Gacheru v Republic (Criminal Appeal E010 of 2024)
[2025] KEHC 10536 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10536 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E010 OF 2024

TW OUYA, J

JULY 18, 2025

BETWEEN

JOSPHAT KARANJA GACHERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. D. N Muyoka SPM in the Chief Magistrate's Court at Gatundu in Thika MCSO E034 of 2022 delivered on 14th September 2023)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual offences Act*. The particulars of the offence are that on 22nd September 2022 at (Particulars withheld) village, (Particulars withheld) Sub County within Kiambu county, intentionally caused his penis to penetrate the vagina of JWN a child aged nine (9) 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 22nd September 2022 at (Particulars withheld) village, (Particulars withheld) Sub- County within Kiambu county, intentionally touched he vagina of JWN a child aged nine (9) years with his penis.

3. The prosecution adduced evidence through five witnesses and at the end of the trial, the appellant was convicted of the main charge and sentenced to fifty years imprisonment. Aggrieved with both the conviction and sentence, the appellant preferred the instant appeal on the following grounds:

    i. The learned judge failed in law and facts considering that the evidence adduced of the doctor was not enough to base a conviction.

    ii. The learned judge failed in law and facts that the first report of the complainant was doubtful according to other witnesses' testimonies.

iii. The learned judge failed in law and facts in convicting me based on witnesses' evidence which was fully contradictions.

iv. The learned judge failed in law and facts to give due consideration on the plausible defence.

v. The learned judge failed in law and facts to rely on prosecution evidence that was riddled with contradictions and discrepancies leading to selective judgment.

4. The Respondent has opposed the appeal and filed a notice of enhancement of sentence to life imprisonment pursuant to Section 8 (1) as read with 8(2) of the *Sexual Offences Act*. The Respondent contends that the prosecution did discharge its burden of proof to the required standard as the evidence tendered in chief was not in any way discredited by the defence during cross examination. Therefore, the Respondent has urged that the instant appeal be dismissed, the appellant's conviction be upheld and the sentence be enhanced to life imprisonment as per the law.

5. The prosecution called five witnesses while the accused gave sworn evidence and called three witnesses who denied being witnesses for the defence.

6. JWN, PW1, testified on affirmation that on 22nd September 2022 at about 11.00 am she was at home when she was sent together with K, her younger brother, by a certain mama Ken to confirm whether Mama Mboga had opened. The appellant called them and promised to give them something. He bought them samosas and, on their way back, the appellant held K and told PW1 that she was cute and beautiful. The appellant then told PW1 to take K home and return to him stealthily without K noticing. She then went to the appellant's place, where he works as a welder. The appellant showed PW1 photos of Diamond, he then told PW1 that he wanted to close the door, PW1 told the appellant that she wanted to go but the appellant held her and threw her onto his bed. He removed PW1's clothes and caused her to lie in supine position. The appellant was wearing a trouser while PW1 was wearing a pink underwear. The appellant then lay on PW1 and then 'put his thing in her thing that she uses to urinate'. Once he was done, he gave PW1 water to wash her private part and Ksh. 80 to buy whatever she needed. He then told PW1 not to tell anyone about the incident while adding that he would marry PW1. He also promised to buy PW1 a mobile phone. She never told anyone about the incident. However, mama samosa informed PW1's mother that she saw her entering the appellant's house. PW1's mother then escorted her to the police station then later the minor was escorted to Gatundu Hospital. The minor identified the pink pant that she was wearing on the day of the incident in court.

7. PW2, NN, PW1's mother, stated that, PW 1 was born on 29th March 2013. She testified that the appellant is not known to her, however, she occasionally saw him at a house he had rented for doing welding work. It was her testimony that on 22nd September 2022 at 05.00pm she was at work when MJ inquired whether PW1 was her child. Upon responding in the affirmative, the said MJ informed her that the appellant had gone with PW1 to her shop and bought samosa for PW1 and another child. She had also seen PW1 enter the appellant's house. She inspected PW1's panty and saw that she had some dent in her vagina. Also, the pant was smeared with something. On inquiring from PW1 what happened, she told her that the appellant had asked her to go to his house and get money for buying Mutura. When she went there, the appellant had sex with her three times.

8. PW3, MW alias MJ, testified that she sells soup, samosa and other eateries. It was her testimony that the appellant is her immediate neighbour at work. He is a welder. She stated that on 22nd September 2022 at around 10.00am she had prepared samosas when PW1 and a small child went to her stall together with the appellant, who bought them samosas. On being asked why he was buying for the children the samosas, the appellant said that it is because the children called them uncle. Shortly thereafter, she

saw PW1 getting into the appellants house, when she noticed that she was taking long, she went and knocked the appellant's door, prompting PW1 to come out. Her trouser was wet and upon asking her what happened to her, she started crying and went away. Later when PW1's mother came back, she informed her of the incident.

9. Dr. Gibson Ndungu , a medical officer at Gatundu level 5 hospital, testified as PW4. He stated that he has five years' experience as a medical officer. He filled PW1's P3 Form. The minor had been taken to the facility under the escort of a police officer with a history of having been defiled by a person well known to him. There were bruises on the lateral vagina, no discharge was noted and the degree of injury was classified as grievous harm.

10. The investigating officer, PC Fedina Kebenyesi, testified as PW5. She stated that on 29th September 2022 she was called by report office personnel and informed that there was a case involving a child that had been reported. She interviewed the child who informed her that she had been defiled by uncle engineer, who had earlier bought her some samosas from MJ. She escorted the child to the hospital where she was examined and treated. She obtained a copy of her birth certificate and established that she was 9 years old at the time of the offence. The appellant was then arrested with the help of officers from Kahuguini Police station.

11. At the end of the prosecution case, the court found that the appellant had a case to answer and put him on his defence. He gave sworn evidence and called three other witnesses. In his testimony, he denied defiling PW1. DW2, Francis Waweru, on the other hand testified that he was following up the case for his brother, he denied being a witness in the case. DW3, James Ngure, also denied being a witness in the case. A similar position was shared with DW4, who also denied being a witness in the case.

12. The appeal was canvassed through written submissions. The appellant filed amended grounds of appeal faulting the sufficiency of the evidence on which his conviction was based. He also termed the sentence meted against him as harsh and excessive.

13. I have read the record of appeal together with the submissions by both the appellant and the Respondent and find that the main issues for determination are whether the prosecution proved its case beyond reasonable doubt and the legality of the sentence meted against the appellant.

14. The role of this court as the first appellate court is well settled. It was held in the case of *Okeno v Republic* (1972) EA 32 and in *Mark Oiruri Mose v 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.

15. The appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with 8 (2) of the *Sexual Offences Act* number 3 of 2006. Section 8 (1) provides as follows:

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

16. This being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt. The ingredients of the offence of defilement are: the age of the victim, penetration and proper identification of the perpetrator – see *George Opondo Olunga v Republic* [2016] eKLR.

17. 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*, 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."

18. 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 v 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."

19. The appellant in this case was charged with defiling a girl aged 9 years. PW1 testified that she was nine years old having been born on 29th March 2013. This testimony was corroborated by PW2 who stated that PW1 was born on 29th March 2013. PW5 also testified that she obtained a birth certificate from PW2 which indicated that PW1 was born on 29th March 2013. PW5 produced the birth certificate in court as proof of age of PW1. I therefore find that the age of the victim was sufficiently proved as nine years.

20. On the proof of penetration, penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

On this, PW4 stated that on examining PW1, she had bruises on the lateral vagina, the degree of injury was classified grievous harm.

21. In the instant case, PW1 described the specifics of the act of penetration. She gave a step-by-step account of how the appellant lured her into his house and defiled her and after that gave her water to wash herself. I have considered that under the proviso to section 124 of the *Evidence Act*, evidence of a single sexual offence victim does not require corroboration and a court can convict on such evidence upon recording reasons for believing such evidence. In the instant case, the medical evidence corroborated the statement of the minor: she had bruises in her lateral vagina which were classified as grievous harm.

22. For emphasis, the corroborative evidence in this case is the medical evidence of PW4 as well as the evidence of PW3 which gave evidence on conduct of the appellant on the day of the incident, both before and after the act of defilement.

23. I find that the prosecution proved the element of penetration to the required standard of proof.

24. On identification of the perpetrator, it is on record that the appellant was known to both PW1 and PW3. PW1 testified that the appellant lured her into his house at around 11.00am after buying for her samosa and forcefully had sex with her. Therefore, this was a case of recognition as opposed to

identification. In the case of *Reuben Taabu Anjononi & 2 Others v Republic* the Court of Appeal in Nairobi held:

> "…….recognition not identification of assailants is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See also the case of *Julius Waititu Muthutite v Republic*. On the issue of recognition, I find that the complainant positively identified the appellant as the perpetrator."

25. On the contention that the appellant's defence was not considered, I have carefully gone through the judgment by the trial court. The trial court considered the defence and found that it could not withstand the strong evidence that was adduced by the prosecution.

26. On the sentence, the appellant has challenged the same as being harsh and excessive and further that it is unconstitutional. The appellant was sentenced to fifty years imprisonment; however, the minimum sentence under Section 8 (2) of the *Sexual Offences Act* is life imprisonment. The sentence imposed was therefore unlawful.

27. In the case of *Republic v Joshua Gichuki Mwangi* Supreme Court of Kenya Petition No. E018/2023, the Supreme Court affirmed the legality of the minimum sentences under the *Sexual Offences Act* as they do not deprive the Judicial Officers of the power to exercise judicial discretion. The Supreme Court held that the sentences under the *Sexual Offences Act* remain lawful as long as Section 8 of the *Sexual Offences Act* remains valid. This decision binds this court by dint of the doctrine of 'stare decisis'.

28. In *Kidero & 5 Others v Waititu & Others* Supreme Court Petition No 18/2014 (consolidated with Petition No. 20/2014- it was stated:-

> "The principle of Stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system."

29. The Supreme Court has settled the Law on the sentences under Section 8 of the *Sexual Offences Act* and this court cannot depart from it. I hereby set aside the sentence of fifty years imprisonment and replace it with the lawful sentence of life imprisonment.

30. In the upshot, the appeal against conviction is dismissed, while the appeal against sentence succeeds to the extent that the fifty-year imprisonment is set aside and replaced with the lawful sentence of life imprisonment.

DATED, SIGNED AND DELIVERED VIRTUALLY AND ELECTONICALLY THIS 18TH JULY, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....Absent

For Respondent.....Ms Torosi

Court Assistant.....Brian