



REPUBLIC OF KENYA



**KENYA LAW**  
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**Guya v Republic (Criminal Appeal E051 of 2022)  
[2023] KEHC 2025 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2025 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E051 OF 2022  
TA ODERA, J  
FEBRUARY 15, 2023**

**BETWEEN**

**VINCENT ONGAYI GUYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against both the Conviction and Sentence dated October 5, 2022 in Criminal Case No E 015 of 2021 at Winam Law Court before Hon F Rashid - PM)*

**JUDGMENT**

1. The appellant, Vincent Ongayi Guya was convicted of defilement contrary to section 8(1) (3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on December 26, 2020 at [Particulars Withheld] Sub-County within Kisumu County, he intentionally caused his penis to penetrate the vagina of CAO a girl child aged 14 years.
2. The appellant was sentenced to serve 10 years imprisonment. He now appeals against the conviction and sentence. Before considering the grounds of appeal it is important to recall that the duty of the first appellate court is to review the entire evidence on record and reach an independent decision whether to uphold the conviction bearing in mind that it neither heard nor saw the witnesses testify (see [Njoroge v Republic \[1987\] KLR 19](#)). In order to proceed with this duty, this court shall set out the evidence emerging from the trial court.
3. On December 26, 2020 CAO PW2 was home alone when at 1:00 pm a neighbour came to the door and asked her for a cup of water. After being given water the neighbour followed CAO into the house, covered her mouth, eyes, tied her legs and carried her to a vehicle parked outside. The neighbour in the company of the driver took her to a secluded house, defiled and abandoned her there, not before threatening her with death if she ever disclosed what happened to her.



4. Later on the January 21, 2021 PW4 JKO the headteacher at [Particulars Withheld] Primary was informed that CAO was writing a suicide note. On further enquiry CAO told her that she had been led to this drastic action because she had been defiled, at that point she called her parents to school. She testified that she knew the perpetrator the appellant herein having met him on several occasions.
5. PW3 RAO the mother to CAO testified that she rushed to [Particulars Withheld] School after being called by PW4 on the January 21, 2021. On arrival she was informed that her daughter wanted to commit suicide on account of defilement. She testified that the Appellant was thereafter arrested four days later, at which point she realised he was their neighbour and family friend. On further questioning CAO stated that the Appellant had done something wrong to her. That he took her to an isolated place in the bush and defiled her.
6. PW1 Calvin Okoth Odhiambo a clinical Officer at Jootrh testified that as per the PRC form the hymen was broken, there was a whitish vaginal discharge, high vaginal swab epithelial cells, a negative syphilis test and a negative HIV test.
7. PW3 Dr Lucy Ombok on her part filled the P3 form on February 9, 2021, in which she indicated that the genitalia was normal with a broken hymen. She then recommended counselling for CAO.
8. PW6 the investigating officer Lydia Adhiambo testified that on January 22, 2021 she was at Kasagam police station when at 2pm CAO arrived at the station accompanied by her father. She interrogated CAO who narrated how the Appellant had found her alone at home bound her hands and legs covered her mouth and transported her to a different location where he defiled her. She equally recounted how she was dumped at the scene and warned of death should she reveal what had happened. PW6 then took down the report of the incident.
9. The Appellant DW1 denied the offence in his sworn testimony. He told the court that on the December 26, 2020 he was at home the whole day. That sometime earlier he had disagreed with the victim's father on account of hitting and destroying his fence. That he thought after repairing the fence everything would be alright which was not the case. That on January 21, 2012 he was arrested at his house and taken to the police station. He concluded his testimony by denying commit the offence.
10. Based on the facts outlined above, the trial magistrate found that prosecution had proved its case and proceeded to sentence the Appellant to 10 years imprisonment. The appellant now appeals this decision based on his petition of appeal and written submissions. He contends that the conviction was against the weight of the evidence which was un-corroborated and full of discrepancies. That the clothes the victim was wearing on the alleged day were not produced in evidence. Furthermore, that the charge sheet was defective and not in tandem with the evidence adduced. Additionally, that the suicide note did not mention his name.
11. In his submissions particularly the Appellant averred that the late reporting of the incident pointed to him being framed due to the bad blood between him and the victim's parents, caused by the destruction of the fence.
12. The Appellant equally stated that the evidence of PW2 was uncorroborated due to the Respondent's failure to call the driver of the vehicle as a witness. That the fact that the crime was reported way after it was allegedly committed raises questions as to when exactly penetration occurred.
13. On the issue of the broken hymen the appellant contended that it could also be caused by masturbation, insertion of objects, tampons and not only penetration.



## Identification

14. As regards the issue of identification the Appellant submitted that the victim was influenced by her parents to mention him as the perpetrator. It was their further contention that in the absence of corroboration then the victim's testimony was not credible. They faulted the Respondent for not calling the driver of the vehicle to corroborate the victim's evidence.
15. The respondent did not file any submissions.
16. It is trite law that the ingredients of defilement are age of the victim, whether there was penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga v Republic [2016] eKLR*.
17. The age of the victim was said to be 14 as per the charge sheet. This was supported by the evidence of the victim and her mother (PW1 and 2 ) and the Birth certificate Pexh 3. This is not disputed. I find that PW1 was 14 years old at the material time.
18. On the issue of identification, the appellant contended that identification was not proved and faulted the finding of the trial Magistrate on identification and that it cannot be ruled out the complainant was coached to mention the appellant as the perpetrator. Further that this supports the defence of appellant that there was bad blood between him and complaints parents as a result of a damaged fence. Also the driver who was allegedly was the witness was not called to testify and corroborate the evidence of the child herein. It was submitted that failure to call the witness may lead to an inference that had the witness been called then he would have contradicted prosecution's case as was held in the case of *Daniel Kipyegon Ng'eno v Republic (2018) eKLR*. I must admit at this point that I never had an opportunity to see the witness. I have perused the evidence of PW1 and I note that she told the court how appellant who is their neighbour went to her home and asked for drinking water and carried her to a car which was waiting for him outside and she was driven to an abandoned house in a bush where he had sexual intercourse with her. She said wrote the suicide note as appellant had threatened to kill her if she revealed her ordeal. This evidence was not shaken on cross-examination. On cross examination she said that on December 28,2020 she met appellant on the road and he tried to strangle her. Appellant admitted that he was a neighbour to the family of PW2. Being a neighbour it is clear that the Appellant was well known to the victim. He however denied that he defiled PW2 as alleged and said that the case was fabricated by the parents of PW2 due to a disputed of their fence which he had destroyed. This was not put to PW2 and PW3 on cross-examination.
19. On failure to call the driver as a witness, appellant submitted that it was the duty of prosecution to avail the driver who allegedly witnessed the incident and since he was not called then it can be inferred that had he been called then his evidence would have been adverse to that of prosecution. Though prosecution did not file any submissions herein, I note that PW1 told this court that the driver was in company of appellant at the material time and he did nothing during the incident. From the facts herein the said driver is also alleged to be a suspected principal offender within the meaning of section 20 (1) (c) of the *Penal Code* as it has emerged that he aided the transportation of PW1 from her home to the scene and did nothing while the offence was being committed, failure to call the driver cannot therefore give rise to a negative inference on prosecution's case.
20. As regards corroboration it is trite law that the same is no longer mandatory in sexual offences. In the Court of Appeal case of *JWA v Republic (2014) eKLR* it was stated furthermore, there is no evidence that the minor was coerced or coached to implicate the Appellant and I do not see any reason why she



would have fabricated the case against accused. The incident occurred in broad daylight and the victim had the chance as follows: -

“We note that the appellant was charged with a Sexual offence and the provision of Section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a ‘voire dire’ examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”

21. Similarly, Section 124 of the *Evidence Act* provides: -

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of alleged victim 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.”. Appellant submitted that the PW2 was not truthful as the case was not reported immediately and also that his name was not mentioned in the alleged suicide note. alibi

22. The Appellant herein also raised the defence of alibi. It was his contention that on the alleged date he was in the house the whole day. It is trite law that the onus is on the prosecution to displace the defence of alibi, as was held by the Court of Appeal in *Victor Mwendwa Mulinge v Republic [2014] eKLR*:

“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution.”

23. Nevertheless, it is also trite law that the weight to be placed on a defence of alibi is dependent on the timing of its introduction and the other evidence adduced by prosecution. The court in *R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145* held as follows regarding alibi:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

24. The alibi in this case was raised for the first time at defence stage and so prosecution did not get an opportunity to investigate it.

25. PW2 said that she did not report the case immediately after the incident as the appellant had threatened her with death twice and hence she decided to write the suicide note the end her life .further that the offence is said to have occurred in broad day light and PW1 had an opportunity to see her assailant as he was with her for quite a long time. From the evidence of the child it is clear that she was truthful, consistent and believable. In view of the foregoing, this court finds that defence of alibi was an afterthought. The Appellant was properly placed at the scene.



## Penetration

26. With regard to penetration it was the Appellant's averment that it was hard to pinpoint the date the offence was committed given that the medical documents were filled a month after the alleged incident occurred.
27. It is true that the offence was reported almost a month after it occurred. PW2 testified that she was threatened with death if she ever disclosed of the defilement on two occasions, immediately after the act and on the December 28, 2020.
28. In fact, the issue of defilement only came to light after the victim was found writing a suicide note. Considering the victim's age it is conceivable that the threats must have traumatized her to the point that she felt that the only way out was to go to the grave with her secret. This explains why it took a while for the offence to be reported. During cross-examination PW2 the victim herein testified that she did not tell her parents because she feared the Appellant would kill her. Secondly that on the December 28, 2020 the Appellant met her on the road and tried to strangle her as a way of ensuring she did not disclose the defilement. All the foregoing would adequately explain the delay in reporting of the defilement.
29. As regards penetration, the victim PW2 was steadfast in her testimony that the same occurred on December 26, 2020. The medical documents also show that the hymen was broken. The victims evidence coupled with the medical documents is conclusive proof that there was penetration. The Appellants claim that breakage of the hymen could be caused by other things is therefore not plausible in the circumstances of this case. The totality of the evidence herein proves penetration.

## Contradictions And Inconsistencies In The Evidence

30. Another issue the Appellants raised was inconsistency in the evidence. The Appellant highlighted the difference in the date of defilement as alluded to in the medical documents and in the victim's narration. It was his contention that the medical documents spoke of sometime before December 25, 2020 while the victim said it was December 26, 2020. This court is of the view that this inconsistency is immaterial given that the victim offence testified that she had been threatened by appellant with death if she reported the incident. She must also have been traumatized by the said threats as evidenced by the suicide note she wrote. In any event, there is no doubt that she was defiled by the appellant and no other. The contradictions thus do not go to the root of the case. .
31. I have re-evaluated the entire evidence of the prosecution witnesses vis a vis the defence, and find the evidence of the witnesses and I find that the evidence adduced by prosecution was firm and cogent. I proceed to dismiss the defence as an afterthought. It is clear that the appellant defiled the minor herein on the material day.
32. On the strength of the foregoing the appeal against the conviction lacks merit and is hereby dismissed and the conviction is upheld.

## Sentence

33. On sentencing, the Appellant was sentenced to 10 years imprisonment upon due consideration of mitigation. Section 8 (3) of the *Sexual Offences Act* provides for a sentence of 20 years for defilement of a child ages between 12 and 15 years old . I have also seen the decision by Justice Mativo (as he then was) and Justice Githinji in Petition No 97 of 2021 Mombasa *Edwin Wachira and 9 others v Republic* consolidated with Petition number 88 of 2021 ,90 of 2021 and 57 of 2021 Mombasa where it was held that 'Luckily for me the Supreme Court in Muruatetu one was categorical that mitigation forms an integral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate



curtails his rights under Article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences take deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused un fair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the circumstances of each offence ‘. The said decision emanates from the High court and I am persuaded by the reasoning in it. The sentences in Sexual Offences Act are couched in mandatory terms but it is trite law that any law which takes away the discretion of a Judge to sentence an offender upon hearing his mitigation violates the right to fair trial under Article 50 of the Constitution. I therefore do not agree with the submission by prosecution that the courts must impose the mandatory sentences in Sexual Offences Act. The trial court must consider the circumstances of the case and mitigation before sentencing. In this appeal, I have taken in account the mitigation of appellant, that the minor was abducted by the appellant and taken to an abandoned house where he defiled her in the presence of the driver. The minor must have been traumatized and thus decided to commit suicide but luckily the suicide note was recovered before she ended her life. These in my view are aggravating circumstances. The sentence was therefore not excessive but very lenient and I substitute it with 20 years imprisonment.

34. In the upshot, the appeal is devoid of merit and I proceed to dismiss it.

35. Right of Appeal.

**T A ODERA - JUDGE**

**15. 02. 2023**

DELIVERED IN VIRTUALLY IN THE PRESENCE OF;  
APPELLANT, MISS NYAGOL FOR APPELLANT,  
MR OKOTH FOR PROSECUTION &  
COURT ASSISTANT ALLAN ONYANDO.

**T A ODERA - JUDGE**

**15. 02.2023**

