



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Republic (Criminal Appeal E093 of 2023)  
[2024] KEHC 6692 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6692 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL E093 OF 2023  
CW GITHUA, J  
JUNE 6, 2024**

**BETWEEN**

**JOSEPH CHEGE MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... STATE**

*(An Appeal from the judgement of Hon. V.Ochanda (S.R.M) delivered on 6th April 2022 in Murang'a Chief Magistrate's Court Sexual Offences Case No. 28 of 2020)*

**JUDGMENT**

1. The appellant, Joseph Chege Mwangi was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No.3 of 2006 (hereinafter the SOA).
2. The particulars alleged that on 24<sup>th</sup> November 2019 at 2300 hours in Murang'a County, the appellant intentionally caused his penis to penetrate the vagina of JWN, a child aged 17 years.
3. Upon conviction, the appellant was sentenced to fifteen (15) years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

In his petition of appeal, the appellant raised a total of eight grounds which can be condensed into three main grounds namely;

- (i) That the learned trial magistrate erred in law and fact by convicting him on evidence full of contradictions and inconsistencies which did not prove the offence of defilement beyond reasonable doubt;
- (ii) That the learned trial magistrate erred by failing to take into account his defence.



- (iii) That the learned trial magistrate erred by sentencing him to the minimum mandatory sentence and failed to take into account the time he had spent in lawful custody thus violating Section 333(2) of the Criminal Procedure Code.
4. The appellant who was unrepresented chose to prosecute his appeal by filing written submissions which he duly filed on 13<sup>th</sup> February 2024. During the hearing, he made brief oral submissions which focused on challenging the victim's credibility.
  5. The respondent on its part opposed the appeal and solely relied on its written submissions filed on 21<sup>st</sup> February 2024.
  6. This being the first appellate court, I am duty bound to thoroughly and exhaustively reconsider and re-evaluate the evidence presented before the trial court to arrive at my own independent conclusion regarding whether the appellant was correctly convicted and sentenced. In order to undertake this task, it is important to summarize the evidence adduced before the trial court.
  7. The court record shows that the prosecution called four witnesses in support of its case while the appellant gave an unsworn statement and did not call witnesses. The victim testified as PW1 and stated that she was born on 14<sup>th</sup> March 2003. She narrated how on 24<sup>th</sup> November 2019 the appellant, who was her distant relative, took her to his house after picking her from a birthday party instead of giving her a ride to her home as she had requested. PW1 recalled that she was forced to spend the night in the appellant's house since it started raining and the appellant refused to take her home claiming that his motor cycle did not have lights. In the course of the night, the appellant defiled her several times. On the following day, he took her to a police station and abandoned her there.
  8. Her mother (PW2) recalled that when PW1 did not go home on 24<sup>th</sup> November 2019, she started looking for her and on the following day, she received information that PW1 had been seen riding Chege's motorcycle. She reported this to the police. Chege who she identified as the appellant herein was summoned by the police and though he initially denied having seen the victim, he later admitted having picked her on a road and dropped her at a petrol station.
  9. According to PW2, she was able to find PW1 on the same day who informed her that the appellant had defiled her in his house on the previous night. PW2 transmitted this information to PW3 Senior Sgt. Peter Kinyua at Kigetuni Police Post on the same day. He issued her with a P3 form and referred PW1 to hospital for treatment.
  10. According to PW4, PW1 was examined by Dr. Githinji at Muranga Level 5 hospital on 26<sup>th</sup> November 2019. The P3 form completed by Dr. Githinji, his colleague, showed that upon examination, he noted that PW1's hymen was broken and there were fresh injuries on her genitalia in the labia majora. Spermatozoa was also noted. He produced the P3 form as Exhibit 6 on behalf of Dr. Githinji under Section 77 of the *Evidence Act*.
  11. In his evidence, PW3 recalled that in the course of his investigations, he discovered that the appellant had disappeared to Loitoktok near the Kenya-Tanzania border. He re-appeared nine months later and was arrested and charged with the offence for which he was convicted.
  12. When placed on his defence, the appellant denied having committed the offence as charged. He admitted that the victim who he described as his cousin called on 24<sup>th</sup> November 2019 and requested him to give her a ride with his motorbike to Kigetuni shopping centre. He agreed but PW1 later directed him to drop her about ten metres from the shopping centre which he did. He was thereafter arrested on 14<sup>th</sup> September 2019.



13. Having carefully considered the evidence adduced before the trial court in its entirety alongside the submissions made by the appellant and the respondent, it is my finding that the issues which arise for my determination in this appeal are two- fold namely;
  - (i) Whether the charge of defilement was proved against the accused beyond any reasonable doubt and;
  - (ii) Whether the sentence imposed on the appellant was lawful.
14. Starting with the first issue, it is trite that for the offence of defilement to be established, the prosecution must prove beyond reasonable doubt its three essential ingredients which are the following:
  - (i) The age of the victim who must be a minor.
  - (ii) Penetration.
  - (iii) That the accused was positively identified as the culprit.
15. In this case, the appellant did not dispute that the victim's age was as stated in the charge sheet. This notwithstanding, the prosecution conclusively proved PW1's age by producing her birth certificate which showed that she was born on 14<sup>th</sup> March 2003- See Exhibit 5. This means that PW1 was over 16 years old at the time the offence was committed.
16. Turning to the element of penetration, PW1's evidence that she was defiled on the night of 24<sup>th</sup> November 2019 was materially corroborated by the medical evidence contained in the P3 form though in law it did not require collaboration in view of the proviso to Section 124 of the *Evidence Act*. Dr. Githinji who examined her on the following day noted fresh injuries on her genitalia and the presence of spermatozoa. This evidence proves without doubt that PW1 had recently been engaged in sexual intercourse. Penetration was thus proved to the required standard.
17. Regarding identification, PW1 was clear and consistent in her evidence that it was the appellant, her distant relative who had defiled her on the night of 24<sup>th</sup> November 2019. They had linked up at around 4 PM during the day after PW1 called him with a request to take her home but the appellant instead took her to his house where he defiled her. The appellant in his defence admitted that PW1 was indeed his relative. He referred to her as his cousin.
18. Given these circumstances, it is obvious that PW1 knew the appellant very well prior to the material date and her recognition of him as her assailant on the material date cannot be open to question. Contrary to the appellant's submissions , I did not find any material contradictions in the evidence adduced by PW1 and PW2. I have no reason whatsoever to doubt their credibility.
19. Flowing from the foregoing, I am unable to fault the learned trial magistrate in her finding that in this case, the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt. It is thus my finding that the appellant was properly convicted. His appeal against conviction consequently fails.
20. Turning to the appeal against sentence, it was the appellant's contention that the learned trial magistrate erred by sentencing him to the mandatory minimum sentence without considering his mitigation and without taking into account the time he had spent in lawful custody.
21. It is settled law that sentencing rests with the discretion of the trial court and an appellate court ought not to interfere with such sentence unless it was illegal or it was satisfied that during sentence, the learned trial magistrate applied wrong legal principles or failed to consider relevant facts or considered irrelevant factors or otherwise abused his or her discretion.



See : Bernard Kimani Gacheru v Republic [2002] eKLR.

22. In this case, it is clear from the record that although the learned trial magistrate imposed on the appellant the minimum mandatory sentence prescribed by the law, there is nothing on record to indicate that she erred in passing the said sentence or she applied wrong legal principles. The record confirms that prior to passing the sentence, the learned trial magistrate considered the plea in mitigation offered by the appellant. The sentence was lawful since it was in accordance with the law. The mere fact that it was the minimum mandatory sentence prescribed by the law does not mean that its imposition was automatically unlawful.
23. The only error I see on record which the learned trial magistrate committed was failing to factor in the period the appellant had spent in lawful custody prior to the date that the sentence was pronounced as required by Section 333(2) of the Criminal Procedure Code.
24. For the above reasons, I do not find merit in the appellants appeal against sentence. The sentence imposed by the trial court is consequently upheld save that it shall be computed from the date the appellant was arrested on 4<sup>th</sup> September 2020. The appellant's appeal against sentence succeeds to this extent only.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 6<sup>TH</sup> DAY OF JUNE, 2024.**

**C.W. GITHUA**

**JUDGE**

In the presence of :

The Appellant

Ms. Muriu for the Respondent

Ms. Susan Waiganjo Court Assistant

