Gichuri v Republic (Criminal Appeal 100 of 2023)
[2025] KEHC 8513 (KLR) (Crim) (18 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8513 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL 100 OF 2023

KW KIARIE, J

JUNE 18, 2025

BETWEEN

HARON MUREU GICHURI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E009 of 2021 of the Principal Magistrate's Court at Engineer by Hon. Liluma Musiega, Resident Magistrate)

JUDGMENT

1. Haron Mureu Gichuri, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No.3 of 2006.

2. The particulars of the offence were that on diverse dates between the 14th and the 18th day of January 2021, at Kipipiri Sub-County within Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of T.W.K. a child aged sixteen years.

3. The appellant was sentenced to fifteen years' imprisonment and has appealed against both his conviction and sentence. He raised the following grounds of appeal:

    a. The learned trial magistrate erred in convicting the appellant, yet failed to note that the complainant left no evidence in the appellant's house, thereby raising doubts in the prosecution's case.

    b. The learned trial magistrate erred in both law and fact in failing to conduct a voir dire examination and proceeded to receive the complainant's evidence in sworn evidence, perhaps as an adult when she was still a minor.

c. The learned trial magistrate erred in law and fact in convicting and sentencing the appellant on the evidence of penetration when the evidence available is not firm or conclusive.

d. That throughout the testimony of PW1, she failed to provide evidence regarding any experience of pain during the alleged incidents, despite claiming that she was defiled by two perpetrators over a period of five consecutive days, thereby casting doubt on the veracity of her allegation of defilement.

e. The learned trial magistrate erred in both law and fact in convicting the appellant, having failed to establish whether the phone number allegedly used by PW 1 to contact her parents was registered to or associated with the appellant.

f. The learned trial magistrate failed to note that PW 1's conduct appeared to be that of a child who was not defiled.

g. The requirement of the proviso to section 124 of the *Evidence Act* was not met for the trial magistrate/court to convict without corroboration.

h. The learned trial magistrate erred in law and fact in coming up with her own opinions, which were not based on the evidence on record, and used the opinions to convict the appellant.

i. The learned trial magistrate erred in law and fact in entering into the fray of the trial case, becoming a witness, a judge, and a prosecutor simultaneously, and the appellant was seriously prejudiced.

j. The learned trial magistrate erred in law and fact in failing to find that the prosecution could not call crucial witnesses, and the presumption is that their evidence would have been favourable to the appellant's case.

k. The learned trial magistrate erred in law and fact in failing to find that the doctor's medical evidence materially contradicted the complainant's evidence.

l. The learned trial magistrate erred in law and fact in failing to find that the complainant's evidence, being the evidence of a single prosecution witness regarding the alleged defilement, required to be considered with a lot of care and caution in the circumstances of this case.

m. The learned trial magistrate erred in law by failing to find that the complainant had been coached by individuals who were not called to testify, thereby undermining the credibility of the prosecution's case.

n. The learned trial magistrate erred in relying on hearsay evidence of the mother of the complainant, contravening the rules of Evidence.

o. The learned trial magistrate erred in law and fact by convicting the appellant based on the incoherent and unreliable evidence of the prosecution witness (PW1), thereby occasioning prejudice to the appellant.

p. The learned trial magistrate erred in law and fact in convicting the appellant to serve fifteen years imprisonment without considering that he was born on 03/02/2004.

q. The learned trial magistrate erred in law and fact by analyzing only the prosecution's evidence without considering it alongside my defence, contrary to the established criminal procedure principles.

r. The learned trial magistrate erred in law in convicting the appellant on a fatally defective charge.

4. The state opposed the appeal through M/s Odera Vena, learned counsel, on the following grounds:

    a. All the offence's ingredients were proven to meet the required standards.

    b. The sentence was the prescribed one.

5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs the Republic [1972] EA 32.

6. A voir dire examination is conducted on witnesses who are children of tender years. Section 125 (1) of theEvidence Act, which states:

> All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

7. Section 19(1) of the *Oaths and Statutory Declarations Act* provides guidance on obtaining evidence from a child of tender years as follows:

> Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

8. I am aware of decisions which held that a child of tender years is a child under the age of ten years, which resonates with the definition in the *Children Act*. However, I subscribe to the school of thought that views the decision in Kibangeny Arap Korir v Republic, [1959] EA 92, as a proper interpretation of who is a child of tender years for testing. The Court of Appeal for Eastern Africa held that tender years refers to a child under the age of 14 years.

9. In this case, it was not necessary to conduct a voir dire for the complainant who was above the age of 14 years.

10. Although the appellant contended that the charge was defective, he did not demonstrate any defect, nor did I observe any defect.

11. To establish an offence of defilement against an accused person, the prosecution has to prove the following ingredients:

    a. That there was penetration of the complainant’s genitalia;

    b. That the accused was the perpetrator and

    c. The victim must be below eighteen years old.

This position was echoed in the case of Fappyton Mutuku Ngui vs Republic [2012] eKLR. Ngugi J. (as he was then) said:

> Going by this definition of defilement... the issues the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant.
>
> Therefore, I will endeavour to establish whether the prosecution met the required standards.

12. The complainant, T.W.K. (PW1), testified that she was sixteen at the time of the alleged offence. A copy of her Certificate of Birth was produced. It is indicated therein that she was born on the 3rd day of August 2004. As of the 14th day of January 2021, she was 16 years and five months old. I find that her age, for Section 8(4) of the *Sexual Offences Act*, was proved.

13. The medical evidence was adduced by Dr. Martin Ouma (PW2) on behalf of his colleague, Dr. Gitonga, who examined the complainant on January 20, 2021. The only positive result was a torn hymen. I find that penetration was proved.

    1. The complainant testified that the appellant was her boyfriend. They met when she was returning home from an errand. He escorted her to their gate, and in turn, they decided that she would escort him. She left the spaghetti she had gone to buy at their gate and escorted the appellant. She eventually ended up at his house, where they had sex. Her evidence was that the appellant held her against her will until the 19th day of January 2021.

    2. Although she contended that the appellant locked her in his house, the subsequent evidence she gave indicates that she had several opportunities to escape, but she did not. For instance, when she said she was taken to Wairimu, an elderly lady, one fails to understand why she did not escape, yet she testified that she was not tied.

    3. Based on my assessment of the evidence, she was a willing participant. However, she legally could not consent.

    4. The appellant contended that Wairimu and the boda-boda riders who arrested him were not called to testify but were material witnesses. Failure to call a material witness may be fatal to the prosecution's case where the evidence is barely adequate. The Court of Appeal in the case of Bukenya vs Uganda [1972] EA 549 (Lutta Ag. Vice President) held:

       > The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
       >
       > Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.
       >
       > In the instant case, the prosecution called sufficient evidence on record, even without the evidence of Wairimu and the boda-boda riders.

18. The learned trial magistrate ordered an age assessment for the appellant before the plea was taken. Although she did not specify her reasons for making the order, I am persuaded it was because he appeared young. The report indicated that he was approximately 19 years old. Given this fact, I am inclined to modify the sentence. I set aside the sentence imposed on the appellant. It is substituted with a three-year probation order. The appeal is allowed to that extent.

DELIVERED AND SIGNED AT NYANDARUA THIS 18TH DAY OF JUNE 2025

KIARIE WAWERU KIARIE

JUDGE