Ivan v Republic (Criminal Appeal 66 of 2019)
[2025] KECA 1508 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KECA 1508 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 66 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

SEPTEMBER 19, 2025

BETWEEN

DAVID WEPUKHULU IVAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Eldoret (W. A. Okwany, J.) dated 6th December 2018 and delivered by Olga Sewe, J. on 19th December 2018 in HCCRA No. 75 of 2017)

JUDGMENT

1. David Wepukhulu Ivan, the appellant, is in this second appeal challenging his conviction and sentence on grounds that the offence was not proved, that his evidence was not considered and that the sentence was harsh and excessive in the circumstances of this case. The appellant was charged, tried, convicted and sentenced to life imprisonment for defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the offence stated that on various dates between April 2016 and 11th July 2016 at an unspecified time at (particulars withheld) the appellant penetrated with his penis the vagina of NJ, a 6-year old girl.

2. To establish the charge against the appellant, the prosecution called 5 witnesses. NJ (PW1) testified that the appellant had been employed by her parents as a herdsman. She stated that sometime in April 2016, upon returning home from school at about 5.00 pm, the appellant made her sit on a stool in the kitchen while he knelt down and inserted his penis in her vagina. She stated that she felt pain, although it was not the first time that the appellant had done this to her. Much later, when she started feeling pain when urinating, she reported the incidents to her mother, who assessed her. She was escorted to Kapsowar Hospital for treatment and then to the police station, where the matter was reported.

3. The complainant's mother, TB, who testified as PW2, stated that her daughter was born on 10th September 2009. She recalled that on 11th July 2016, the girl arrived home from school looking unwell

and walking abnormally. Upon inquiry, the child also complained of pain when passing urine. PW2 testified that her child had experienced a similar episode on 26th April 2016, and she had been taken to the hospital for treatment. This time round, she decided to examine the girl and noticed a discharge and a mucus-like substance in her vagina. Upon interrogating the child, she revealed that the appellant had defiled her between April and July. She escorted her to Kapsowar Hospital after requesting AC (PW3) to keep watch over the appellant so that he could not escape.

4. PW3 testified that he was a neighbour of PW2 and sometimes worked for her. He knew the appellant, who was also PW2's worker. He recalled that on 11th July 2016, after he received the news of the complainant's ordeal from PW2, he informed the area chief of the incident, after which police officers were alerted and they arrested the appellant.

5. Dr. Winfred Kimosop (PW4) attended to PW1 at Kapsowar Mission Hospital. He noticed that the girl had an altered walking gait. Upon further examination, he observed that the labia majora and labia minora were swollen and reddened, the hymen had fresh and old tears, and there was a whitish, yet blood-stained discharge. The laboratory tests revealed the presence of pus cells in her urine. He concluded that the girl had been defiled. He also testified that he examined the appellant and established that he had pus cells in his urine. He produced the P3 forms for the complainant and the appellant as exhibits.

6. Police Constable Allan Njagi (PW5) gave an account of his investigations into the matter, which led to the arrest and prosecution of the appellant. He also produced the complainant's birth certificate.

7. In his defence, the appellant stated that on 12th July 2016, he worked at the farm alongside PW2 and PW3, after which he proceeded to his house. Later that evening, PW3 asked him to accompany him to watch a football match. It was while they were on their way to the match venue that he was arrested and taken to Kapsowar Police Station. According to him, his arrest arose because he had asked PW2 for his unpaid wages.

8. When this appeal came up for hearing, the appellant appeared virtually in person from Naivasha Maximum Prison, while Ms. Grace Mukangu, Assistant Director of Public Prosecutions, represented the respondent. The parties opted to rely on their respective written submissions, which were already on record at the time.

9. Through submissions dated 28th April 2025, the appellant argued that the elements of the offence of defilement were not proved. His contention in urging this submission was hinged on the grounds that the offence could not have happened in the manner described, and that the complainant was compelled under duress to name him as the defiler, and that he was framed for having demanded his pay. Arising from the foregoing assertions, the appellant argued that his rights under Articles 25(c) and 50(2) of *the Constitution* were trampled upon since his evidence was not considered. Regarding the sentence, the appellant submitted that the same was illegal as it was issued in its mandatory nature and that his mitigation was also not considered.

10. Ms. Mukangu opposed the appeal through the submissions dated 29th April 2025. She restated the evidence and urged that the offence of defilement was established to the required standard against the appellant. Regarding the sentence, Ms. Mukangu relied on the Supreme Court holding in Republic v Ayako [2025] KESC 20 (KLR) in urging us not to interfere with the sentence as it was legal. In the end, counsel for the respondent urged us to dismiss the appeal in its entirety.

11. This being a second appeal, our jurisdiction flows from section 361 (1) of the Criminal Procedure Code, and by virtue of the provision, our focus is on matters of law and not facts. Our interference with factual conclusions is only warranted where the courts below considered irrelevant facts, neglected

relevant ones, or outrightly erred in the analysis of the evidence. This jurisdiction has been reiterated in several decisions of this Court, including Dzombo Mataza v Republic [2014] KECA 831 (KLR), where it was held that:

> " As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. We do not discern such misgivings in this appeal."

12. We are also aware that this being a second appeal we must limit our determination to issues that were raised before the first appellate court. This principle of law was recently reiterated by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR), and we are bound to comply.

13. With that in mind, we have reviewed the record and appreciated the tone and significance of the submissions and authorities of the parties. We note that the question of infringement of rights to fair trial and the constitutionality of the sentence were not raised before the first appellate court. The two issues are therefore not available for our determination in this appeal. It therefore follows that what arises for our determination is whether the offence of defilement was proved and whether the appellant's defence was considered.

14. In order for the prosecution to secure a conviction in a charge of defilement under section 8(1) of the *Sexual Offences Act*, it must prove that the complainant was under 18 years of age, that she or he was penetrated, and that the person in the dock is the one who committed the act-see John Mutua Munyoki v Republic [2017] KECA 376 (KLR).

15. The first element of defilement is the question of age. The Court in Peter v Republic [2024] KECA 1124 (KLR) outlined the applicable principles of proof of age as follows:

> " 28. From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians.
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> 30. There cannot be any better way to prove the age of PW1 than by the Birth Certificate, which is an official document issued by the Registrar of Births. The appellant did not challenge the authenticity of the Birth Certificate. To this end, we will not belabour much but conclude that PW1's age was proved beyond reasonable doubt."

16. We fully associate ourselves with the above holding. In this appeal, we note that during voir dire examination, PW1 stated that she was 6 years old. TK (PW2) in her evidence stated that the minor was born on 10th September 2009 and was 6 years old at the material time. The investigating officer produced a birth certificate showing that PW1 was born on 9th September 2009. Whereas the trial court found the age of the complainant to be 6 years and 10 months, the first appellate court found that she 6 years old. The foregoing conclusion was in tandem with the evidence on record. Section 8(2) of the

Sexual Offences Act simply required the prosecution to establish that the victim was below 11 years, which it did. We therefore find that the complainant's age was proved to the required standard.

17. The second element of the offence of defilement is penetration. In this case, PW1 narrated how the incidents unfolded. She also stated that the offence was committed on more than one occasion. PW2, a nurse by profession, assessed PW1 and suspected that she had been defiled due to her observations before she took her to hospital. She also informed the trial court that this was the second time the child had complained of pain in her private parts. PW4, who attended to the complainant, gave an account of his findings, which led him to the conclusion that the complainant had been defiled. This evidence in its totality supports the conclusion by the trial court and the first appellate court that the complainant was indeed defiled. We are therefore satisfied that the prosecution sufficiently proved that the child was penetrated and, in the circumstances, we find no basis for interfering with the conclusion by the two courts below on the issue of penetration.

18. Regarding the identity of the offender, we note that from the evidence on record, the appellant was well known to the complainant. The appellant was employed by PW2 as a herdsman. This evidence was corroborated by PW3, who sometimes worked with the appellant for PW2. This evidence was not denied by the appellant. Instead, it was his case that he was being framed because he was owed wages by his employer, PW2. The appellant's identity was therefore not in doubt.

19. The appellant also contends that his defence that he was framed because he had demanded money owed to him by PW2 was not properly considered by the first appellate court. However, upon perusing the judgment of the High Court, we find this argument unsupported. The learned Judge at paragraphs 14 and 17 of the judgment observed as follows:

> " 14. The Appellant did not controvert the complainant's evidence even though he claimed that the complainant had been coached to lie. I find that the testimony of the complainant was consistent and graphic. She explained defilement incident in great detail and in a step by step manner that left no doubt in the mind of the trial magistrate that she was indeed defiled by the appellant. The trial magistrate observed as follows on the testimony of the minor:
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> > " "PW1 passed as a young vulnerable child whom the accused had taken advantage of severally. The court observed the demeanour of the young girl. I am convinced that she was telling the truth."
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> 15. ...
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> 16. ...
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> 17. I have examined the judgment by the learned trial magistrate, and I find that the Appellant's claim is not supported. The trial magistrate set out the unsworn statement given by the Appellant in the said judgment, but found that the complainant was a truthful witness. I have examined the said evidence, and find that all the Appellant did in his defense was to describe the events on the day of his arrest and claim that the complainant's mother had framed him in the case because of the debt that she owed him. I find that the appellant's defense did not impeach the otherwise watertight case of the prosecution. I therefore find no reasons to interfere with the trial magistrate's finding in this regard."

20. We cannot fault the learned Judge's conclusion. From the cited passage, it is clear that the appellant's defence was considered and rejected as it did not in any way impeach the cogent evidence put forth by

PW1 as to how the offence took place. As we are expected to consider issues of law, we find no reason to interfere with the concurrent finding by triers of fact in the circumstances. There is no apparent error of law in the manner in which the evidence was considered by the two courts below. Indeed, the trial magistrate, upon recording the testimony of the appellant, recalled PW2 on 30th May 2017, who admitted on oath that she actually owed the appellant Kshs. 15,000 and intended to pay him within two weeks. The money owed to the appellant was thus not denied, and we do not see how it could have been the basis for the prosecution of the appellant on a framed charge.

21. We therefore find no reason to interfere with the conclusion by the first appellate court that it was the appellant who defiled the complainant. The prosecution, therefore, established the charge of defilement against the appellant to the required standard.

22. Finally, on the appeal against sentence, we only need to refer the appellant to the Supreme Court holding in Republic v Mwangi (supra) that:

> " 57. ... Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence...
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> 67. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law.... Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

23. The Supreme Court has clearly stated the position of the law to the effect that the sentences under the *Sexual Offences Act* are constitutional. The appellant, having been charged, tried, and convicted under section 8(1) of the *Sexual Offences Act* for defiling a child under the age of eleven years, the only punishment provided under section 8(2) of the Act is life imprisonment. Having stated the position of the law, we decline the appellant's plea that we should interfere with his sentence.

24. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF SEPTEMBER 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR