Nakuarar v Republic (Criminal Appeal E047 of 2024)
[2025] KEHC 13052 (KLR) (10 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E047 OF 2024

LN MUTENDE, J

SEPTEMBER 10, 2025

BETWEEN

WILSON EDAPAN NAKUARAR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Wilson Edapan Nakuarar, the Appellant, was arraigned in court following allegations of having defiled P.W. a girl aged nine (9) years. The act was stated to have contravened Section 8 (1) and (2) of the *Sexual Offences Act*.

2. In the alternative, it was alleged that he committed an Indecent Act with the child, P.W. by intentionally and unlawfully causing his penis to come into contact with her genital organs namely, vagina.

3. The offence in issue was stated to have been committed on 8th day of April, 2019 at Kwanjiku area in Laikipia County.

4. The Appellant denied the charges, but, having been taken through full trial, he was found guilty, convicted and sentenced for the offence of defilement. As a result, he was ordered to serve life imprisonment.

5. Aggrieved by both the conviction and sentence, he appeals on grounds that: ingredients of the offence per the Post Rape Care Form (PRC) were not proved; the prosecution evidence was full of glaring contradictions and discrepancies; the defence was dismissed despite the case not being objected to; the sentence passed was harsh under the circumstances and considering that a presentence report was not availed to guide it.

6. Briefly, facts of the case were that on the fateful date the victim had been sent to graze goats and sheep and while herding a person she identified as the Appellant who was also herding animals called her.

She went only to be molested. PW3 SA who went looking for her found her in the bush with the assailant who had not dressed up. She raised an alarm and her call of distress was answered by people including PW2 RLE. The victim was taken to hospital for examination and treatment. She was found to have a freshly broken hymen. The offender who had been arrested and handed over to the police was arraigned in court.

7. Upon being placed on his defence the Appellant who made an unsworn statement testified that on 06/04/2019 the animals that he was herding trespassed onto the homestead of PW2 and PW3 and ate maize that they were drying. When he went to drive them away he did not find anyone at home. That on 7th he encountered the lady who told him of the wrong he had done and he apologised and proceeded to herd in the forest. He encountered the chief who said he had a bad report about him. He told him that he was a problem and had to leave and if he joked he would be beaten.

8. On 8th he went to graze animals and on reaching near the church he saw people who were registering for Huduma numbers but on going there he met the chief who asked for his Identity Card which he did not have hence he chased him away. As he went back to take the animals, people went after him, they grabbed him but he was rescued by some gentleman and the chief arrived where after he was taken to Kwa Wanjiku Police Station and subsequently transferred to Kinamba Police Station. On being arraigned, charges he knew nothing about were read to him.

9. The appeal was canvassed through written submissions; It was urged by the Appellant that the prosecution failed to prove the act of penetration and identity of the offender. Reliance was placed on the case of JOO v Republic [2015] eklr where Mrima J held that:

> "It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person"

10. That the act of penetration was not established, as the evidence of PW3 indicated the offence was attempted but not penetrative which undermines the conviction. That the conviction was against the weight of evidence as there was no conclusive medical evidence of penetration which was a critical flaw and contradictions were apparent. Reliance was placed on the case of Richard Munene v Republic [2018] eklr where it was held that:

> "We begin with the submissions that the prosecution evidence was contradictory. In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
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> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only

when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

11. That the Appellant's right to fair trial as enshrined in Article 50(2) of *the Constitution* was contravened. That the court not only failed to properly evaluate evidence but also failed to inform the Appellant of his right to representation and promptly. That during investigations his rights as enshrined in Articles 27, 28 and 29, to dignity and freedom from torture was contravened. And, that obligatory minimum mandatory sentence is unconstitutional and should be declared so.

12. The Respondent/ State did not file submissions.

13. This being a first appellate court, I am guided by the principle pronounced in the case of Okeno v R [1972] E.A. 32 where the Court of Appeal stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted afresh and exhaustive examination (Pandya –versus- Republic [1957] E.A. 336) and the appellate court's own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -versus- Republic [1957] E.A. 570). It is not a function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own 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 Peter -versus -Sunday Post [1958] E.A. 424)."

14. The burden of proof in a criminal case rests with the prosecution and the standard of proof is beyond reasonable doubt. It is not the duty of the accused to prove his innocence; where he gives an explanation, it is usually on a preponderance of probability

15. The act of defilement is defined by Section 8 (1) of the *Sexual Offences Act* that provide thus: A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

16. Ingredients of defilement were stated in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where court delivered itself thus:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

To prove the case to the required standard, the prosecution was required to prove existence of the following ingredients.

i. Age of the victim

ii. Proof of penetration.

iii. Positive identification of the perpetrator of the act.

17. The Prosecution was required to prove the age of the child either by producing a birth certificate, medical age assessment, through direct testimony of the parent, guardian or the victim or through expert testimony (See Mwalango Chichoro Mwanjembe v Republic [2016] eklr). The victim's age was proved through production of her birth certificate serial number(Withheld) which proved her age as

nine (9) years having been born on 05/09/2010. The Appellant does not dispute the age hence the age of the complainant was proved to the required standard.

18. On the Question of penetration, the act is defined by Section 2 of the *Sexual Offences Act* thus:

> " Partial or complete insertion of the genital organs of a person into the genital organs of another person;"

19. It is urged by the appellant that, evidence adduced suggested an attempt as opposed to penetration. Notably, the victim herein though nine years old was a child attending nursery school and while at home she would herd animals as instructed by her guardians since she was an orphan. She stated that the offender took her to the bush where there was long grass and did bad manners to her. That he removed his thing from his trouser and put it in her indicated by the court as 'front part' that the child pointed at. In Kasim Ali v Republic (2006) eKLR it was stated that:

> " ... [The] absence of medical examination 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."

20. PW3 said that when she found the Appellant, he lay on the victim with his clothes removed and she saw his genital organ. The child's panty had been removed and he was in the act of inserting 'amirr' (genital organ) into the girl's 'aborr' (vagina).

21. The act in issue is stated to have been committed on 08/04/2019 at 15:00 hours. She was seen in hospital the following day, 09/04/2019 and upon examination she had a freshly broken hymen.

22. Section 388 of the Penal Code defines Attempt as:

> (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
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> (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
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> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

23. Evidence of PW3 was according to the facts as they unfolded. The victim did refer to the act as 'bad manners.' The expression 'bad manners' would mean something inappropriate especially to a vulnerable person. To a child it is an immoral behaviour. Medical evidence adduced by PW6 Dr. Boniface G. Miringu testified to the child having had a freshly broken hymen. Medical evidence did corroborate evidence of the child as having been penetrated, it was not a mere attempt since the offender fulfilled his intention of violating her sexually.

24. Therefore, to establish whether or not the complainant was defiled by the appellant, he was identified by the victim as the assailant. Although in his testimony he alleged that the area chief did warn him to leave the area as he was ill mannered, there is evidence of PW3 who caught him in the act and saw his nakedness. The allegation that he was framed because his animals ate PW3's maize on various days does

not hold water since there was proof of an act of penetration having been committed on the person of the complainant.

25. According to PW4 Inspector Jonathan Kariuki, the Appellant was arrested on 08/04/2019 and taken to the Police Station. He acted upon receiving a call from the area Assistant-Chief who reported that The Appellant had defiled a child. On going to the scene he found the Appellant near the forest surrounded by people who were already assaulting him hence he rescued and took him to Kwa Wanjiku Police Station.

26. The fact of having been arrested immediately after the act was proof that the Appellant was not arrested days after the act as alleged in the defence. Therefore, the prosecution proved the identity of the assailant as the Appellant herein beyond any reasonable doubt.

27. It is urged by the Appellant that his rights were contravened; it is a principle that a party must be confined to grounds of appeal as raised in the memorandum. It would be unfair for the court to determine an issue that was not raised for the respondent to respond to.

28. On sentence, Section 8(2) of *Sexual Offences Act* provides thus:

> 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.

29. The appellant argues that the sentence was harsh and excessive. In Ogolla s/o Owoura v Reginum [1954] EACA 270 it was stated that:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

30. The trial court in meting out sentence of life imprisonment was fettered by the minimum mandatory prescribed sentence. The court pointed out the fact of lack of jurisdiction hence passing the provided for sentence. In the premises, the sentence cannot be dismissed as having been excessive.

31. Therefore, I find the appeal bereft of merit. Accordingly, it is dismissed in its entirety.

32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF SEPTEMBER, 2025.

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L. N. MUTENDE

JUDGE