Gathoni v Republic (Criminal Appeal 138 of 2018)
[2025] KECA 2080 (KLR) (28 November 2025) (Judgment)

Neutral citation: [2025] KECA 2080 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 138 OF 2018

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

NOVEMBER 28, 2025

BETWEEN

CHARLES KINYUA GATHONI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (Matheka, J.) dated 26th September 2017 in HCCRA No. 26 of 2015)

JUDGMENT

1. The appellant, Charles Kinyua Gathoni, was charged before the Karatina Magistrate's Court with an offence of defilement, contrary to section 8 (1) as read with section 8(3) of the *Sexual Offences Act* ("the Act"). The particulars of the charge stated that, on 1st September 2013, at Mathira East District within Nyeri County, the appellant intentionally penetrated the vagina of MWW, a child aged 12 years.

2. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the Act. The particulars of the charge were that on 1st September 2013 at Mathira East District within Nyeri County, the appellant intentionally assaulted MMW, aged 12 years, by touching her genital organ, namely the vagina, using his penis.

3. The facts of the case as presented by the prosecution were that on 1st September 2013, at around 1:00 pm, while at church, MWW (PW1) was sent to the shop by an unnamed lady to buy an airtime card for her. PW1 went to the appellant's shop to make the purchase when the appellant unexpectedly pulled PW1 into his house, which was separated from the shop by a curtain.

4. Once inside, the appellant put PW1 on his bed and warned her not to tell anyone. He removed all of PW1's clothing, including her skirt, blouse, stockings, biker shorts, and underwear, while covering her mouth. He also took off his own trousers and underwear and defiled her. After the act, he spent about

20 minutes with her, continuing to threaten that he would kill her if she told anyone. He thereafter allowed her to leave.

5. PW1 also testified that one Rose Waithera witnessed the appellant pulling her into his house, and Rose sent a boy to inform PW1's grandfather. As she left the appellant's house, she came across her grandfather and a village elder, and she narrated the incident to them. When questioned about the defilement, the appellant denied. They were both subsequently taken to the police station when PW1's mother arrived. Both were taken to particulars withheld District Hospital for examination. PW1 received treatment. Thereafter, they returned to the police station to record their statements.

6. JMM (PW2) PW1's grandfather, testified that on 1st September 2013 at around 1:00 pm, he received a call from elder M M, informing him that PW1 had been defiled by the appellant at his shop. PW1 lived with him, while her mother resided elsewhere. PW2, along with the sub-chief and JMM, while enroute to the appellant's shop, met PW1, whom they took back to the appellant's shop. They found the appellant at the shop, and when they confronted him about what he had done to PW1, he denied any wrongdoing.

7. They all then proceeded to Itundu AP. Camp with the Assistant Chief, PW1, and the village elder. At this point, the appellant admitted to having defiled PW1. From the AP Camp, they went to the particulars withheld Police Post, where they recorded their statements and were referred to particulars withheld District Hospital, where PW1 was examined and found to have been defiled. The appellant was also examined.

8. MWM (PW3), PW1's mother, testified that on 1st September 2013, while working at particulars withheld, she received a phone call at 1:00 pm from her sister N, who informed her that her daughter, PW1, had been defiled. PW3 boarded a motorcycle to their home. Upon arriving, she found no one at home. She then learned of their whereabouts and followed them to Particulars Withheld, where she found her parents, PW1, and the appellant, who was sitting on the ground. She enquired about her daughter's defilement and was informed that the appellant had defiled her. PW1 also confirmed the incident, explaining that she had gone to the appellant's shop around 1:00 pm to buy a card, and the appellant had pulled her into his house, covered her mouth, and defiled her.

9. PW3 further testified that they reported the matter at particulars withheld Police Station and then went to the appellant's house, where they discovered a used condom hidden under the bed. Both PW1 and the appellant were examined, and PW1 was provided with medication to last a month. The appellant was taken to particulars withheld Police Station, while PW1 and PW3 returned home.

   She further informed the court that PW1 was 12 years and 3 months at the time of the accident, having been born on 23rd January 2000.

10. J M N (PW4), the Assistant Chief, testified that on 1st September 2013 at around 1:00 pm, while at her home, M M, the village elder, visited her. He informed her that he had received a call about a child who had been defiled at the appellant's house, identified as M (PW1). PW4, along with the elder, went to the appellant's shop. They found the appellant with PW1 and PW2. She asked PW1 what she was doing there, and she explained that she had gone to buy airtime at the kiosk when the appellant grabbed her, took her into his house behind the kiosk, removed her underwear, and defiled her. PW4 confronted the appellant, demanding that he closes his kiosk out of fear that the crowd would become violent. PW4 took the appellant to the Itundu AP Post and handed him over to a police officer before proceeding to Kiaruhiu Police Post around 3:00 pm.

11. M M M (PW5), the village elder, testified that on 1st September 2013 at around 12:30 pm, he received a call from a villager that there was a child in the appellant's house and the door was locked. PW5

went to PW2's home, but PW1 was not there. They then left together for the appellant's house. They encountered PW1 as she was leaving the appellant's house. PW5 advised the parents to ensure that the appellant did not escape, so they sought help. He then went to PW4, and they returned together.

12. Dr. Marcella Nyawira (PW6) testified that PW1 was examined and treated at particulars withheld District Hospital on 1st September 2013 at around 6:30 pm. It was reported that PW1 had been sexually assaulted by someone she knew and that this was not the first time, as the same person had reportedly defiled her a week earlier and threatened to strangle her if she told anyone. On examination, PW1 was found with a small vaginal tear, and there was the presence of white fluid. The hymen was not intact, and samples were taken, which showed positive signs of sperm. The P3 form was dated 10th September 2013.

13. PC David Kusu (PW7) of particulars withheld Police Station, testified that on 1st September 2013, while stationed at particulars withheld Police Post, PW4 and PW5 arrived with the appellant, whom they had arrested for allegedly defiling a child. The child was also in their company along with her grandfather. PW7 detained the appellant and took him along with PW1 to particulars withheld District Hospital. He received the results of the examination on 2nd September 2013. PW1 was able to identify the appellant positively. He recorded statements and subsequently took the appellant to the particulars withheld Police Station, where he was subsequently charged with the offence of defilement.

14. When put to his defence, Charles Kinyua Gathoni, the appellant (DW1), elected to give sworn evidence. He stated that he was a potato vendor and that on 1st September 2013, he had purchased potatoes from Kabaru and brought them to particulars withheld and in the company of DW2, sold them at the Jambo area. The last person he sold potatoes to was Miano. He then began collecting debts, and the last place where he collected his debt was at Kareki, where he parked his motorcycle by the roadside and asked Kirungaru to watch it for him as he entered the home of PW1, where they began to scream and refused to pay him, threatening to frame him for defiling their daughter. A crowd gathered, including PW4. He was subsequently arrested and taken to Itundu Police Station, where the police officers beat him, coercing him to admit to the crime. Out of fear, he admitted to having defiled PW1. He was then taken to the police station at particulars withheld and later, around 6:45 pm, to particulars withheld District Hospital for examination. Due to a power outage, he was informed that his report would be ready the following day. He was then taken to the particulars withheld Police Station and later arraigned in court.

15. Johnson Kirungaru Wanjau (DW2) testified that on 1st September 2013 at around 1:00 pm, he sold potatoes alongside the appellant in the Jambo area. Afterwards, they went to collect debts. They entered two homesteads together, and in the third homestead, he stayed outside to watch over the motorcycles while the appellant went in alone. Suddenly, he heard a commotion, took the appellant's keys, and left on his motorbike. He returned around 4:00 pm to see what had happened and found the appellant's motorcycle still parked by the roadside. He took the bike and left with it. The appellant later called him and informed him that he had been arrested for rape.

16. Simon Miano (DW3) testified that on 1st September 2013, the appellant, who was accompanied by another man, sold potatoes to him at around 1:00 pm. Two weeks later, he learnt that the appellant had been arrested.

17. In its determination, the trial court found that the ingredients of the offence of defilement had been established and the charge had been proved beyond any reasonable doubt. The court found the defence to be a sham and the appellant's evidence to be untenable, and convicted him as charged. He was sentenced to 20 years' imprisonment.

18. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. On 31st August 2017, the High Court upheld both the conviction and sentence, thus precipitating this second appeal in an undated ground of appeal containing grounds that: the learned Judge erred in law and facts: by upholding the appellant's conviction without considering the trial court's failure to recognize the risks associated with relying on a single identifying witness; in supporting the appellant's conviction without addressing the doubts raised by the clinical officer's evidence; in rejecting the appellant's defence, which had not been effectively challenged by the prosecution and failing to note that the prosecution witnesses' testimonies were fraught with doubts and contradictions, making them an unreliable basis for conviction.

19. At the hearing of the appeal through an undated application, the appellant sought to withdraw the appeal on conviction and to proceed with the appeal on sentence on the grounds that: he was arrested on 1st September 2013, convicted and sentenced on 18th May 2015 to serve 20 years' imprisonment; he is remorseful over the incident and seeks the following orders:

    a. A review of the appellant's sentence in the interest of justice.

    b. A declaration that the failure to consider the appellant's mitigating circumstances due to the mandatory nature of the sentencing under the charge resulted in an unfair trial and constituted a miscarriage of justice.

    c. A declaration that the imposition of a 20-year sentence clearly indicates that the mitigating factors were not taken into account because of the nature of the offence.

    d. A declaration to reduce the sentence from the original minimum imposed to a less severe punishment, in accordance with Article 50(2)(p) and other relevant laws.

20. The appellant further informed the Court that he had undergone rehabilitation through various educational programs, including a diploma in biblical studies and certificates in leadership and life skills, and that he was the breadwinner of his family, a fact overlooked during mitigation. He asked for compassion from the Court, promising to rebuild his family and support the youth, and that he was a first offender and his family is ready for his reintegration into society.

21. Learned counsel for the respondent filed submissions dated 14th October 2024, where he submitted on all grounds, including conviction. Since the appellant dropped his appeal on conviction, we will not review the submissions thereof.

22. On sentence counsel referred to Republic vs. Joshua Gichuki Mwangi & 4 Others [2024] KESC 34 (KLR), in which the Supreme Court addressed the issue of mandatory minimum sentences in sexual offence cases. Counsel asserted that, according to the Supreme Court's decision, the sentence imposed by the trial court and subsequently upheld by the High Court was lawful. It was neither punitive nor excessive, and was proportionate to the offence committed by the appellant against the innocent minor.

23. Having duly considered the record, the appellant's grounds of appeal and the rival submissions, we start by reminding ourselves that this being a second appeal, the court is restricted to addressing itself to matters of law only as provided in section 361(1) of the Criminal Procedure Code. The section provides as follows:

> 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.

24. From his submissions, the appellant is calling upon this Court to interfere with the sentence that the trial court meted out on account of it being severe. The provision of section 361(1) above is fortified by the decision of the Supreme Court in Republic vs. Joshua Gichuki Mwangi & 4 Others (supra), where the Court stated:

> "(49) 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."
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> (Emphasis added)

25. As things stand now, this Court cannot venture into questioning the severity of the sentence meted out by the trial court. The appeal is therefore dismissed.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF NOVEMBER, 2025.

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR