Kigotho v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 8674 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8674 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E008 OF 2024

LN MUTENDE, J

JUNE 16, 2025

BETWEEN

JOSHUA KIGOTHO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. Joshua Kigotho, the Appellant, was arraigned following allegations of having committed the offence of Defilement contrary to Section 8(1) (4) of the *Sexual Offences Act*. The particulars of the offence were that on the 29th day of February, 2023, in [Particulars Withheld] in Kirima Sub-County within Laikipia County he intentionally caused his penis to penetrate the vagina of J.W., a minor aged 15 years.

2. In the alternative, he faced the charge of Committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars being that on the 29th day of February, 2023, at [Particulars Withheld] in Kirima Sub-County within Laikipia County, the Appellant intentionally caused his penis to come into contact with the vagina of J.W., a child aged 15 years.

3. Having denied the charges he was taken through full trial, convicted and sentenced to serve 20 years imprisonment for the offence of defilement.

4. Aggrieved, the Appellant appealed on grounds that;

    1. That the learned trial Magistrate erred in law and fact in finding that the Appellant defiled the Complainant J.W. in the night of 29th February, 2023.

    2. That the learned trial Magistrate erred in law and in fact in failing to find that the evidence presented by the prosecution witnesses was not sufficient to prove the offence of defilement beyond reasonable doubt.

3. That the learned trial Magistrate erred in law and in fact in relying on the evidence of PW3 which was not supported by the laboratory examination results and ultra sound scans to corroborate that J.W. was pregnant.

4. That the learned trial Magistrate erred in law and in fact in finding that the Appellant confessed to the offence whereas no such confession was recorded as per the law required and produced as evidence.

5. That the learned trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant.

6. That the learned trial Magistrate erred in law and in fact in completely disregarding the evidence on record including the defence evidence thus arriving at an erroneous decision.

7. That the learned trial Magistrate erred in law and in fact in failing to consider the Appellant's mitigation, to request for a pre-sentence report and meting an excessive sentence in the circumstances.

5. Briefly, facts of the case were that on 29th February, 2023, PW1 J.W. met the accused, her boyfriend at a funeral and he convinced her to go to his home. While at his home they engaged in coitus. A month later she discovered that she was pregnant. Her mother PW2, MNN having discovered the reality that was unpleasant to accept sought an explanation from the complainant regarding the pregnancy and she mentioned the Appellant as the person responsible. They brought the issue to the attention of the Appellant but he denied responsibility.

6. The matter was reported to PW4 Stephen Mwangi Mukundi the area Chief who caused the Appellant to be arrested. He was taken to Sipili Police Station where investigations conducted by PW5 No. 112922 PC Losekon Ephantus Eyanai culminated into his arraignment.

7. Upon being placed on his defence the Appellant denied having committed the offence. He testified that he was charged with an offence he did not commit. That the allegations were by a victim who falsely accused him. He denied having impregnated her. On cross – examination he denied having been in a relationship with the Complainant but claimed that he was a friend to her cousin Grace Wanjiru aged 22 years. That he learnt of the pregnancy on the day of his arrest.

8. The trial court considered evidence adduced and reached a finding that the Appellant did penetrate the Complainant, a child. It emphasized the question of the Appellant having not challenged evidence of the Complainant hence the conviction.

9. The appeal was canvassed through written submissions. It is urged that the charge sheet is fatally defective having been brought under a non-existing provision of the law; a defect that resulted into a sentence of 20 years imprisonment. In this respect reliance was placed on Hillary Nyongesa v Republic (2010) eKLR where the High Court stated that;

> "Charge by the prosecution and the failure by the trial court to note it and have it amended are fatal to the charge. The evidence led at trial was that of defilement and in my assessment of that judgment defilement did in fact occur as charged. There was however no evidence led on the alternative charge of indecent assault and so the prosecution case was incurably flawed and cannot be saved at this late stage. The trial magistrate also failed to state what provisions of the *Sexual Offences Act* he was convicting the accused under, whether on the main count or on the alternative one. That failure is another fatality."

10. That penetration was not proved as the words used to describe what purported to have happened were "sexual intercourse" "sexual act" and "having sex. Reliance is placed on Jackson Kariuki Kamau v Republic, Nyahururu HCCRA No. 182 of 2017 where the court held;

> " Whether penetration was proved:
>
> Section 2 of the *Sexual Offences Act* defines penetration as "as partial or complete insertion of the genital organs of a person into the genital organs of another person"
>
> The complainant told the court that she had sexual intercourse with the appellant who was her boyfriend. She did not explain what sexual intercourse entails and exactly what happened between her and the appellant. The complainant never explained whether the appellant caused his genital organs namely penis to penetrate her genital organs."

11. On the alternative charge, it is urged that it was not proved.

12. That the Complainant's pregnancy was not in any way connected to the Appellant and no DNA was conducted to confirm that the Appellant was responsible.

13. On the part of the Respondent, it is submitted that the victim positively identified the Appellant as the perpetrator of the act of defilement. That she gave a vivid description of what transpired and the Appellant who confirmed having known the Complainant elected not to cross – examine her.

14. That the trial court did not rely on the confession but the statement given by the Appellant to the investigation officer at the time of arrest and interrogation did not occasion any irregularity.

15. That the defence put up by the Appellant was a mere allegation which did not place any doubt on the credible evidence adduced by the prosecution. On the sentence imposed it is argued that the court considered age of the minor.

16. This being a first appellate court, it is duty bound to re-consider evidence adduced at trial, re-evaluate it so as to reach conclusions while bearing in mind that it neither saw the witnesses so as to observe their demeanor nor heard them. This salient subject was discussed in Okeno v Republic [1972] EA 32 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 v 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 v 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 v Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174."

17. It is argued that the charge sheet was fatally defective. The legal requirement to be met by a charge is provided in Section 134 of the *Criminal Procedure Code* (CPC) that stipulate as follows;

> 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.

18. From the reading of the provision of law, every charge sheet must state the specific offence and provide sufficient particulars to enable an accused person understand the nature of the offence. A charge would be dismissed as defective if it excludes essential elements of the offence or if it is inconsistent with evidence adduced. In Bernard Ombuna v Republic [2019] eKLR the Court of Appeal considered what would constitute a fatally defective charge sheet by stating as follows;

> " .. 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."

19. The defect alluded to is the provision of law quoted in the statement of the offence namely Section 8(1)(4) of the *Sexual Offences Act* and that the age quoted being 15 years the correct provision of law should have been Section 8(3) and not Section 8(4) of the *Sexual Offences Act* under which the Appellant was sentenced.

20. Looking at the particulars of the offence, they have captured the age of the victim, the act of penetration and the alleged perpetrator. The particulars provided were sufficient to make the Appellant understand the nature of accusation. As a result, he did mount a defence by adducing evidence. He was not prejudiced. Therefore, the charge sheet cannot be dismissed as having been fatally defective.

21. The ingredients of the offence of defilement are provided by the definitive Section 8(1) of the *Sexual Offences Act* that enact thus;

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

22. The prosecution (Respondent) was obligated to prove elements constituting the offence of defilement that are;

    i. The victim's age.

    ii. The act of penetration.

    iii. Positive identification of the perpetrator.

23. In Kaingu Elias Kasomo v Republic [2010] eKLR the Court of Appeal held that;

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

24. In Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000 the Court of Appeal held that;

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

25. To prove the age of the complainant the prosecution adduced in evidence a birth certification which proved that the Complainant was born on 23rd November, 2009. At the time of the act the Complainant was 14 years three months shy of 15 years as stated in the charge sheet. Needless to add that the question of age was not in dispute.

26. It is questioned whether the act of penetration did occur, the Respondent submits that the victim upon being examined was pregnant and the weapon used to cause the injuries was a penis which was proof beyond reasonable doubt.

27. Section 2 of the *Sexual Offences Act* defines penetration thus;

> " Penetration" means the partial insertion of the genial organs of a person into the genital organs of another person.

28. In her testimony the Complainant stated that she had sexual intercourse with the Appellant act that resulted into conception. The question so be asked would be "what is sexual intercourse".

29. The Oxford Dictionary defines sexual intercourse as;

> " sexual contact between individuals involving penetration, especially the insertion of a man's erect penis into a woman's vagina...."

30. What can be deduced is that it means physical act that involves penetration of the vagina by the penis. It is not denied that the complainant turned out to be pregnant. Upon examination she was found to be 28 weeks pregnant. The conception period was approximated to have been late February – early March 2023.

31. The Complainant described the Appellant as her boyfriend and even went on to say how they had sexual intercourse suggesting that the act was consensual. However, such sexual activity would not have been legal because she had no capacity of consenting.

32. It was argued by the Appellant that he did not commit the act with a school going child. That the victim falsely accused him. Evidence of the fact of penetration into the Complainant's genitalia was for a single witness pursuant to the requirement of the proviso to Section 124 of the *Evidence Act*, the court considered evidence adduced and believed the Complainant.

33. The trial Magistrate is faulted for relying on a purported confession. On cross – examination PW4 stated that while at the police station the Appellant admitted having had sexual intercourse with J.W. The answer was solicited by the Appellant upon putting a question to him. In the judgment the learned trial Magistrate stated that;

> " It is worth noting that both PW4 and PW6 told the court that at the time of his arrest the accused confessed or admitted to being responsible for PW1's pregnancy."

34. Confession is defined in Section 25 of the *Evidence Act* as;

> A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

35. Section 25A enacts that;

(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

36. Such alleged confession/admission was not admissible hence it was a misdirection on the part of the court to reach such a finding.

37. In a Criminal case an accused person is presumed innocent until proven guilty. The burden of proof hence lies with the prosecution and the burden of proof does not shift to the defence. Unless it is subject to some exceptions.

38. It is stated in the grounds of the appeal that the burden of proof was shifted to the Appellant but this was not expounded in the submissions. Notably what the court emphasized was lack of challenge of the evidence adduced by the victim through cross – examination. It is apparent that the victim narrated what transpired and the Appellant did not put any questions to her. The purpose of cross – examination is to test the credibility, reliability and truthfulness of a witness' testimony. Failure to do so when granted an opportunity may be interpreted to mean the witness was telling the truth. This cannot be taken to mean shifting of the burden of proof.

39. On the question of DNA being conducted to confirm whether the Appellant was the person responsible for the pregnancy. DNA analysis is a significant component that may provide scientific proof of there having been a sexual encounter but it has been stated now and again that failure to consider DNA does not preclude a court from reaching the decision to convict as long as there is sufficient evidence to confirm the allegations put forth.

40. In Kassim Ali v Republic (2006) eKLR the Court of Appeal stated that;

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

41. In AML v Republic [2012] eKLR the Court of Appeal held that;

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

42. On the question of the court having disregarded the defence evidence, it is a legal principle of fair trial that evidence adduced by the defence must be considered by the court, such evidence either supports an accused's innocence or may even mitigate his culpability. That be as it may the weight of such evidence must be weighed depending on its relevance and in contest of the case presented by the prosecution.

43. Indeed, the trial court did consider evidence tendered by the defence. It noted that although the Appellant argued that he was falsely accused by the Complainant's relative Grace Wanjiru through defilement of the Complainant he did not call any witnesses to substantiate his claims.

44. The misdirection is not fatal to the prosecution's case. That is why the High Court as a first appellate court bears the responsibility of re-evaluation of the facts and legal issues decided by the trial court and to apply its mind independently based on the evidence before the trial court and its findings.

45. Finally, the Appellant complains that the trial court failed to consider the Appellant's mitigation, to a request for a pre-sentence report and meting an excessive sentence. A pre-sentence report is a vital tool that assists the court to be informed prior to meting out a sentence, more so it captures the views of the victim as well as the accused. However, it is not a mandatory requirement especially in a case like

the instant one where the sentence provided is a minimum mandatory one. Therefore, failure to call for a pre-sentence report was not fatal.

46. On the issue of sentence, the Appellant was convicted for defilement. The penal part was Section 8(4) of the *Sexual Offences Act* which provides thus;

> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

47. In meting a sentence, the court must consider the gravity of the act committed in proportionate with circumstances of the victim and the society at large. How would the society condemn the criminal act and whether the offender can be rehabilitated. In the instance case the Applicant was a first offender. When given the opportunity to mitigate he told court that he was raised by his grandmother that he was taking care of and was 21 years old.

48. If indeed he was a young adult as stated, he may reform and there is nothing to suggest that he will repeat the offence. In the circumstances, I affirm the conviction but call to this court the sentence of 20 years meted out which I set aside and substitute with a sentence of 15 years imprisonment which will be effective from the date of sentencing the 8th March, 2024.

49. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16 TH DAY OF JUNE, 2025.

....

L.N. MUTENDE

JUDGE