Giteli v Republic (Criminal Appeal 54 of 2019)
[2025] KECA 1085 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1085 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 54 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JUNE 20, 2025

BETWEEN

ELIUD OENGA GITELI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyahururu (R.P.V. Wendoh, J.) dated 30th May 2019 in HCCRA No. 167 of 2017)

JUDGMENT

1. The appellant faced two counts of defilement when he was arraigned in the trial court in Nyahururu CMC (SO) No. 2568 of 2014. On the first count, he was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 1st September 2014 and 30th September 2014, in Laikipia County, the appellant unlawfully and intentionally caused his penis to penetrate into the vagina of RM a girl aged 13 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and place, the appellant unlawfully and intentionally caused his penis to come in contact with the vagina of RM a girl aged 13 years.

3. On the second count of defilement, he was charged contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars were that on diverse dates between 1st September 2014 and 30th September 2014 in Laikipia County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of CW a girl aged 10 years old.

4. He faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and place, the appellant unlawfully and intentionally caused his penis to come in contact with the vagina of CW a girl aged 10 years.

5. The appellant pleaded not guilty to all charges when indicted before the trial court. After a full trial, the appellant was convicted on the two counts of defilement. The convictions on the alternative charges were held in abeyance. He was sentenced to 20 years on count I and life imprisonment on count II.

6. The appellant was aggrieved with those findings. He pursued an appeal before the Nyahururu High Court in HCCA No. 167 of 2017. On 30th May 2019, RPV. Wendoh, J. dismissed his appeal on conviction and sentence. It is those findings that galvanized the filing of the present appeal.

7. The appellant filed his undated notice of appeal lodged on 20th June 2019. His memorandum of appeal dated 10th May 2019 raised four grounds disputing the findings of the first appellate court. He also filed supplementary grounds of appeal annexed to his written submissions. The grounds of appeal are summarized as follows: the prosecution failed to discharge its burden of proof being beyond reasonable doubt to the required standard; and since he had been rehabilitated, he prayed for a lenient sentence. For those reasons, he prayed that his appeal be allowed, his conviction be quashed, his sentence be set aside and that he is set free.

8. The appeal was heard on 18th March 2025. The appellant was present and represented himself while the respondent was represented by Mr. Omutelema, Senior Assistant Director of Public Prosecutions. The appeal was heard on the basis of the parties' written submissions.

9. The appellant's undated written submissions challenged the medical evidence to submit that it did not prove that he caused penetration upon PW1. In this regard, he cast doubt on the evidence of PW1, PW3 and PW4. He further submitted that PW1's age was not proved in the absence of documentary evidence. Turning to the sentence meted out, he decried that the two courts stated that the sentence accorded to him was mandatory, yet in his view, the courts ought to have exercised their discretion to mete out a lenient sentence. In any event, annexing certificates, he submitted that he had been rehabilitated. For those reasons, he prayed that his appeal be allowed.

10. The respondent filed written submissions, a case digest and a list of authorities all dated 22nd August 2024. It submitted that all the ingredients to the offence of defilement were proved beyond reasonable doubt. It added that the appellant's defence was considered but failed to shake the prosecution's evidence. Finally, the sentence was lawful. It prayed that the appeal be dismissed.

11. The duty of this Court as a second appellate Court was explained by this Court (constituted differently) in the case of Ahamad Abolfathi Mohammed & another vs. Republic [2018] KECA 743 (KLR) as follows:

> "As it is a second appeal, we are obliged, by dint of section 361 (1) (a) of the *Criminal Procedure Code* to consider only issues of law. Where the two courts below have made concurrent findings of fact, we are further obliged to respect those findings unless we are satisfied that the conclusions are not supported by the evidence or are based on a perversion of the evidence. This is a well-established principle and is aptly articulated in the authorities cited by the appellants such as Karingo v. Republic [1982] KLR
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> 213. . In M'Riungu v. Republic [1983] KLR 455, this Court was empathic that:

> "[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

12. The prosecution called four witnesses in a bid to establish that the appellant committed the offences that he was charged with. The record before us captures the evidence as follows: PW1 CW one of the complainants, testified that she was born on 10th April 2004. Since the death of her mother, she lived with her grandparents, uncle and sister PW2 RW. Her evidence was that in the month of September 2014, on one night, she was alone at home with PW2. Their uncle came with the appellant, who ordered them to remove their clothes and threatened to kill them if they didn't do what they asked. The appellant then defiled them. PW1 further stated that on another occasion, the appellant came to their house when they were sleeping during the night hours. He knocked on the door, walked in and defiled PW2 before he pounced on her and did the same thing. He forced himself on her. PW2 ran away thereafter.

13. PW1 recognized the appellant as a friend of her uncle. She occasionally saw him in town. One other day, the appellant showed them his penis when they were at his house washing utensils.

14. PW2 RN, the 2nd complainant, confirmed that she used to live with their grandparents and her sister PW1. She was born in the year 2002. Her evidence was that in September 2014, her grandfather regularly drank leaving them at home alone. On diverse dates, she recalled that a man, whom they referred to as uncle, would catch them by force. One day, the appellant knocked the door. PW2 opened upon being assured by the appellant that he was a normal person. Once he gained access, he removed PW2's clothes and sexually assaulted her. When he was done with her, he turned on PW1 and defiled her. The appellant threw PW2 against the wall and hurt her.

15. PW2 recalled that she knew the appellant and his home. He was their neighbour. After they were defiled, PW2 did not report to school as she was unwell. She explained that they were defiled on two occasions. The first time was at his home while the second time was at his place. On the second instance, after he was done, he escorted them back home. They were thereafter seen by a doctor and reported the appellant to the police station.

16. PW3 Peter Wachiuri Waweru, the assistant chief, testified that on 25th October 2014 at noon, she received information from Dorena that the complainants had been defiled by two people, the appellant being one of them. On 27th October 2014, having reported the incident at the police station, located the appellant at his home and was arrested. PW3 was also shown M's house. He was arrested. The appellant was lined up with eight other men for the complainants to identify him which they positively did. Their uncle and grandfather were drunkards.

17. PW4 Dr. Joseph Karimi Kinywa, a medical doctor working at Nyahururu County Hospital produced two P3 forms. The first one, dated 1st October 2014, was that of PW2 aged 13 years old. On observation of her private parts, he saw no injuries. Her vagina was inflamed. Her hymen was broken and old looking. There was whitish discharge. His conclusion was that there was penetration. He also relied on the treatment notes, Post Rape Care form, appointment card and lab request form all adduced in evidence.

18. Regarding the 2nd P3 form of PW1, a minor aged 10 years old, PW4 found that on observing PW1, she had bruises on her right labia majora. Her hymen was absent. She had a whitish discharge. He concluded that there was penetration. He filled her P3 form dated 21st October 2014. It was produced in evidence together with her treatment notes, lab notes, appointment card and her Post Rape Care form.

19. PW5 Sergeant Lawrence Weru attached to Rumuruti Police Station testified that on 7th October 2014, he received the report that the complainants had been defiled repeatedly between 1st September 2014 and 30th September 2014. They had been defiled by their uncle JM and the appellant, whom they referred with different names. He then conducted investigations, interrogated witnesses and gathered evidence. The appellant was arrested on 28th October 2014. He produced their immunization cards indicating that PW1 was born on 1st February 2004 while PW2 was born on 28th August 1999. They knew the appellant very well. He was then brought to court to answer to the charges.

20. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. His unsworn testimony was that on 27th October 2014, officers came to his home inquiring if he knew Sammy wa bodaboda to which he denied. That regardless, he was escorted to the police station. He found two girls who touched M and not him. He was then charged with the present offence.

21. In order to sustain a conviction for the offence of defilement, the prosecution must establish the following crucial ingredients: the age of the complainant, penetration, and the identification of the perpetrator. On the age of the complainants, both courts relied on the complainants' immunization cards to establish that PW1 was 9 years old at the time of the offence while PW2 was 15 years old. We will therefore not disturb those findings.

22. Did the appellant cause penetration on both complainants?

    Both courts confirmed that from the medical evidence of PW4, coupled with the P3 form, treatment cards and health cards, they had been sexually assaulted. Both courts also affirmed that the assailant was very well known to the complainants. He was recognized as a friend to his uncle. The appellant sexually assaulted them on two vivid occasions together. One took place at his home while the other took place at their home. In another incident, he showed them his penis while they were at his home. The minors were living with their grandparents who were not keen on taking care of them. Their grandfather would leave them alone to partake in alcohol drinking leaving them vulnerable. The evidence of the complainants was truthful and in compliance with section 124 of the *Evidence Act*. Furthermore, the defence of the appellant, which was considered, was not cogent. In view of the foregoing, we find that the appeal against the conviction lacks merit and it is hereby dismissed.

23. On sentencing, the appellant was sentenced to 20 years imprisonment on count I and life imprisonment on count II in line with the provisions of section 8 (3) and 8 (2) respectively of the *Sexual Offences Act*. These sentences were upheld by the High Court. A reading of the provision against the findings of the two courts finds that the sentences were lawful. Furthermore, the Supreme Court in Republic vs. Joshua Gichuki Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) and Republic vs. Manyeso [2025] KESC 16 (KLR) have affirmed that the sentences provided under the *Sexual Offences Act* are lawful and do not give courts discretionary powers. We therefore find that the appeal against the sentence lacks merit and it is hereby dismissed.

24. In the end, we find that the present appeal is unmerited.

Accordingly, we affirm the convictions and uphold the sentences.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR