:-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

23. The appellant argues that the charge sheet is defective for it omitted the penalty clause. The appellant was charged with the offence of defilement contrary to Section 8(1) of the *Sexual Offences Act*. The particulars of the charge were that on 21st day of March 2020 at Magogoni village within Kiambu County, intentionally and unlawfully caused his penis to penetrate the vagina of HWM, a child aged 12 years.

24. The age of the victim in a sexual offences case is crucial as it shall determine the sentence to be meted upon a convicted person. The charge sheet clearly indicates that complainant was 12 years of age and the trial magistrate sentenced the appellant to twenty years imprisonment which is provided for in Section 8(3) of the *Sexual offences Act*.

25. It is important to consider whether any prejudice was suffered by the appellant, whether he understood the case against him in order to properly mount a defence and whether there was failure of justice occasioned. In *Mahero vs Republic* [2002] 2 KLR 406 the court held that:-

In the appellant’s case we have perused through the record of the trial court and are satisfied that the appellant understood the charge he faced, he asked relevant questions to the charge and in no way was prejudiced.

26. The record shows that the charge was clearly read out to the appellant and he responded to it by pleading not guilty. By the said participation, the appellant was fully aware that he faced a charge of defilement of a child aged 12 years. These particulars were also read out to the appellant on the date of taking plea. Thus it is evident that the appellant fully understood the charge that he faced from inception. He fully participated in the trial and did not complain of anything. The language used was of his choice. As a result, the omission of the penalty clause in the charge was not fatal and no prejudice was caused to the appellant.

Whether the prosecution proved its case beyond any reasonable doubt

27. 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.

28. 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.”



29. 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.
30. PW1 testified that she was in class 5 at the time of giving the testimony. PW4, the clinical officer produced the PRC Form filled on 3/2/2021 who was aged 12 years and in class four at the time. The witness further produced a P3 Form filled on 4/2/2021 for the complainant aged 12 years. PW5 the investigating officer testified that the complainant was 12 years old. From the evidence presented from the PRC and P3 Form as well as the testimony of the PW1, PW4 and PW5, the complainant was 12 years old at the time of the commission of the offence. Thus, it is my considered view that the prosecution proved the age of the minor.
31. 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.”
32. On the element of penetration, PW1 testified that the on 21/3/2020 in the evening she went to collect milk from a neighbor met the appellant. On her way back, the witness testified that she met four men on the foot path who grabbed her and took her to the bush where the appellant was waiting. Once the men left, the appellant removed her clothes. She stated that she could not recall the clothes the appellant wore but it was a pair of shorts and a t-shirt. The appellant then removed the victim’s shorts and panty then he removed all his clothes. The complainant testified that the appellant laid her on the ground and had carnal knowledge of her. PW1 testified that the appellant inserted his penis into her vagina and he threatened to kill her if she dare told anyone. Gripped with fear, the witness did not tell anyone at that time. However, she later informed her teacher at school after about one month.
33. The clinical officer at Thika Level 5 Hospital, PW4 testified on behalf of her colleague Peter Wanjohi and Dr. Ngetich. She produced the PRC Form filled on 3/2/2021 for the minor who was in class 4 aged 12 years at the time and testified that the minor had reported to have been defiled a year prior on 21/3/2020 and she knew the perpetrator. She further testified that the victim’s hymen was broken and the HIV test was negative. The witness further produced the P3 Form filled on 4/2/2021 for the victim aged 12 years who had reported to have been defiled by someone well known to her. The doctor examined her and found that her hymen was broken and had no sexual transmitted diseases. The pregnancy test was done and it was negative. PW4 produced the Post Rape Care Form, the P3 Form and treatment notes as exhibits.
34. To prove penetration, the key evidence relied on by courts in a defilement matter is the complainant’s testimony which is usually corroborated by the medical evidence produced by the medical officer. Thus the evidence of PW1 was corroborated by the medical evidence of PW4. PW3 pointed out that the broken hymen indicated penetration of the penile. Thus the inevitable conclusion from the analysis of the evidence is that there was sufficient evidence to prove penetration.
35. On the issue of identification, PW1 and PW2 testified that the appellant used to take care of the cows. Thus, the appellant was well known to the complainant. This was a case of recognition and not simple



identification. The complainant testified that when they went to where the appellant was, the blindfold covering her eyes was removed and the appellant told the four men to leave. The complainant further testified that the appellant removed her clothes as well as his clothes and lay her down. The victim had ample time to see and recognise the appellant. The appellant affirmed that he was a herder and used to herd the complainant's mother's cows. As such, it is evident that the complainant and her mother knew the appellant well. It is beyond doubt that the testimony of PW1 and PW2 amounted to positive identification of the appellant as the perpetrator. The appellant has admitted in his own evidence that PW2 was well known to him. It is thus my considered view that the appellant was positively identified as the perpetrator. The prosecution therefore proved the element of identification.

36. The appellant has 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.

37. The appellant testified that he was a herder and he would herd people's cows including those of the complainant's mother. He further testified that PW2 started defaulting in payment of his salary and arrears accrued. He then stopped working from May to December 2020. The appellant further testified that he had issues with PW2 on 2/2/2021 when he met her near her home and asked for money but she stated that she would not pay. The appellant further testified that on 5/2/2021 he was arrested at Maguguni Shopping Centre and he was framed with the instant case as PW2 owed him Kshs. 6,000/-.
38. I have perused the court record and noted that the trial magistrate in his judgment considered the appellant's defence and was not convinced that PW2 had any basis to frame up the appellant. The learned magistrate further noted that the claim of being framed was a bit farfetched. The trial learned magistrate stated that the defence presented by the appellant simply did not add up. 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 believed the overwhelming evidence of the prosecution and rejected the appellant's defence.
39. It is therefore my considered view that the trial court did consider the defence evidence but found that it did not displace the evidence by the prosecution witnesses.
40. PW1 gave a very comprehensive testimony of the incident. Her evidence was consistent and credible. As such, it is my considered view that the defence evidence albeit being considered was not sufficient to displace the prosecution evidence.
41. Accordingly, I find the prosecution proved its case beyond reasonable doubt. The conviction was based on cogent evidence and is hereby upheld.



Whether the sentence is harsh and excessive

42. 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.”

43. 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.

44. 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.

45. 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 mentally challenged child’s future, it is my considered opinion that the sentence of twenty years was commensurate to the offence. The sentence is within the law and is neither harsh nor excessive. This court upholds the sentence accordingly.

46. I find no merit in this appeal and it hereby dismissed.

47. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

