Fundi v Republic (Criminal Appeal E067 of 2025)
[2025] KEHC 14603 (KLR) (14 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14603 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKADARA

CRIMINAL APPEAL E067 OF 2025

J WAKIAGA, J

OCTOBER 14, 2025

BETWEEN

NICHOLAS WAIRIMU FUNDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case So 267 of 2019 of the Chief Magistrates Court at Makadara delivered on 1st December 2022 by Hon. L. Gatheru (PM)

JUDGMENT

1. The appellant was charged, tried and convicted of the charge of sexual assault contrary to section 5(1)(a) I (2) of the *sexual offences Act*, the particulars of which were that on the 25th day of October 2019 at [Particulars Withheld] in Kariobangi North within Nairobi County, unlawfully used his fingers to penetrate the genital organs (vagina) of ENM a child aged 16 years. He was sentenced to fifteen years less 18 months spent in custody under the provision of Section 333(20 of the *CPC*.

2. Being aggrieved by the said conviction and sentence, he filed this appeal, initially as High Court Criminal Appeal No E 325 of 2023 at the Criminal Registry at Milimani and raised the following grounds of appeal:

    a. The court erred in finding that the prosecution case was proved beyond reasonable doubt.

    b. The court demonstrated open bias towards the prosecution evidence and ignoring the defence, thereby arriving at a wrong decision.

    c. The court erred in concluding that the appellant was positively identified against the evidence on record.

d. The trial was conducted in an irregular, strange and unusual manner thereby prejudicing the appellant.

e. The court erred in convicting the appellant on scanty and doubtful evidence therefore arriving at a wrong conviction.

3. Following the establishment of this registry, on the 13th February 2025, this appeal was transferred to this registry for determination the trial having been conducted at the Chief Magistrates Court at Makadara with directions having been issued that the same be heard by way of written submissions.

Submissions

4. By way of background, it was contended that this appeal epitomized the unfair consequences that are inherent in the critical enforcement of the *Sexual Offences Act* and the unquestioning imposition of some of its penal provisions which could easily lead to statute backed purveyance of harm, prejudice and injustice, quite apart from the noble intention of the legislation.

5. It was contended that the appellant was not identified in that it was the evidence of PW 1 that she did not know the appellant by name but he was a familiar face that she used to see and that on the material day he was wearing a small scarf(bandana) on the face from the nose covering the mouth, thereby calling for the need for identification pared, which was never conducted and further that he was wearing navy blue shirt and jeans but failed to elaborate whether at the time of arrest he was wearing the same clothes.

6. It was submitted that the according to the evidence of PW3, the victim told them that the appellant was known as 'Kevo', while according to the probation report he was known as 'Niki' and therefore the prosecution failed to prove whether there was a nexus to the moniker to the appellant or whether 'Niki' and 'Kevo' was the same person. In support thereof the appellant relied on the case of *John Mutua Munyoki v Republic* [2017] eKLR where the Court of Appeal stated that in order for the offence of defilement to be committed, the prosecution must approach each ingredient beyond reasonable doubt.

7. It was contended that the court failed to appreciate the existence of a grudge between the appellant and the father of the victim and that according to PW1, the appellant had stolen her hood which her father identified, and that if her fathers hood had been stolen, the prosecution failed to demonstrate that no any other person would own a similar hood.

8. In support of the submissions, reliance was placed on the case of *Gathiga versus Republic* [2024] KEHC 8210(KLR) where the court held that it was possible that the appellant had been framed to square out a grudge that existed between the complainant's family and the appellant.

9. It was submitted that there was inconsistencies and contradictions in the prosecution case, such as the issue of the screams by the complainant, whether the appellant was known as 'Kevo' or 'Niki'.

10. It was finally submitted that the sentence of thirteen years was manifestly harsh and excessive.

11. On behalf of the prosecution it was submitted that the appellant stopped the victim and demanded for phone or money, have searched her pocket and could not find anything, he opened the victims trouser and searched her pants and put his hand on her vagina and the buttocks nut still did not find any money or phone. He them commanded the victim to the banana plantation where he made her suck his penis and inserted his fingers into her vagina twice.

12. It was submitted that the appellant was identified by his silver plated tooth, injured hand and her father's jumper which he was wearing. It was day time and was therefore ideal for identification which

was corroborated by PW2 and PW3 the sister and the father respectively and that the appellant was arrested immediately upon the report by PW1, whose age was proved through her birth certificate.

13. On the defence it the same was properly dismissed and that section 5 (2) on sentence provides for a term of not less than ten years and which may be enhanced to imprisonment for life. In sentencing the appellant to 15 years, the court called for presentencing report and the mitigation of the appellant was considered.

Proceedings

14. This being a first appeal, as was stated in *Joseph Ndungu Kagiri versus Republic* [2016] eKLR, 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.

15. PW1 who was found to be of good intelligence and understood the nature of oath and telling the truth, testified on oath and stated that she used to see the appellant, who approached her as a thief and told her to give him either money or phone having blocked her way, he searched her pockets and found nothing, he then took her to a banana plantation where he opened her trouser and put his hands inside her pants, touched her buttocks and breast in search of money. She then begged him to let her go and would bring him money later on, he took her to another spot and threatened to kill her and told her to remove her trouser asking her whether she had a boyfriend.

16. He then told her to remove her trouser which she did, asked her whether she had had sex, which she answered in the negative, he then gave her two options, either she sucks his penis or have sex and if she didn't do either, he would stab her and throw her into the river to which she opted to sack his penis, he then took her to another spot and inserted his two fingers into her vagina twice.

17. In cross examination she stated that she used to see him around and that she only screamed after the incident, she confirmed that her father had lost a jumper which she came to known that it is the appellant who had taken it.

18. PW3 Janet Mwikali Maina stated that the victim came home without pants and told her how the boy who had stolen their Dads sweater had defiled her and that they knew him as 'Kevo', she then called her brother and they want looking for him from where he stays but did not find him until 7.40 am when they saw him having changed clothes and was arrested. In cross examination she confirmed that he had stolen their dad's sweater and was known in the area as 'Kevo'.

19. PW4 Moses Mwangi produced their copy of the birth certificate. He corroborated the evidence of PW1 and PW3, they went to scene where they found the trouser and the panties of the victim. They then mobilized people to look for the appellant having reported the master to the police. In cross examination he confirmed that the appellant was known as 'Kevo' and that he had seen him with his jacket which got lost during an event.

20. PW5 Constable Zainabu Mwangolo recorded the complainants statement, re-arrested the appellant from members of the public, recovered the victims jacket and trouser from the scene and that the appellant escaped to Uganda and had to be traced for over two years. In cross examination she stated that the appellant was arrested by a group of people and that the father of the complainant was still at the police station when the appellant was brought.

21. PW6 Salano Barbara Keere produced the PRC form and P3 form on the victim, her date of birth was confirmed to be 19.12 .2002 and that she gave a history of sexual violation. In cross examination she confirmed that the victim had a bleeding on the hymen.

22. When put on his defence, the appellant stated that he was a boda boda rider and that he had issue with the complainant's father since his son had sold to him his jacket and that when he told him so, he stated that he will come to pay heavily for the same. After one week the father came and told him to accompany him to the police station where he met the complainant with her mother and that when she was asked if the appellant was the one she did not respond at first until the third time when she shook her head in approval. He was then kept in the cell until 4.00pm when the OCS asked if he had kshs 30,000 to settle the matter to which he said he had only Kshs 750 in Mpesa and was told by the OCS that he would go and rot in jail.

23. In cross examination he confirmed that the victim was his neighbour though he only used to talk to her brother and that the alleged time he was in his house with his wife and child who he can't bring to court as he didn't want to expose them

Determination

24. From the proceedings, the record of appeal and submissions herein there, the following issues have been identified for determination in this appeal:

    a. Whether the prosecution against the appellant was proved to the required degree

    b. Whether the appellant defence was considered by the court

    c. Whether the sentence was harsh and excessive

    d. What order should the court make

25. On the first issue, from the evidence on record, this matter seems to had started as a robbery within the appellant t accosting the compliant demanding for money and phone and it is only when the same was unable to get the money that he now turned his mind into sexually assaulting the complainant. I therefore find and hold that the appellant was properly charged with the offence and that his contention that this matter is one of the misuse of the noble intention of the sexual offence Act has no foundation at all both in l saw and fact.

26. The appellant was positively identified by the compliant as 'Kevo' who had been accused of stealing her father's jacket a fact that the appellant confirm though with a rider that the same was sold to him by the complaints brother. His identification was therefore one by recognition as corroborated by the evidence of the complainant, her sister and father. He also confirmed that he was known to the family, through their brother and therefore the issue as top whether he was 'Kevo' or 'Niki' I do not affect the finding on identification.

27. The trial court therefore rightly found and can not be faulted that there was apparent history between him and the complaints family, thus his identification was free from error.

28. On his defence that there was a grudge between him and the complaints father which led to his being framed, the complainants father testified as PW4 and stated that whereas the appellant had his jacket which he considered lost he did not take any action and therefore it is not believable that he would cause his daughter to enact an ordeal like what she described in the hand of the appellant so as to get even with the appellant over a jacket. The court rightly found and held that the complainant was very detailed on each step she underwent in the whole ordeal.

29. The appellant also advanced an alibi defence which he did not pursue to its logical conclusion as he alleged that he was at home with his wife and child whom he did not wish to expose. However,

the account of PW1 placed them together on the said date which evidence was not dislodged by the defence.

30. Was there any contradiction on the witness account as alleged by the appellant, a review of the evidence tendered before the trial court does not support this contention and is therefore dismissed.

31. Was compliant sexually assaulted by the appellant ? the answer is in the affirmative , the appellant moved with the same at different stages including giving her three option, either such my dick or I defiled you or kill you and threw the body in the river and being a wise lady she opted to suck the dick as the mouth tell no tale of sexual nature as the creator did not intend the mouth to be used for that purpose , none the less the appellant in breach of their agreement proceeded to finger her.

32. It therefore follows that the prosecution case against the appellant was proved beyond reasonable doubt as the age of the complainant was proved through the birth certificate, sexual assault through her account as corroborated by her sister and confirmed through the evidence of PW6 the medical officer who examined her and produced the medical report thereon and the recovery of her clothes at the scene. The appellant was positively identified by recognition.

33. On sentence the same remains at the sole discretion of the trial court. in sentencing the appellant, the court while acting on the then existing jurisprudence and stated that the court was not bound to impose the minimum sentence but rather to exercise discretion, which position as since shifted by the jurisprudence from the Supreme Court, that the court is now bound by the sentences provided for in legislation.

34. In arriving at the sentence herein the court at paragraph 16 of the ruling on sentence stated thus “aggravating circumstances warrants stiff penalty than would be ordinarily imposed in their absence and mitigating circumstances reduce the sentence. Relevant to this case is that the offence is gender based crime, the victim was made to undergo a series of humiliating and obnoxious sexual acts against her will. She was subjected to physical and mental torture for the whole while and all along was made to fear for her life. She had to run from him half naked during day light”

35. I find no fault with the sentence herein as the law allows the trial court to enhance the sentence for up to life and therefore fifteen years thereof cannot be considered harsh in respect of the appellant which despite the fact that he knew the complaint and her family did not extend to her mercy to the extend that even when she had negotiated with him to accept the lesser of what he had proposed which this evil generation call “blow job” he went against the same and dipped his fingers into her vagina not once but several time and did not even give her the opportunity of giving him money the next day which confirms the offence of sexual assault.

36. It therefore follows that the appeal herein lacks merit and is therefore dismissed both on conviction and sentence with the trial court finding thereon affirmed.

37. The appellant however retains right of appeal to the Court of Appeal.

38. And it is ordered.

DATED SIGNED AND DELIVERED THIS 14th DAY OF OCTOBER 2025

J. WAKIAGA

JUDGE

In the presence of

Court Assistant - Irene

Appellant in person

Ms. Kariuki for DPP