Kitur v Republic (Criminal Appeal E009 of 2024)
[2025] KEHC 9534 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9534 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E009 OF 2024

JK NG'ARNG'AR, J

JULY 3, 2025

BETWEEN

WESLEY KIPKURUI KITUR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case Number E001 of 2021 by Hon. Kimtai B.M. in the Senior Principal Magistrate's Court at Sotik)

JUDGMENT

1. Wesley Kipkurui Kitur (now Appellant) was 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 charge were that on 27th April 2020 at [Partculars Withheld] Village in Sotik Sub-County within Bomet County, the Appellant intentionally caused his penis to penetrate the vagina of PC, a child aged 15 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that that that on 27th April 2020 at [Particulars Withheld] Village in Sotik Sub-County within Bomet County, he intentionally touched the vagina of PC, a child aged 15 years with his penis.

3. The Appellant pleaded not guilty to the charge before the trial court and a full hearing was conducted. The prosecution called seven (7) witnesses in support of its case. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence. The Appellant gave sworn testimony and closed his case.

4. At the conclusion of the trial, the Appellant was convicted of the offence of defilement and sentenced to serve twenty (20) years in prison.

5. Being dissatisfied with the Judgment of the trial court Wesley Kipkurui Kitur appealed against his conviction and sentence.

6. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court and come to my own independent conclusion and decision. I now proceed to summarize the Prosecution's case and the Appellant's defence in the trial court and their respective submissions in the present Appeal.

The Prosecution's/Respondent's Case.

7. It was the Prosecution's case that the Appellant defiled PC (PW1) on 27th April 2020. PW1 testified that on the material day, the Appellant who was his neighbour and boyfriend took her by her hand, led her to a bush and had sexual intercourse with her. PW1 further testified that she became pregnant and bore a child named LC.

8. Polycarp Luta Kwenyu (PW5) who was a Principal Government Chemist testified that he conducted a DNA test on PW1, the Appellant and the minor LC and determined that the Appellant was the biological father of LC

9. Doris Cherono (PW6) who was the clinical officer at Ndanai Sub-County Hospital testified that she examined PW1 on 5th January 2021 and found that PW1 had an old broken hymen and further that there was evidence of defilement since PW1 had an infant.

10. The Appellant filed his written submissions on 28th March 2025 and submitted that there were two documents produced to prove the age of the victim. That a Birth Certificate was produced by the Prosecution and he produced a copy of the victim's Identity Card. The Appellant further submitted that an Identity Card was a superior document to a Birth Certificate and he relied on *Richard Wahome Chege v Republic* (2014) eKLR.

11. It was the Appellant's submission that the validity of the two documents remained undisputed. That there was a discrepancy in the victim's age and one could not state that the element of age was proved beyond reasonable doubt. It was the Appellant's further submission that the trial court adopted the Birth Certificate and did not explain its criteria in choosing it over the National Identity Card.

12. The Appellant submitted that the DNA test conducted was an afterthought and the Prosecution had ulterior motives to forcefully link him to the charge. That it would have been impossible to link the Appellant to the offence in the absence of the DNA test which was taken against his will. The Appellant further submitted that the samples extracted from him for DNA violated his rights enshrined under Article 49 (1) (d) of the *Constitution* of Kenya. He relied on *SMW v GMK* (2011) eKLR and *Robert Julo v Republic* [2011] KEHC 710 (KLR).

13. It was the Appellant's submission that the Appellant, without his knowledge, greatly aided and advanced the Prosecution's case to his own detriment. That the court ought to have advised him of his status as an Accused person that giving out his blood samples would amount to giving self-incriminating evidence.

14. The Appellant submitted that he was well known to the victim as he was her boyfriend. The Appellant further submitted that the Prosecution did not prove all the elements of defilement beyond reasonable doubt and as such he was wrongfully convicted.

15. It was the Appellant's submission that the trial court did not consider his defence and mitigation. That he had an affair with PW1 after she told him that she was an adult and he reasonably believed PW1 when she told him she was not a minor. It was the Appellant's further submission that PW1 gave

him a copy of her Identity Card which showed that she was born on 4th August 2002. That he was a beneficiary of the defence under section 8(5) and 8(6) of the *Sexual Offences Act*.

The Accused's/Appellant's Case.

16. The Appellant, Wesley Kipkurui Kitur (DW1) testified that he knew PW1 as a neighbour. DW1 testified that he stayed with PW1 for about three months before he left for work. DW1 further testified that he later heard that PW1 had given birth and he did not know if the baby was his.

17. It was DW1's testimony that PW1 gave him a copy of her Identity Card and it showed that PW1 was born on 4th August 2002.

18. At the time of writing this Judgement, the Prosecution had not filed their submissions despite being given time to do so.

19. I have gone through and given due consideration to the trial court's proceedings, the Record of Appeal dated 26th September 2024 and the Appellant's written submissions dated 28th March 2025. The following issues arise for my determination: -

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Defence placed doubt on the Prosecution case.

    iii. Whether the sentence preferred against the Appellant was harsh.

i. Whether the Prosecution proved its case beyond reasonable doubt.

20. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

21. On the issue of age, Rule 4 of the *Sexual Offences Rules of Court* 2014 provides that: -

    When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

22. PC (PW1) testified that she was born in the year 2005. AR (PW2) testified that she was the victim's mother and when she was cross examined, she stated that the victim (PW1) was born in August 2005. No. xxx PC Florence Chepkirui (PW7) produced a Birth Certificate as P. Exh1. I have looked at the Birth Certificate and it indicated that PW1 was born on 17th August 2005 which would make her 15 years old at the time of the commission of the offence. The production and authenticity of the Birth Certificate was not challenged by the Appellant during cross examination.

23. On the other hand, the Appellant produced the victim's National Identity Card as D. Exh 1. I have equally looked at the exhibit and it indicated that PW1 was born on 4th August 2002. The production and authenticity of the National Identity Card was not challenged by the Appellant during cross examination.

24. The court is now faced with two conflicting documents with regard to the age of the victim. I will be guided by the Court of Appeal in *Mwalengo Chichoro Mwajembe v Republic*, Msa. App. No. 24 of 2015 (UR), where it held: -

> " .....the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or

guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v Republic*, Criminal Appeal No. 19 of 2014 and *Omar Uche v Republic*, Criminal Appeal No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable....."

25. In the present case, the victim (PW1) and her mother (PW2) testified that the victim was born in the year 2015. Both PW1 and PW2's testimonies were corroborative in nature and were uncontroverted during cross examination. I find it curious why the Appellant did not cross examine the victim (PW1) on the issue of her National Identity Card and the fact that she (PW1) had handed a copy to him (Appellant). The issue of the victim's National Identity Card was raised in the Appellant's defence and not during cross examination. The Appellant could have equally cross examined the victim's parents, AR (PW2) and PC (PW3) about the victim's age now that he was in possession of the victim's alleged National Identity Card. This is my view was an afterthought and I dismiss the Appellant's assertion that the victim was born on 4th August 2020.

26. Flowing from the above, it is my finding that PW1 was born on 17th August 2005 and was aged 15 years at the time of the commission of the offence.

27. With regard to the issue of identification, the victim (PW1) testified that the Appellant was her neighbour and boyfriend and had been in a relationship with him since the year 2019 when she was in class 8. The Appellant on the other hand confirmed that he was the victim's neighbour and further testified that he stayed with her for about three months. In my view, this was evidence of recognition. I am guided by *Peter Musau Mwanzia v Republic* [2008] KECA 92 (KLR) where the Court of Appeal held: -

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident....."

28. From the evidence above, I am clear that the victim (PW1) and the Appellant were not strangers and knew each other well. Therefore, I have no reason to disbelieve or doubt that the positive identification of the Appellant by the victim (PW1). There was no possibility of mistaken identity.

29. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.

30. Penetration can be proved through the evidence of the victim corroborated by medical evidence. In the instant case, I shall carefully evaluate the victim's testimony and the medical evidence tendered.

31. I shall begin with the medical evidence tendered in court. Doris Cherono (PW6) a clinician based at Ndanai Sub-County Hospital testified that she examined PW1 on 5th January 2021 and found that

PW1 had an old broken hymen. PW6 testified that there was evidence of defilement because PW1 had an infant. PW6 produced treatment notes and a P3 Form as P. Exh 2 and 3 respectively. I have looked at the exhibits and I have confirmed that the contents corroborate PW6's testimony and more importantly, that the victim was observed on 5th January 2021.

32. I find the probative value of the medical evidence above as wanting. This is because the victim (PW1) was examined on 5th January 2021, which was approximately 8 months after the commission of the offence. The findings of PW6 could not be used to determine penetration committed on the material day due to a long lapse of time. I therefore disregard the medical evidence tendered by PW6.

33. The Appellant submitted at large regarding the issue of the DNA test and how his rights under Article 49 of the *Constitution* were violated when he was compelled to undergo a DNA test to determine paternity of the child LC. In that regard, Section 36(1) of the *Sexual Offences Act* provides: -

> Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

34. The Court of Appeal in the case of *Robert Mutungi Muumbi v Republic* [2015] KECA 584 (KLR), held that: -

> " Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

35. Similarly in *AML v Republic* [2012] KEHC 2554 (KLR), held: -

> " .....The fact of rape or defilement is not proved by a DNA test but by way of evidence."

36. From the above, it is clear that DNA evidence was not the only way to prove the offence of defilement. By virtue of section 124 of the *Evidence Act*, this court can solely convict on the sole testimony of the victim and medical evidence is only corroborative and persuasive and its absence is not fatal in proving penetration.

37. In the instant case, DNA evidence was presented by Polycarp Luta Kwenyu (PW5) who was a Principal Government Chemist. PW5 testified that he conducted a DNA test on PW1, the Appellant and the baby L.C and determined that the Appellant was the biological father of LC. PW5 produced a Government Analyst Report as P. Exh 4b. I have looked at the Report and it corroborated the findings of PW5. It is therefore my finding that the Appellant and the victim (PW1) were the biological parents of LC.

38. PC (PW1) testified that the Appellant had sexual intercourse with her on the material day in a bush. PW1 further testified that she became pregnant as a result. When PW1 was cross examined, she reiterated that the Appellant had sexual intercourse with her.

39. Having considered the victim's (PW1) testimony and the medical evidence tendered by PW5, it is my finding that the victim was penetrated by the Appellant on the material day.

40. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

ii. Whether the Defence placed doubt on the Prosecution's case.

41. The Appellant's (DW1) defence was aptly captured in detail earlier in this Judgment. The Appellant did not deny committing the offence. He testified that stayed with PW1 for about three months before he left for work. He further testified that the was the father of LC.

42. In his submissions, the Appellant relied on the provisions of section 8(5) and 8(6) of the *Sexual Offences Act* as a defence. Section 8(5) and 8(6) of the *Sexual Offences Act* provides: -

> (5) It is a defence to a charge under this section if—
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years.
>
> (6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

43. The Court of Appeal in *Jonda v Republic* [2023] KECA 374 (KLR) held: -

> " Our view is that section 8(5) requires a conjunctive as opposed to a disjunctive reading and application, for the reasons that firstly, the word
>
> > "and" in its ordinary usage is as a conjunction, connecting words, phrases and sentences that are to be taken jointly, and secondly, a departure from this ordinary meaning will have to be required by the purpose of the statute. Therefore, starting with the ordinary meaning and construction of section 8(5), it is our view that the defence therein is available only if, firstly a child makes a deceptive representation that they are an adult that leads to such a subjective belief on the part of the accused person; and, secondly, the accused person demonstrates that reasonable circumstances existed that made him or her form an objective belief that the child was an adult. It is also our view that the absence of the term "reasonable" in section 8(5)(a) and its presence in section 8(5)(b), and the linkage of the two paragraphs by the conjunction "and", imports the co-existence of both a subjective and an objective element of the defence that both require to be demonstrated by an accused person.
> >
> > In addition, a disjunctive application and interpretation of the word "and" of section 8(5) in our view could not have been intended by the legislature, as it would result in the absurd, unjust and disproportionate situation where the defence is made available to an accused person where a child holds himself or herself out as an adult, even when all surrounding circumstances clearly demonstrate otherwise, and would clearly be contrary to the purpose of the

> *Sexual Offences Act* and the mischief the section 8 of the Act seeks to address, which is the protection of children from defilement. Lastly, we also hold the view that the need and rationale for section 8(6) was not to place any qualifications on sub-section (5), but on the contrary, to place an obligation on an accused person to demonstrate that reasonable grounds existed to form a belief that a child was of age, for the defence in section 8(5) to be available." (Emphasis mine)

44. I have looked at the Appellant's testimony. He testified that the Appellant was not going to school and when he asked PW1 her age, PW1 stated that she was waiting for an Identity Card. The Appellant further testified that he stayed with PW1 for about three months before he left for work. It is these circumstances that the Appellant relied on when he invoked the provisions of section 8(5) and 8(6) of the *Sexual Offences Act*.

45. I have also looked at the victim's testimony particularly when she was cross examined. She testified that she told the Appellant that she was 15 years old, which was in contrast to the Appellant's testimony that PW1 was waiting for an Identity Card.

46. Having gone through the Appellant's testimony, I have not found any reasonable grounds demonstrated by the Appellant that would indicate that PW1 deceptively represented herself to be an adult. The fact that the Appellant failed to cross examine the victim on her alleged Identity Card has led this court to believe that it was an afterthought. The upshot of the above is that the defence contemplated under section 8(5) of the *Sexual Offences Act* was not available to the Appellant.

47. Flowing from the above, it is my finding that the Appellant's defence as a whole, did not cast any doubt on the Prosecution's case which I have already found proven.

iii. Whether the sentence preferred against the Appellant was harsh.

48. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles.

49. The penal section for this offence is found in section 8(3) of the *Sexual Offences Act* which states 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.

50. I have considered the circumstances of this case and the fact that the victim was aged 15 years old at the time the offence was committed. I have also considered the Appellant's mitigation in the trial court.

51. As stated above, the minimum sentence for the offence of the present offence was 20 years. It is my finding therefore that the trial court did not err when it sentenced the Appellant to serve 20 years imprisonment.

52. For avoidance of doubt, I uphold the Appellant's conviction and sentence.

53. In the end, the Appeal dated 19th August 2024 has no merit and is dismissed.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 3RD DAY OF JULY, 2025.

.....

HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of Appellant, Mr. Mugumya for the Appellant and Siele/Susan (Court Assistants).