Vichenje alias Kenyatta v Republic (Criminal Appeal 226 of 2019)
[2025] KECA 1573 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1573 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 226 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

OCTOBER 3, 2025

BETWEEN

DAVID OKELLO VICHENJE ALIAS KENYATTA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court at Eldoret (D. S. Majanja, J.) dated 23rd April 2019 in HCRA No. 90 of 2018)

JUDGMENT

1. David Okello Vichenje (the appellant), was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (the Act) at the Chief Magistrate's Court at Eldoret in Criminal Case S.O No. 44 of 2018. The particulars were that on 15th February 2018 within Lugari Sub-county in Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of FLA, a child aged 11 years. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act.

2. The prosecution case rested on the testimony of 6 witnesses, namely, the complainant (PW1), the complainant's mother (PW2), the appellant's neighbour (PW3), the complainant's teacher (PW4), a clinical officer (PW5) and the investigating officer (PW6). The defence case rested on his sworn testimony. He did not call any witness in support of his defence. At the conclusion of the trial, the learned Magistrate returned a verdict of guilty on the main count. After considering the appellant's mitigation, the trial magistrate sentenced him to serve life imprisonment.

3. Dissatisfied by the said verdict, the appellant appealed to the High Court at Eldoret in Criminal Appeal No. 90 of 2018 against both the conviction and sentence. After hearing the appeal, Majanja, J. upheld both the conviction and sentence. Undeterred, the appellant appealed to this Court seeking to reverse the High Court decision principally citing 3 grounds in his undated amended grounds of appeal,

namely: (a) faulting the learned Judge for convicting and sentencing him to serve the mandatory life imprisonment without considering the circumstances prevailing during the commission of the offence and the provisions of article 50 (2) (p) of *the Constitution*; (b) wrongfully finding that the prosecution proved the ingredients of the offence; and (c) failing to consider his defence.

4. When this appeal came up for hearing before us on 6th May 2025, the appellant appeared in person while the prosecution counsel, Ms. Kirui, appeared for the respondent. Both parties relied on their written submissions.

5. In support of his appeal, the appellant submitted that section 8 (2) of the Act is couched in mandatory terms leaving no room for the court to impose a lesser severe sentence, therefore, he was not accorded a fair trial and he was denied the right to access to justice.

6. Citing this Court's decision in Geoffrey Thiongo Mukunyi vs. Republic [2020] KECA 692 (KLR), the appellant maintained that suspicion cannot form the basis of a conviction and argued that the ingredients of the offence of defilement were not proved because inconsistencies and contradictions marred the prosecution evidence.

7. Regarding penetration, the appellant maintained that the absence of the hymen simply meant that the minor was not a virgin, and no scientific reasons were advanced to explain the absence of the hymen. Therefore, PW1's evidence could not conclusively prove penetration. Instead, PW4's evidence left many questions unanswered nor did the evidence clearly demonstrate penile penetration. The appellant relied on this Court's decision in P. K. W vs. Republic [2012] KECA 103 (KLR) that it is erroneous to conclude the absence of a hymen is proof of defilement. He maintained that penetration, an essential ingredient was not proved by PW1 and PW5.

8. The appellant also submitted that his sworn defence was not considered alongside the prosecution evidence. He maintained that he was framed by the complainant's mother with whom he had a grudge because of a Kshs.10,000/= debt she owed him, which he earned after ploughing her sugar cane farm. Further, the prosecution was supposed to invoke section 309 of the Criminal Procedure Code and seek leave to adduce further evidence to rebut his defence of alibi which he raised in court.

9. The respondent's counsel Ms. Kirui opposed the appeal on three grounds. Regarding the sentence meted, she urged this Court to bear in mind the circumstances of the offence and maintained that life imprisonment under section 8 (2) of the *Sexual Offences Act* remains lawful and cited the Supreme Court decision in Republic vs. Joshua Gichuki Mwangi SCORK Petition E018 of 2023 [2024] KESC 34(KLR) which underscored that courts have no business deviating from lawful sentences provided in legislations unless amended by Parliament or declared unconstitutional through constitutional proceedings.

10. Regarding the sufficiency of the evidence adduced, Ms. Kirui submitted that PW5's evidence confirmed the presence of spermatozoa that had pus cells and it was her finding that PW1's hymen had been broken which was a clear indication of sexual intercourse. Further, Ms. Kirui submitted that PW3 saw PW1 come out of the appellant's house where he lived alone and PW1 identified the appellant as the person who defiled her.

11. Regarding the complainant's age, Ms. Kirui stressed that PW1's age was confirmed by her birth certificate produced as exhibit 3 which indicated that she was born on 2nd November 2006.

12. As to whether the appellant was properly identified as the offender, she submitted that PW1 knew the appellant very well because he lived next to their school and that she had gone to the appellant's house severally. It was also her submission that the appellant had defiled PW1 on different occasions and she knew him by his nickname, that is: "Kenyatta". It was also submitted that PW3 who lived in

the same compound with the appellant saw PW1 come out of the appellant's house. Therefore, the identification evidence was compelling because the appellant was known to PW1 and PW3.

13. Replying to the complaint that the appellant's defence was not considered, Ms. Kirui maintained that the issue of a grudge as a result of a Kshs.10,000/= debt for ploughing PW2's sugar cane farm was never raised during the cross examination of PW2 and it was an afterthought which cannot discredit the consistent testimony tendered by the prosecution witnesses.

14. This is a second appeal therefore, this Court's jurisdiction is limited to considering matters of law as stipulated by section 361 of the Criminal Procedure Code. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence or the courts below are demonstrably shown to have acted on wrong principles in arriving at their findings. The Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (supra) stated thus:

> " Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

15. We have reviewed the record as well as submissions in this appeal and in our view, the issues for determination are whether the offence of defilement was established, whether the appellant's defence was considered by the two courts below and whether a case has been made for our interference with the sentence imposed upon the appellant.

16. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* which provides:

> " 8 (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement 8 (2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

17. As the above provision shows, the offence of defilement is embedded on three core elements being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients must each be proven for a conviction to issue.

18. We will first address the issue whether penetration was proved to the required standard. The trial court and the first appellate court found that the evidence established that the complainant was defiled. PW1 narrated how the appellant took her to his house, removed her clothes and "did bad things to her." It was her evidence that this was not the first time he did this to her, because previously he used to call her every evening and put his penis in her vagina. PW5, Mr. Samuel Chelule, a clinical officer, upon examining PW1 established that although there were no visible injuries on the complainant's labia minora and majora, the laboratory examination showed presence of spermatozoa which confirms the act of sexual intercourse and therefore penetration. PW3, the appellant's neighbor in the same compound testified that she saw PW1 leaving the appellant's house, thereby corroborating PW1's narration that the appellant took her to his house and did bad things to her. We find no reason to

doubt the credibility of these three witnesses. Accordingly, the appellant has not laid any basis for us to overturn the concurrent findings by the two courts below on the issue of penetration.

19. The other issue is whether the appellant was properly identified as the offender. Just like the other two ingredients, identification of an assailant in a defilement case is a grave issue which goes to the heart of this appeal. As was appreciated by this Court in Wamunga vs. Republic [1989] KLR 424 where the only evidence against a defendant is evidence of identification by way of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction. Addressing its mind to this pertinent question, the first appellate court stated:

> "I find that the testimony of PW1 was clear and consistent on what the appellant had done to her. According to her, it was not the first time that the appellant had subjected her to penetration. The appellant was her neighbour whom she knew as Kenyatta and he admitted that was his name in his defence. The incident took place at daytime and in my view the entirety of the evidence standing along (sic) was a capable of securing a conviction under the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that the uncorroborated testimony of a victim in sexual offences is sufficient to support a conviction without corroboration, if the trial magistrate believed, for reasons to be recorded, that the child was stating the truth. The trial magistrate came to the conclusion that PW 1's testimony was credible and that she had no reason to lie against the appellant."

20. We have re-evaluated evidence tendered by PW1 and PW3. We agree with the conclusion by the two courts below and especially the analysis and conclusion by the trial court that the appellant was known to PW1, therefore, the question of wrong identification cannot arise. The appellant was the complainant's neighbour and she knew him very well and she referred to him as "Kenyatta", a name he himself admitted belonged to him. PW1's evidence was corroborated by PW3, the appellant's neighbour who testified that she saw PW1 leave the appellant's house. Therefore, the finding by the two courts below on the appellant's identification was safe.

21. The third prerequisite in cases of this nature is prove of the complainant's age. There is no dispute that PW1's birth certificate produced as exhibit 3 clearly shows that PW1 was born on 2nd November 2006. Therefore, as at the time of the offence on 15th February 2018, she was 11 years old. Consequently, we are clear in our minds that the complainant's age was proved, therefore, we find no compelling reason to so depart from the concurrent findings of fact by the two courts below.

22. Concerning the ground that the first appellate court failed to appreciate the appellant's defence of the existence of a grudge between the appellant and the complainant's mother triggered by an alleged Kshs.10,000/= debt, this Court in Kigen vs. Republic [2025] KECA 131 (KLR) on the issue whether the first appellate court considered an appellant's defence stated:

> " it is important to mention that by requiring the trial court to consider and weigh an accused person's defence does not mean that its judgment must include a complete embodiment of all the evidence the defence led, as if it comprises a transcript of the proceedings. In order to determine whether there is any merit in the said complaint, this Court must consider the defence led in the trial court, juxtapose it against the trial court's judgment, and finally determine whether there is any basis for interfering with the said judgment, bearing in mind that the onus to proof the case beyond reasonable doubt lies upon the prosecution. The best indication that a court has applied its mind in the proper manner is to be found in

its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses."

23. Addressing this issue, the High Court had this to say;

> " the overwhelming evidence of the prosecution I have set out above, leaves the appellant's defence that he was being framed empty. Like the trial magistrate found, I also find that the appellant did not even suggest to PW 2 in cross-examination that she owed him money."

24. The appellant's contention that there existed a grudge between him and the complainant's mother is essentially an issue of fact. The trial court which had the benefit of hearing and observing the witnesses disbelieved the appellant's version. The first appellate court reviewed the evidence and concurred with the trial court's finding. We have within the remit of our jurisdiction in determining concurrent findings by the two courts below re-examined the material before us to satisfy our selves whether it has been demonstrated to us that the said findings are based on no evidence or that the two courts below ignored relevant considerations. We are clear in our minds that the appellant has not met this threshold. We can only add that the appellant's defence did not dislodge the prosecution evidence and as a result we cannot interfere with the concurrent finding of fact by the two courts below.

25. Related to the appellant's submission that his defence was not considered, is the argument that the prosecution was supposed to invoke section 309 of the Criminal Procedure Code and seek leave to adduce further evidence to rebut his defence of alibi which he raised in Court. As we have already established, the appellant's claim that he was framed because of money owed to him by the child's mother was an afterthought. He did not raise the issue when cross-examining PW2 and there was no reason for the prosecution to call PW2 back to the witness stand. We therefore find this argument to be without any merit.

26. Lastly, the appellant contended that his right to a fair trial was violated since section 8 (2) of the *Sexual Offences Act* provides for a mandatory sentence which deprives the trial court the discretion to impose an appropriate sentence considering the circumstances of the case. We have carefully considered the appellant's petition of appeal before the High Court and his submissions before the High Court. Notably, the appellant did not specifically complain on the constitutionality of the life sentence imposed on him before the High Court, therefore, the said issue was not placed before the High Court for its determination. Consequently, the first appellate court did not have the benefit of applying its mind to the said argument. Accordingly, we are precluded from addressing the said issue.

27. The above notwithstanding, it is important for us to mention that the Supreme Court affirmed the lawfulness of the mandatory minimum/maximum sentences prescribed under the *Sexual Offences Act* in Republic vs. Joshua Gichuki Mwangi & Others (supra). It stated:

> "(57) In the Muruatetu case, this court solely considered the mandatory sentence of death under section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders and eliminating unjustifiable sentencing disparities...

(62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

28. In view of the foregoing, it is clear that our hands are tied and we cannot interfere with the sentence even if the question of violation of the appellant's rights had been urged before the 1st appellate court. In conclusion, we find that this appeal is without merit and the same is hereby dismissed in its entirety.

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

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR