



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitonga v Republic (Criminal Appeal 27 of 2018)  
[2025] KECA 595 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KECA 595 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 27 OF 2018  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
MARCH 28, 2025**

**BETWEEN**

**DUNCAN GITONGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Meru (S. J. Chitembwe, J.) dated 25th January, 2018 delivered by A. Mabeya J. in H. C. Cr. A. No. 23 of 2017)*

**JUDGMENT**

**Background**

1. The appellant was charged before the Chief Magistrate's Court at Meru for the offence of defilement contrary to Section 8(1)(2) (sic) of the *Sexual Offences Act*. The particulars of the charge were that on 3<sup>rd</sup> May 2015 at around 3.00pm at Buuri District in Meru County intentionally caused his penis to penetrate the vagina of PG (name withheld) a child aged nine years.
2. The appellant pleaded not guilty to the charge and the prosecution called four (4) 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 life imprisonment.
3. Aggrieved, the appellant appealed against conviction and sentence before the High Court at Meru (Chitembwe, J.). His first appeal was unsuccessful prompting this second appeal against conviction and sentence.



4. 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.”

5. 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.
6. On 30<sup>th</sup> December 2015, the Court conducted a *voire dire* examination of the minor noting that the minor was not composed enough to withstand proceedings for a long duration and thus adjourned the matter to 13<sup>th</sup> January 2016. On 13<sup>th</sup> January 2016, the court conducted a second *voire dire* and established that the minor was fit to testify as she understood the meaning of an oath and the duty to tell the truth. The trial court directed that PW1 give sworn testimony.
7. PG (PW1) testified that she was a standard four (4) pupil and that she lived with her grandmother (PW2) and older sister. That she attended school and on Saturdays she would graze her grandmother’s animals. It was her evidence that on the material day, which was a Sunday, she went to graze her grandmother’s animals while her older sister prepared the evening meal. It was PW1’s evidence that the appellant was also at the grazing field grazing his animals. It was PW1’s further evidence that there was no one else at the grazing field. It was her further evidence that the appellant carried her and covered her with his jacket to a place where there were tall trees where he defiled her. PW1 further stated that the appellant threatened to kill her with a club and dispose of her body if she told anyone that he had defiled her. It was her evidence that the appellant left and she got up, wore her clothes and continued to graze the animals. PW1 further stated that she felt pain in her private parts.
8. It was her further evidence that the following day her grandmother noted that she was walking with difficulty and enquired what had happened to her. PW1 stated that she informed her grandmother that two (2) different men had defiled her on Saturday and Sunday. PW1 further stated that the matter was reported at the police station where she was referred to hospital where a P3 form was filled. PW1 stated that she knew the appellant as a neighbour.
9. RRM (PW2) testified that she was PW1’s grandmother. That PW1 was 9 years old while her sister was 12 years old. PW2 testified that PW1 and her older sister grazed her animals over the weekends. It was her further testimony that she did not see PW1 on Sunday as she returned home after 7pm. and that PW1 and her older sister went to school on Monday. It was her further testimony that she noticed that PW1 was walking with difficulty on Monday after school, prompting her to ask her what had happened to her. It was her further testimony that PW1 informed her that the appellant had defiled her at the grazing field as they grazed their animals and had threatened her not to disclose this to anyone. PW2 further testified that she examined PW1’s private parts and noted the presence of bruises. She testified that she took PW1 to a hospital known as Farm where they were referred to Meru General Hospital. Further, that the matter was reported to the Tutua Police Station. PW2 denied that she had asked the appellant for Kshs.7,000.
10. PC John Kisitu, No. 33xxx (PW3) was stationed at Tutua Police Post. PW3 and Dr. Kagasi Trevor (PW4) testified in chief but were stood down following objection by the appellant who requested



for the examining doctor, Dr. Belinda Namisi and the case-investigating officer (PC Tirop) to testify personally. Subsequently, the appellant conceded that another doctor could adduce evidence on behalf of Dr. Belinda Namisi. The appellant however insisted that the initial investigating officer (P.C Tirop) adduce evidence personally.

11. Dr. Winnie Mutungu (Dr. Mutungu) (PW5) was based at the Meru General Hospital where she worked with Dr. Belinda Namisi (Dr. Namisi) who had moved to the Aga Khan Hospital. PW5 testified that PW1 had an inflamed labia minora with greenish/yellow discharge. Her hymen was not intact and the injury was classified as grievous harm. Spermatozoa were also seen and PW1 had an infection. A P3 form was filled and PW1 was referred to Tutua Police Station.
12. PC Paul Tirop (PW6) was based at Tutua Police Station and was the Investigating Officer. It was his evidence that the case was reported at the police station on 5<sup>th</sup> May 2015 when he issued PW1 with a P3 form. It was his testimony that PW1 informed him that two people had defiled her on two consecutive days. It was his further testimony that he visited the grazing field and the appellant was subsequently arrested and charged. It was his further testimony that he also investigated the other defilement case and arrested the perpetrator.
13. When placed on his defence, the appellant gave sworn evidence and did call one witness. He denied committing the offence and testified that he was not at the scene on the material day. That he was carrying ballast with his witness, Anderea (DW2). The appellant further testified that he used cows to fetch ballast and that he worked from 9.00am to 6.00pm on the material day. It was his testimony that PW1 claimed to have been defiled but did not identify him as the perpetrator. It was his further evidence that his cows ate PW2's maize whereupon she asked him to pay Kshs.7,000. That he failed to pay her whereupon she threatened him and demanded Kshs.50, 000. It was his further evidence that he was arrested together with two other people and taken to the police station.
14. Anderea Mburugu (DW2) testified that in May 2015 he gave the appellant a place to stay while he performed his duties. That on a Thursday, PW2 who was his uncle's wife went to his home with two police officers at about 10.00pm and had the appellant arrested. That the previous Sunday he had given the appellant some work of ferrying ballast using an ox cart, which he completed the same evening. It was his further evidence that on the material day when PW1 is alleged to have been defiled, he went to Church in the morning with his family and left the appellant working and returned in the evening.
15. The trial court dismissed the defence and found in part as follows:

“The chronology of events that the victim narrated to the Court are similar to those she disclosed to her grandmother and P.C. Tirop. The accused did not have any grudge with her that would have made her fabricate the charges against him as he claimed...I believe the evidence that was adduced by the victim on identification.

In doing so I find (sic) prosecution has proved the main count and its particulars against the accused person. I convict the accused person for the charge of defilement contrary to section 8 (1) and (2) of the *Sexual Offences Act*. This is pursuant to the provisions of Section 215 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya.”

16. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The High Court after re-evaluating and analyzing the evidence on record, found as follows:

“The age of the complainant was proved. A birth certificate was produced. It shows that PW1 was born on 1/1/2006. By the time the offence was committed, PW1 was nine (9) years old. She was in a position to know her defilers. Her evidence is believable and is



corroborated by that of PW5 and PW6. Her grandmother also checked her and saw that she walked differently. The prosecution evidence is well corroborated and is not conflicting. The investigations were not shoddy. There was no need for the trial court to warn itself against relying on the evidence of PW1. PW1 is the victim and her evidence is supported by the other witnesses. The incident took place during the day and the identification of the appellant by PW1 is quite positive. The provision of section 36 of the Sexual Offences Act in relation to DNA examination are not mandatory. The prosecution evidence proved the case beyond reasonable doubt.

The upshot is that the appeal lacks merit as is hereby disallowed.”

17. Undeterred, the appellant has now filed this second appeal premised on the Memorandum of Appeal raising six grounds claiming that:
  - a. The High Court failed to discharge its duty of re-considering, re-evaluating and analyzing the evidence before the trial court and come to its own conclusion;
  - b. The prosecution case was not proved beyond reasonable doubt;
  - c. The High Court erred in both matters of law in failing to note that circumstances were not favourable for positive identification;
  - d. The High Court erred in matters of law by failing to note that the evidence was inconsistent, contradictory and uncorroborated;
  - e. The appellant’s defence was rejected without giving any cogent reasons; and
  - f. The sentence meted out was harsh and excessive in the circumstances.

### **Submissions**

18. At the appeal hearing, the appellant who was acting in person had filed written submissions as had Ms Nandwa, the learned Prosecution Counsel for the State. The appellant submitted that the evidence relied on by the prosecution to convict him was contradictory. The appellant emphasized that PC Paul Tirop informed the court that two blood-stained underpants were produced in evidence. In contrast, Dr. Winnie Mutunga informed the trial court that PW1’s clothes had no positive findings.
19. The appellant further submitted that he was not medically examined and that no DNA test was conducted to verify that the stains on PW1’s underpants were from the appellant. It was the appellant’s further submission that the 1st appellate court failed to consider the role of the prison service in the rehabilitation and reintegration of convicts serving life sentences.
20. It was the appellant’s submission that prison is a correctional facility established by the Constitution to rehabilitate the offenders of its laws. The appellant asserted that sentencing him to serve life imprisonment denied the prison an opportunity to demonstrate its role. That life sentence demeans the effort of the Prison Service to reform offenders. Further, that the life sentence imposed on the appellant has denied him his constitutional benefits to the least severe of the prescribed punishment. The appellant urged us to make a finding that the life sentence imposed on the appellant is unconstitutional and set it aside.
21. Ms. Nandwa, the Prosecution Counsel opposed the appeal and submitted that the prosecution proved its case beyond reasonable doubt and proved all the ingredients of the offence of defilement. Ms. Nandwa submitted that the prosecution proved that PW1 was a minor aged 9 years. That a birth certificate was produced which indicated that PW1 was born on 1st January 2006. Ms Nandwa asserted



- that at the time of the commission of the offence, PW1 was therefore 9 years old. Further, that PW2 who was PW1's grandmother also testified that PW1 was 9 years old. That during voir dire, PW1 stated that she was 9 years old which was confirmed by PW5, the Medical Doctor in the P3 form.
22. Counsel further submitted that penetration was proved through the evidence of PW1, PW2, and the medical evidence of PW5. Ms. Nandwa asserted that PW1 testified that the appellant defiled in a field as they were grazing their farm animals. Further, that the appellant threatened to kill PW1 with a club and dispose of her body if she disclosed to anyone that he had defiled her. Ms. Nandwa further submitted that PW2 noted that PW1 was walking with difficulty and upon enquiry; PW1 informed her that the appellant had defiled her. That PW2 examined PW1's genitalia and noted that the same was bruised whereupon PW2 took PW1 to the hospital and later reported the matter at Tutua Police Station. Ms. Nandwa further submitted that the evidence of PW5 corroborated that of PW1 in all material respects. That PW5 formed the opinion that PW1 had been penetrated and had been defiled.
23. On the identity of the perpetrator, counsel submitted that there was no mistake of the identity of the appellant by PW1. That identification was positive as the incident occurred in the afternoon in broad daylight and there was therefore sufficient light for PW1 to identify the appellant. Counsel asserted that PW2 testified that she was the appellant's neighbour and their homes were separated by a fence. Counsel submitted that the identification of the appellant by PW1 was free from error as she had known him prior to the incident and the identification was therefore by recognition.
24. On the ground that the appellant's defence was not taken into consideration by the trial court and the 1st appellate court, counsel submitted that his defence was taken into consideration by the two courts below. Counsel emphasized that it was the appellant's testimony that he had been working with DW2 to ferry ballast to Muriithi's home. That DW2 confirmed that he did instruct the appellant to ferry ballast but that they did not work together as alleged by the appellant. From the evidence, DW2 went to church and later to his home while the appellant was left working alone. Counsel asserted that the appellant could not explain his whereabouts between 10 am and 6 pm on the material day. Counsel submitted that the appellant had the time and opportunity to defile PW1.
25. Regarding the sentence, Ms. Nandwa submitted that the sentence meted out to the appellant was not excessive but was well within the law. Counsel relied on the decision of this Court in *Onesmus Musyoki Muema v Republic Criminal Appeal No. 104 of 2021* and the Sentencing Guidelines, 2023 in support of the proposition that the sentence of life imprisonment is a lawful and legal sentence. Counsel submitted that the trial court and the 1st appellate court took into consideration the appellant's mitigation and the circumstances of the case and found that life imprisonment was an appropriate sentence for the offence for which the appellant was found guilty and convicted. Counsel urged us to uphold both the conviction and sentence and dismiss the appeal for lack of merit.

## **Determination**

26. We have considered the record of appeal, the appellant's submissions, the authorities cited and the law. The appellant filed grounds of appeal raising six (6) grounds to wit that the 1st appellate court: failed to discharge its duty of reconsidering, re-evaluating and analyzing the evidence before the trial court and coming to its own conclusion; failed to note that the circumstances were not favourable for positive identification; and failed to note that the evidence was inconsistent, contradictory and not corroborated. Further, that the prosecution case was not proved to the required standard; that the appellant's defence was rejected without giving any cogent reasons; and that the sentence was harsh and excessive in the circumstances.



27. We discern three (3) issues for determination in this appeal: whether the prosecution proved its case beyond all reasonable doubt; whether the appellant's defence was rejected without giving any cogent reasons; and whether the sentence imposed by the trial court and upheld by the 1st appellate court was harsh and excessive in the circumstances of the case.
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 9 years old at the time of the commission of the offence. Her grandmother, PW2 also testified that PW1 was 9 years old. This evidence was corroborated by PW5, the medical doctor who examined PW1 and indicated PW1's age as 9 years on the P3 form. The birth certificate that was produced in evidence by PW2 indicated that PW1 was born on 1<sup>st</sup> January, 2006 and was therefore 9 years old. We therefore find that the prosecution proved that PW1 was a minor and aged 9 years at the time of the commission of the offence.
30. On penetration, PW1 testified that the appellant defiled her when they were alone grazing their farm animals. Medical evidence produced by PW5 proved that upon examination of PW1, her findings were that her hymen was not intact and that PW1 had been defiled. On the identity of the perpetrator, PW1 testified that the appellant defiled her in the grazing field during the day and that he was their neighbour and was known to her. PW2 also confirmed that the appellant was their neighbour. The appellant conceded that he was PW1 and PW2's neighbour. PW1's identification of the appellant was therefore by recognition. In the circumstances, we find that the prosecution proved the three (3) ingredients of the offence of defilement beyond all reasonable doubt.
31. On the ground that the appellant's defence was rejected without giving any cogent reasons, from the record, we find that the trial court and the 1st appellate courts considered the appellant's defence and found that the appellant had the opportunity and time to defile PW1. Notably, DW2's testimony did not support the appellant's claim that they both carried ballast. DW2 testified that he went to church and thereafter went to his home while the appellant worked all day carrying ballast. We therefore find that the appellant's defence was considered and properly rejected by the trial court and the 1st appellate court and that cogent reasons were given for the rejection of the defence.
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 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.”
34. By parity of reasoning, we find that this appeal is devoid of merit and we dismiss it in its entirety.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF MARCH, 2025.**



**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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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**

