Kabayo v Republic (Criminal Appeal E015 of 2024)
[2025] KEHC 10307 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10307 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E015 OF 2024

JN KAMAU, J

JULY 16, 2025

BETWEEN

JETHRO LUSENO KABAYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. M. Gituma (SRM) delivered at Vihiga in the Senior Principal Magistrate's Court in Sexual Offence Case No 2 of 2020 on 18th October 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) 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(1) of the *Sexual Offences Act*.

2. The Learned Trial Magistrate, Hon M. M. Gituma (SRM) convicted him of the main charge and sentenced him to twenty (20) years imprisonment.

3. Being dissatisfied with the said Judgement, on 13th March 2024, he lodged the appeal herein. His Petition of Appeal was dated 17th November 2022. He set out four (4) grounds of appeal.

4. His Written Submissions were dated 6th November 2024 and filed on 7th November 2024 while those of the Respondent were dated and filed on 11th December 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof of Prosecution's Case

9. Ground of Appeal No (1), (2) and (3) of the Petition of Appeal were dealt with under this head.

10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Appellant did not submit on this issue. On the other hand, the Respondent submitted that No xxx PC Jane Ekai (hereinafter referred to as "PW 5")testified that the Complainant, TM (hereinafter referred to as "PW 1") was fourteen (14) years old and produced a Birth Certificate to that effect. It added that her uncle, Japheth Afandi (hereinafter referred to as "PW 2") also identified the Birth Certificate which belonged to PW 1. It was its contention that PW 1's age was proved beyond reasonable doubt and that the production of the baptismal card (sic) was not challenged during cross-examination.

13. Notably, PW 5 produced a Birth Certificate which indicated that PW 1 was born on 26th August 2005. The incident took place on 11th January 2020. Thus, PW 1 was fourteen (14) years old at the material time.

    14. As the Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven beyond reasonable doubt and that she was a child at all material times.

B. Identification

15. The Appellant submitted that PW 2 and PW 5 testified that PW 1 was defiled by Japheth, however, in court they drastically changed the assertion and PW 1 stated that she was defiled by Luseno and that she did not know Japheth. In this regard, he relied on the case of Terekali & Another vs Rex (1952) EACA on the issue of first report and later embellishments in court. It was his contention that the Prosecution's evidence created doubt in the mind of the court as to who defiled PW 1.

16. He asserted that other contradictions arose as to the time and where PW 1 was defiled, where she was found after the defilement, if she was at the playing field or at their gate when she was called by the perpetrator, if she had bananas when she met Rose Kageha (hereinafter referred to as "PW 3") or she had thrown them away, if she was with her friend TL (hereinafter referred to as "PW 4"), also known as Q, at the time of the incident.

17. He placed reliance on the case of Ndungu Kimanyi vs Republic [1979]eKLR 283 where it was held that the witnesses in a criminal case upon whose evidence was to be relied upon should not create an impression in the mind of the court that they were not straight forward persons or raise suspicion about their worthiness or do or say something which made it unsafe to accept their evidence.

18. He further contended that although PW 2 claimed that PW 1 was mentally challenged, he did not adduce any medical proof in court in proof of the same. He concluded that the contradictions were grievous, substantial and went to the root of this case hence inconsequential to conviction.

19. He pointed out that although the incident took place at night, in darkness, PW 1 and PW 4 did not state the source of light that informed their identification by recognition. He added that PW 4 stated that PW 1 was called when they were at the play field but did not state at what distance the person who called PW 1 was.

20. He relied on the case of R vs Turnbull (1976) E. 3 All ER 549 without highlighting the holding he relied on therein. He further cited the case of Simiyu & Another vs Republic (2005) KLR 192 where it was held that there was no better mode of identification than by name and when a name was not given, then there was a challenge on the quality of identification and a great danger on mistaken identity arose. He invoked Section 107 of the *Evidence Act* and submitted that the onus was on the Prosecution to prove its case. He argued that although the Trial Court stated that since PW 1 stayed with her perpetrator for quite a long time then she positively identified him but that she lost sight under what light was that long observation made (sic). He asserted that since there was no light, he had proved that there was a long poor observation.

21. He also cited Section 108 and 109 of the *Evidence Act* and argued that it was not provided by law that the proof of identification should lie on the defence questioning the prosecution about light and distance. He was emphatic that the circumstances of identification were not favourable hence mistaken identification. To buttress his point, he relied on the case of Kiarie vs Republic (eKLR citation not given) where it was held that it was possible for a witness to be honest but mistaken.

22. He blamed the Trial Court for failing to appreciate his defence that overwhelmed the Prosecution's case. He argued that his house was searched at the time of the incident but PW 1 was not found there. He asserted that there was a land dispute which was the reason why he had been framed for this crime.

23. On its part, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her. It contended that PW 2 informed the Trial Court that the Appellant was his neighbour and that he lived about a hundred (100) meters away from where PW 1 lived. It added that PW 4 told the Trial Court that the Appellant called PW 1 to his house and that she saw PW 1 get into his house.

24. It pointed out that PW 1 was able to identify the Appellant by his name Luseno and he took her to his house which she knew as they were neighbours. It was its contention that the Trial Court arrived at a correct conclusion that PW 1 was well aware of the person that had defiled her and she was able to easily identify him during trial as Josiah (sic).

25. It argued that the inconsistencies and contradictions raised by the Appellant did not go to the core of the case and that the variance in itself did not in any manner distort or dislodge the defilement of the material day subject of the charge. It submitted that the court was required to consider the evidence adduced as a whole and not selectively. In this regard, it placed reliance on the case of S. O. O. vs Republic[2018]eKLR which cited the case of Dickson Elia Nsamba Shapwata & Another vs Republic Criminal No 92 of 2007 where it was held that the court had to decide whether inconsistencies and contradictions were minor or whether they go to the root of the matter.

26. It was its contention that the Trial Court considered the Appellant's defence but rejected the same after finding it to have been a mere denial which did not rebut the Prosecution's case.

27. A perusal of the proceedings showed that on the material day of 11th January 2021 (sic), PW 1 was at home playing with her sister Q when Luseno, the Appellant, came and entered his house. He saw her at her gate and called her into his house. He locked the door and gave her bananas and sugarcane. He then removed her trouser and shirt, laid on top of her, inserted his thing that he used to urinate in her thing that she used to urinate. He did it twice and stopped. She screamed and her mother came to her rescue. She added that it was her mother that took her to hospital for treatment where she stayed for several days.

28. PW 2 was PW 1's uncle. His evidence was that on the material day of 11th January 2020, he was at Mbale Town when he received a call from PW 3 telling him to go back home quickly. At home he found PW 1, PW 3 and his mother who told him that the incident had occurred at around 5.40pm. He stated that PW 1 informed him that she was with one Japheth and that they were in the sitting room then they went to the bedroom and had sex after he had given her a banana. He added that he asked about it and PW 3 and his mother confirmed the incident. He took PW 1 to the hospital the following day at Vihiga County Referral Hospital.

29. PW 3 testified that on the material day of 11th January 2020, PW 1 went missing and that she heard her late mother in-law who stayed with PW 1 shouting that PW 1 was missing. She said that she was staying near the Appellant about a hundred (100) meters away. She pointed out that it was around 8.30 pm when she assisted her late mother-in-law to look for PW 1 but they did not find her.

30. She further testified that later at around 8.40p.m, she saw PW 1 walking home carrying two (2) bananas. She stated that when she asked PW 1 where she was coming from, PW 1 told her that she was with Luseno, the Appellant, who had called her and defiled her by sleeping with her at the chair and then took her to the bed.

31. PW 4 testified that she was a friend to PW 1 and that one day her grandmother sent her together with PW 1 to Luseno's house (the Appellant's) to get munyu (sic) and when they went to his house, he gave them the munyu (sic) but called PW 1 to his house. She stated that she left for home alone and did not know what PW 1 and the Appellant did in the Appellant's house.

32. In her re-examination, PW 5, who was the investigating officer stated that PW 1 said that she went to Japheth's home and who defiled her.

33. Indeed, there were inconsistencies regarding the name of PW 's perpetrator. PW 2 and PW 5 testified that PW 1 was defiled by Japheth. However, in her testimony, PW 1 was categorical that it was Luseno,

the Appellant herein, who defiled her. She pointed at him at the dock. In her cross-examination, she stated that she did not know who Japheth was. She was the one who would have known who defiled her more than PW 2 and PW 5.

34. As PW 4's testimony corroborated that of PW 1 in that on the material date, they were together when the Appellant called PW 1 to his house, this court was convinced that the inconsistencies did not go into the core of the case as PW 1 was clear in her mind as to who had defiled her. As they were neighbours and not strangers.

35. Although, the Appellant claimed that the issue of lighting at the time of the incident was not proven, PW 2 testified that he was informed by PW 1, PW 3 and his mother that the incident took place as from about 5.40p.m. In the mind of this court, PW 1 and PW 4 would not be playing outside in the night on a normal setting unless it was late in the evening.

36. Having said so, this court noted that PW 1 was the only identifying witness. Notably, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

37. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> 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 (emphasis)."

38. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

39. Both PW 1 and PW 4 positively identified the Appellant. There could not therefore have been any possibility of a mistaken identity.

40. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition

C. Penetration

41. The Appellant did not submit on this issue. On its part, the Respondent submitted that the evidence of PW 1, PW 3 and the Clinical Officer, Ibrahim Vonyali (hereinafter referred to as "PW 6") proved that the Appellant penetrated PW 1's vagina.

42. PW 6 confirmed that on examining PW 1, there were bruises on her labia and minora with a creamish vaginal discharge. He added that her hymen was freshly broken and concluded that she had been defiled. He produced the P3 Form, Post Rape Care (PRC) form, treatment notes, laboratory request form and prescription form as exhibits during trial.

43. In his defence, the Appellant narrated of how he was arrested on the material day of 10th January 2020 (sic) and stated that he had been framed for the offence as he had a land dispute with PW 1's family. He produced letters dated 24th February 2016 and 21st July 2017 from the Ministry of Lands and photographs of his house as exhibits in court.

44. Be that as it may, the Appellant's defence was a mere denial. It did not outweigh the inference of guilt on his part as laid out by the Prosecution witnesses.

45. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material date as there was proof of defilement as PW 6 testified.

46. In the premises foregoing, Ground of Appeal No (1), (2) and (3) of the Petition of Appeal were therefore not merited and the same be and are hereby dismissed.

II. Sentencing

47. Ground of Appeal No (4) of the Petition of Appeal was dealt with under this head.

48. The Appellant blamed the Trial Court for not finding that his sentence should start running from the time of his arrest. In this regard, he relied on the case of 88 Prisoners vs the DPP, AG & The Prison Home Made Petition (eKLR citation not given) where it was held that a least prescribed sentence was the one where time spent during trial had been taken into account.

49. Notably, in its Written Submissions, the Respondent invoked Section 8(1) and 8(3) of the *Sexual Offences Act* No 3 of 2006 and placed reliance on the case of Francis Karioko Muruatetu & Another vs Republic; Katiba Institute & 5 Others (Amicus Curiae)[2021]eKLR where the Supreme Court clarified that the decision in Muruatetu 2017 could not be the authority of stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the *Constitution*.

50. It contended that the sentence meted on the Appellant was not unconstitutional and that the Trial Court considered his mitigating factors. It urged the court to uphold the same as it was lawful.

51. Notably, the Appellant was convicted and sentenced under Section 8(3) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). The said Section 8(3) of the *Sexual Offences Act* provides that:-

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

52. This court could therefore not fault the Trial Court for having sentenced the Appellant to twenty (20) years imprisonment as that was lawful.

53. Notably, on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR to the effect that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. In its said decision, the Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

54. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

55. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code*. The said Section 333(2) of the *Criminal Procedure Code* stipulates that:

> " 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 (emphasis court)".

56. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is provided that: -

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

57. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR.

58. The Charge Sheet herein showed that the Appellant herein was arrested on 12th January 2020. He was released on bond on 16th January 2020. He was remanded on 18th October 2022 when Judgement was delivered. He was sentenced on 8th November 2022.

59. A reading of the Trial Court's Sentence showed that it did not take into account the time that he spent in remand before his sentencing. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

60. In the premises, Ground of Appeal No (4) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

Disposition

61. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 17th November 2022 and filed on 13th March 2024 was not merited and the same be and is hereby dismissed.

62. However, it is hereby directed that the period that he spent in custody between 12th January 2020 and 16th January 2020 and between 18th October 2022 when he was remanded and 7th November 2022 before he was sentenced be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

63. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 16TH DAY OF JULY 2025

J. KAMAU

JUDGE