Mugo v Republic (Criminal Appeal E093 of 2024)
[2025] KEHC 11127 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11127 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E093 OF 2024

RM MWONGO, J

JULY 23, 2025

BETWEEN

HENRY MUNYI MUGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. J.N. Githaiga, in Siakago MCSO No. E014 of 2024 delivered 29th August 2024)

JUDGMENT

The Charge.

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*. Particulars are that on 23rd March 2024 at around 0630Hrs in Karambari location in Mbeere North Subcounty within Embu County, the appellant intentionally caused his penis to penetrate the anus of S.M. a child aged 7 years.

2. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the alternative charge are that on 23rd March 2024 at around 0630Hrs in Karambari location in Mbeere North Subcounty within Embu County, the appellant intentionally committed an indecent act by touching the anus of S.M. a child aged 7 years.

3. At the trial, the appellant pleaded 'not guilty' to the charges. A full hearing was conducted and the appellant was subsequently convicted for defilement, and sentenced to 50 years imprisonment.

The Petition of Appeal.

4. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 29th November 2024, seeking orders that the appeal be allowed, the conviction quashed, and the sentence

of 50 years imprisonment be set aside. He prayed that he be set at liberty. The appeal is premised on the grounds that:

1. The learned trial magistrate erred in both law and fact by imposing a harsh and excessive sentence upon the appellant;

2. The learned trial magistrate erred in both law and fact by convicting the appellant against the weight of the evidence;

3. The learned trial magistrate erred in both law and fact by rejecting the appellant's defense without giving cogent reasons;

4. The learned trial magistrate erred in both law and fact by failing to establish the age of the complainant from the evidence for a safe conviction;

5. The learned trial magistrate erred in both law and fact by convicting the appellant while the 3 ingredients of defilement were not proved to the required standard; and

6. The learned trial magistrate erred in both law and fact by relying on the prosecution's narrative which was covered in doubts.

Summary of the Evidence at trial.

5. At the hearing, PW1 the victim, stated that the appellant is her grandfather. She testified that while she was staying at her grandmother's house, the appellant went to the place where she was sleeping, removed her clothes and inserted his penis into her anus and vagina. The appellant told her not to tell anyone what had happened and that he would buy her sweets. Since her grandmother was not home at the time, she reported the matter as soon as she returned. Her grandmother then took her to Siakago Level 4 Hospital where she was treated, and they reported the matter at Kathanje Police Post. In cross-examination, she stated that there was no one else around the house at the time of the incident and that she was not coached.

6. PW2 was the complainant's grandmother. She stated that on the morning of the incident, she woke up and went out to sell miraa, leaving the appellant and the complainant sleeping in separate room in the house. When she returned, she met the appellant in the house awake and he did not tell her what he was upto. In the morning, PW1 told her that the appellant had penetrated her anus. She took PW1 to the hospital and then reported the matter at Kathanje Police Post.

7. She stated that this was not the first time that the appellant did something like that; That he had defiled a member of the family twice before. That the first time, he defiled PW2's daughter and he was convicted and sentenced to 2 years imprisonment. He defiled her daughter again and in 2018, he was convicted and sentenced to life imprisonment but was released on appeal.

8. In cross-examination, she stated that she left the house at around 6am and was not present when the incident occurred. She did not inform the appellant of the incident because she assumed that he already knew. She said that the appellant had the capacity to have an erection but not to ejaculate, but she did not know if the appellant was examined at the hospital. She said that she had nothing to gain if the appellant is jailed because he has defiled her daughter and now her granddaughter.

9. PW3 was PC Mathias Kalonzo Mwinzi who recorded the incident when it was reported at Kathanje Police Post. He referred the complainant to the hospital where she was treated and then he investigated the case and arrested the appellant. He established the minor's age through her birth certificate (P.Exb 1) before charging the appellant with the offence.

10. PW4 was Martin Murimi, a clinical officer at Siakago Level 4 Hospital who examined PW1 and observed that there was a fresh anal laceration with active bleeding. The complainant was also in pain and there was discharge from her vagina even though the hymen was intact. He filled the P3 form which he produced in evidence as P.Exb 2.

11. At the close of the prosecution's case, the trial court put the appellant to his defense. Testifying as DW1, he gave sworn evidence stating that on the material day, he woke up at around 5:20am and ate for 1 hour. That after eating, he followed PW2 to the market to sell miraa. Even though there were 3 children in the home that day, he denied having seen them since he had gone away to the market. He stated that he went about his business and returned home at around 10:30am but PW2 did not tell him anything. He denied defiling PW1. He stated that he was implicated in the offence because he refused to sell his land to pay a debt of Kshs.40,000 /- that PW2 had borrowed and was accruing interest.

Parties' Submissions.

12. The appeal was canvassed by way of written submissions as directed by the Court.

13. The appellant submitted that following an illness, he cannot achieve an erection hence he could not have defiled the complainant, who was also sharing a room with her older cousin. He submitted that he has always had differences with his wife who has been threatening to get him imprisoned so that he can move out of their home. That PW2 had successfully got him convicted of sexual offences twice before and that this time, he did not defile the complainant since he was not at home at the time of the alleged incident. He stated that he should have been subjected to medical examination to ascertain his identity as the assailant but this was not done. He urged the court to allow his appeal.

14. The respondent relied on sections 2 and 8(1) & (2) of the *Sexual Offences Act* and argued that the evidence adduced proved the offence beyond reasonable doubt. It relied on the case of Hadson Ali Mwachongo v Republic [2016] KECA 521 (KLR) Rule 4 of the Sexual Offences Rules 2014 and stated that the age of the complainant was well established through her birth certificate. (P.Exhb 1) Further reliance was placed on the cases of Reuben Taabu Anjononi & 2 others v Republic (1980) eKLR and Aloyo Ewoi v Republic [2017] KEHC 77 (KLR).

Issues for Determination.

15. The issues for determination are as follows:

    1. Whether the offence was proved beyond reasonable doubt; and

    2. Whether the sentence meted out to the appellant was harsh and excessive.

Analysis and Determination

16. In the case of Okeno v Republic [1972] EA 32, the court held thus regarding the role of a first appellate court:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so,

it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

17. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (2) of the *Sexual Offences Act* provides that:

> "(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."

18. Therefore, the elements that constitute the offence of defilement are as follows:

1. The age of the complainant- that the complainant was a child;
2. That penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child;
3. That the perpetrator was positively identified.

19. On the first element, the age of the complainant, PW1, was proved through her birth certificate which was produced in evidence as P.Exb 1 It shows that the complainant was 7 years old at the time of the incident. In the case of Mwalango Chichoro Mwanjembe v Republic (2016) eKLR the court stated thus regarding proof of age of a defilement victim. It held:

> " 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 documentary 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."

20. Here, there is no contest that the birth certificate (P.Exb1) of the child was availed as evidence. The birth certificate confirmed the age of the victim as seven years old, a point that is not seriously contested.

21. As for the element of penetration: the testimony of PW4 was that anal penetration occurred. PW4 observed that there was a fresh laceration on the anus. PW1 testified that at the time of the incident, PW2, her grandmother was not at home. PW2 stated that she had gone to the market to sell miraa and when she returned, she found the appellant walking around the house. PW1 told PW2 what had transpired and she reported the matter to the police station, then took the complainant to hospital for examination and treatment.

22. The appellant contended that he could not have penetrated the complainant because he suffers from a condition which renders him unable to achieve an erection. He also defended himself saying that he was not at home at the alleged time of the incident. The issue of whether or not the appellant can achieve an erection is immaterial. What matters is whether he can be properly identified as the assailant and that he partially penetrated the victim.

23. On identification, section 124 of the *Evidence Act* provides that the testimony of the victim of a sexual offence on identification of his/her assailant is sufficient proof. The provision is as follows:

> " 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."

24. PW1 identified the appellant as her assailant and she told PW2 about it. PW2, in her testimony, stated that the appellant is not a first-time sexual offender since he had been convicted twice of defiling PW2's daughter. That detail notwithstanding, the appellant was properly identified by the victim, who is not a child of tender years. Moreover, the appellant is the victim's grandfather, a person who is well known to her.

25. Following conviction, the appellant was sentenced to 50 years imprisonment, a departure from the mandatory sentence prescribed by the *Sexual Offences Act*. One of the grounds of appeal is that the trial magistrate erred in law and fact by imposing a harsh and excessive sentence upon the appellant. Section 8(2) of the *Sexual Offences Act* prescribes the sentence in such a case in mandatory terms as follows:

> "(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." [Emphasis added]

26. The Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) rendered itself on the sentences prescribed under the *Sexual Offences Act*. There, the Court held thus:

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

27. The Supreme Court reiterated its findings in that case through its recent decisions in the cases of Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) and Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR). It held that until parliament reviews the sentences imposed in statute, the court has no mandate to review or depart from them.

Conclusion and Disposition.

28. As to whether the sentence should be reviewed, the trial court erred in imposing a sentence that is not prescribed under the *Sexual Offences Act*. In line with section 354(3)(b) of the *Criminal Procedure Code*, this Court has powers on appeal to alter a sentence by reducing or increasing it. In the present case the sentence imposed by the trial court cannot stand and ought to be set aside and substituted with the statutorily prescribed sentence.

29. In light of the foregoing and given the Supreme Court decisions herein on sentencing, the appeal fails and the conviction is hereby upheld.

30. However, the sentence of 50 years imprisonment meted by the trial Court is improper and is hereby set aside and substituted with a sentence of life imprisonment as provided under section 8(2) of the *Sexual Offences Act*. It is so ordered.

31. Orders accordingly.

Delivered, dated and signed at Embu High Court this 23rd day of July, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Henry Munyi Mugo – Appellant in Person

Miss Nyika for the State

Francis Munyao - Court Assistant