Githinji v Republic (Criminal Appeal E121 of 2023)
[2025] KEHC 18966 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E121 OF 2023

CW GITHUA, J

DECEMBER 17, 2025

BETWEEN

ISAAC MBURU GITHINJI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. J Irura (SPM) at the Kigumo Senior Principal Magistrate's Criminal case No. E009 of 2022 dated 20th November 2023)

JUDGMENT

1. The appellant, Isaac Mburu Githinji was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* (SOA).

2. The particulars were that on the 11th day of February 2022 at [Particulars withheld] village, Murang'a South Sub-County in Murang'a County, the appellant intentionally caused his penis to penetrate the vagina of JWN, a child aged 5 years and three months.

3. Upon conviction, he was sentenced to serve 40 years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

4. In his petition of appeal filed on 23rd November 2023, the appellant relied on seven grounds of appeal which can be condensed into two main grounds namely; that the learned trial magistrate erred in law and fact by violating his constitutional rights guaranteed under Article 50(2) (c) of *the Constitution* in that he was denied adequate time and facilities to prepare his defence; and; that in convicting him, the trial court relied on insufficient evidence which was contradictory and which did not prove the ingredients of the offence of defilement beyond reasonable doubt.

5. The appeal was prosecuted by way of written submissions. The appellant who appeared in person filed his written submissions dated 28th February 2025 while those of the respondent dated 13th May 2025 were filed on 14th May 2025.

6. In his written submissions, the appellant contended that he was convicted on the basis of a defective charge sheet since the charge sheet failed to indicate that the act he allegedly committed was unlawful. He submitted that the omission of the word "unlawful" in the charge was fatal and ought to vitiate his conviction.

7. It is important to state at this juncture that the appellants claim that his conviction was based on a defective charge sheet was introduced for the first time in his written submissions as it was not contained in his petition of appeal. Under Section 350 (2) of the Criminal Procedure Code (CPC), this court is discouraged from allowing an appellant to rely on a ground of appeal which was not set out in his petition of appeal. However, given that the appellant was prosecuting his appeal in person, I will give him some latitude and consider this to be a procedural technicality which I choose to disregard in favour of interrogating the substance of the appellant's complaint.

8. The appellant also asserted that the prosecution's case lacked credibility due to two reasons; namely; failure to call a material witness, the victim's elder sister who was supposed to be in the victim's company at the material time and failure to adduce scientific evidence in the form of DNA evidence to link him to the commission of the offence.

9. On sentence, the appellant relied on what in his view was recent jurisprudence on the unconstitutionality of mandatory long sentences. He submitted that sentencing should be individualized and should be a product of a courts discretion after taking into account the unique circumstances of each case. For this proposition, he relied on the Supreme Court's decision in Francis Karioko Muruatetu & Another V Republic [2020] KEHC 1390 (KLR) and the Court of Appeal decisions in Julius Kitsao Manyeso V Republic [2023) eKLR and Kaingu V Republic (2024) KECA 566 (KLR), among others.

   He prayed that his conviction be quashed and sentence set aside as it did not align with constitutional values and principles.

10. The appeal was contested by the respondent. Learned prosecution counsel Ms. Muriu in her submissions supported the trial court's decision on both conviction and sentence. She disputed the appellants claim that the charge sheet was defective contending that the defect pointed out by the appellant was curable under Section 382 of the Criminal Procedure Code (CPC) as it did not occasion him any prejudice.

11. Further, the respondent submitted that through its eight witnesses, it had presented consistent and reliable evidence before the trial court which proved the charges preferred against the appellant beyond any reasonable doubt. She urged the court to find that the appellant was properly convicted.

12. On sentence, Counsel submitted that the sentence was lawful and should not be disturbed. She argued that when passing sentence, the trial court exercised its discretion properly after considering all relevant factors including the nature of the offence, the age of the victim as well as the mitigating and aggravating factors in the case. In her view, the appeal lacked merit and ought to be dismissed in its entirety.

13. This being a first appeal to the High Court, this court is enjoined to re-analyse, re-evaluate and re-assess the evidence adduced before the trial court to arrive at its own independent conclusions. In undertaking this task, I should remember that unlike the trial court, I did not have the advantage of hearing or seeing the witnesses and give due allowance for that disadvantage.

See: Okeno V Republic (1972) EA 32; Kiilu & Another V Republic (2005) iKLR 174.

14. I have carefully considered the grounds of appeal, the written submissions filed by both parties and the authorities cited. I have also read and understood the evidence on record as well as the trial court's judgement.

15. Having done so, I find that although the appellant had in one of his grounds of appeal alleged that his constitutional right under Article 50(2) (c) of *the Constitution* had been violated during the trial, he appears to have subsequently abandoned this complaint as he did not make any submissions in support of that ground of appeal. He did not therefore substantiate his complaint with details regarding the instances or the manner in which he was allegedly denied adequate time and facilities to prepare his defence.

16. My reading of the proceedings before the trial court does not give any indication that the learned trial magistrate ever denied him time or an opportunity to prepare or advance his defence. Nothing therefore turns on that ground of appeal.

17. From the evidence on record and the parties written submissions, it is my view that only three key issues lend themselves for my determination which are;

    (i) Whether the charge sheet was defective as alleged.

    (ii) Whether the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt.

    (iii) Whether the sentence imposed on the appellant was unlawful or manifestly excessive.

18. On the first issue, the appellant complained that the learned trial magistrate erred by convicting him on a defective charge sheet. The substantive law governing validity of a charge is set out in Section 134 of the Criminal Procedure Code which provides as follows;

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"

19. The Court of Appeal in Peter Ngure Mwangi V Republic [2014) eKLR addressed itself to the test of determining whether or not a charge sheet was defective. The court held that there were two limbs to the test, namely, whether the charge sheet was indeed defective and secondly, even if the charge was defective, whether the defect was curable or not.

20. In this case, as stated earlier, the appellant was convicted in the main count with the offence of defilement. A perusal of the charge sheet shows that it contained a statement of the charge, the particulars supporting it which clearly indicated the date, place and acts constituting the alleged offence and details regarding the victim.

21. In my considered view, the charge sheet fully complied with the provisions of Section 134 of the Criminal Procedure Code (C P C) as it specified the offence charged and gave sufficient information in the particulars thereof which disclosed the nature of the offence charged and how it was allegedly committed.

22. Although it is true as contended by the appellant that the word "unlawful" was omitted in the particulars supporting the charge, this omission did not by itself render the charge sheet defective since

the acts allegedly committed by the appellant against the victim were fully disclosed and if proved, they were unlawful as they constituted the offence of defilement. As an unlawful act cannot cease to be unlawful just because it was not described as such, I find that the omission of the word "unlawful" in the charge sheet did not render the charge incurably defective.

23. In any event, the court record shows that the appellant participated in his trial in a manner that indicated that he understood the nature of the charges facing him. He cross- examined witnesses and tendered an appropriate defence. In the premises, I am satisfied that the aforesaid omission did not cause him any prejudice.

24. Turning now to the second issue, it is trite that before the prosecution can secure a conviction for the offence of defilement, it must prove beyond doubt the offence's three essential ingredients, which are;

    (i) Age of the victim

    (ii) Penetration

    (iii) Positive identification of the perpetrator

25. A perusal of the trial court's record shows that the age of the victim as stated in the charge sheet was not disputed by the appellant. The age was also confirmed by the victim's birth certificate which was produced as PExhibit 4 by PW8, the investigating officer. The birth certificate confirmed that the victim was born on 28th November 2016. Given this evidence, i am in agreement with the learned trial magistrate that the age of the victim was proved to the required legal standard.

26. On the element of penetration, a reading of the trial court's judgement reveals that the learned trial magistrate addressed her mind to the definition of penetration set out in Section 2 of the *Sexual Offences Act* (SOA) and appreciated what in law amounted to penetration. She correctly noted that penetration did not need to be complete insertion of the genital organ of the culprit into the genital organ of the victim or the release of spermatozoa; that partial insertion was sufficient to complete the offence.

27. In this case, PW1, the victim after a brief voire dire examination narrated how at the material time, a person she had previously seen many times passing or seating near their home met her as she was returning home from the shop and took her to a nearby maize plantation. He removed the stocking she had used as underwear, knelt down on the ground and as she was standing, he urinated on her between her legs. She went home thereafter and reported to her parents what had happened. She described to them the person who had "urinated" on her.

28. . The victim's mother who testified as PW2 confirmed having received PW1's report and on checking her private parts, she realized that she had been defiled. She summoned her husband (PW4) who together their neighbours took PW1 to Kenol Police Station and reported the matter.

29. On the following day, PW1 was examined by PW7, a Clinical Officer at the Maragwa Sub County Hospital. PW7 recalled that on examination, he found bruises on PW1's vagina and noted that her hymen was freshly torn. The child had taken a bath and so no blood or discharge was seen. He concluded that the child had been defiled. He completed a P3 form which he produced as P.Exhibit 1.

30. Given PW1's evidence which was not challenged in cross examination coupled with the clinician's evidence and the findings made in the P3 form, I find that PW1's claim that the appellant had urinated or done bad manners to her was her way of communicating to the court that the appellant had defiled her. She was a child of very tender years and her language was understandable. I am thus unable to fault the trial court's finding that penetration was also proved beyond any reasonable doubt.

31. Regarding whether the appellant was positively identified as the perpetrator, PW1 maintained that she was able to see and recognize the appellant as her assailant since he assaulted her during the day as darkness had not fallen. She knew the appellant as she had seen him pass or seat near their home several times before the material date.

32. Her evidence on identification was corroborated by the evidence of PW5 who testified that on the material date at around 5.00 p.m, she saw the appellant fleeing from a shamba when putting on his trouser and shortly thereafter, PW1 emerged from the same shamba crying. Upon enquiry, PW1 pointed at the appellant saying he had done bad manners to her. She escorted PW1 to her home and reported to PW2 what she had seen.

33. When placed on his defence, the appellant gave a sworn statement and did not call witnesses. He denied having committed the offence as alleged and claimed that he was arrested from his home by members of the public led by a village elder who took him to the victim's home and later handed him over to the police.

34. It is clear from the evidence on record that the appellant was arrested based on PW1's and PW5's description of him as PW1's assailant. My perusal of the evidence on record does not indicate or suggest that PW2 or PW5 had any reason to give false evidence against him. The appellant did not allude to any.

35. The appellant's submission that he was not properly identified as no DNA sample was taken from him for analysis which could have linked him to commission of the offence cannot be sustained because it is clear from Section 36 of the SOA that taking of DNA samples was not mandatory since medical or forensic evidence through DNA sampling and testing is not the only way that commission of sexual offences including defilement can be proved.

36. The offences can be proved by other forms of evidence which link the culprit to commission of the offence. Section 124 of the *Evidence Act*, for instance, empowers a court to convict on the sole evidence of a minor victim of a sexual offence if the trial court believed that the victim was a truthful witness and recorded its reasons for such belief.

    In view of the foregoing, I am in agreement with the learned trial magistrate that the appellant was positively identified as the culprit in this case and there was no possibility of mistaken identity.

37. . Having found as I have above, I have come to the conclusion that the prosecution proved the charge of defilement against the appellant in this case beyond any reasonable doubt. It is thus my finding that the appellant was correctly convicted. His appeal against conviction therefore fails.

38. . With regard to his appeal against sentence, the appellant cited recent jurisprudence starting with the Supreme Court's decision in Francis Karioko Muruatetu & Others V Republic (2017) KLR in which the Supreme Court held that the minimum mandatory sentence for the offence of murder was unconstitutional for fettering the court's discretion in sentencing. This principle was adopted and applied by the Court of appeal, the High Court and subordinate courts to the minimum mandatory sentences prescribed in the SOA. Relying on the above decisions, the appellant questioned the constitutionality of his sentence which he described as a long sentence.

39. . It is clear that in his submissions, the appellant was challenging the constitutionality of the minimum mandatory sentences prescribed in the SOA. I will briefly respond to this challenge by referring to the decision of the Supreme Court in Republic V Joshua Gichuki Mwangi [2024] KESC 34 [KLR] when it upheld the constitutionality of the aforesaid sentences when overturning a decision previously made

by the Court of Appeal to the effect that minimum mandatory sentences prescribed in the SOA were unconstitutional. This is what the Supreme Court said;

> "...We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the constitution*...."

40. . Turning to the sentence imposed by the trial court in this case, although Section 8 (2) of the S O A prescribes a minimum mandatory sentence of life imprisonment for any person convicted of the offence of defilement where the victim was 11 years and below, the appellant was sentenced to serve 40 years imprisonment.

41. . The court record shows that the trial court's sentence was passed on 20th November 2023 before the Supreme Court overturned the Court of Appeal decision in Joshua Gichuki Mwangi V Republic Criminal Appeal (Nyeri) No. 84 of 2015 on 12th July 2024. The Court of Appeal in Joshua Gichuki Mwangi V Republic had declared that minimum mandatory sentences prescribed in the SOA were unconstitutional and that courts retained discretion to impose any other appropriate sentence depending on the facts and circumstances of each case.

42. . As the above decision and other decisions made by the High Court and the Court of Appeal on the same lines were at the time binding on subordinate courts, I am unable to fault the trial court's sentence in this case since it was in accordance with the jurisprudence that was in force at the time the sentence was passed.

43. . It is also noteworthy that the prosecution did not file a cross-appeal against the sentence and it did not also seek its enhancement. Instead, the prosecution supported the sentence and urged me not to disturb it. In the circumstances of this case, I find no reason to interfere with the appellant's sentence and it is hereby upheld.

44. For all the above reasons, I have come to the conclusion that this appeal lacks merit and it is hereby dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 17TH DAY OF DECEMBER 2025.

HON. C. W. GITHUA

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JUDGE

In the presence of;

Appellant present

Ms Muriu for the Respondent

Ms Susan Waiganjo, Court Assistant