Njau v Republic (Criminal Appeal E006 of 2024)
[2025] KEHC 7855 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E006 OF 2024

TW OUYA, J

JUNE 5, 2025

BETWEEN

SAMUEL GITAHI NJAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of Hon. O.M Wanyaga (SRM) at the Chief Magistrate's court at Thika, in Sexual Offences case no. E053 of 2022, delivered on 6th June, 2023)

JUDGMENT

1. The appellant herein, Samuel Gitahi Njau, was tried and convicted for the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act*. It is alleged that on 11th November, 2018, at Juja sub-county within Kiambu county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FWW, a girl aged 16 years.

2. Upon his conviction, the appellant was sentenced to a term of fourty (40) years imprisonment. He was aggrieved with both his conviction and sentence hence the present appeal.

3. In his amended petition of appeal, which he filed together with his written submissions, the appellant alleged that he had been convicted and sentenced on a defective charge sheet, yet the prosecution had all the time to amend the charge sheet; that the prosecution did not prove their case beyond all reasonable doubt and the perpetrator of the crime was not properly identified; and that he was sentenced to serve a sentence that is not described in law.

4. The appeal was canvassed by way of written submissions; which submissions I have duly considered and will refer to later when analysing the issues raised by the appellant in his amended petition of appeal.

5. In support of its case at the lower court, the prosecution called a total of Seven (7) witnesses. The victim who testified as PW1 at the trial court, alleged that on 11th of November, 2018, at around 9:30 pm, she was coming from the shopping centre in Juja farm going back home, when a guy on a motorbike approached her. She testified that she stopped the motor bike rider, as she wanted to be taken home; that on approaching the entrance to her home, the rider sped off instead of stopping, which forced her to jump off the motor cycle.

6. It was her testimony that when she jumped off, the rider stopped his motorbike, followed her, grabbed her by the neck and forced her on to his motor cycle; he then used one hand to control the motor bike while holding her with the other hand. The motor bike rider then took her to a deserted place, and when she tried to run, he punched her and slapped her and he also threatened to throw her into the quarry. He then defiled her and told her to get back on the motor cycle so that he could take her back home.

7. She stated that the rider then took her to their gate and offered to give her Kshs. 100, which she refused to take. It was her evidence that on entering their house, she found her small brother and after an hour, she went to a neighbour's house by the name AN who then took her to hospital, where she was given a note to go to the police station. She then went to her grandparents whom they later went with to the police station, before proceeding to Thika Level 5 hospital.

8. The victim alleged that she was able to recognise the accused considering that there were lights from vehicles, a supermarket and there was also moonlight. She also stated that the appellant was familiar to her, as she had been seeing him at the boda boda shed for about two (2) years before the incident.

9. PW2, SMG, who is the victim's grandfather, testified that on 12th November, 2018, at about 6:00am, PW1 came to him crying and informed him that she had been raped the previous night by the accused. He then took her to Juja farm police post, where they reported the incident, and they were referred to Thika level 5 hospital. It was his testimony that he knew the accused prior to the incident, as he was a boda boda guy and he also dealt with construction sand.

10. PW3, AN, testified that on the 12th November, 2018 at about 2:30 am, PW1, her neighbour, came to her house and informed her that she had been raped by Samuel Gitahi. She stated that PW1 informed her that the appellant, who had carried her, passed her home and took her to a deserted place. According to PW3, she took the victim to a dispensary and thereafter they proceeded to the police, where they recorded their statements. It was her testimony that she knew the appellant before the incident, as he used to operate a boda boda.

11. PW4, PC David Chemweli, and PW5, PC Samuel Njuguna, the arresting officers attached at Juja Police station, testified that on the 14th July, 2022, they were summoned by the OCPD and asked to arrest a defilement suspect, who had previously gone into hiding for over two years. They stated that they were about five (5) police officers, and they proceeded to the appellant's house at about 2:00am. On reaching his house, they identified themselves, arrested him and took him to Juja Police station.

12. PW6, Ms. Beatrice Martha, a clinical officer at Thika level five hospital, informed the court that she was giving evidence on behalf of Dr. Dennis and Dr. Wanyange who filled the P3 form, but were no longer working at the said hospital. She testified that after the incident, PW1 was first attended to at Juja Farm health centre and was given a referral note. She stated that PW1's clothes had blood stains, she had injuries on the face and lacerations on her ankle.

13. It was her testimony that PW1 also had lacerations on her genitalia, her hymen was freshly torn, and she had blood in the vagina; that her HVS showed pus cells whereas her spermatozoa urinalysis was normal. She stated that PW1 was given drugs to prevent HIV, pregnancy and STI.

14. On cross examination, PW6 stated that PW1 had injuries on her head, neck, waist and genitalia. That she had a swollen face, a swollen nose, lacerations on her neck, bruises on her upper limbs, bruises on her right foot and that the approximate age of her injuries was less than 24 hours.

15. According to PW6, the possible type of weapon used on the victim were fingers and penis; and her degree of injury was assessed as harm. She also stated that the findings of the medical examination carried out on PW1, were consistent with penile vaginal penetration.

16. When put on his defence, the accused gave a sworn statement and did not call any witness. He testified that on 14th July 2022, he went to work as usual, then went back home and slept. He stated that at about 2 am, his door was knocked by people who identified themselves as police officers; and when he opened for them, they took him to Juja police station, on claims that he had raped someone in 2018.

17. The appellant in his testimony denied ever defiling anyone. Upon being cross examined by the prosecution counsel, the appellant stated that he was informed that the offence was committed in 2018. He claimed that he had not evaded arrest and that he was in Murera engaging in construction work. He stated that in 2018 he had a motor cycle, and that the same was for private business; and that he was a boda boda operator in the year 2015.

18. Having carefully considered the amended grounds of appeal, the written submissions filed on behalf of both parties as well as the evidence tendered before the trial court, I find that the main issues arising for determination, are whether the evidence adduced by the prosecution proved the charge of defilement against the appellant beyond all reasonable doubt; and whether the sentence by the trial court was excessive in the circumstance.

19. Before considering these issues, I would first like to deal with the complaint made by the appellant in his written submissions that that he was charged and convicted on a defective charge sheet.

20. The appellant had alleged in his written submissions that considering that the evidence adduced before the trial court showed that the victim was sixteen (16) years at the time it is alleged he defiled her, he should have been convicted and sentenced under section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*; instead of Section 8(1) as read with Section 8(3) of the said Act. It was his submissions that this mistake made the charge sheet defective; and resulted in him being given an excessive sentence.

21. I have noted that the respondent in their submissions conceded to the fact that the applicant should have been charged under Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*, as the victim was a minor aged 16 years at the time the incident occurred.

22. On my part, I have gone through the records of the trial court, and I have noted that indeed the appellant was charged under section 8 (1) as read with section 8(3) of the *Sexual offences Act*; instead of Section 8 (1) as read with section 8(4) of the Act. I have also noted that no application was made by the prosecution to amend the said charge sheet, considering that the victim herself, as well as all the evidence adduced before the trial court, pointed to the fact that she was sixteen (16) at the time she had been allegedly defiled. It is therefore evident that the charge sheet was defective.

23. The question than now begs to be answered, is whether the appellant was in anyway prejudiced by the defective charge sheet; given the complaints in his written submissions, that the trial court meted out on him an excessive sentence, owing to the defect on the charge sheet.

24. The Court of Appeal in *Benard Ombuna v Republic* (2019) eKLR; stated as follows regarding a defective charge sheet:

> "In a nutshell, 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."

25. First, I would like to state that I have read through the proceedings and judgement of the trial court, and it is evident that the appellant clearly understood the charges that had been levelled against him; which was that he had been accused of defiling PW1, who at the time was a minor of 16 years. It is why he was able to put up an appropriate defence before the trial court.

26. As to whether the trial court sentenced him to a term of forty years imprisonment due to the defect in the charge sheet; it is evident from the judgement of the trial court, that the learned trial magistrate knew and understood that the appellant had been charged for defiling a minor who was 16 years of age.

27. I say so because, from her analysis of the evidence on record, the learned trial magistrate knew fully well during the hearing and at the time she was convicting the appellant, that the victim was 16 years at the time of the incident.

28. From my reading of the ruling on sentence by the trial court, it is clear that the learned trial magistrate sentenced the appellant to serve a term of forty (40) years imprisonment, owing to the fact that she was of the view that the appellant deserved a stringent sentence due to the violent manner he had defiled the victim. It is clear that the sentence was not meted out on him because the appellant had been charged under the wrong provision of the *Sexual Offences Act*.

29. Based on the above, I am of the view that the appellant was not in anyway prejudiced by the defective charge sheet. It is clear that he understood the charges levelled against him, hence his ability to put up an appropriate defence. It is also clear that the sentence meted out on him was not as a result of the defect on the charge sheet, rather, it was due to the violent manner the court found the appellant to have committed the said crime.

30. Regarding the claim by the appellant that the prosecution had failed to prove the charge of defilement levelled against him beyond all reasonable doubt; it is trite that for the prosecution to sustain a charge of defilement against an accused person, all the three (3) ingredients of the offence must be proved beyond reasonable doubt. The prosecution must adduce evidence proving that the victim is a minor, that there was penetration of the minor by the accused and that the person charged was identified by the victim as the perpetrator.

31. This position was restated by the Court of Appeal in *Serem v Republic* (Criminal Appeal 108 of 2019) (2023) KECA 30 (KLR) as follows:

> "The key ingredients that must exist to found a conviction in an offence of defilement are firstly, that the complainant/ victim is a child, secondly, that there was penetration and thirdly, that the person charged was positively identified as the perpetrator of the offence."

32. Again, the Court of Appeal in *John Mutua Munyoki v Republic* (2017) eKLR addressed itself as follows:

> " Under the *Sexual Offences Act* the main elements of the offence of defilement are as follows:

(i) The victim must be a minor, and

(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice. Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt."

33. Regarding the age of the victim, PW1 had indicated at the time of her testimony before court, which was on 29th November, 2022, that she was an adult of 20 years. She indicated that the appellant had defiled her on the 11th November, 2018, which means she was approximately 16 years at the time of the alleged incident.

34. The P3 form, which was produced as PEXH-2 by the victim at the trial court also indicated that she was 16 years old at the time of the alleged incident. I have noted from the proceedings that though a copy of PW1's birth certificate was marked for identification and produced as evidence, the same was not in the court file.

35. That notwithstanding, I am of the considered view that there was sufficient evidence on record to prove that PW1 was a minor of 16 years at the time it is alleged the appellant defiled her.

36. As regards penetration, PW1 narrated before the trial court how the appellant took her to a deserted place, asked her to lie on the ground, and he began defiling her. Her evidence that she was defiled was corroborated by the medical evidence adduced by PW6, the clinical officer, which showed that the PW1 had laceration on her outer genitalia and that her hymen was freshly torn. The high vaginal swab done on the victim also showed presence of pus cells and spermatozoa. The prosecution was therefore able to prove the element of penetration.

37. Regarding the identification of the appellant by the victim; PW1 had stated that she knew the appellant prior to the incident, given that she used to see him at the boda boda shed for a period of two years before the incident; and he was therefore familiar to her. She also stated that at the time of the incident, there were lights coming from vehicles, a super market and there was also moon light. She indicated to court that she saw the appellants face, before and at the time he defiled her and she was therefore able to recognise him.

38. Given that the appellant was someone the victim knew and saw prior to the incident; and considering also that at the time the victim alleges the appellant defiled her there was sufficient lighting from vehicles, a supermarket and the moonlight, I am of the view that she was able to positively identify the appellant as her assailant.

39. Given the foregoing, I am of the view that the prosecution proved beyond all reasonable doubt the charge of defilement against the appellant. I am therefore of the considered view that the conviction by the trial court should be upheld.

40. Regarding the sentence, the appellant had submitted that the sentence of forty (40) years imprisonment meted out on him by the trial court was harsh and excessive; given the nature of the offence committed.

41. It is trite that sentencing is a matter of judicial discretion, and an appellate court will not easily interfere with this discretion, unless it can be shown that the trial court, while passing the said sentence overlooked some material factors, took into account some immaterial factors, acted upon wrong principles, or the sentence is manifestly excessive in the circumstance of the case.

42. This principle was reiterated by the Court of Appeal in the case of *Wanjema v Republic*, (1971) EA 493; as follows:

> " An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

43. In this case, considering that the victim was a minor aged 16 years at the time the appellant defiled her; Section 8(4) of the *Sexual Offences Act*, makes it clear that a person who defiles a minor between the age of 16 and 18 years is liable to imprisonment for a term of fifteen (15) years. The said provision of law stipulates as follows:

> " 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."

44. The learned trial magistrate however exercised her discretion and sentenced the appellant to a term of forty (40) years imprisonment for the offence, on grounds that the appellant deserves a stringent sentence, owing to the violent manner in which he committed the said offence.

45. In my view, the said sentence was lawful, considering that the minimum sentence that can be meted out on an accused under the said provision of law is imprisonment for a term of not less than fifteen years; the learned trial magistrate however, has the discretion to issue out a higher sentence than that prescribed, in appropriate cases.

46. From the evidence on record, it is clear that the appellant not only defiled the victim, but he also assaulted her in the process, resulting in injuries to her face, neck, upper limbs and legs. The learned trial magistrate can therefore not be faulted for coming to the conclusion that the appellant deserves a stringent sentence.

47. Being that as it may, I have noted that the appellant, was a first-time offender. I am therefore of the view that a sentence of 40 years imprisonment meted out on him by the trial court was harsh and excessive for a first offender.

48. Given the foregoing, I am of the considered view that the 40-year imprisonment by the trial court should be set aside and substituted instead with a term of 20 years imprisonment, given the violent manner in which the appellant defiled the victim and considering also that the appellant did not in any way appear to be remorseful for his actions.

49. I have noted from the proceedings of the trial court that appellant has been in custody from the 14th of July, 2022, which is the date when he was first arrested to the 6th of June, 2023, when he was convicted and sentenced for the offence of defilement.

50. I say so because, although the appellant was granted bail by the trial court, there was no indication that he was ever able to meet the bail terms set by the court, and it is evident that he has been in custody from when he was arrested until the conclusion of his trial. From the record, the learned trial magistrate appears not to have taken this fact into consideration while sentencing the appellant. This in my view, was an error on the learned trial magistrate's part, as it contravenes the provision of section 333 (2) of the *Criminal Procedure Code*.

51. Section 333 (2) of the *Criminal Procedure Code* states as follows;

> " Subject to the provisions of section 38 of the Penal code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

52. The Court of appeal in *Bethwel Wilson Kibor v Republic* (2009) eKLR; expressed itself as follows regarding this issue:

> " By proviso to section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody."

53. Given the foregoing, I am of the view that the sentence of the accused should begin running from the 14th of July, 2022, when he was first taken to custody and not the 6th of June, 2023, when he was sentenced.

54. Flowing from the foregoing, this court holds that the appellant's appeal partially succeeds, to the extent that his sentence of forty (40) years should be set aside and substituted with a sentence of twenty (20) years imprisonment.

55. Final orders

    a. Appellant's conviction upheld

    b. Forty (40) years sentence set aside and substituted with twenty (20) years imprisonment

DATED, SIGNED AND DELIVERED VIRTUALLY ON 5TH JUNE, 2025.

HON. T. W. OUYA

JUDGE

For Appellant...Samuel Gitahi Njau present at Kamiti

For Respondent.....No appearance

Court Assistant.....Jackline