Gitire v Republic (Criminal Appeal E027 of 2023)
[2025] KECA 1159 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1159 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E027 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

JUNE 20, 2025

BETWEEN

DAVID KIMANI GITIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Nairobi (Ngenye, J.) dated 20th July 2017 in HCCRA No. 114 of 2012)

JUDGMENT

1. The appellant, David Kimani Gitire, is exercising his right of appeal on a second appeal before us. The appellant was charged with defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 11th July 2010 and 2nd August 2010 at [particulars redacted] in the defunct Kajiado North District within the then Rift Valley Province, the appellant intentionally and unlawfully inserted his penis into the anus of B. K. N., a child aged 6 years. Arising from the same facts, the appellant faced an alternative charge of committing an indecent act contrary to section 11 (1) of the *Sexual Offences Act*. The appellant was convicted of the main charge and sentenced to life imprisonment.

   His appeal to the High Court was dismissed in its entirety, prompting him to move to this Court in the present appeal.

2. Through his undated memorandum of appeal the appellant faults the first appellate court judge for failing to consider his amended grounds of appeal; abdicating the responsibility of analyzing and evaluating the evidence adduced at the trial; failing to find that the elements of defilement were not proved to the required standard; failing to hold that all the essential witnesses were not procured by the prosecution; and, failing to consider his unrebutted defence.

3. In a nutshell, the evidence against the appellant was that B.K.N. (PW1), who was five years old, was at the material time staying with his mother and grandmother. On the material day while the complainant was outside his grandmother's hotel with his brother, M., the appellant, who was a shoeshiner took him to a nearby toilet and placed an object in his anus. PW1 later informed his grandmother, V. W. (PW2). PW2 who worked in her food kiosk with her daughter T. N. (PW3) who is also the mother of the complainant. PW2 confirmed that they had indeed taken the complainant to their place of work on the material day but it was only on the next day that she became aware of the incident when the complainant told her that he was unwell. Upon interrogating him, he informed her that he had been assaulted on the anus by the appellant who he described as "Kim". Together with PW3, they escorted the complainant to Kiserian Police Station and later to Nairobi Women's Hospital, where the minor received medical attention. PW2 testified that the appellant had been a shoeshiner near her kiosk for over eight months.

4. T.N. (PW3) confirmed that she was indeed the complainant's mother and gave his date of birth as January 2005. Her testimony was that the complainant and his younger brother were in the kiosk when she went to fetch water. On her return, she found the appellant sitting inside the kiosk holding the complainant between his legs. The appellant asked her for food before he proceeded to insult her and then left. The next day, the complainant informed her in the presence of PW2 that he had been defiled by the appellant. Together with PW2, they reported the matter to Kiserian Police Station, from where the complainant was taken to Nairobi Women's Hospital, where he received medical attention.

5. Dr. Zephania Kamau (PW4) was at the material time based at the Police Surgery Unit where he attended to the complainant on 15th July 2010 after he had been treated at Nairobi Women's Hospital. He observed that his anal opening was torn at 9 o'clock. He produced the P3 form as an exhibit. Police Corporal William Kamau (PW5) gave an account of his investigations into the matter from the time the incident was reported until the time he preferred the charges against the appellant. Dr. Fred Kairimith (PW6) presented a report and treatment sheets by his colleague, Dr. Mulembe of Nairobi Women's Hospital.

6. In his defence, the appellant stated that at the material time, while he lived in Kiserian Town, he worked as a shoe shiner. On 17th July 2010, he was arrested by a police officer while heading for political campaigns. He alluded to a grudge between him and his accusers and that the locus in quo was a busy environment.

7. When the appeal came up for hearing on 25th February 2025, the appellant was present in person while Mr. Yamina, an Assistant Director of Public Prosecutions (ADPP), appeared for the respondent.

8. In his submissions dated 23rd April 2024, the appellant contended that the prosecution did not establish all the elements of the offence of defilement. He faulted the first appellate court for what he terms as failure to reappraise the evidence on record. While appreciating that penetration is a crucial element of the offence, the appellant submitted that based on the complainant's testimony, there was no organ-to-organ penetration and the evidence was therefore insufficient to prove penetration as defined in the *Sexual Offences Act*. According to the appellant, the evidence of the complainant leaned towards proving the alternative charge of indecent act, which carries a sentence of ten years. Turning to the identification element of the offence, the appellant argued that the prosecution failed to prove that he was the person who defiled the complainant. The appellant questioned how the trial court concluded that David Kimani Gitire was the same person as "Kim the shoeshiner". Relying on the evergreen holding in *Woolmington v DPP* [1935] AC 462 that the burden of proof in a criminal case lies with the prosecution, which must prove the guilt of the accused person beyond a reasonable doubt, the appellant contends that the evidence relied upon was insufficient, uncorroborated, incredible and

fell short of the standard required for a criminal conviction. While highlighting his concerns about the reliability of identification and the quality of the evidence presented, he submitted that the trial resulted in a wrongful conviction.

9. Finally, the appellant in urging the Court to interfere with his sentence invited us to consider that he has spent significant time in prison and has participated in rehabilitation programs. He prayed for a non-custodial sentence or a reduced sentence of ten years prescribed for the alternative charge of indecent act, given that penetration was not proved.

10. In the submissions dated 21st February 2025, Mr. Yamina referred to section 361 of the *Criminal Procedure Code* and *Boniface Kamande & 2 Others v Republic* [2010] eKLR to point out the Court's jurisdiction on a second appeal and to urge us not to interfere with the concurrent findings of fact by the trial court and High Court. Turning to the substance of the appeal, counsel maintained that the learned judge of the High Court properly considered the grounds of appeal and the evidence on record before rendering the judgment. Mr. Yamina also submitted that the learned judge exhaustively reviewed the trial proceedings and reached her independent conclusions on the evidence. Mr. Yamina rehashed the evidence and submitted that all the elements of the offence of defilement were proved. Noting that the two courts below reached concurrent findings of fact, counsel urged that we disregard the appellant's alibi defence and the allegation of a possible grudge between him and his accusers. Regarding the sentence, Mr. Yamina urged the Court not to interfere with the life imprisonment imposed upon the appellant, which the learned Judge found proper and legal. Counsel also asserted that the sentence is in tandem with prevailing jurisprudence on the life sentence. Ultimately, the respondent prayed that the appeal be dismissed in its entirety.

11. As per the provisions of section 361 of the *Criminal Procedure Code*, ours is to engage with the matters of law while deferring to the concurrent findings of fact by the trial court and the first appellate court. Severity of sentence is a matter of fact and does not fall within the remit of our jurisdiction. The Court can only interfere in factual matters where it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or failed to consider matters they should have considered or where 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 - see *Karani v Republic* [2010] 1 KLR 73. Additionally, as held by the Supreme Court in *Republic v Ayako* [2025] KESC 20 (KLR); and *Republic v Manyeso* [2025] KESC 16 (KLR), we are bereft of jurisdiction to entertain issues not raised before the first appellate court and addressed by that court. We have reviewed the record as well as the submissions of the parties, and the basic issue in this appeal is whether the offence of defilement was proved against the appellant.

12. The elements of the offence of defilement are identifiable under section 8(1) of the *Sexual Offences Act* as follows:

> " "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement." (Emphasis ours)

13. Therefore, and as has been held in a long chain of decisions of this Court, for the prosecution to establish the offence of defilement against an accused person, they must prove that the victim was a child, that there was penetration of the victim's genital organs regardless of whether complete or partial, and that it was the accused person who caused the penetration. For instance, it was held *John Mutua Munyoki v Republic* [2017] KECA 376 (KLR) in that:

> " Under the *Sexual Offences Act* the main elements of the offence of defilement are as follows:

i. The victim must be a minor, and

ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.

Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt."

14. From the evidence on record, there was no contestation that at the time of the offence, the complainant was five years old. This fact, which was never in dispute, was established through the evidence of the complainant (PW1), his grandmother (PW2), and his mother (PW3), who testified that the minor was born in January 2005. In the P3 form, PW4 at Part C of the said form estimated the complainant's age at five years. Additionally, the letter from Nairobi Women's Hospital produced by PW6 indicated that the minor was five years old when he was attended to. As we have already intimated, the appellant never contested the age of the complainant. In our view, this would lead to the conclusion that, having known the complainant prior, he was satisfied that the complainant could be of the said age, hence his reluctance to challenge the same even in his cross-examination. A similar approach was adopted by the Court in *Katana v Republic* [2024] KECA 393 (KLR) where the learned judges held that:

> " 29. We have considered that when PW1 was led through voire dire examination she stated her age to be 16 at the time she testified. In her sworn testimony she maintained that she was 15 years of age at the time of the attack the previous year. The P3 form also indicated the age of 15 years. PW1 was well known to the appellant before the attack and notably, the appellant was satisfied with the apparent age of the minor during trial and did not question it. Neither did he raise it as a ground during the first appeal. We therefore, agree with the findings of the two courts below and therefore, nothing turns on this issue."

15. Similarly, the Court in *Kasanga v Republic* [2025] KECA 693 (KLR) reaffirmed the principle that age can be proved through oral evidence, documentary evidence, or even the evidence of the parent. We are therefore satisfied that the trial court and the High Court correctly applied the law concerning proof of this element of the offence, and the evidence on record did indeed establish this fact.

16. The next element the prosecution needed to prove was penetration of the complainant's genitalia. According to the appellant, the evidence on record did not prove penetration as the complainant testified that he touched his anus. It is the appellant's submission that such evidence would only lead to the establishment of the offence of indecent act and not defilement.

17. Section 2 of the *Sexual Offences Act* defines the term "genital organs" and "penetration" as follows:

> " genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;
>
> ...
>
> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

18. As can be gleaned from the definitions, a genital organ includes the anus and penetration need not be complete because even partial penetration meets the degree. In this case, it was the evidence of the complainant that the appellant took him into a toilet and defiled him through the anus. His grandmother, PW2, noticed the boy's pain the following day and upon assessing him, she noticed that

he had been defiled in the anus. A similar account is shared by his mother, PW3, who also affirms that she saw the appellant holding the complainant between his legs the previous day inside their hotel. Treatment notes from Nairobi Women's Hospital established that the complainant had a tear at 12. o'clock and 6 o'clock, and they concluded that he had been sodomised. While filling the P3 form, PW4 also found that the complainant had a tear in the anus at 9 o'clock. This set of evidence corroborates PW1's testimony that he was defiled. We therefore find no difficulty in finding that penetration was proved to the required standard.

19. The other question is whether it was the appellant who defiled the complainant. The evidence of PW1, PW2, and PW3 all spoke to the appellant being known as "Kim", a shoeshiner near the kiosk run by PW2 and her daughter, PW3. In cross-examining PW2 and PW3, the appellant was concerned with how long he had been a shoeshiner near the kiosk and not whether he was indeed the "Kim the shoeshiner". Even in his defence, he did not deny being "Kim". He also admitted he used to be a shoeshiner prior to his arrest. We therefore find that the evidence of PW2 and PW3 corroborated PW1's identification of the appellant.

20. The appellant alluded to his being on the campaign trail from 17th July 2010 until the date of his arrest. He also talked of a grudge between him on the one hand and PW2 and PW3 on the other hand. It is, however, intriguing that the appellant did not cross- examine any of the witnesses along this line of defence. As for the claim that he was on the campaign trail at the material time, it is noted that the offence occurred between 11th July 2010 and 2nd August 2010, and there is no evidence that the appellant was engaged in campaigns during all that time. Additionally, PW3 gave evidence that he encountered the appellant on the material day and around the time when the offence occurred. The appellant did not cross-examine her on this pertinent evidence. We are therefore satisfied that the trial court and the first appellate court rightly dismissed the appellant's defence.

21. In his submissions, the appellant also contested that one M. was not called to testify. In *Bukenya v Uganda* [1972] EA 549, the Court of Appeal for East Africa held that the duty to call witnesses lies with the prosecution and that only those witnesses whose evidence is essential shall be called. In this case, M. was the younger brother of the complainant. The appellant has not demonstrated what aspect of the elements of the offence remained unproven, that the evidence of M. would have spoken to. The prosecution in this case called all the necessary witnesses, and we cannot say that there was left unproved an aspect of the case that the evidence of M. could have covered. Moreover, the inference that a witness who was not called, would probably give evidence adverse to the prosecution case applies where the evidence adduced is barely adequate, which is not the case herein.

22. Finally, the appellant asked us to interfere with the sentence. The statutory sentence provided for the offence under section 8(2) of the *Sexual Offences Act* is life sentence. We have reviewed the sentencing proceedings and find that the appellant's mitigation was appreciated by the trial court, but just as the law provided, the appellant was given the only available sentence being life imprisonment. As has been held by the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR); *Republic v Ayako* [2025] KESC 20 (KLR); and *Republic v Manyeso* [2025] KESC 16 (KLR), we do not have jurisdiction to interfere with such a sentence.

23. From the foregoing, dismissal is the fate befalling the appellant's appeal. Consequently, we find the appeal lacks merit and dismiss it in its entirety.

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

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed .

Deputy Registrar.