Wamuyu v Republic (Criminal Appeal E022 of 2022)
[2025] KEHC 8673 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8673 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E022 OF 2022

TW OUYA, J

JUNE 19, 2025

BETWEEN

EVANS KARIUKI WAMUYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. P.N. Maina, (Chief Magistrate) in Nyeri Chief Magistrate's Court Sexual Offences Case No. 34 of 2020 delivered on 16th May 2022)

JUDGMENT

1. The Appellant was arraigned before the Chief Magistrates Court at Nyeri and charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual offences Act*. The particulars of the offence were that on the 14th day of October 2020 at around 12.30pm at Ruria Sub location within Murang'a County, the accused person intentionally caused his penis to penetrate the vagina of V.T.W, a child aged 15 years.

2. In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the 14th day of October 2020 at around 12.30pm at Ruria Sub Location within Murang'a County, the accused person intentionally and unlawfully touched the vagina of VTW a child aged 15 years with his penis.

3. The prosecution called four(4) witnesses to prove their case, while the appellant was the only witness in his case, and at the end of the trial, the accused was found guilty of the offence of defilement contrary to section 8(1)as read with 8 (3) of the *Sexual Offences Act* and convicted under Section 215 of the *Criminal Procedure Code*. He was subsequently sentenced to twenty (20) years imprisonment.

4. Aggrieved with both conviction and sentence, the appellant has filed the instant appeal on the following grounds:

a. The trial magistrate erred in law and fact by failing to consider that there was a grudge between the appellant and PW2 over the issue of sand, hence occasioning a serious dereliction of justice;

b. The trial magistrate erred in law and fact by failing to consider that the element of the offence charged was not proved beyond reasonable doubt, again occasioning miscarriage of justice;

c. The trial magistrate erred in law and fact by rejecting the appellant's defence without a cogent reason

d. The first appellate court judge erred in law by failing to consider the sentence meted out which is harsh and excessive.

5. To discharge its burden, the prosecution called a total of four (4) witnesses. PW1, who gave sworn evidence, stated that she is 15 years old. She states that on 14th October 2020 she had gone to fetch firewood from the forest when the appellant found her, held her and fell her down. Thereafter, the appellant removed her clothes and defiled her. In the process, the appellant touched her breast. She was unable to scream because the appellant held her mouth. The appellant then left PW1, who took her firewood and told her mother about the incident. The appellant was beaten and taken to the police station while PW1 was escorted to Murang'a Hospital. PW1 knew the appellant prior to the incident as he used to pass by their home in a lorry. PW1 said that the incident happened during the day at around 2.00pm.

6. PW2, Tabitha Wanjiru, testified that on 14th October 2020 she came back from work and found that her child, PW1 was not at home. Upon inquiring, she was informed that PW1 had gone to fetch firewood. She proceeded to look for her and upon not finding her, she sat down in a shade and waited for her. After a while, PW1 came back with little firewood and informed her that the Appellant had held her by force. She saw the appellant come from the forest with an energy drink, which he alleged belonged to PW1. In anger, she slapped the appellant and escorted him to the police station. Thereafter, she took PW1 to Murang'a General Hospital for treatment. She knew the appellant prior to the incident as a broker for sand. PW1 visited the scene with her sister-in-law, Valentine.

7. PW3, Linus Muturi Kabora, a clinical officer stationed at Murang'a level 5 hospital testified on behalf of his colleague David Githinji who had since retired. He stated that he had worked with the said David Githinji for 22 years and was well acquainted with his handwriting and signature. He further stated that PW1 went to the medical facility on 14th October 2020 in the company of her mother with a history of having been defiled by a person well known to her. Medical examination revealed that there was a small laceration on the posterior aspect of the vaginal opening. The hymen was freshly torn/ broken and there was mild bleeding in the vagina. The patient, PW1, appeared in pain therefore a high vaginal swab could not be done. A urinalysis was done and the conclusion was that the patient had been defiled. She was counselled and put on treatment. On cross examination PW3 stated that the patient had been a virgin prior to the incident as the hymen was freshly broken, the laceration was fresh and there was active bleeding in the vagina.

8. Hilda Marete, PW4, of Kabuta Police Patrol base testified as the investigating officer having taken over the file from PC Mary Njeru who had since been transferred from Nyeri police station. She received PW1's birth certificate from PW2. The date of birth was recorded as 23rd October 2015. Therefore, PW1 was aged 15 years at the time of the incident. She also stated that there was no independent witness for the offence.

9. When placed to his defence the appellant stated in a sworn statement that he was a sand harvester aged 30 years old. He denied knowing PW1. Instead, he alleged that PW2 had borrowed Ksh. 7,400.00 from

him with the promise that it would be refunded through supply of sand on 6th and 7th October 2020. However, PW2 failed to deliver the sand leading to several misunderstandings among them ultimately leading to the false accusation that he had defiled PW1.

10. The appeal proceeded by way of written submissions. The Appellant submitted that the trial court had failed to his defence which was based on the fact that he had been framed for the defilement due to an existing grudge between him and PW2. He also submitted that the elements of the offence of defilement had not been proved to the standard required by law. He relied on the case of Fappyton Mutuku Ngui vs Republic [2010], John Muthama vs Republic [2016] and Francis Ndung'u Tweni versus Republic [2017]eKLR to argue the position that the elements of the offence of defilement to wit penetration, age and identity of the perpetrator had not been proved.

11. Regarding the sentence, the appellant submitted that it was harsh and excessive as it denies the trial court the discretion to impose any other sentence other than the one stipulated in Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*.

12. The Respondent on the other hand submitted that the three ingredients of the offence of defilement of proof of the age of the complainant, penetration and positive identification of the complainant were proved. That the age was established by the complainant herself that she was 15 years of age. That the Birth Certificate indicated that she had been born on 23rd October 2015.

13. It was submitted that penetration was established by the testimony of the complainant that the appellant inserted his penis in her vagina and medical evidence confirmed that she was a virgin prior to the defilement as her hymen was freshly torn, the laceration was fresh and there was vaginal bleeding. Also, PW1 was in so much pain during the examination that a high vaginal swab could not be done.

14. It was further submitted that the complainant knew the appellant and identified him as the person who defiled her. The Prosecution relied on Reuben Taabu Anjononi and 2 others versus Republic 1980 (KLR) where it was held inter alia that:

> " ... this was however a case of recognition not identification of the assailant; recognition of an assailant is more satisfying more assuring and more reliable than identification of a stranger because upon the personal identification of the assailant in one form or another."

15. Regarding the appellant's defence, the prosecution submitted that the same was merely an afterthought as it did not arise in cross examination of either PW1, PW2 or PW4. This shows that the trial court actually considered the appellant's defence.

16. The prosecution relied on the Supreme Court case in Petition E018 of 2023 Republic versus Joshua Gichuki Mwangi urging that the sentence of 20 years meted against the appellant was both legal, lawful and just considering the gravity of the offence.

Analysis And Determination.

17. The role of this court as the first appellate court is well settled. It was held in the case of Okeno vs. Republic (1972) EA 32 and in Mark Oiruri Mose vs. R (2013) eKLR that a first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its own independent conclusion but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

18. The ingredients of the offence of defilement are: the age of the victim, penetration and proper identification of the perpetrator see George Opondo Olunga vs. Republic [2016] eKLR.

19. It is of utmost importance to prove the age of the victim in a case of defilement. In the case of Hadson Ali Mwachongo v Republic [2016]KECA 521(KLR), the Court of Appeal held that:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

20. The age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR that:

> " ... 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."

21. The appellant in this case was charged with defiling a girl aged 15 years. PW1 in her oral testimony stated that she is 15 years old. This was corroborated by PW2 who stated that PW1 was born on 23rd October 2015. PW4 also produced PW1's birth certificate which she obtained from PW2 indicating that PW1 was born on 23rd October 2015. The birth Certificate was produced in Court as Prosecution Exhibit 4. In light of the decision in Edwin Onsongo Case (Supra), I find that the age of the victim was sufficiently proved as required by law to be 15 years old.

22. On whether there was penetration of the victim's genital organ, it is now well settled that penetration can be proved by direct or circumstantial evidence. The Supreme court of Uganda put it succinctly in Bassit*a v Uganda S.C. Criminal Appeal No. 35 of 1995* which was quoted with approval in Sammy Charo Kirao v Republic [2020] KLR where the court stated;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

23. Unlike other crimes where invariably eye witness evidence is available, it is seldom that eye witness accounts would be available in a sexual offence as the act will always be perpetrated in secrecy away from the public eye. That explains why the evidence to be relied upon more often than not will be the evidence of the victim corroborated by medical evidence (where available) and circumstantial evidence.

24. In the instant case, in support of the fact of penetration, we have the evidence of the minor victim (PW1), PW2, and PW3 (clinical officer). The evidence of PW1 was to the effect that the appellant found her in forest gathering firewood, held her and had intercourse with her while covering her mouth. The incident happened during the day and the appellant was well known to her. PW2 testified that she saw the appellant leaving the forest carrying an energy drink which he alleged belonged to PW1. This therefore places the appellant at the scene of the incident.

25. PW3 testified on behalf of his colleague of 22 years who had since retired that PW1's hymen was freshly broken, with fresh lacerations and active bleeding. He made a conclusion that there was defilement. He tendered the P3 form, treatment notes and PRC form filled in evidence.

26. For the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete. Section 2 of the *Sexual Offences Act* defines "penetration" as:

> 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

27. In Abdulsalim v Republic (Criminal Appeal E005 of 2023) [2023] KEHC 25863 (KLR) (30 November 2023) the court stated that:

> "Proof of penetration can be either by way of medical evidence or other evidence.

28. The trial court, in the instant case, noted that the trustworthiness of the victim and the credibility of her testimony was not in doubt as the same had been corroborated by medical findings as testified by PW3 and in the expert reports admitted as evidence pursuant to Sections 48 and 77 of the *Evidence Act*.

29. In the present appeal, evidence abounds that there was actual penetration of PW1's vagina as there is medical evidence that the hymen was freshly broken, there was fresh lacerations and active vaginal bleeding.

30. As regards the identification of the Appellant as the perpetrator of the act, the evidence adduced is that of PW1 and PW2. PW1 testified that the appellant found her in forest gathering firewood, held her and had intercourse with her while covering her mouth. The incident happened during the day and the appellant was well known to her. PW2 testified that she saw the appellant leaving the forest carrying an energy drink which he alleged belonged to PW1.

31. Both PW1 and PW2 are clear that the appellant was known to them as he was not a stranger. Therefore, there evidence on him was based on recognition. It should be noted that PW1 went to the hospital on the very day that she had allegedly been defiled by the appellant. Also, PW2 recognized the appellant leaving the same forest that PW1 had gone to fetch firewood in, carrying an energy drink that allegedly belonged to PW1.

32. In Anjere v Republic (Criminal Appeal E028 of 2022) [2024] KEHC 2855 (KLR) (20 March 2024) (Judgment) the court stated:

> " It is trite law that recognition of an attacker is more satisfactory, more assuring and more reliable than identification of a stranger as it depends on personal knowledge of the Assailant by the complainant."

33. Although the appellant alleged that he had been framed, the trial court noted that his defence did not cast any shadow on the prosecution's case since penetration had been properly established. The defence was thus an afterthought.

34. I have looked at the defence proffered by the Appellant at trial. He asserts that he had given the complainant's mother kshs. 7,400.00 and when he demanded the same she reported him to the police. He never raised this issue in cross examination of either PW1 or PW2. I have weighed the evidence from both divides. In light of the weight of the prosecution's evidence and especially the evidence of

PW1 and PW3, the medical officer, the Appellant's defence cannot possibly be true. On the whole and through my own evaluation of the evidence in totality, I am satisfied that the Appellant was the perpetrator of the offence.

35. As regards sentence, the sentence prescribed for the offence as per Section 8(3) of the *Sexual Offences Act* is twenty (20) years imprisonment. Although the court is not to consider itself bound by the minimum sentences prescribed, the court balances between the mitigation by an Accused person vis-a- vis the aggravating factors.

36. It is trite law that sentencing is at the discretion of the trial court. Like all discretionary powers, it must be exercised judiciously. A proper basis must be laid for the court to interfere with the sentence of a trial court. An appellate court can only interfere when there is evidence that the discretion was exercised injudiciously, or that the sentence was manifestly harsh, or that the court considered extrinsic factors to sentence, or omitted to consider material factors.

37. In MMI v Republic [2022] eKLR, the court stated thus:

> " ...The principles guiding interference with sentencing by the appellate court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at paragraph 12 where it was held that:
>
> A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court ..... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had been the trial court is so marked that it can properly be described as ''shocking'', ''startling'' or ''disturbingly inappropriate.''

38. The appellant argues that the sentence meted by the trial court was not only harsh and excessive but also denied the trial court an opportunity to exercise discretion. I have noted that the court took the appellants statement in mitigation and considered that the appellant was not remorseful. Therefore, the trial court meted the sentence of twenty (20) years imprisonment as per the law.

39. It is noteworthy that the appellant in challenging the sentence imposed by the trial court has merely termed it as harsh and excessive. He has not in any way challenged its constitutionality or legality. As a result, the sentence under Section 8 (3) of the *Sexual Offences Act* remains lawful and legal unless declared unconstitutional by a superior court or amended by Parliament.

40. The Supreme Court of Kenya in Petition E018 of 2023 Republic versus Joshua Gichuki Mwangi versus Republic, in addressing the issue of minimum offences under the *Sexual offences Act* remarked thus:

> " As we have stated before, this Court recognizes and respects the constitutional competence of courts in the judicial hierarchy to resolve matters before them. We have also settled that for an appeal to lie to the Supreme Court from the Court of Appeal under Article 163(4)(a), the constitutional issue must have first been in issue at both the High Court and then the Court of Appeal for determination." [Emphasis mine]

41. The Supreme Court further stated that:

> 51. In light of the structural and supervisory interdicts issued, the Court issued the Muruatetu Directions, wherein it, inter alia, pronounced itself on the application of its decision in the Muruatetu Case to other statutes prescribing mandatory or minimum sentences as follows:
>
> We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute."

42. In the Joshua Gichuki case(supra), the Supreme Court distinguished mandatory sentences from minimum sentences thus:

> " Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words."

43. In light of the above, I find that the trial court did have jurisdiction to exercise its discretion in sentencing and upon taking into consideration the mitigation and the aggravating circumstances opted to sentence the appellant to the minimum sentence of Twenty (20) years imprisonment.

44. In this case, the victim was 15 years old and a virgin. This is an aggravating factor which called for a deterrent sentence. The trauma and impact of this incident on her life will live with her forever. Twenty years is provided for in respect of the offence under Section 8(1)(3) of the *Sexual Offences Act*. It is a legal sentence. No basis is laid for this court to interfere with the sentence. With this result, I find no ground upon which to fault the judgement and findings of the trial court. The evidence adduced supported the charge and the degree of proof required in law was met. The appeal has no merit and is dismissed.

45. Consequently, I find that this appeal lacks merit and is hereby dismissed. The conviction and sentence of the accused are upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH JUNE, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....EVANS KARIUKI WAMUYU

For Respondent.....P Mwangi

Court Assistant.....Brian