KENYA LAW
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Gayalwa v Republic (Criminal Appeal E138 of 2022)
[2025] KEHC 8731 (KLR) (Crim) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 8731 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E138 OF 2022

CJ KENDAGOR, J

MAY 15, 2025

BETWEEN

BENARD AGALOMBA GAYALWA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence of twenty (20) years imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act in Sexual Offence Case no. 62 of 2017 at the Chief Magistrate's Court at Makadara by Hon. H. Onkwani, Principal Magistrate on the 24th November, 2021.)

JUDGMENT

1. The Appellant was charged and convicted of the offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act*. The particulars are that on the 11th day of April, 2017 at [particulars withheld] within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of JBC He faced an alternative charge of causing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences No 3 of 2006. The particulars of the alternative charge were that on 11th April, 2017 at [particulars withheld] within Nairobi County, the Appellant intentionally and unlawfully committed an indecent act with JBC a child aged 13 years by touching her vagina.

2. Dissatisfied with the conviction and sentence he filed a Petition of appeal listing the following grounds of Appeal;

   i. That, the trial court convicted and sentenced the appellant of the offense charged, notwithstanding prosecution failed to prove case beyond reasonable doubt.

ii. That, the trial court convicted and sentenced the appellant of the offence charged, notwithstanding the crucial prosecution witnesses were not availed.

iii. That, the trial court convicted and sentenced the appellant of the offence charged, notwithstanding the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.

iv. That, the trial court convicted and sentenced the appellant of the offence charged, notwithstanding the plausible defence of the appellant was not given due consideration.

v. That, the trial court convicted and sentenced the appellant of the offence charged, notwithstanding the vital ingredients of the offence charged were not proved as stipulated by law.

vi. That the age of the complainant was not ascertained by the court.

vii. That the medical evidence availed in court were riddled with inconsistencies.

3. The appeal was canvassed through written submissions. The Appellant contended that the prosecution failed to provide sufficient evidence connecting him to the alleged defilement. He asserted that his fundamental right to a fair trial was compromised as he was neither granted legal representation nor adequately informed of this right. Additionally, he claimed that the charges against him were not thoroughly explained, depriving him of the opportunity to effectively defend himself. Furthermore, he argued that the imposed sentence was excessively harsh.

4. As a first appellate Court, I must reconsider and evaluate the evidence in the Court below to arrive at an independent conclusion while bearing in mind that I did not hear or see the witness. In Kiilu & Another V Republic, [2005] 1 KLR 174, the Court of Appeal set out the duties of a first 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 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. 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; 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.

5. Guided by the aforementioned principle, I have reviewed the grounds for appeal, the evidence presented in the trial court, and the written submissions filed by the appellant. I have also examined the trial Court's judgment. The key issues for determination are whether the prosecution proved the charges against the appellant beyond reasonable doubt and whether the sentence imposed was harsh and excessive.

6. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* provides:

> " 8(1)a person who commits an act which causes penetration with a child is guilty of an offence termed defilement
>
> 8(2)"......................................."

> "Section 8 (3) provides; 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".

7. In Charles Wamukoya Karani v R CR Appeal No. 72 of 2013 the Court stated the ingredients of the offence of defilement:

> " That the critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant."

8. The first element of the defilement offence which ought to be proved for purposes of sentence is the age of the victim. In Francis Omuroni v Uganda Court of Appeal CR Case No. 2 of 2000 the Court held inter alia that:

> " Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

9. The essence of the proof of age and the distinct implications it holds, along with its valuable guidance, can be found in the case of Moses Nato Raphael v R [2015] eKLR, in which the Court stated as follows:

> " On the challenge posed by the uncertainty in the complainants age, this Court had occasion to deal with similar issue in Tumaini Maasai Mwanya v R Mombasa CRA No. 364 of 2010 where the Court held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually, the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability."

10. The Complainant told the Court that she was 13 years old and that she was born on 10th April, 2003. PW2 informed the Court that the minor was born in 2004 and produced her birth certificate to verify the child's age. The birth certificate indicates date of birth as 10th April, 2004. I am satisfied that the child's age was established through the birth certificate presented in Court and the oral evidence; she was 13 years old at the time relevant to this case.

11. The Complainant was a child who gave sworn evidence. The record shows that the trial Court noted the child was mature enough to give sworn evidence and recorded it accordingly. I am satisfied that the trial Court employed the correct procedure in ascertaining the child's competence to give evidence.

12. The next issue is whether the prosecution proved penetration. 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." Penetration is a fundamental element of the offence that must be established beyond a reasonable doubt. Furthermore, even the most minimal insertion into the genitalia suffices to fulfil the legal requirement for proving this aspect of penetration.

13. In the case of Remigious Kiwanuka v Uganda SC Crim Appeal No. 41 of 1995 the Court stated as follows:

> " Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence."

14. The Complainant informed the Court that the perpetrator ambushed her in their home on the relevant date, around 5.00 p.m. She stated that he seized her hand and pushed her onto the bed, where he removed the towel she had been covering herself with and forced himself upon her and inserted his penis into her vagina. She stated that the perpetrator quickly woke up when someone knocked at the door, and her mother entered the house, demanding to know what was happening. The Complainant stated that the perpetrator had covered her mouth and face with a pillow, thus preventing her from screaming.

15. PW2, the Complainant's mother, stated that although she did not witness the events that occurred, she found the Appellant inside her house with her daughter, PW1, who was covered in a towel and crying. She recounted that the Complainant told her that the Appellant had raped her. In response, she raised an alarm, and neighbours came to help. Following this, the police who were called, arrested the Appellant as PW2 took the Complainant to the hospital.

16. The treatment notes and medical certificate produced by PW4 indicated that there was a bruise on the posterior fourchette, the hymen was broken, and that the tear was caused by force. PW5, who is a doctor who examined the Complainant, also indicated that she had bruises on the posterior fourchette and that the hymen was broken. The first medical examination took place on the same date the incident occurred, the injuries were noted as fresh..

17. Medical notes play a crucial role in proving claims of sexual assault, and each case is evaluated in its entirety to determine whether there is enough evidence to support a conviction. In this particular instance, the treatment notes and the P3 form reinforced the minor's testimony and that of her mother. The accounts provided by PW4, the nursing officer, and PW5, a doctor, offer compelling evidence that indeed there was penetration.

18. The third element, which is as critical as the first two, deals with the identification of the assailant being at a crime scene as the defiler of the victim.

19. The Court's duty on identification is set out in Roria v R {1967} EA 583, Abdalla Bin Wendo v R {1953} 20 EACA 166. According to the principles in Simiyu & Another v R IKLR 192 the Court of Appeal laid down the following guidelines:

> " In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of the description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given."

20. The victim positively identified the assailant as someone she knew in her testimony. PW2 also stated that the Appellant was their neighbour and someone they were familiar with. It is undisputed that the victim and the Appellant were neighbours and well acquainted with each other. The investigating officer corroborated PW2's testimony, confirming that the Appellant was found inside the house and was subsequently arrested there on the same day that the incident occurred.

21. The Appellant acknowledged that he was arrested at the same house but denied any sexual involvement with the Complainant. According to the Appellant, it was the Complainant who called him inside the house and led him to the bedroom. He stated that he opened the door for PW2 after she persistently knocked and asserted that he told her she had not defiled the Complainant.

22. This defence, however, is effectively undermined by the substantial evidence presented, particularly the Complainant's testimony and the medical notes that documented the findings. As previously mentioned, the treatment notes, along with the P3 form, corroborate and strengthen the testimonies provided by the minor and her mother. Furthermore, the testimonies from PW4, the nursing officer, and PW5, the examining doctor, provide compelling and detailed evidence indicating that penetration indeed occurred.

23. The Appellant has argued in his submissions that there are inconsistencies in the prosecution's evidence. He highlighted the failure of PW4 to indicate that the weapon likely used for the injury was a penile shaft. Additionally, he raised concerns about the Complainant's place of residence being uncertain. In his appeal, he also claimed that the prosecution failed to call crucial witnesses. However, these claims lack merit, as the Complainant clearly stated that the penetration was by the penis. It is unequivocal that the minor correctly identified the Appellant as the perpetrator of the sexual assault. The arrest took place at the scene on the same day.

24. The totality of the evidence establish the required standard of proof, that it was the Appellant who defiled the minor.

25. I have reviewed the lower Court record, and it is my conclusion that the Appellant received a fair trial. The claim that the Appellant was ambushed and forced to proceed with the hearing without legal representation is unfounded. According to the practice directions regarding pauper briefs, pro bono services are only available in capital cases and for children in conflict with the law within the Magistrate Court. Upon examination of the record, I found that the charges were explained to the Appellant during the plea taking. Further, the Court provided the Appellant with ample time to participate in the trial and prepare his defence. On 23rd July, 2017, he expressed that he was praying for time to obtain a lawyer. This was before the hearing proceeded. This indicates that he was aware of his right to legal representation of his choice but chose not to have one. If he had secured a lawyer, there would have been options available for recalling witnesses, provided that the application was made before the trial Court. The record reveals that he was actively engaged in the examination of witnesses. His defence reflects a clear comprehension of the charges brought against him.

26. In the end, I concur with the learned trial magistrate that all the ingredients of the offence in the main count were proved beyond reasonable doubt. The Appellant was afforded a fair trial, and the conviction was safe. The appeal against conviction is accordingly dismissed.

27. I will now turn to the sentence. Section 8 (3) of the *Sexual Offences Act* provides; 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.

28. The learned trial magistrate considered the mitigation and called for a pre-sentence social inquiry report, dated 12th October, 2021 and filed in Court on 4th November, 2021. The Appellant was given the minimum sentence. The Supreme Court has given guidance on minimum sentences under the *Sexual Offences Act* in Republic V Joshua Gichuki Mwangi Petition No. E018 of 2023. The Court held that where a sentence is set in statute, the legislature has already determined the course unless declared unconstitutional. The trial Court meted out a lawful sentence.

29. The upshot is that the appeal is hereby dismissed.

30. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 15TH DAY OF MAY, 2025.

....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant present

Mr Chebii, ODPP for Respondent