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Pato v Republic (Criminal Appeal E101 of 2023)
[2025] KEHC 6830 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E101 OF 2023

WM KAGENDO., J

MAY 14, 2025

BETWEEN

OMAR PATO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of the offence were that on 14th day of November, 2022 at Jomvu Sub County within Mombasa County he unlawfully and intentionally caused his penis to penetrate the vagina of Y.B a child aged 8 years.
3. He was also charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006.The particulars of the offence were that on 14th day of November 2022 at Jomvu Sub County within Mombasa County he unlawfully and intentionally caused his penis to rub the vagina of Y.B. , a child aged 8 years.
4. The appellant pleaded not guilty to both the main and the alternative charge and the matter proceeded for hearing.
5. The trial magistrate, Hon. David O Odhiambo, SRM, after hearing 4 prosecution witnesses and sworn testimony by the appellant in his defence found that the prosecution had proved their case against the appellant beyond reasonable doubt and proceeded to convict and sentence the appellant to 40 years' imprisonment.
6. Dissatisfied by the said judgment, conviction and sentence, the appellant filed his petition of appeal based on the following grounds of appeal:

i. That the learned trial magistrate erred in law and fact by convicting me on absence of any cogent and tangible evidence.

ii. That the learned trial magistrate erred in law and fact by forming a conviction in reliance of single witness testimony that was not substantiated by an independent witness.

iii. That the learned trial magistrate erred in law and fact by relying on contradictive and inconsistent and unsubstantiated witness account of the allegation levelled against me.

iv. That the learned trial magistrate erred in law and fact by finding my conviction and sentence by failing to take into consideration my unshaken defence.

Facts at Trial

7. The Appellant took plea on 16/11/2022 denied the charges and a plea of not guilty was entered. The Complainant Y.B. aged 8 years was found fit to testify following a voire dire examination. According to PW3 Y.B. she stayed at Likoni with her auntie M and she was in standard 4 at [particulars withheld] School in Jomvu. She stated that she used to be taken to school and madrasa by one Mwarabu, the appellant, on his motor cycle and that she knew him very well.

    She stated that on the fateful day the appellant had dropped her brother home and then later on went for her and brought her some biscuits. He then took her to a narrow path where he used to take her and there he removed his penis into her vagina. Some women saw him and screamed and came to her help as he was in the act. She said she then taken home and later to Port Reitz Hospital. She identified the appellant before court.

8. PW1, the minor's mother stated that the Appellant is the one who used to take the minor to school since she was in nursery school. On the fateful day she was waiting at home for the minor to be dropped by the appellant from madrasa. She stated that the Appellant had called earlier on to say that his bike had a problem which he since fixed and that he had promised to drop the minor. She said a that at around 8,00pm she was at home with her relatives when a crowd came with the appellants who was bleeding and upon inquiry she was told that the accused had defiled her child. She said that when the minor arrived home she confirmed that she was not take okay and that she was taken to Port Reitz Hospital where the doctors confirmed that she had been defiled.

9. PW4 confirmed that she found the appellant already in the police cells when took over the case and that she was involved in taking the minor to hospital.

    broken hymen with a fresh scar. She also had tenderness on the vagina and discharge with an abrasion at 6 o'clock. She had a stained panty and the age of the injury was hours. He prepared the PRC and P3 form which were produced in evidence. As per PW3's testimony PW2 had pain and had problems in walking, the genitalia were swollen and there was tenderness in the labia and the vagina wall which had fresh bruises indicative of penetration.

10. The court found out that the at the complaint prosecution had established prima facie came against the accused and he was put to his defense under Section 211 of the *Criminal Procedure Code*. He gave sworn testimony and called no witness. In his defense, the accused stated that he had picked the complainant from madrasa and on the way home the motor cycle broke down. After he had repaired and was leaving, two women showed up and pulled him and they fell down. He stated that the women started calling him a thief and claimed that he had defiled the complainant. He said he was beaten by crowd of people and he got injured on the ear. He was then taken to the home of the complainant where the police came and arrested him. On cross-examination, the accused stated that the complainant

was his neighbour and he had no grudge with them. He stated that he was the one who had been picking the complainant from madrasa and on the material day he had picked another child before the complainant. He stated that the motor cycle did not break down in a small path though they were alone. He told the court that they were pulled down by two women before they left and the women called him a thief without any reason.

Analysis and Determination

11. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This is a first appeal and this court has a duty to analyze and evaluate the evidence which was adduced before the trial court and come up with its own independent finding. The appellant has a legitimate expectation that the evidence will be subjected to an exhaustive evaluation by the appellate court and the appellate court's own independent finding. This principle has been considered in various decisions of this court and those of the Court of Appeal.

12. The leading authority on the subject is Okeno - Versus - Republic (1972) EA 32. In this case the court stated-;

> " The duty of the 1st appellate court is to analyze, reevaluate the evidence which was before the trial court and itself come up with its own conclusion on the evidence. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified and must leave room for that.
>
> > The Court of Appeal in the case of David Njuguna Wairimu Versus Republic (2010) while citing with approval the case of Okeno Versus Republic Supra, stated as follows: -
> >
> > > The duty of the first appellate court is to analyze, re-evaluate the evidence which was before the trial court and itself come up with its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellant court may be depending on the fact and the circumstances of the case, come to the same conclusion as those of the lower court. It may reverse those conclusions. We do not think there is anything objectionable in doing so, provided 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 decision."
> > >
> > > The court of appeal further stated that – "an appellant on a 1st appeal is entitled to expect the evidence as whole to be subjected to a fresh exhaustive examination (Padya Versus Republic 1975 EA 336) and that the appellate court's own decision on the evidence. the appellate court must itself weigh the conflicting evidence and draw its own conclusions.
> > >
> > > In doing so it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter's Versus Sunday Post 1978 E.A 424".

13. In the case of Gabriel Kama Njoroge – Versus - Republic, Criminal Appeal No.149 of 1986 [1987] eKLR Court of Appeal in Nairobi, Platt & Apaloo, JA.A. and Masime Ag. J.A reiterated the duty of a first appellate court as follows: -

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court."

14. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following broad issues for determination: -

    a. Whether or not the Prosecution proved its case beyond reasonable doubt;

    b. Whether the Defense was considered in making the conviction and the Sentence by the trial Court.

I. Whether or not the Prosecution proved its case beyond reasonable doubt Elements of offence of defilement

15. The Appellant was charged with two counts of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides: -

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

16. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    a. Age of the complainant;

    b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    c. Positive identification of the assailant

17. On these elements; "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant." ("Charles Wamukoya Karani – Versus - *Republic, Criminal Appeal No. 72 of 2013*").

18. What does the evidence portend? In a charge of defilement, the age of the victim is important for two reasons: -

    i. defilement is a sexual offence against a child; and

    ii. age of the child has been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence

19. A child is defined as a person under the age of eighteen years. Is the victim herein a child? In the case of "Hillary Nyongesa – Versus - Republic (Eldoret) Criminal Appeal No. 123 of 2009" Mwilu, J. stated thus:

> " Age is such a critical aspect in Sexual Offences that it has to be proved conclusively. Anything else is not good at all. It will not suffice. And it becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

20. The Appellant was convicted and sentenced on the offence of defiling a child aged 8 years old respectively. PW 1 testified that the victim was born on 24th March, 2014 which makes the victim 8 years at the time of the commission of the offence.

21. On this question of age, I am content to cite the case of "Fappyton Mutuku Ngui – Versus - Republic [2012] eKLR" where it was held:

> ... 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.

22. Further, 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."

23. The accused person did not avail any evidence to challenge the complainant's age. On the basis of the evidence adduced, I find that the age of the victim was proved to be 8 years old by the production of the birth certificate serial number 2232429 issued on 30th May, 2014 produced as Pex 1.

Penetration

24. 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." The same section defines "genital organs" to include; "the whole or part of male or female genital organs and for purposes of this Act includes the anus."

25. PW3 stated that the accused took her to small path and did bad manners to her. She explained that the accused removed his penis and inserted it into her vagina.

26. 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."

27. The medical evidence on record was presented by PW2, a doctor who gave his evidence and stated that there was penetration. He examined the minor hours after the incident and relied on the P3 form and the PRC form which he produced into evidence. The minor in her evidence in chief did testify that the accused penetrated her vagina with his penis.

28. PW2 produced PRC form and P3 form which showed that the complainant had broken hymen with fresh scar and had tenderness on the vagina indicative of penile penetration. She also had abrasions at six o'clock and there were epithelial cells on the vagina. With the testimony tendered I find that the element of penetration was proved as per the trial Court's findings.

29. The above as witness testimonies prove the fact that there was penetration of the child. But by whom? This is the mega question.

Was the appellant the perpetrator?

30. The Appellant was well known to the complainant and her family as he was the neighbor and relative. The trial court noted that the it was not disputed even by the Appellant that the complainant was well known to him. The appellant acknowledged this in his defense.

31. It bears repeating that the Appellant was a person known to the complainant. She testified that he is the one who removed her clothes and I do not find any element of mistaken identity of the Appellant as the person who penetrated the complaint's vagina. The complainant categorically implicated the Appellant as the perpetrator of the sexual offence committed on her. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainants.

32. Therefore, the third and last element of identification was proved as there was positive identification by the victim which was corroborated by PW1 and PW4 who all saw the accused moments after he had been accosted and beaten by the members of the public who caught him in the act.

33. The elements of defilement were proved by the prosecution.

I. Whether the defense was considered in the conviction and sentencing of the Appellant

34. In his defense, the accused stated that he had picked the complainant from madrasa and on the way home the motor cycle broke down. After he had repaired and was leaving, two women showed up and pulled him and they fell down. He stated that the women started calling him a thief and claimed that he had defiled the complainant. He said he was beaten by crowd of people and he got injured on the ear. He was then taken to the home of the complainant where the police came and arrested him. When cross examined he stated that the accused stated that the complainant was his neighbor and he had no grudge with them. he stated that he was the one who had been picking the complainant from madrasa and on the material day he had picked another child before the complainant, he stated that the motor cycle did not break down a small path though they were alone.

35. His defense in no way watered down the Prosecution case which was that of recognition and the sexual act was proved to have occurred. I do agree with the Trial Court the defense did not dislodge the prosecution case and the testimonies by the four prosecution witnesses was believable and corroborated.

36. The Trial Court in its judgment found that the prosecution provided evidence beyond reasonable doubt proved all the elements of defilement against the Appellant who was convicted under Section 215 of the *Criminal Procedure Code* for the offence of defilement Contrary to Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 which carries mandatory sentence of life imprisonment.

37. Was the sentence excessive?

38. In the Court of Appeal case of "Bernard Kimani Gacheru – Versus - Republic [2002] eKLR" where it was stated as follows: -

> " 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."

39. In the present case the Court record shows mitigation was done prior to conviction at Page 19 of the record of Appeal. Similarly, there is no evidence to show that the Appellant was remorseful and/ or asked for forgiveness. I am alive to the fact that the Appellant was convicted for defiling a child of 8 years. In my view, the Trial Court was in order meting out the sentence it did.

40. It is my finding that the trial court considered all the evidence and mitigation. The Appeal on conviction fails.

41. Further the court is aware that the sentence under section 8 (2) 0f the *sexual offences Act* is life imprisonment. For some time now, this area had remained a bit grey following the supreme court decision in the Muruatetu decisions and the subsequent application by the courts in resentencing in other cases but murder. That position has however been clarified by The Apex court in Joshua Gichuki Mwangi NC [2024] KESC 34 (KLR) where the court emphasized that the statutory provisions with minimum sentences are not unconstitutional.

42. Also, recently in Evans Nyamari Ayako the Supreme court again settled the issue that a life sentence means just that; life and the proceeded to reverse the 30-year-old sentence

43. Taking a cue from these two decisions I find that the correct sentence ought to be a life sentence and accordingly I substitute the 40-year-old sentence with the mandatory sentence under section 8(2) of the *Sexual offences act* which is life imprisonment

44. In sum therefore, I find that the conviction was proper. Appeal on conviction therefore lacks merit and is hereby dismissed.

Conclusion and Disposition

45. Having found that all the grounds of appeal have failed I hereby consequently find the Appeal as filed unmerited and hereby dismiss it and the sentence is enhanced as above.

It is so ordered acordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS.....14th......DAY OF.....MAY...., 2025

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HON. LADY JUSTICE W. M. KAGENDO (JUDGE)

HIGH COURT OF KENYA AT MOMBASA (CRIMINAL DIVISION)

In the presence of:

Appelant

M/s. Bebora, Court Assistant;

Mr. Ngiri… State Counsel;

SIGNED BY: HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.