Ambetsa v Republic (Criminal Appeal E066 of 2024) [2025] KEHC 10212 (KLR) (15 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E066 OF 2024

S MBUNGI, J

JULY 15, 2025

BETWEEN

MOHAMMED MUSA AMBETSA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment in Butere PM'S Court S. O No. E029 OF 2022 By Hon E. Wasike-Principal Magistrate.)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (2) as read with Section 8 (1) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(A) of the *Sexual Offences Act* No.3 of 2006.

2. He was tried and convicted by the Learned Trial Magistrate, Hon E. Wasike (PM), who sentenced him to twenty (20) years imprisonment.

3. Being dissatisfied with the said Judgement, on 24th April 2024, he lodged the Appeal herein. The same was dated 12th June 2024. He set out eight (8) grounds of appeal as follows;

    a. That the learned magistrate grossly erred in both law and fact by convicting him without considering that the main ingredients were not conclusively proved beyond a reasonable doubt.

    b. That the learned magistrate erred in law and fact by presiding over a trial that violated his right to a fair trial under Article 50 (2)(c) of *the constitution*.

c. That the learned trial magistrate erred in both law and fact by sentencing him to 20 years' imprisonment without exercising the judicial discretion powers in sentencing.

d. That the learned trial magistrate grossly erred in both law and fact by finding penetration proved without noting that the absence of hymen alone was not conclusive proof of penetration.

e. That the learned trial magistrate erred in law and fact by failing to interrogate the medical evidence tendered.

f. That the learned trial magistrate wrongfully admitted the medical evidence without appreciating the period the offence took before it was reported to the police.

g. That the learned trial magistrate erred in both law and fact by imposing on him a harsh, excessive sentence and failed to consider that this was a systematic, planned strategy to implicate him in this case.

h. That more grounds would be adduced during the hearing and after receiving the proceedings of the trial court.

i. That the trial court erred in law and in fact in not weighing the conflicting evidence in the prosecution's case that was inconsequential to the conviction

j. That the trial court erred in law and fact in not appreciating the Appellant's cogent defence that overwhelmed the prosecution's case

a. That others are to be adduced upon perusal of the court's records

4. The appellant prays that this court quash the 20-year conviction and set him free.

5. This appeal was to be canvassed by way of written submission, but at the time of writing this judgment, none of the parties had filed their submissions on the CTS.

Brief of the facts

6. PW1, SO, was the complainant's uncle. He testified that on 9/7/2022, he got a call from his mother informing him that his niece had been defiled. They interrogated her, and she informed them of what transpired. They reported the case at Butere police station, and later the minor was escorted to Butere County Hospital, where she was examined and treated.

7. He produced the P3 form marked PMF I 1, PRC form marked PMF 2, treatment notes marked PMF 3, and the lab request form marked PMF 4, as well as her birth certificate marked PMF 5.

8. PW2, the complainant, stated that at the time of the incident, she was staying with her grandmother at Sabati. She recalled that on 9th July 2022, the accused called her and her friends A and B while they were on their way to harvest and gave them sodas and doughnuts, and then asked the two, A and B, to leave the house.

9. She testified that the accused closed the door and took her to the bedroom. He started to remove his and her clothes, and proceeded to defile her, and later put back his clothes.

10. She then left for her grandmother's house and informed her what transpired. later on after showering, they went to the police station and then the hospital where she was examined and treated.

11. On cross-examination, she identified the accused as their neighbor and the person who defiled her. She confirmed that she showered at her grandmother's request, and later they went to report the case at the police station.

12. On re-examination, she clarified that her grandmother had asked her to say it all in court and denied the allegation that her uncle had coached her and confirmed that she did not bleed during the incident.

13. PW3 was the complainant's grandmother. She confirmed knowing the accused as their neighbours. She recalled that on 9.7.2022, she had gone for a funeral and when she came back, found PW2 and her other grandchildren missing.

14. She later learnt from a neighbour's child that PW2 was at the accused's home. She testified that around 7 p.m., PW2 came home and informed her of what transpired. How the accused lured them to his house with sodas, later chased the other children, and proceeded to lock the door and defile her.

15. She claimed that she immediately informed the village elder and PW1, who took the minor to the hospital and then to the police station.

16. On cross-examination by the accused, she confirmed that they were neighbours and denied knowing any differences between PW1 and the accused.

17. PW4 was the clinical officer stationed at Butere sub-county Hospital. She produced the treatment notes PMF1-3, the P3 form as PMF1-1, the PRC form as PMF1-2, the Lab request form as PMF1-4 for PW1, and the accused person examination form as PMF1-2. On examination, she confirmed that the minor had vaginal discharge and a broken hymen, which was fresh. The lab tests indicated that there were epithelial cells, pus cells, and blood in the urine. She produced the medical treatment notes.

18. On cross-examination, she confirmed that the minor, who was 9 years old at the time, had a broken hymen and bleeding from her vagina.

19. PW5 was police constable Stephen Keino from Butere police station, who stood in place of his colleague. He testified that according to the investigating officer, PW1 had been defiled by the accused on 9/7/2022. She was later referred to Butere County Hospital, where she was examined and the P3 form filled.

20. On cross-examination by the accused, he confirmed that he was standing in for his colleague who investigated the case. He further confirmed that they visited the crime scene on 11/07/2022 and denied the claim that the accused had been framed.

21. The prosecution closed its case, after which the trial court established that it had proved a prima facie case and placed the accused on his defence.

22. DW1 was the accused. He testified that on 9/7/2022, around 6:40 a.m., he was at home and later left for the mosque where he indulged in various activities until 6.45 p.m. when he left the mosque and arrived home at 7.30 p.m., only to be informed the next day that some people were looking for him.

23. On 11.7.2022, his grandchild told him that some people were looking for him, and he learnt that he had been accused of defiling a child. He denied the allegation and claimed that the families had a land dispute and that the allegations against him had been fabricated.

24. DW2 was Mohammed Okumu; he testified that they were neighbours with the accused and recalled that on 9/7/2022, he had gone to the mosque for prayers, and he was with the accused. They were at the mosque for the preparation of the celebrations, and they parted ways at 6.30 p.m. He claimed that

four days later, he was shocked to learn that the accused had defiled a minor and avers that the two families had a land dispute.

25. The defence closed its case. The trial court, upon analysing the evidence and the defence case, concluded that the prosecution had proved its case beyond a reasonable doubt.

26. The trial court found that the accused was guilty and sentenced him to 20 years' imprisonment, which has now prompted the current appeal

Analysis and Determination.

27. As this is the first appeal, the court will re-evaluate the evidence afresh and arrive at its independent conclusions. Except, being minded to give allowance to the fact that the court neither saw nor heard the witnesses firsthand

Issues for determination

28. Based on the grounds raised by the appellant, the following are the main issues for determination.

    i. Whether the prosecution proved their case beyond a reasonable doubt; and

    ii. Whether the sentence was manifestly harsh and excessive

29. On the first issue, the Appellant was charged with 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."

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

    i. Age of the complainant;

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

    iii. Identification of the assailant.

31. The first element for determination is the age of the complainant. PW1, the complainant's uncle, testified that at the time of defilement, which was on 9/7/2022, the complainant had been 10 years old. He produced her birth certificate marked as PMF1-5 as evidence. I have perused the minor's birth certificate and note that her date of birth is 4/3/2013, which places her age at 9 years old at the time of the offence.

32. On this question of age, I am content to cite the case of Fappyton Mutuku Ngui v Republic [2012] eKLR, where it was held that:

> Conclusive" proof of age in cases under the *Sexual Offences Act* does not necessarily mean a 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."

33. Based on the evidence adduced, I find that the age of the victim was proved to be 9 years. The trial court, which saw and heard the complainant, did observe and was persuaded beyond doubt that the child was of that age.

34. I find that the prosecution adduced sufficient evidence to prove that the complainant was nine (9) years old at the time the offence was committed. The age of the complainant was proved beyond any reasonable doubt.

35. The second element for determination is penetration.

36. 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".

37. Pw2 testified that on the material day, the appellant lured her and her friends with soda and doughnuts to his house and later chased her friends away and proceeded to close the door, remove her clothes and his clothes, and defiled her. She left the accused's home and, when asked, told her grandmother what happened.

38. Her evidence was corroborated by the clinical officer, PW4, who testified that upon examination, the minor had vaginal discharge and that the hymen was freshly broken. Upon conducting a lab test, they found epithelial cells, pus cells, and leucocytes present as well as blood in her urine. This is prima facie evidence of penetration; hence, there can be no doubt that penetration was occasioned on the complainant.

39. On the issue of identification, PW2 testified that the appellant was her neighbor, the same was corroborated by her grandmother, PW3, and PW1, her uncle. There was no doubt that the Appellant was a person known to the complainant. She testified that the accused was her relative. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

40. The appellant gave a defence of alibi saying that at the time of the alledged incident he was at the mosque from 6.40 am to 6.45 pm. He called Mohammed Okumu Kataka alias Josephat as a witness to support his alibi. Mohammed Okumu Kataka said that he was with the appellant at the mosque and they went home together.

41. A defence of alibi should always be raised at the earliest time during the trial to enable the prosecution to adduce evidence to rebut the same if necessary. In this case the appellant raised the defence late in the proceedings during his defence the prosecution did not have a chance to rebut. Secondly the time of the day when the incident occurred did not arise as an issue in the proceedings. Further the complainant was aged 9 years. At this age ordinarily a child is too naïve and innocent to tell lies. The complainant was firm it is the appellant who defiled her, a person whom she used to know. I find no reason to fault the trial court for believing in her evidence. Section 124 of the *evidence act* permits a court to believe in evidence of a minor in sexual offences trial if the court believes the minor is telling the truth.

    Section 124 provides........Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, 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.

42. It is therefore the finding of this court that the appellant was rightly identified as the perpetrator.

43. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement, namely, penetration and minority age of the victim, were proved beyond doubt. The conviction was therefore proper.

44. The appellant raised the issue of sentencing. He opined that the sentencing of 20 years for the offence was too harsh and further that the trial magistrate failed to exercise his judicial discretion while sentencing.

45. On the issue of sentencing, Section 8 (2) of the *Sexual Offences Act* to Convict provides as follows:

> " 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."

46. Sentencing is a discretion of the court of law, but the court should look at the facts and the circumstances in their entirety to arrive at an appropriate sentence. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharashtra at paragraphs 70 – 71, where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of criminal law is the imposition of appropriate, adequate, and proportionate sentences commensurate with the nature and gravity of the crime and how the crime is committed.

47. Further, this Court is guided by the principles set out in the Court of Appeal case of Bernard Kimani Gacheru vs. 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, a sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a sentence unless that sentence is manifestly excessive in the circumstances of the case, or 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 one of the matters already stated is shown to exist."

48. The objectives of sentencing should be considered in totality. In this regard, section 8(2) of the *Sexual Offences Act* gives no room for the exercise of judicial discretion.

‘’ (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.”

49. In Petition No E018 of 2023 Republic v Joshua Gichuki Mwangi wherein the court faulted the Court of Appeal's decision to reduce the sentence meted out on the appellant from 20 years to 15 years on the grounds of unconstitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act. The Supreme Court noted that:

> " The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence, which was not the case in the present matter."

50. The trial court, in my view, exercised its judicial discretion wrongly in awarding a sentence of 20 years as opposed to life imprisonment as stipulated in Section 8 (2) sexual Offenses Act, the sentence is illegal given the supreme courts pronouncement that all sentences prescribed under *sexual offences act* are lawful, and in the circumstances, I do interfere with the same and set aside the sentence of 20 years and replace it with sentence of Life Imprisonment. Therefore the appellants appeal is dismissed, conviction upheld and sentence enhanced. The appellant to serve life imprisonment instead of 20 years.

51. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 15TH DAY OF JULY, 2025.

S.N MBUNGI

JUDGE

In the presence of:

Appellant –

Court prosecutor – Ms. Osoro present

Court Assistant – Elizabeth Angong'a