



REPUBLIC OF KENYA



KENYA LAW
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**Kigen v Republic (Criminal Appeal 62 of 2018)
[2025] KECA 131 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 131 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 62 OF 2018
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
FEBRUARY 7, 2025**

BETWEEN

EDWARD KIPROTICH KIGEN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kericho
(Mumbi Ngugi, J.) dated 11th October 2018 in HCCA No. 45 of 2017)*

JUDGMENT

1. Edward Kiprotich Kigen, (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* No.3 of 2006 at the Chief Magistrate’s Court at Kericho in Case No. 26 of 2017. The particulars of the offence were that on 20th May 2017 within Kericho County, he intentionally and unlawfully caused his penis to penetrate the vagina of GCK, a child aged 9 years. He also faced a second count of deliberate transmission of a sexually transmitted disease contrary to Section 26 (1) (b) of the *Sexual Offences Act*. It was alleged that on the above date, at the same place and time, having actual knowledge that he was infected with syphilis, he intentionally, knowingly and willfully infected GCK a child of tender years.
2. The prosecution rested on the testimony of 5 witnesses, namely, the complainant’s mother, (PW1), the complainant, (PW2), the complainant’s brother, (PW3), the Clinical Officer, (PW4), and PW5, (the Investigating Officer). The defence case rested on his unsworn testimony. He did not call any witness in support of his defence. At the conclusion of the case, the trial court returned a verdict of guilty on the first count and convicted the appellant accordingly, but acquitted him on the second count. After considering the appellant’s mitigation and a pre-sentence report, the trial magistrate sentenced him to serve life imprisonment.



3. Dissatisfied by the said decision, the appellant appealed to the High Court at Kericho in Criminal Appeal No. 45 of 2017 seeking to overturn his conviction and sentence. After hearing the appeal, Mumbi Ngugi, J. (as she then was) upheld both the conviction and sentence and dismissed the appeal.
4. Undeterred, the appellant has filed the instant appeal seeking to reverse the High Court decision citing 6 grounds which can be reduced to 5 grounds essentially faulting the High Court for failing to find that:
 - (a) the medical evidence adduced at trial was questionable and insufficient to support conviction;
 - (b) the prosecution failed to provide witness statements to him to enable him to adequately prepare for his defence;
 - (c) the complainant's mother was just suspicious that the child was defiled; and
 - (e) Section 124 of the *Evidence Act* was used wrongfully without giving cogent reasons thereby resulting an unfair conviction and sentence.
5. When this appeal came up for hearing, the appellant appeared in person while learned counsel Mr. Omutelema appeared for the respondent. Both parties relied on their written submissions.
6. In support of his appeal, the appellant submitted that the prosecution failed to tender conclusive medical proof connecting him with the offence. He maintained that when PW2 was taken to the hospital, she had changed clothes, there were no tears in her private part which was confirmed by PW4, who testified that nothing abnormal was found on PW2's clothes nor did he see any discharge on her private part when he examined her.
7. The appellant also submitted that his rights under Article 50 (2) (c) were contravened since he was not furnished with the prosecution witness statements and as a result he did not have adequate time and facilities to prepare for his defence and as a result he was prejudiced.
8. Regarding the complainant's age, the appellant maintained that no age assessment was done nor was her age sufficiently proved but after the prosecution discovered the omission, a birth certificate was hurriedly prepared for the purposes of adducing it in evidence. He cited the High Court decision in Dominic Kibet Mwareng vs. Republic [2013] eKLR in support of the holding that the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to her age does not suffice.
9. Regarding the sentence, the appellant submitted that section 8 (2) of the *Sexual Offences Act* takes away discretion of the court in sentencing because the minimum mandatory sentence deprives the court the discretion to consider whether a lesser severe punishment would be more appropriate considering the peculiar circumstances of the case.
10. The appellant also submitted that his defence was not considered alongside the prosecution evidence yet he gave sworn testimony. He maintained that he was framed by the complainant's mother because of a grudge that existed between them. 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.
11. In opposing he appeal, the respondent's counsel Mr. Omutelema submitted on six points. Regarding penetration, he maintained that PW4's evidence was sufficient because it demonstrated that there was penetration resulting in a longitudinal tear at 6 o'clock position on the victim's anal area. Furthermore, PW4 testified that the laceration on the victim's anal orifice showed an attempt of defilement.
12. Responding to the appellant's claim that he was not supplied with witness statements, Mr. Omutelema submitted that the said ground was an afterthought because it was not among the grounds raised



- before the High Court for determination. He maintained that the evidence on record indicates that the appellant was granted an opportunity to cross-examine all the witnesses and did not raise the said complaint at all.
13. Regarding the complainant's age, Mr. Omutelema submitted that the complainant's birth certificate was produced by her mother, (PW1) and it confirmed that the complainant was 9 years 4 months old as at the time the offence was committed. Consequently, her age was proved beyond reasonable doubt.
 14. Answering the submission that the PW1's evidence was marred by contradictions and inconsistencies, Mr. Omutelema maintained that under Section 124 of the *Evidence Act*, the complainant's evidence is sufficient to sustain a conviction provided it is reliable.
 15. Replying the assertion that the appellant's defence was not considered, he maintained that the appellant's defence was considered by the Magistrate's Court and the High Court but it was found to be wanting because he failed to prove that he was employed by the victim's mother and there were pending arrears due to him on account of work done.
 16. On the legality of the sentence, Mr. Omutelema submitted that the Supreme Court in 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) (12 July 2024) (Judgment) determined that the minimum mandatory sentences in sexual offences are lawful and therefore the sentence meted upon the appellant was lawful.
 17. This is a second appeal, therefore, our 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 its findings. (See David Njoroge Macharia vs. Republic [2011] eKLR).
 18. We will first address the issue whether penetration, one of the key ingredients of the offence was proved to the required standard. The trial court and the first appellate court found that the evidence established that the complainant was defiled. PW2 stated that the appellant removed her trouser and defiled her by doing "tabia mbaya" and that she felt pain. PW4, Mr. Robert Kipyego Langat, a clinical officer, upon examining PW2 established that although there were no visible injuries on the complainant's labia minora and majora, and the hymen was intact, the complainant's anal region had a longitudinal tear at 6 o'clock position. However, the sphincter was intact and a rectal swab showed no blood or sperm. PW4's conclusion was that the complainant had suffered an attempted defilement.
 19. In order to prove defilement, the prosecution must show that the accused did an act that amounts to penetration. Section 2 of the Act defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The Act define "genital organs" to include the whole or part of male or female genital organs and for purposes of this Act includes the anus." Therefore, it is not necessary for the prosecution to prove complete insertion. Partial penetration in any of the organs mentioned in the above definition will suffice.
 20. In addition to the findings by the clinical officer, PW3 (the complainant's brother) testified that he saw the appellant pulling his trousers up and the complainant walking away. In our view, sufficient evidence was adduced corroborating the complainant's testimony. In any event, Section 124 of the *Evidence Act* permits a court to receive the evidence of a victim of a sexual offence and convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth. The trial court was satisfied that the complainant was truthful. Indeed, the evidence



on record puts the appellant at the scene of the crime. This critical evidence remains uncontested, just like his identification as the offender.

21. The other ground urged by the appellant in his supplementary grounds of appeal is that the prosecution evidence was contradictory and inconsistent. This Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. (See for example *Kimeu vs. Republic* [2002] 1 KAR 757 and *Willis Ochieng Odera vs. Republic* [2006] eKLR).
22. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit therefrom. The correct approach is to read the evidence tendered holistically. In this regard, we have carefully considered the testimony of PW1, PW2, 3 and 4. We find that even if the testimony of PW1 contained inconsistencies as alleged, PW2's testimony was sufficiently corroborated by the testimony of PW3 and 4, therefore, the alleged inconsistencies (if any) cannot vitiate the conviction.
23. Next, we will address the question whether the complainant's age was proved to the required standard. Proof of age of a child is a question of fact. A copy of the birth certificate was produced by PW1 showing that the complainant was 9 years old. Consequently, we find no reason to overturn the concurrent findings of the two lower courts on the issue of age.
24. Concerning the complaint that the first appellate court failed to appreciate that the appellant's defence was not considered, 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 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 prove 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. In this regard, in addressing this issue, the High Court had this to say;

"There is no evidence of a grudge between the appellant and the complainant's mother over salary. She had testified and this was not challenged in cross-examination by the appellant, that he was employed by her brother-in-law, it is noteworthy that he did not raise the issue of salary arrears or a grudge over such arrears when he cross-examined PW1 that the appellant was being framed as it is not stated whether there was any grudge."
25. The two courts below disbelieved the appellant's allegation that there existed a grudge between him and the complainant's mother over an alleged salary dispute which he claimed was the basis for framing the charges against him. This is a factual finding arrived at by the two courts below and it has not been demonstrated to us that the said findings are based on no evidence or that the two courts below ignored relevant considerations. We can only say that the appellant's defence did not dislodge the prosecution evidence.



26. On whether the appellant was supplied with witness statements to enable him prepare his defence, the first appellate court had this to say:

“...the appellant argues that he proceeded with his case without witness statements. I note however that orders were made for him to be supplied with statements, and he did not thereafter raise the issue. It is also clear that he was able to follow the proceedings and cross-examine witnesses and so I find that this ground also has no merit.”

27. Faced with a similar situation, this Court in *Simon Ndichu Kahoro vs. Republic* [2016] eKLR stated as follows:

“We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of *the Constitution*, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case.”

28. We have carefully reviewed the entire record. We note that the appellant’s plea was entered on 23rd May 2017. On 30th June 2017, the learned magistrate directed that the appellant be furnished with witness statements. When the matter came up for hearing on 17th August 2017, the appellant informed the court that he was ready to proceed with the hearing and he did not complain that he had not been supplied with the witness statements. Instead, he proceeded with the trial and went on to cross examine all the witnesses except PW5 CPL Cynthia Bore. Just like the first appellate court, we are satisfied that the appellant was supplied with the witness statements prior to the commencement of the trial. Therefore, this ground is an afterthought.

29. Lastly, regarding the legality of the sentence, it is noteworthy that the mandatory minimum sentence provided for defilement of a child aged 11 years or below under section 8 (2) of the *Sexual Offences Act* is the life imprisonment sentence that was meted on the appellant. Nevertheless, we have carefully considered the appellant’s petition of appeal before the High Court and his submissions before the High Court. We note that 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 on the said argument. Consequently, we are precluded from addressing the said issue.

30. The above notwithstanding, it is also important for us to mention that the Supreme Court recently affirmed the lawfulness of life imprisonment when it held in *Republic vs. Joshua Gichuki Mwangi and others* (supra) affirmed the lawfulness of life imprisonment prescribed under the *Sexual Offences Act*. 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.”

31. 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 7TH DAY OF FEBRUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb

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JUDGE OF APPEAL

This is a true copy of the original.

Signed

DEPUTY REGISTRAR.

