Kaparo v Republic (Criminal Appeal E134 of 2024)
[2025] KEHC 15158 (KLR) (28 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15158 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E134 OF 2024

JK NG'ARNG'AR, J

OCTOBER 28, 2025

BETWEEN

THOMAS ARASA TAI ALIAS KAPARO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Kisii (S.N. Abuya, CM) delivered on 16th December 2024 in Criminal Case (SO) No. E062 of 2024)

JUDGMENT

1. The appellant, Thomas Arasa Tai alias Kaparo, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between May 2024 and 19th July 2024 at [Particulars Withheld] in Kitutu Central sub-county within Kisii County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of B.K. a child aged 8 years.

2. The appellant also faced an alternative count of committing an indecent act with a child contrary to section to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same dates and place, the appellant intentionally touched the vagina of B.K., a child aged 8 years with his penis. The appellant was arraigned before the trial court. He pleaded not guilty to both counts. After a full trial, the appellant was convicted of defilement. He was sentenced to 20 years imprisonment.

3. It is those findings that precipitated this appeal. The appellant filed his petition of appeal dated 26th December 2024. He raised eight grounds disputing the findings of the trial court. He complained that since a long time had lapsed before the offence occurred and his arraignment in court, the evidence was cast in doubt. He was of the view that the evidence of the prosecution was marred with inadequacies, contradictions and insufficiencies taking into account the fact that the age of the complainant was not proved. He lamented that his defence, though cogent, was not considered by the trial court. Finally, he

complained that his sentence was harsh and excessive. For those reasons, he prayed that his appeal be allowed, the conviction be quashed and the sentence be set aside.

4. The appeal was heard by way of written submissions. The appellant filed his written submissions and a list of authorities dated 1st September 2025 through the firm of J. M. Nyagwencha & Company Advocates for the appellant. He submitted that the complainant's age was not proved to the required standard. This is because the testimonies of the witnesses were contrary to the age in the charge sheet. In his view, the birth certificate relied on by the trial court was not sufficient enough as the court ought to have called for the age assessment of the minor. He submitted that the contradiction was major and rendered the conviction unsafe.

5. Next, the appellant submitted that the evidence adduced before the trial court failed to conclusively find that he was the perpetrator of the offence. He stated that this was explained in his alibi defence to the extent that he was not at the crime scene as particularized in the charge sheet and the evidence adduced by the prosecution. He further faulted the trial court for shifting the burden of proof from the prosecution to the appellant. Finally, he submitted that the prosecution failed to prove the offence beyond reasonable doubt. For those reasons, he prayed that his appeal be allowed.

6. The respondent opposed the appeal. It filed written submissions dated 22nd August 2025 through Prosecution Counsel Cletus Akelo. It also filed a notice of enhancement dated 21st August 2025 seeking to have the sentence of 20 years imprisonment be enhanced to life in line with section 8 (2) of the *Sexual Offences Act*. He submitted that all the ingredients to the offence of defilement were proved to the required standard of proof. On sentence, he urged this court to set aside the sentence meted out by the trial court and substitute the sentence to that of life. The respondent prayed that the appellant's appeal be dismissed and the notice of enhancement be allowed.

7. I have considered the submissions, examined the record of appeal and analyzed the law. The duty of this court sitting as a first appellate court was enunciated by the Court of Appeal in the case of Sango Mohamed Sango & another vs. Republic [2015] KECA 178 (KLR) in the following terms:

> " A first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. The Court is not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, the Court must weigh conflicting evidence, make its own findings and draw its own independent conclusion. (See Okeno V. Republic [1972] Ea 32 And Kiilu & Another V. Republic [2005] KLR 174)."

8. The prosecution marshalled five witnesses to prove the offence to the required standard. The evidence before the trial court is recorded as follows: PW1 B.K. testified that she was a grade 3 pupil at [Particulars Withheld] School. She testified that she knew the appellant who used to be their neighbour. She referred to him as Kaparo. She continued that the appellant took her to his place within their shared plot. He removed her clothes, his clothes and started doing "tabia mbaya" to her. She added: "He put his thing for urinating in my anus (where I puupuu) and vagina (where I susu). She recalled that he did this several times whereafter PW1 informed her mother. That she was defiled on those days at 1:00 p.m. after leaving school. She recalled that she never raised an alarm because the appellant stopped her.

9. PW2 NKO, the complainant's daughter testified that the complainant was born on 20th September 2015. She produced her birth certificate in evidence. She was nine years old. Her evidence was that on 24th July 2024, on her way back home from work, she met PW1 and the appellant. PW1 complained

to her that her stomach was upset. PW2 recalled that the complainant had been having stomach upsets for two months irrespective of administering traditional treatment to her.

10. After luring PW1 to tell her the truth, PW1 informed her that the appellant sexually assaulted her on several occasions. He would cover her mouth and once they were done, they dressed up and left. PW2 examined PW1 and found that it was not normal. Thus, PW2 reported the matter at Nyanchwa police station. Thereafter, she took PW1 to the hospital. Later on, the appellant was arrested by the community policing people. She stated that she could not frame the appellant as they were not friends.

11. PW3 Dr. Morebu Momanyi, a senior medical officer at Kisii Teaching and Referral Hospital, produced the appellant's medical evidence; the P3 form, the PRC form, the treatment notes and lab notes. She was brought to their facility on 19th July 2024. He observed that the complainant had a torn hymen. It appeared that she had engaged in several sexual activities with the same person. She was given medicine to cure the infections she had developed. He signed the P3 form on 26th July 2024.

12. PW4 Josphat Nyangera Mageto testified that he knew the appellant as he used to live in his boma. He received a report of the offence on 25th July 2024 from PW2. He advised her to report the matter to the police station. He was aware that the minor was taken to hospital and the appellant was later on arrested. He was one of the people that arrested the appellant.

13. PW5 Corporal Josephine Waswa from Nyanchwa police station was the investigating officer in this case. She recorded the witness statements, collected the evidence and preferred the charges against the appellant. She added that the birth certificate confirmed that the minor was eight years old at the time of the offence.

14. At the close of the evidence of the prosecution, the trial court formed the opinion that the appellant had a case to answer. He was placed on his defence. He testified that on 25th July 2024 at 5: 30 p.m., he was back home after doing his daily chores. He was then arrested by the community policing for committing an offence that he denied. He then gave a description on the circumstances in his arrest and what transpired when he was interrogated by the police.

15. He was adamant that PW2 framed her because he denied her romantic advances. He then gave a vivid description of PW2's relationship with her husband stating that it was rocky and the appellant did not want to get involved. He was of the opinion that PW2 was pouring out her martial frustrations on him because he did not want a relationship with her. He informed the landlord about those transpirations. He added that he could not have committed the offence as he was at work. Furthermore, since there were no eye witnesses, then he could not have committed the offence.

16. A conviction on a charge of defilement must prove the following conjunctive elements: age of the complainant, penetration and identity of the culprit. On the complainant's age, PW2 produced the minor's birth certificate in evidence. According to it, the minor was born on 20th September 2015. As at the time the offence took place, that is between May 2024 and 19th July 2024, the complainant was just shy of 9 years old. She was 8 years old at the time of the offence. Contrary to the appellant's submission, the birth certificate proved beyond reasonable doubt that she was 8 years old at the time of the offence.

17. The next ingredient is penetration. According to PW1, she was sexually assaulted on several occasions. PW3's medical evidence confirmed that PW1's hymen was torn and old looking. This proves that penetration was proved beyond reasonable doubt.

18. Lastly is the identity of the culprit. PW1 doubled up as the sole witness and victim of the offence. Her evidence was that she knew the appellant as Kaparo. On several occasions, the appellant took her to his place within their shared plot. He removed her clothes, his clothes and started doing "tabia mbaya"

to her. She added: "He put his thing for urinating in my anus (where I puupuu) and vagina (where I susu). That she was defiled on those days at 1:00 p.m. after leaving school. She recalled that she never raised an alarm because the appellant stopped her.

19. From the evidence at trial, it was noted that the complainant was truthful. Her evidence was not shaken. She knew the appellant very well. The offence repeatedly took place during the day discounting any chance of mistaken identity. When cross examined, her evidence remained credible. Though the appellant advanced that he had been framed by PW2, this defence was not put to the witnesses during his cross examination. I therefore find that his defence was an afterthought. Taking the above into account, I find that the prosecution proved its case beyond reasonable doubt that the appellant defiled the complainant on several occasions. I also find that there were not major contradictions as to affect the credibility of the witnesses. Accordingly, the appeal against the conviction lacks merit and is hereby dismissed.

20. Though finding that the appellant was convicted under section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*, the trial court sentenced the appellant to 20 years imprisonment. The court took into account the appellant's mitigation. However, that sentence meted out was unlawful. This is because the dictates of section 8 (2) of the *Sexual Offences Act* make it mandatory, without the exercise of discretion, of condemning the convicted person to a sentence of life.

21. It is instructive to note that the respondent filed its notice of enhancement dated 21st August 2025. In essence, the respondent sought to urge this court to give a lawful sentence if the conviction is upheld. I have also taken note that the appellant was ably represented by counsel. He therefore must have been advised on the dangers of proceeding with his appeal in light of the notice of enhancement. He however took his chances. Unfortunately for him, this court has already found that the conviction was safe.

22. Taking into account the binding jurisprudence of our Apex Court, this court shall interfere with the sentence. I therefore set aside the sentence of 20 years imprisonment and substitute the same with life imprisonment.

    It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

.....

HON JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Kipchirchir (Court Assistants)

Masolo for the Appellant

Koime for the Respondent