



**Gikunju v Republic (Criminal Appeal 117 of 2018)
[2025] KECA 401 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 401 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 117 OF 2018
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
FEBRUARY 21, 2025**

BETWEEN

ALBERT GITARI GIKUNJU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kerugoya
(L.W. Gitari J.) dated 27th September, 2018 in H.C.Cr.A. No. 24 of 2017)*

JUDGMENT

Background

1. Albert Gitari Gikunju (the appellant) was charged before the Principal Magistrate's Court at Baricho with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#).
2. The particulars of the charge were that on 4th July, 2016 in Mwea West Sub-County within Kirinyaga County, the appellant willfully and unlawfully caused his penis to penetrate the vagina of MW (name withheld), a child aged 12 years old.
3. At the trial, the appellant pleaded not guilty to the charge and the prosecution called five (5) witnesses in support of its case. At the conclusion of the trial, the appellant was found guilty of the offence of defilement, convicted and sentenced to twenty (20) years' imprisonment.
4. Aggrieved, the appellant appealed against the conviction and sentence at the High Court at Kerugoya (L.W. Gitari J.). His first appeal was unsuccessful, prompting this second appeal against conviction and sentence.
5. The jurisdiction of this Court on a second appeal is well settled.



In *Karani v Republic* [2010] 1 KLR 73, this Court expressed itself as follows: -

“This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the Superior Court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

6. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-examined by the High Court in reaching the impugned judgment.
7. Before commencing trial, the trial court undertook a *voire dire* on the complainant, MW (PW1) and established that she was not intelligent enough to understand the meaning of taking an oath and accordingly directed that she tenders unsworn evidence.
8. PW1 in her unsworn testimony stated that she was a class 2 pupil at [Particulars withheld] Primary School and that she lived with her mother, aunt, and her two siblings. She stated that on the material day, 4th July 2016, she left school at 4.00pm with her younger sister, one W and took a short cut that passed through the appellant's home. She stated that she was wearing her school uniform. She further stated that the appellant hid in the maize field and grabbed her hand and neck. PW1 further stated that the appellant removed her clothes with one hand as he choked her neck with the other. She further stated that the appellant tripped her causing her to fall down whereupon he defiled her. She further stated that she met with one Kariuki on her way home and that he asked her where she had been and she informed him of the ordeal that she had undergone.
9. PW1 further stated that she and Kariuki later went to Kiangai Police Post where the report was made and were thereafter referred to Sagana Police Station. PW1 further stated that the report was booked at Sagana Police Station before the officers took her to Sagana Sub County Hospital, where she was treated and admitted for one day. PW1 further stated that she was in the company of her elder brother, SNG (PW2). PW1 stated that she knew the appellant prior to the incident, as he was her uncle. PW1 stated that although she felt pain during penetration, she did not scream as the appellant held her by the neck.
10. SNG, PW2, testified that he was PW1's brother and that he had known the appellant for 7 years, as he was their uncle and neighbour. He testified that on the material day he was at Kagio, when he was called and informed by one Ivan that PW1 had been defiled. He further testified that he went to the scene, which was near the appellant's home where he found PW1 seated on the ground. That they proceeded to Kiangai where they reported the matter and were referred to Sagana Police Station. It was his further testimony that PW1 was treated and it was confirmed that she had been defiled. Further, that the appellant had fled and was later arrested at Ndindi Rock near Mwea.
11. Naftali Macharia Mwangi, (PW3) a clinical officer at Kerugoya County Hospital, testified that he examined PW1, who was about 12 years old. It was his testimony that he assessed the degree of injury to be grievous harm and noted that the injuries were about 5 days old. It was his evidence that PW1's hymen was broken. Further, that the urine analysis revealed the presence of pus cells, epithelial and spermatozoa. PW3 produced the P3 form and the treatment notes.
12. APC Elkanah Cherop, No. 2008053625 (PW4) of Kangai AP Post Mwea West sub-county, testified that 4th July 2016 at 5.30pm, he received PW2 and PW1 at the station where they reported that the



- appellant had defiled PW1. It was his testimony that on the same date, they arranged to arrest the appellant but when they went to his home at 8.00pm, his wife informed them that she did not know his whereabouts. PW4 further testified that on 8th July, 2015 at 4.00pm, he received a report that the appellant had been traced at Mwea East, Gathigiriri village, having been arrested by a village elder.
13. No. 96371 PC (W) Ann Okindo (PW5) of Sagana Police Station testified that on 4th July 2016 at 7.00p.m, she was at the station when a 12-year-old girl and her elder brother visited the station and reported that the minor had been defiled. It was her further testimony that she booked the report and escorted the minor to the hospital where she was examined and treated. It was her further evidence that thereafter, she issued PW1 with a P3 form which was duly filled. It was PW5's further testimony that she took PW1 for age assessment and produced the age assessment report.
 14. When placed on his defence, the appellant gave an unsworn statement where he stated that he was not at his home on the material day as he was at Gathigiri where he was undertaking masonry work. He stated that he left his home on 3rd July 2016 and returned on 8th July 2016 arriving at his residence between 4.00-5.00p.m. He further stated that he was arrested and taken to Sagana Police Station. He stated that there was a disagreement between him and one Janjani over a water pump, which he had lent Janjani. The appellant identified Janjani as his brother in law as he had married Janjani's sister. He stated that the charges were a frame up and that he does not know anything about the charges leveled against him.
 15. The trial court entered judgment dismissing the appellant's defence and found in part as follows:

“ ... If indeed that was the case this ought to have been raised well in advance or a basis for the same being laid. In nutshell I do find that it's the accused that has been connected to the offence and therefore the one who defiled the complainant.

The last issue to consider is whether there are any doubts which have been created by the defence by way of cross examination and explanation. The accused in his defence said that he didn't commit the alleged offence. That he was away at Gathigiri area where he was doing some masonry work. This defence of alibi I have already found otherwise. In short, I find that no doubts have been created which can be exercised in his favor.

In the circumstances I hold that the main charge 'has been proved beyond a shadow of doubt the accused is here by convicted under section 215 of the criminal procedure code.”
 16. Aggrieved by the conviction and sentence, the appellant appealed to the High Court, which after re-evaluating and analyzing the evidence on record, found as follows:

“Having considered the evidence tendered, I come to the conclusion that the conviction of the appellant was safe and was based on well corroborated and cogent evidence. The appeal is therefore without merits and so I dismiss it.”
 17. Undeterred, the appellant proffered an appeal to this Court vide his Memorandum of Appeal premised on grounds,inter alia, that the learned Judge erred in law by: dismissing his appeal on scanty and contradictory evidence; failing to consider that penetration was not proved to the required standard; failing to absolve that the age of the complainant was not established to the required standard; failing to note that the appellant was not given a fair hearing as he was not given enough time to prepare for his defence; not considering that the case was full of contradictions and inconsistencies; failing to consider that identification was not proved; and failing to consider his defence.



Submissions

18. At the hearing of the appeal, the appellant was acting in person while learned counsel, Mr. Naulikha represented the State.
19. The appellant had filed written submissions, which he opted to rely on.

The appellant submitted that the prosecution failed to prove the 3 ingredients of the offence of defilement. It was his submission that the medical evidence adduced was inconclusive regarding penetration. It was the appellant's submission that the medical evidence revealed that the injuries found on PW1 were about 5 days old yet PW1 was taken to the hospital for examination and treatment on the same day that the offence occurred. The appellant further submitted that the type of weapon that caused penetration was not proved.
20. Regarding PW1's age, the appellant submitted that the prosecution failed to prove her age beyond all reasonable doubt. It was the appellant's submission that PW1's birth certificate was not availed by PW7, the Investigating Officer. Further, that the clinical officer who assessed PW1's age was not called as a witness. The appellant submitted that the trial court had no information regarding PW1's age.
21. On the identity of the perpetrator, the appellant submitted that this was not proved to the required standard. That there was no eye witness and PW5, the Clinical Officer did not carry out a DNA test to prove the identity of the perpetrator of the said offence. That the evidence relied on was that of a single identifying witness (PW1) yet the trial court and the 1st appellate court did not warn themselves of the danger of relying on the evidence of a single identifying witness.
22. The appellant further submitted that the trial court and the 1st appellate court failed to take into account that there was a grudge between him and PW2. That he and PW2 disagreed about a water pump and no longer spoke to each other. That PW2 takes care of PW1 and had therefore framed him and coached PW1 to lie due to their disagreement. The appellant submitted that he did not have a grudge against PW1. The appellant further submitted that he was not at home on the material day and left his home on 3rd July 2016 and returned on 8th July 2016.
23. Regarding sentence, the appellant submitted that the sentence imposed by the trial court and upheld by the 1st appellate court is harsh and excessive and urged us to interfere with the sentence. The appellant submitted that he has undertaken various trainings while in prison and urged this Court to consider that he is elderly and is over 67 years of age and has reformed. He urged us to allow his appeal.
24. Learned prosecution counsel, Mr. Naulikha opposed the appeal and submitted orally. Counsel submitted that the trial court and the 1st appellate court considered the evidence adduced by the prosecution. Regarding the element of penetration, counsel submitted that medical evidence in the P3 form indicated that PW1 was defiled and there was penetration. Counsel asserted that the prosecution evidence was not contradictory or inconsistent. That identification of the perpetrator was by recognition as PW2 and PW1 both testified that they had known the appellant for over 7 years. Counsel asserted that the evidence relied on by the trial court and the 1st appellate court was therefore not that of a single identifying witness.
25. Counsel further submitted that the evidence tendered by the prosecution was consistent and was not contradictory and corroborated each other in all material aspects. That there was direct evidence in support of the prosecution case and the evidence of the witnesses was believable, reliable, and cogent. Counsel urged us to dismiss the appeal against conviction.



26. Regarding sentence, counsel submitted that the sentence of 20 years imprisonment imposed by the trial court and upheld by the 1st appellate court was not excessive and is the prescribed lawful sentence. Counsel asserted that PW1's age was proved to be 12 years and the sentence of 20 years' imprisonment was therefore lawful. Counsel urged us to dismiss the appeal against sentence.

Determination

27. We have considered the record of appeal, the appellant's submissions, the authorities cited and the law. We discern three issues for determination in this appeal: whether the prosecution proved its case beyond all reasonable doubt; whether the appellant's defence was considered; and whether the sentence imposed by the trial court and upheld by the 1st appellate court was harsh and excessive in the circumstances.
28. On the ground whether the prosecution proved its case beyond reasonable doubt, in a case of defilement, the prosecution must prove three (3) key ingredients: the age of the victim; that there was penetration; and the positive identification of the perpetrator. See: Charles Karani vs. Republic, Criminal Appeal No. 72 of 2013.
29. In the instant appeal, PW1 testified that she was 12 years old but did not know when she was born and was taken for an age assessment. PW2 who is PW1's brother testified that she was born in 2005. Further, PW3, the Clinical Officer testified that the appellant was about 12 years old when he examined her. He produced the age assessment report which indicated that PW1 was between the age of 12 and 14 years. We therefore find that the prosecution proved that PW1 was a minor and was between 12 and 14 years at the time of the commission of the offence.
30. On penetration, PW1 testified that the appellant defiled her and that she felt pain when he penetrated her. This evidence was corroborated by medical evidence that PW3 produced which indicated that PW1's hymen was broken and spermatozoa was present. On the identity of the perpetrator, from the evidence the appellant was known to PW1 and her brother, PW2 for about 7 years as he was their neighbour. Further, from the record, the incident occurred in broad daylight at about 4 pm and there was sufficient light for PW1 to identify the appellant as the perpetrator. In the circumstances, we find that the prosecution proved the three ingredients of the offence of defilement to the required legal standard.
31. On the question of whether the appellant's defence was considered by the trial court and the 1st appellate court, the appellant testified that there was a grudge between him and one Jajani who framed him by blaming him for defiling PW1. The appellant in his defence further claimed that he was away from his home on the material day. Notably, the appellant was charged on 11th July 2016, and the trial started on 19th September 2016. The appellant gave his defence on 15th November 2016. The trial court and the 1st appellate court found that the defence was an afterthought, as it was not raised when the Investigating Officer and PW1 testified. We find that the 1st appellate court did not err when it found that the trial court did not err when it considered and dismissed the appellant's defence as it was not tested and was not put to the witnesses who testified and was therefore an afterthought.
32. In the circumstances, we find no reason to interfere with the concurrent findings of the two courts below. We, therefore, find that the appellant's conviction was safe.
33. On sentence, the appellant was charged under Section 8 (1) as read with Section 8(3) of the [Sexual Offences Act](#). Section 8(3) provides as follows:
- 8.(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.



34. On the issue of sentence, this Court in the recent decision of Octavious Waweru Kibugi V Republic Criminal Appeal No. 41 of 2018 stated as follows:

On the issue of sentence, we defer to the recent decision of the Supreme Court in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others {Amicus Curiae) (Petition E018 of 2023} [2024] KESC 34 (KLR) where the Court held that the minimum mandatory sentences under the Sexual Offences Act remain lawful until determined otherwise by the Supreme Court when the matter is properly escalated to that Court. That being the case, this being a second appeal, severity of sentence becomes a question of fact which is, by dint of section 361(2) of the Criminal Procedure Code, outside our remit.”

35. In the circumstances, we find that this appeal is devoid of merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF FEBRUARY, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

