Kuto v Republic (Criminal Appeal E030 of 2024)
[2025] KEHC 13012 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13012 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E030 OF 2024

LN MUTENDE, J

SEPTEMBER 18, 2025

BETWEEN

JOSEPH KUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Joseph Kuto, the Appellant, was arraigned following allegations of having contravened the law by committing offences of Defilement contrary to the *Sexual Offences Act*; and, in the alternative committing indecent acts.

2. In Count 1, he was stated to have contravened Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the offence being that on diverse dates between 10th April,2022 and 29th December,2022, at [Particulars Withheld] Area in Nyahururu, within Laikipia County, he intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of MC, a child aged 16 years.

3. In the alternative, he faced the charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars being that on diverse dates between 10th April,2022 and 29th December,2022, at [Particulars Withheld] Area in Nyahururu Sub-County, within Laikipia County, he intentionally caused his genital organ(penis) to come into contact with the genital organ (vagina) of MC, a child aged 16 years.

4. In Count 2, the charge was contrary to 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence being that on diverse dates between 20th January, 2023 and 22nd January,2023, at [Particulars Withheld] Area in Nyahururu, within Laikipia County, he intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ (vagina) of PC, a child aged 13 years.

5. 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*. Particulars being that on diverse dates between 20th January,2023 and 22nd January,2023, at [Particulars Withheld] Area in Nyahururu, within Laikipia County, he intentionally and unlawfully caused his genital organ(penis) to come into contact with the genital organ (vagina) of PC, a child aged 13 years.

6. In Count 3 the offence was contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. Particulars were that on diverse dates between 8th August 2022 and 15th December,2022, at [Particulars Withheld] Area in Nyahururu, within Laikipia County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of JC, a child aged 16 years.

7. 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 were that on diverse dates between 8th August 2022 and 15th December,2022, at [Particulars Withheld] Area in Nyahururu, within Laikipia County, he intentionally and unlawfully caused his genital organ(penis) to come into contact with the genital organ (vagina) of JC, a child aged 16 years.

8. Having denied the charges he was taken through full trial, convicted and sentenced to serve 20 years imprisonment on each count of defilement, sentences that were to run consecutively.

9. Aggrieved, the Appellant appealed against both conviction and sentence on grounds that;

    1. That the learned trial Magistrate erred in law and fact by convicting based on contradictory evidence of PC and that of her mother regarding time.

    2. That the learned trial Magistrate erred in law and in fact by convicting the Appellant against the weight of the evidence adduced.

    3. That the learned trial Magistrate erred in law and in fact by not considering that the complainant in the 2nd count denied the allegation that something happened between her and the Appellant.

    4. That the learned trial Magistrate erred in law and in fact by relying on medical evidence that could not have been used due to the time that had lapsed.

    5. That the learned trial Magistrate erred in law and in fact by not taking into account time when the offence was alleged to have been committed and when the report was made which was a sign of framing the Appellant.

    6. That the learned trial Magistrate erred in law and in fact by not considering the Appellant defence in regard to the family grudge between him and his sister in respect of land.

    7. That the mandatory sentence denied the court the discretion of sentencing according to circumstances.

10. The acts in question were stated to have happened on diverse days between the 10th day of April 2022 and 20th January 2023. To prove the case the prosecution availed 7 witnesses. PWI MC, a pupil in Grade 7 testified to have known the Appellant, their neighbor and on that fateful date she had been sent to the shop by her mother when she encountered the Appellant who enticed her with sweets and cakes and took her to the bush and molested her.

11. PW2 PC stated that the Appellant her maternal uncle gave her a cake and soda and slept with her in her mother's bedroom. That on the 20th January, the Appellant offered her cake that she gladly accepted and ate. He then led her to her mother's bedroom and molested her. On the 22nd January 2023 he found her at the shamba and gave her a soda and cake which she ate and he had sex with her. She later told PW1 of what had befallen.

12. PW3 JC testified to have been looking after goats when the Appellant found her and sought to know where the goats were as some of them were missing. That the Appellant alleged that he had seen them hence asked her to follow him which she did. He offered her a cake and sweets that he carried in a carrier bag. Upon eating them he made her lie down. Despite resisting he forcefully threw her on the ground and molested her.

13. PW4 MK, the mother of PC and sister of the Appellant testified to have been informed by LC of the Appellant's involvement with M and P hence made a report to the area chief and police station.

14. PW5 Anne Cherotich, the mother of J got the information in respect of the act of defilement LC, committed against her daughter. PW6 the mother of PW1 M on receiving information regarding the arrest of the Appellant and allegations of the acts committed by him in respect of M confronted her and she disclosed that the Appellant had coitus with her as well as P.

15. The victims were examined by PW7 Rose Wangui Juma, a Clinical Officer after 72 hours who confirmed that each one of them had a broken hymen.

16. Upon being placed on his defence, the Appellant acknowledged M as his niece while the other two complainants as his neighbours' children. He denied the allegations and said that the girls were told to lie. Further he denied having been with them on the alleged dates. Admitting that he bought a thermos flask for M he urged that she requested him to do so.

17. Additionally, he stated that he disagreed with his sister over land. That his sister who was married returned to her maiden home and she wanted a share of land as she had a son but he was opposed to the idea. Regarding mothers of the other two complainants, he claimed that M's mother left her matrimonial home and later tried to seduce him but he declined hence she was not happy with him.

18. Similarly, the third lady also wanted to be his lover but he was not happy with her approach. In the result the three ladies corroborated to frame him.

19. The appeal was canvassed through written submissions that I have duly considered.

20. This being a first appellate court, it is duty bound to re-consider evidence adduced at trial, re-evaluate it so as to reach conclusions while bearing in mind that it neither saw the witnesses so as to observe their demeanor nor heard them. This salient subject was discussed in Okeno v Republic [1972] EA 32 as follows;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings 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, see Peters v Sunday Post [1958] EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174."

21. It is argued by the Appellant that PW1 was a refractory witness whose evidence should be disregarded. That the P3 contradicted particulars of the charge-sheet which calls for his acquittal. Section 152 of the Criminal Procedure Code which gives a clear and precise explanation of what a Refractory witness is provides thus:

> 1. Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence—
>
> a. refuses to be sworn; or
>
> b. having been sworn, refuses to answer any question put to him; or
>
> c. refuses or neglects to produce any document or thing which he is required to produce; or
>
> d. refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.
>
> 2. If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.
>
> 3. Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.

22. PW1 turned up in court having been summoned as a prosecution witness and upon taking up the witness stand, according to the court record she gave evidence under oath, but, following an application by the prosecution counsel, she was stood down for not speaking loudly. This may suggest that she was not expressing herself without fear or hesitation, but, the court did not note down her demeanor.

23. After the other two witnesses testified, she was recalled and after she testified to the fact, the court on its own volition declared her a refractory witness and made an order for her to be remanded at Nyahururu Police Station until she was ready to testify. The following day she was present and did conclude her testimony in chief whereby the Appellant had no question to put to her in cross examination.

24. What can be deduced from the record is the genesis of the problem that emanated was the witness not being audible. This however does not fall in the category of a refractory witness. That notwithstanding, in Daniel Odhiambo Koyo v Republic [2011] KECA 66(KLR) the court stated as follows:

> " ...a refractory witness. The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case.

In Maghenda v. Republic [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:

> "The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court."
>
> There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.
>
> Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify...."

25. The ingredients of the offence of defilement are provided by the definitive Section 8(1) of the *Sexual Offences Act* that enact thus;

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

26. The prosecution was obligated to prove elements constituting the offence of defilement that are;

i. The victim's age.

ii. The act of penetration.

iii. Positive identification of the perpetrator.

27. In Kaingu Elias Kasomo v Republic [2010] eKLR the Court of Appeal held that;

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

28. In Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000 the Court of Appeal held that;

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

29. To prove the age of the complainant the prosecution adduced in evidence a birth certification which proved that the Complainant MC was born on 07/09/2007 such that at the time of the alleged act she was 16 years old and the question of age was not in dispute.

30. The contention is whether the act of penetration did occur, considering the fact that the court opined that the victim was a refractory witness. This was a witness who could not remember when exactly the act was committed, but, according to her, the Appellant violated her sexually more than thrice.

31. Section 2 of the *Sexual Offences Act* defines penetration thus;

> " Penetration" means the partial insertion of the genial organs of a person into the genital organs of another person.

32. According to the charge sheet the act of penetration happened between the month of April, 2022 and December,2022. She was subjected to medical examination on 29/1/2023 at Ngarua Health Centre and according to the Post Rape Care Form (PRC) the outer genitalia was normal, the vagina had white discharge but the hymen was absent. Subsequently a P3(Medical examination Report) was filled on the same date by PW7 Rose Wangui Juma, a clinical officer at the same facility who estimated the age of injuries as 4 months. In addition to what was captured on the PRC she noted mild laceration on the labia minora.

33. Although the clinical officer opined that what was found was evidence of sexual intercourse having been there before, when exactly it occurred is a question to be determined and the answer was not outright. It has been held severally and forensic experts have also emphasized that the absence of a hymen per se cannot reliably be definitive of the fact of recent or past sexual intercourse.

34. This therefore leaves the court to revert to the testimony of the victim. The proviso to Section 124 of the *Evidence Act* provides thus:

> ... 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 33 *Evidence Act* (Cap. 80) Kenya the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

35. In Kassim Ali v Republic (2006) eKLR the Court of Appeal stated that;

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

36. The court considered evidence adduced in respect of the victim and stated that MC said she was defiled and her testimony was coupled with medical examination that was sufficient to determine whether penetration occurred. The trial court which declared MC a refractory witness hence diminishing the probative value of her evidence did not give reasons as to why it believed her.

37. On Count 2 evidence adduced through evidence of the victim's mother, PW4 MK and birth certification evidence established that PC was born on 16/11/2009 hence was of an apparent age of 13 years at the time of the act. Evidence of the act of penetration having occurred was adduced by the victim, the Appellant's maternal niece who described what happened. That the Appellant made her lie on the bed in her mother's room and inserted his penis into her vagina. The next time it happened on the farm where she had gone to graze goats. The answers recorded on cross examination were that 20/01/2023 was not a school day and that he went to their (victim's) house on the material day.

38. On being subjected to medical examination on 27/01/2023 which was way after 72 hours, it was established that she had no bruises or lacerations on the labia minora or majora but the hymen was absent. This evidence per se may not establish the fact of penetration by the Appellant having been the cause hence evidence remains that the single victim. Notably, the evidence by the witness having had no plausible reason to be challenged, it was believable and the trial court rightly did so pursuant to Section 124 of the *Evidence Act*.

39. On Count 3, JC's age was proved through documentary evidence of a birth certificate. She was born on 03/03/2007 hence at the time of the alleged act she was of an apparent age of 16 years. She adduced evidence regarding penetration where she stated that the Appellant forced her onto the ground, undressed and removed his penis then inserted it into her vagina. On cross examination the Appellant sought to know if he forced her and the victim responded that he did not. But, on re examination she stated that he forcefully had sex with her.

40. Similarly, JC was examined after 72 hours, there were no obvious bruises or lacerations noted on her genitalia but the hymen was broken which per se could not be conclusive proof of defilement, however the evidence of the victim was detail in narration. The defence was a mere denial, and by endeavoring to establish consent having existed on the part of the victim, apparently a minor had no capacity to consent. Corroboration of her statement as argued by the defence was not a requirement.

41. It is also argued that failure to call the investigation officer was detrimental to the prosecution's case. The question would be whether an injustice was occasioned. In the matter the prosecution counsel addressing the court stated that the remaining witness was PC Barasa who was not in court and that his evidence was only to state that he had arrested the suspect hence it would not have added any value to the case. In that regard, the argument was that no investigations were conducted, especially the alleged grudge that existed per the allegation in the defence.

42. So far questions of integrity or procedural violations did not arise that may have resulted into exclusion of some evidence which would call for clarification. The duty of the appellate court is to reappraise evidence adduced which means that failure to call the investigation officer to occasion an injustice would depend on circumstances of each case. The issue would be whether an injustice has been occasioned. In Livingstone Musambi Okumu v Republic [2015] KECA 293 (KLR)

> " ...18. As regards failure to call the investigating officer, we agree with Miss Oduor that given the circumstances of this case, such failure did not occasion the appellant any injustice. In Harward Shikanga & Another V Republic (supra), this Court held that failure to call an investigating officer cannot automatically result in an acquittal. Each case has to be considered on its own circumstances..."

43. As to the allegation that the Appellant was framed because he declined to accept love overtures from the mothers of two of the complainants, there was need to build a coherent narrative supported by cogent evidence of the desire expressed and what action he took. This was lacking. For The allegation of having disagreed with the sister over land, it would have held water had evidence of existence of the land and a long-standing grudge that would have resulted into the Appellant being implicated. In the result the explanation given by the Appellant was not plausible.

44. Finally, the Appellant complains that the sentence imposed was harsh. The charge in Count 2 was brought pursuant to the penal Section 8(3) of the *Sexual Offences Act* that provides thus:

> 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.

45. On Count 3, the Appellant was convicted for defilement contrary to the penal part Section 8(4) of the *Sexual Offences Act* which provides thus;

> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

46. The Appellant was sentenced to serve 20 years imprisonment on each count, sentences that are running consecutively. In meting a sentence for a sexual offence, the court must not only consider the minimum mandatory prescribed sentence but also the gravity of the act committed in proportionate with circumstances of the victim and the society at large which must be protected. How would the society condemn the criminal act and whether the offender can be rehabilitated? In the instant case the

Applicant was a first offender. When given the opportunity to mitigate he told court that he was a first offender and had reformed during the period he was in remand custody. In meting out the sentence the court took into consideration the duration spent in custody.

47. No doubt, the Appellant's behavior posed a risk to girls in his neighborhood and family. Such problematic behavior called for his incapacitation for purposes of protecting minors. In the circumstances opting to sentence him to 20 years imprisonment per count was apt.

48. The court is further faulted for imposing consecutive sentences instead of concurrent sentences.

49. In the Judiciary Sentencing Policy Guidelines it is provided that: "7:14- The discretion to impose concurrent or consecutive sentences lies with the court."

50. Section 14 of the Criminal Procedure Code provides that:

    (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

    (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

    (3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences— (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or (b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

    (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

51. In the case of Peter Mbugua Kabui v Republic [2016] eKLR the Court of Appeal stated as follows:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal

or unlawful" We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same."

52. The Appellant was convicted to serve multiple sentences of imprisonment; and, the victims and locations where the offences were committed were different. These were sexual offences, the fact of having defiled one child after another on different dates which was evident repeat behavior with no remorse, warranted consecutive sentences.

53. In the circumstances, I find the appeal having succeeded partially in that I quash the conviction on Count I, and set aside the sentence meted out, but, affirm the conviction and sentence on both Count 2 and Count 3, respectively, sentences that will run consecutively and to be effective from the date of arrest, the 29th January, 2023.

54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF SEPTEMBER, 2025.

.....

L.N. MUTENDE

JUDGE