



REPUBLIC OF KENYA



**Kitungi v Republic (Criminal Appeal 038 of 2022)  
[2023] KEHC 1778 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1778 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL APPEAL 038 OF 2022  
F WANGARI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**THOMAS KIMANZI KITUNGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. M. ONKHOBIA  
(P.M) in Mwingi SO Case No. 87 of 2014 delivered on 11/5/2021)*

**JUDGMENT**

**Background**

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (4) of the *Sexual Offences Act*<sup>1</sup>. Particulars of offence that on 13<sup>th</sup> September 2014, at (withheld) within Migwani District within Kitui County, intentionally did an act which caused penetration of his male genital organ namely penis to penetrate into the female genital organ namely the vagina of ENM a child aged 17 years, 2 months and 19 days.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. Particulars of offence are that on 13<sup>th</sup> September 2014, at (withheld) within Migwani District within Kitui County, intentionally did an act which caused the contact of his male genital organ namely penis with the female genital organ namely the vagina of ENM a child aged 17 years, 2 months and 19 days.
3. The appellant was convicted in the main charge and was sentenced to serve imprisonment period of 15 years. Having been dissatisfied with the judgment, conviction and the sentence imposed the appellant

<sup>1</sup> Act No. 3 of 2006



lodged this appeal. This being the first appellate court, I am guided by the principles as set in the case of *Ganpat v State of Haryana*<sup>2</sup>, as cited by Mativo J in *Makau v Republic*<sup>3</sup> as hereunder;

- a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
  - b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
  - c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
  - d. When the trial Court has breached provisions of the *constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
4. Also in *Okeno v Republic*<sup>4</sup> and *Kiilu & ano. v Republic*<sup>5</sup>, the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.
5. The Court of Appeal has also pronounced itself on this issue. In Civil Appeal 79 of 2012 *Peter M. Kariuki v Attorney General*<sup>6</sup> where the court held *inter alia* as follows: -

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”

### Summary of evidence

6. The complainant (PW 3), was first declared a vulnerable witness by the court as she was a person living with a mental disability. However, at the time of giving her testimony, she had already obtained the age of majority. Nothing was said of her mental ability then, but from her testimony, one can deduce that she understood the court proceedings very well. PW3 gave evidence that at on the material date, she had been sent by her mother to her uncle's place. While on the way to the river, she met the accused who was well known to her. He told her that he would buy her mandazi. He told her to accompany him to the nearby thicket, which she did. That is when the accused caused her to lie down, removed her clothes, he also removed his trouser and he defiled her. She said the accused caused his penis to penetrate her vagina.
7. They then heard the noise of someone coming. The accused quickly dressed up and walked away. She then heard her mother calling her. He went and met with the mother. She was with the accused. The

<sup>2</sup> *Ganpat v State of Haryana* (2010) 12 SCC 59

<sup>3</sup> *Makau v Republic* (Criminal Appeal E015 of 2021) [2022] KEHC 179 (KLR) (14 March 2022) (Judgment)

<sup>4</sup> *Okeno v Republic* (1972) EA 32

<sup>5</sup> *Kiilu & ano v Republic* (2005) 1KLR 174

<sup>6</sup> *Peter M. Kariuki v attorney General* (2014) eKLR



- mother asked the accused what had happened. The accused said he had gone for a long call. PW 1 disputed that and said the accused was defiling her. The matter was reported to the chief and later to the police. She was taken to hospital for examination.
8. On cross examination, she reiterated the contents of her evidence in chief. She however denied that she was found eating mangoes. She also denied that she had earlier said that she had not been sexually assaulted. She also said that she was not aware if her mother was demanding some money from the accused person.
  9. MM (PW 4) gave evidence that on the material date which was 6 years before his testimony in court, he was with PW1, who was epileptic, when the accused came and called PW 1. They spoke for a little while and they went to a nearby bush. PW 4 followed them. That is when he saw the accused who was naked as he had removed his trouser and pant, lying on top of PW 1. They were having a sexual intercourse. He ran and called the mother to PW 1. Upon return they did not find the accused in the act. He was by the roadside. He was asked the whereabouts of the complainant and he said he had not seen her. They called out the name of the complainant and that is when she reappeared.
  10. On cross examination, he said the accused found them fetching firewood. He reiterated that he witnessed the accused have sex with the complainant. He denied having any knowledge of the demand for the accused to give money.
  11. SMM (PW 1), the mother to the complainant gave evidence that her daughter was epileptic and a special needs child. At the time of the alleged offence, she was 17 years old. On the material date, she took the complainant to her uncle one MM2, and she left her in the company of other children. Upon returning, she saw other children playing, but her daughter was nowhere to be seen. She enquired of her whereabouts and she was informed that she had been called by Kimanzi to go greet him. She followed the direction where the accused and PW 3 had gone. On the way, she made Mbaku PW 4, and he told her that the complainant was in the bush together with Kimanzi. As they approached the scene, they saw Kimanzi running away. She called him but he did not respond. She followed him and caught up with him. She asked him where the daughter was and he said he didn't know. They started calling out the name of the complainant and she responded. She said that the accused person had defied her. The accused denied defiling her but stated that he had gone to the bush for a long call. That is when she called the area chief and later the matter was reported to the police. The complainant was taken to hospital for examination. She gave evidence that at the time the complainant was 17 years old.
  12. On cross examination, she said the accused had offered to pay her some money but she refused.
  13. Jackson Mutembi Mbiti (PW 2), the area Ass. Chief gave evidence that the uncle to the complainant called him to his home. That is when he found the accused, complainant, PW 4 and the uncle to the complainant. It was alleged that the accused had defiled the complainant. He called the OCS and he was advised to tell the parties to go to the police station. He said the accused offered to settle the matter out of court. WMM (PW 5), uncle to the complainant gave corroborating evidence to that of the complainant's mother and the Ass. Chief (PW 2). he said he did not witness the accused in the act.
  14. Cpl. Purity Katui (PW 6), the investigating officer gave evidence how PW 1 and PW 3 reported a defilement case where the accused was said to have defiled the complainant. The complainant was taken to hospital where the P3 for was filled. It was found that the complainant had been defiled. The accused was arrested after the investigations were complete. She denied being a party to the demand for compensation by the accused. P.C. Deye Paul Harmon took over the matter after PW 8 was transferred. He produced the immunization card indicating the date of birth of the complainant as 25/6/97.



15. Dr. Christopher Wahenya (PW 8) produced the P3 form, PRC form and the treatment notes. This was after the accused objected to Dr. Phineas Omondi (PW 7) giving evidence on behalf of PW 8. The witness gave evidence that fresh injuries were noted on the genitalia of the complainant, the hymen was freshly lacerated. There was a whitish discharge and pus cells noted in the urine.
16. In his defence, the accused said he was from the chief's office where he had gone to seek some assistance. On his way back home, he heard someone call out his name. he saw it was the mother to the complainant who asked him if he had seen her daughter. He helped her to look for her daughter. Later he was accused of defiling the daughter.  
  
The complainant denied meeting the accused or being defiled by the accused. He said if he had committed the offence, he would not have helped in looking for the complainant and he would have run away. He said the complainant's family were trying to obtain money from him so that they could drop the case against him. He further added that he couldn't rise to the occasion and he relied on a medical document which he produced as an exhibit.
17. After considering the entire evidence on record, the honorable magistrate found the accused person guilty of the main count and he sentenced him to serve a 15 year imprisonment term.

### **Grounds of appeal**

18. Being dissatisfied with the judgment and the sentence, the appellant lodged an appeal on grounds summarized as hereunder;
  - a. The trial magistrate erred in matters of law and fact by convicting the appellant on evidence that was below the standard of proof
  - b. The trial magistrate erred in matters of law and facts in relying on evidence of persons from the same family
  - c. The trial magistrate erred in matters of law and facts in failing to consider the grudge between the accused and PW 1
  - d. The trial magistrate erred in law and facts in failing to consider the defence evidence of alibi.

The appellant argued his appeal orally. He said he was framed due to an existing grudge between him and the family of the complainant. He said their intention was to take his land which he did. he submitted the complainant had denied being defiled but she later changed her mind. He denied committing the offence. On the other hand, the state submitted that they had proved all the elements of the offence of defilement and the conviction was proper. The accused did not raise the issue of the grudge during the trial, hence it was an afterthought.

### **Issues for determination**

19. The issues arising from this appeal are;
  - a. Whether the elements of the offence of defilement were proved
  - b. Whether the sentence meted against the appellant is safe

### **Whether the elements of the offence of defilement have been proved**

20. On the first issue, sections 8 (1) and 8(4) of the *Sexual Offences Act*, under which the main charge is founded provides as follows: -



- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (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.
21. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and identification of the perpetrator. The age of a victim in a case of defilement is crucial because under Section 8 of the *Sexual Offences Act*, age determines the sentence. It must therefore be proved to the satisfaction of the court. It cannot be gainsaid that the prosecution must prove all the three elements.<sup>7</sup>

### Age of the complainant

22. Interrogating the first element, the minor was said to be 17 years at the time the alleged offence was committed. The prosecution produced an immunisation card for the complainant indicating her date of birth as 25/6/1997. The mother to the complainant also gave evidence that her daughter was 17 years old and she identified the immunisation card as proof. Even without the birth certificate, it has been held that age can be proved through other means other than a birth certificate.
23. In *Salim Ego Hassan v Republic*<sup>8</sup>, it was held thus;

“...The age of the victim in sexual offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal card. It can also be proved by medical age assessment; direct evidence of parents or guardian or by observation by the court...”

In the present case, an immunisation card was availed and it is thus not in dispute that the victim was a minor at the time of the alleged offence.

### Penetration

24. On the second element, proof of penetration is key. Penetration is defined under section 2 of the *Sexual Offences Act* as follows:
- “Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
25. It is trite that courts mainly rely on the evidence of the complainant corroborated by medical evidence.<sup>9</sup> In this case, the victim (PW3) gave evidence that on the material date, the accused called her and took her to the bush where he defiled her. PW8, the medical doctor produced treatment notes, PRC form and the P3 form. He confirmed that the complainant was mentally challenged. It was noted that there was a whitish discharge from her vagina. There were fresh bruises on her vaginal wall. The hymen was freshly lacerated. To this end, I am satisfied that there was penetration.
26. As to who is the perpetrator, the appellant submitted that he could not rise to the occasion. He produced a medical report. I have perused the medical assessment form signed in February 2003 by

<sup>7</sup> Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013.

<sup>8</sup> Salim Ego Hassan v Republic (2019) eKLR

<sup>9</sup> Dominic Kibet Mwareng v Republic [2013] eKLR



Col. (Dr.) K.O. Mak'anyengo, the Chief Surgeon Armed Forces Memorial Hospital. The issue with the appellant was the Lower Back Pain (LBP) and the comments by the doctor had nothing to do with his erectile dysfunction as alleged by the appellant. I am convinced that the appellant had no problem that would cause his male organ not to penetrate the female organ of the complainant.

### Identification

27. On the issue of identification, it is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in *Francis Muchiri Joseph v Republic*<sup>10</sup> [2014] eKLR where it stated that: -

“In *Lesarau v R*, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name....”

28. PW1, PW 2, PW 3, PW 4 and PW 5 all mentioned the appellant by name. the appellant was known to them as he was their neighbour. From the evidence above, the Appellant was well known to the complainant and her family and was properly identified. There was no possibility of mistaken identity.

### Sentencing

29. From the above, the appellant was properly convicted. On sentence, Section 8 (4) of the *S.O.A* states as hereunder;

‘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’.

30. The above provision prescribes a mandatory minimum sentence of 15 years’ imprisonment. In *Maingi & 5 others v DPP & ano*<sup>11</sup>, Odunga J. in holding that the mandatory minimum sentences in S.O.A are unconstitutional stated as hereunder;

‘To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *constitution*’.

31. The appellant was sentenced to serve a 15 year imprisonment which is the mandatory minimum sentence as per the *Act*. The court is therefore bound to re-examine the sentence in the light of the above. The accused states he is of an advanced age. In his mitigation, he said he was 79 years old. Though there is no documentary evidence indicating his age, by observation during the virtual hearing of the appeal, it is a fact that he is a senior citizen in terms of age.

### Conclusion

32. I have re-evaluated the evidence on record and I am satisfied that the prosecution proved the elements of the offence of defilement. The appellant was therefore properly convicted and sentenced in accordance with the law. The appeal on conviction therefore fails, and proceed to uphold the conviction by the trial court.

<sup>10</sup> Francis Muchiri Joseph v Republic (2014) eKLR

<sup>11</sup> Maingi & 5 others v Director of Public Prosecutions & ano (Petition E017 of 2021) KEHC 13118 (KLR) (17 May 2022)



33. In respect to the sentence imposed, the trial magistrate was tied by the minimum sentence imposed in the S.O.A. The same having been held to be unconstitutional, this court has the discretion to revise the sentence. I've considered the age of the accused and the time the offence was committed. The file has been active in the criminal justice system for almost 9 years. I have considered that the appellant has been in custody since 11/5/2021. Going by the mitigation of the accused on his age, the appellant is now over 80 years old. I hereby revise his sentence to 2 years imprisonment. The imprisonment term to run from the date of judgement as accused was out on bond during trial. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

Pauline Mwaniki for State

Appellant present

Court Assistant - Guyo

