Kiptoo v Republic (Criminal Appeal E003 of 2022)
[2025] KECA 1522 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1522 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E003 OF 2022

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

OCTOBER 3, 2025

BETWEEN

BERNARD KIPTOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court at Kericho (A.N. Ongeri, J) dated and delivered on 20th December 2021 in Criminal Appeal No. 1 of 2020)

JUDGMENT

1. This is a second appeal lodged by the appellant against the judgement delivered on 20th December 2021 by the High Court at Kericho (A. N Ongeri, J) in High Court Criminal Appeal No 1 of 2020. That appeal emanated from the judgement of the Chief Magistrate's Court at Kericho in Criminal Case (S.O) No. 15 of 2016 in which the appellant was charged, convicted and sentenced to 20 years for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No.3 of 2006. The particulars of the charge were that on the 5th day of February 2016 in Kericho West District within Kericho County, the appellant wilfully and intentionally caused in his penis to penetrate the anus of MC, a girl aged 13 years.

2. The prosecution, in support of its case called 6 witnesses. The synopsis of the prosecution case was that the complainant, a girl aged 14 years, was on 5th February 2016 at 4.00 pm sent by her mother (PW4) to her grandmother's home to get pineapples. Failing to get her grandmother, the complainant proceeded to her friend's home, whom she similarly failed to find. While she was going away, she met the appellant, a boda boda rider, to whom her father, PW2, was a client who offered to take her home on his motorbike. However, despite her protests, the appellant went past her home while threatening her and instead proceeded to Kapsoit, where the appellant took her to a house in a residential plot and forcefully dragged her into a one roomed house. In the process, the complainant's skirt and panties got torn. In the house, the appellant put her on the bed, facing down, removed his penis and inserted it

in her anus. In the process the complainant bled but did not raise any alarm due to threats from the appellant. When done, the appellant dressed up and left. It was her evidence that it was 5.30pm and there was still daylight.

3. After the appellant left, the complainant also left and at Kapsoit centre, she met her father (PW2) who took issue with her being out at night and together they proceeded home. At home, the complainant narrated the incident to her elder sister who conveyed the information to her mother (PW4). The following day she was taken to the hospital.

4. PW2 confirmed having met the complainant at night on the same day at Kapsoit. He corroborated the complainant's evidence that the complainant had disclosed that she had been defiled by the appellant. The following day, they reported the incident to the police after which the appellant was arrested by PW5. While he confirmed that he knew the appellant, PW2 denied that there were differences between him and the appellant over timber.

5. The age of the complainant was confirmed by the complainant's mother, PW4, based on the Child's Health Card which showed the date of birth as 26th May 2003. It was her evidence that she did not know the appellant but confirmed that on 5th February 2016 at 4.00 pm, she sent the complainant to her grandmother to bring some school items, but it was not until 7.20pm that she heard PW2 angrily returning home with the complainant. The complainant narrated what had happened to her and she later got to know from the hospital documents that the complainant had been penetrated from the anus.

6. The defilement of the complainant was confirmed by PW3, a Clinical Officer at Kericho District Hospital who examined the complainant on 8th February 2016. In his evidence, the external genitalia was normal, the hymen was intact, with no bruises or bleeding but there was a 0.3cm cut on anal canal although the anal sphincter was intact. VDRL was negative, SWAP showed no pus cells or sperm and the urine test was negative. He concluded that the presence of an anal tear strongly suggested penetration.

7. At the completion of the investigations by PW6, the charge of defilement was preferred against the appellant.

8. Upon being placed on his defence, the appellant in his unsworn statement, stated that the complainant was forced to record a statement against him by her father. It was his case that PW2 went to his home and asked him if he could withdraw the case, but the appellant declined and instead asked PW2 to accompany him to the chief who also declined the suggestion of the withdrawal of the case. He alleged that he was assaulted by PW 6 who claimed that he had admitted the offence but subsequently denied. He stated that the complainant was married and complained that he had suffered anxiety during the pendency of the case.

9. In her judgment, the learned trial Magistrate found that it was proved that the complainant was aged 13 years at the time of the commission of the offence; that the findings of PW3 proved that there was anal penetration of the complainant; and that the complainant was truthful in her testimony. Upon conviction, he was sentenced to 20 years imprisonment.

10. On appeal to the High Court at Kericho in Criminal Appeal No. 1 of 2020, the appellant contended: that he was convicted without sufficient evidence to support the charge of defilement and without evidence of the scene; that he was not medically examined as stipulated in section 2 (i) of the *Sexual Offences Act*; and that the trial court did not consider his defence.

11. In her judgment, dismissing the appeal, the learned Judge found that the medical evidence corroborated the complainant's testimony that there was penetration; that the appellant was properly identified as he was a person well known to the complainant; and that the incident occurred in broad daylight.

12. When this appeal was called out for virtual plenary hearing on 12th May 2025, the appellant appeared in person from Kericho Main Prison while learned Senior Assistant Director of Public Prosecution, Mr Omutelema, appeared for the respondent. Both parties relied entirely on their written submissions.

13. It was submitted by the appellant: that the charge-sheet appeared faulty since it bore the name MC, while in court, the complainant gave her name as MC; that there was inconsistency in the evidence of PW1 who stated that she was at home that day, while that of PW4, the mother, was that PW1 was out of school at 4 pm; that it was not possible for the appellant to have walked for 2 kms to her grandmother's home then to her friend's home, then driven to Kapsoit centre, 2 km away and be defiled within a span of 1½ hours from 4.00pm to 5.30pm; that whereas PW2 said that he reported the matter the next day to the area chief, then to Kapsoit AP Camp, this contradicted the statement by PW1 who said that the incident was reported by PW2 at Sosiot AP camp; that whereas PW2 claimed that he took PW1 to Faith Clinic at Kapsoit township, PW1 told the court that she was taken to AP- Sosiot Dispensary, then to a clinic in Sosiot; that whereas PW1, PW2 and PW4 told the court that the alleged incident took place on 5th February 2016, PW3 who said he examined the complainant on the 8th February 2016, projected that the incident took place two days before which must have been on 6th February 2016; that PW3 told the court that there was a 0.3cm cut on the anal canal of PW1 with an intact sphincter thus showing a higher possibility of a hard stool being a possible cause of the cut as there was no sign of any bleeding and that the cut was not fresh; and that PW4 stated that the complainant was born in the year 2004, on or about May, contradicting all other witnesses.

14. According to the appellant, the evidence tendered by the prosecution was not sufficient to warrant the dismissal of the appeal since the case was not proved to the required standards.

15. On behalf of the respondent, it was submitted: that there was sufficient evidence from PW1, PW2, PW4 and the immunization card to prove that PW1 was a child aged 13 years at the time she was defiled; that the medical evidence corroborated the complainant's testimony, thus, the respondent proved sexual penetration of the complainant beyond a reasonable doubt; that the complainant was not mistaken in identifying/recognizing the appellant since she knew the appellant well and the incident happened in broad daylight; that based on Anjononi & Others v Republic [1980] KLR, the evidence of recognition is more satisfactory and more reliable than the identification of a stranger; that the trial Court was satisfied that the complainant was telling the truth and her evidence was corroborated by PW2, PW3 and PW4; that the trial and the appellate courts considered the appellant's defence with the rest of the evidence and found that it was a mere denial that could not shake the respondent's witnesses' testimony; that on the authority of the Supreme Court's decision in Republic v Joshua Gichuki Mwangi Petition No. E018 of 2013, the minimum sentence of imprisonment is mandatory and lawful; that the appellant's mitigation notwithstanding, the circumstances of the case called for the sentence imposed; and that this Court should uphold the conviction and sentence.

16. We have considered the submissions made in this appeal. This being a second appeal, our jurisdiction is circumscribed by section 361(1) of the Criminal Procedure Code which provides that:

> A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

1. This provision has been the subject of judicial consideration in several decisions of this Court including in Karingo v Republic [1982] KLR 213, where the Court stated that:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

18. This Court's remit under the said provision was explained in Karani v R [2010] 1 KLR 73 in which it was held that:

> " By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

19. Therefore, as restated by this Court in the case of Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360, we have:

> " loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law."

20. Loyalty to findings of fact enjoins us, as held in Adan Muraguri Mungara v R CA Cr App No 347 of 2007:

> " to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

21. Before us the appellant has raised the issue of the defect in the charge sheet for the first time. That issue was not raised before the first appellate court. In Alfayo Gombe Okello v Republic [2010] eKLR this Court expressed itself as follows:

> " ....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

22. The predecessor to this Court in Alwi Abdulrehman Saggaf v Abed Ali Algeredi [1961] EA 767 held that the course of taking a point of law on appeal, which has not been argued in the court below, ought not to be allowed unless the court is satisfied that the evidence upon which it is asked to decide,

establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> " The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

23. It follows that we cannot, in this appeal, deal with the alleged defect in the charge sheet.

24. Based on the foregoing, it is our view that the only points of law which falls for our determination are whether the prosecution proved its case beyond reasonable doubt, particularly in light of the alleged contradictions in the prosecution's case and, secondly, whether the appellant's defence was considered.

25. The appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of *Sexual Offences Act* No.3 of 2006. The ingredients of the offence were identified by this Court in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 in which it was held that:

> " The critical ingredients forming the offence of defilement are; age of PW1, proof of penetration and positive identification of the assailant."

26. In its judgement, the trial court found that:

> " On the age of the victim, the Child's Heath Card copy presented reflects date of birth as 26/02/2003 and hence this victim must have been indeed or apparently aged 13 as at the time of the incident in this case. The parents and victim as well very were very clear about the date of birth in issue and the court has no reason at all to doubt this date. I find MC to have been apparently/or about the age of 13 in year 2006."

27. In her judgement, the learned Judge addressed the issue of age as follows:

> " I also find that the age of the complainant was proved by production of the clinic card which confirmed that the complainant was born on 26/2/2003 and therefore she was 13 years and 11 months (almost 14 years)."

28. It is true that the evidence of PW2 and PW4 was not in sync as regards the complainant's date of birth. However, in Mwalango Chichoro Mwanjembe v Republic [2016] KECA 183 (KLR) on proof of age of a complainant this court stated:

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R,Cr.Appeal No.19 of 2014 and

Omar Uche v R,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim.Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

29. The two courts below found, as a fact, that the complainant was aged 13 years at the time of the commission of the offence. That being a finding of fact, we can only interfere if persuaded that the case meets the threshold stipulated in Karani v R (supra) where it was held that:-

> " We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

30. In this case, the courts below considered the evidence as contained in the Child's Health Card. We cannot say that they were plainly wrong in relying on the said document.

31. As for the evidence of penetration, the complainant's evidence that was that she was penetrated in the anus. This evidence was corroborated by the evidence of PW3 who found that "on anal canal, there was a 0.3 cm cut". The trial court, in the judgement concluded that:

> " The findings of the doctor, however, as presented in this case and taking into account the age of the victim suggests recent incident of anal tamper, penetration or defilement of the child's genital/anus at the time in question."

32. In order to allay any doubt as to whether the evidence of PW3 corroborated the complainant's evidence, the learned trial magistrate held that:

> " It is the truthfulness of the minor herein as well as the consideration of any other proper corroborative circumstances or material that will help in determination of guilt on the part of the suspect in this case. By law and in precedence, a court has power to receive and convict even on uncorroborated evidence of a child for reasons to be put down, such court is cautiously satisfied that the child spoke the truth. See section 124 of the *Evidence Act* and as echoed in the case of Chila v Republic [1967] EA 722."

33. Pronouncing itself on the same issue, the learned Judge held that:

> " On the issue of penetration, the complainant gave clear evidence how the Appellant took her to a residential unit at Kapsoit Centre and after undressing her and tearing her skirt and panty he inserted his penis into her anus. I find that the medical evidence corroborated the complainant's testimony."

34. Penetration as an ingredient being a legal requirement in an offence of defilement, the failure by the court to address itself to that ingredient, is a matter of law for the purposes of a second appeal. However, the act of penetration is factual and where the two courts below find that there was, in fact, penetration, unless the matter falls within the contemplation of the case of Karani v R (supra), this Court cannot inquire into the same. We therefore have no basis for interfering with the finding that penetration was proved.

35. Regarding the identity of the appellant as the perpetrator, there was no doubt that the complainant knew the appellant very well. Both herself and PW2 attested to this fact. The appellant himself admitted that PW2 was well known to him and that there was a transaction between them. The complainant was picked by the appellant in broad daylight. As has been held by Madan, JA (as he then was) in Anjononi and Others v Republic (1976-80) 1 KLR 1566 at page 1568:

> "...This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

36. As regards the other averments regarding the inconsistency in the evidence, the law as laid down by this Court in Willis Ochieng Odero v Republic [2006] eKLR is that:

> "As for the contradictions in the prosecution evidence...that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code."

37. This Court explained in John Nyaga Njuki & Others v Republic [2002] eKLR that:

> "In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

38. In our view, the discrepancies were minor considering the matter before us and the circumstances of the case and did not affect the otherwise proved case against the appellant. They are the kind that are curable under section 382 of the Criminal Procedure Code.

39. On the issue of the appellant's defence not being considered, the trial court expressed itself as follows:

> "His defence as appears in this case is utter mere denial on the face of clear and unbiased incriminating well corroborated evidence."

40. We agree with the learned trial magistrate that the appellant's defence was a mere denial and as was held by this Court in Isaac Njogu Gichiri v Republic [2010] eKLR:

> "With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: 'I find that the defence of the 5th accused is not true.' We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: 'The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances; We agree with this confirmation."

41. In this case, the appellant similarly said nothing about the events of the material day.

42. We have considered this appeal and we find it devoid of merit. Accordingly, it is dismissed.

43. We so order.

DATED AND DELIVERED AT NAKURU THIS 3RD DAY OF OCTOBER, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR