Tot v Republic (Criminal Appeal 339 of 2018)
[2025] KECA 1376 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1376 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 339 OF 2018

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JULY 25, 2025

BETWEEN

JOSEPHAT KIPLIMO TOT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Eldoret (A.C. Mrima, J.) dated 1st November 2021 in HCCRA No. 112 of 2015)

JUDGMENT

1. Josephat Kiplimo Tot was before the trial court charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that between 28th August 2013 and 23rd September 2013, in Eldoret West District, within Uasin Gishu County, the appellant defiled MJ, a 16-year-old girl. The appellant also faced an alternative charge of indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. After a full trial, the appellant was convicted on the main charge and sentenced to 20 years' imprisonment. His attempt to reverse the trial court's judgment at the High Court failed, prompting him to lodge the present appeal.

2. In the appeal before us, the appellant contends that the evidence adduced was insufficient to sustain the charge; that the circumstances of the offence did not amount to defilement; and, that the punishment provision ought to have been sub-section (4) instead of sub-section (3) of section 8 of the *Sexual Offences Act*, as was the case.

3. In a nutshell, the evidence adduced at trial was that on 25th August 2013, RC (PW1) sent her children, including the complainant, MJ, to the quarry. At around 6 p.m., the other children returned home except MJ On inquiring from the other children where the complainant was, they told her that she had disappeared. On 30th August 2013, she made a report about the missing child to the village elder and later made a similar report at Baharini Police Station, where the incident was booked. She later traced

the complainant to the home of the appellant after the appellant's parents visited her to report the matter. Later on, the appellant and the complainant were summoned to the chief's office, where the appellant was arrested and the minor taken to Moi Teaching and Referral Hospital for examination. According to PW1, the complainant was missing for 22 days.

4. MJ who testified as PW2 stated that she was 17 years old and had known the appellant for a long time. She said that on 28th August 2013, the appellant dragged her from the quarry to his house, where he locked her up. Later that evening, the appellant took food to her. They spent the night in the house and had sex that night and every other night until 23rd September 2013 when it was discovered that she was in that home. They would then report to the chief's office after they were summoned and that is when the appellant was arrested. She was escorted to Moi Teaching and Referral Hospital for examination and treatment. She denied being a girlfriend to the appellant and insisted that she was forced into coitus by the appellant.

5. Dr. Joseph Imbezi (PW3) presented a P3 form prepared for PW2 by Dr Yatich. The examination revealed that the appellant had old tears in the vagina. The doctor concluded that the examinee had been penetrated.

6. In her testimony, Police Constable Jacinta Atieno (PW4) recalled that on 30th August 2013, she received a report of a child who had gone missing since 20th August 2013. She liaised with the area chief to assist with the search. PW2 later reported to her that the child had been found at the appellant's house. She arrested the appellant and issued a P3 form to the complainant. The witness produced the complainant's birth certificate and a letter from the complainant's school.

7. In his defence, the appellant denied committing the offence. Upon cross-examination, he conceded that he housed the complainant for a month, introduced her to his parents as his wife, but maintained that they did not have sex at all.

8. When the appeal came up for hearing, the appellant was present in person while Ms. Limo appeared for the respondent. The parties opted to rely on their already filed written submissions.

9. Through his submissions dated 6th November 2024, the appellant submitted that the offence of defilement was not proved. He argued that the complainant's age, as stated in the charge, was never proved. On the element of penetration, he contended that the evidence of PW3 did not corroborate the complainant's claim that she had been penetrated. Further that the evidence of this witness did not directly point to him as the person who penetrated the complainant. It was also his assertion that his defence was not considered. The appellant additionally urged that he did not receive a fair trial as he was not supplied with the statements of the witnesses. He relied on Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR to buttress the argument that an accused person is entitled to the materials that the prosecution intends to use in the trial.

10. Turning to his appeal against the sentence, the appellant submitted that he should have been sentenced pursuant to the provisions of section 8(4) and not section 8(3) of the *Sexual Offences Act*. In support of this ground of appeal, the appellant argued that the evidence adduced proved that the complainant was 16 years old at the time of the commission of the offence, hence he was, upon conviction, liable to a sentence of 15 years imprisonment. He consequently urged the Court to allow his appeal in its entirety, or, alternatively, reduce the jail term from 20 years to 15 years.

11. In opposing the appeal, learned prosecution counsel Ms. Limo for the respondent relied on the submissions dated 3rd March 2025 and asserted that all the elements of the offence of defilement were proved beyond reasonable doubt. It was her position that the charge, as framed, met the threshold of section 134 of the *Criminal Procedure Code* and was supported by the evidence on record. Counsel

refuted the appellant's contention that he was not accorded a fair hearing and relied on Hussein Khalid & 16 others vs. Attorney General & 2 Others [2019] eKLR to argue that the appellant had an obligation to bring to the attention of the trial court the fact that he had not been supplied with the witness statements as ordered by the court, which he did not do. Ms. Limo ultimately urged for the dismissal of the appeal in its entirety.

12. This being a second appeal, our jurisdiction flows from section 361 (1) of the *Criminal Procedure Code*. Our focus is on matters of law and not facts, which have presumably been settled by the two courts below. We can only interfere with factual conclusions where those courts considered irrelevant facts, neglected relevant ones, or clearly erred in their judgment. The role of this Court on second appeals has been reiterated in a plethora of decisions, including Dzombo Mataza vs. Republic [2014] KECA 831 (KLR), where it was held that:

> "As already stated, this is but a second appeal. Under the law, we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno vs. Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. We do not discern such misgivings in this appeal."

13. We are also aware that we should limit our determination to issues that were raised before the first appellate court. On this principle we refer to the holding of the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) that:

> "The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the Respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the Respondent's sentence was also not raised either before the trial court or the High Court. The Respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal...
>
> Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction." [Emphasis ours]

14. With that in mind, we have reviewed the record and appreciated the tone and significance of the submissions and authorities as presented by the parties. We note that the issues of the defectiveness of the charge and the violation of the right to fair trial are being raised for the first time, and, are, as per the cited decision of the Supreme Court, not available for our determination. In that regard, the only

issue available for our consideration is whether the offence was proved. In determining this issue, we will answer the question as to whether the appellant's defence was considered.

15. For the prosecution to secure a conviction on the charge of defilement under section 8(1) of the *Sexual Offences Act*, it must prove that the complainant, while under eighteen years, was penetrated by none other than the accused person. Failure to prove any of the three elements will result in the acquittal of the accused person. Thus, in John Mutua Munyoki vs. Republic [2017] KECA 376 (KLR), it was held 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."

16. What was the appellant's age? We have looked at both the judgment of the High Court and that of the trial court, and no definitive finding was made on the issue of age. The manner of proving the age of the victim in a sexual offence has been spoken to by this Court on several occasions. For instance, in Peter vs. Republic [2024] KECA 1124 (KLR), the Court enunciated those principles as follows:

> " 28. From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians.
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> 30. There cannot be any better way to prove the age of PW1 than by the Birth Certificate, which is an official document issued by the Registrar of Births. The appellant did not challenge the authenticity of the Birth Certificate. To this end, we will not belabour much but conclude that PW1's age was proved beyond reasonable doubt."

17. We fully associate with the cited decision. In this case, R.K. (PW1) stated that she was the mother of the complainant and that her child was born on 19th November 1997. On her part, the complainant testified that she was born in 1997. Police Constable Jacinta Atieno (PW4) produced the complainant's birth certificate, which indicated that she was born on 19th November 1997. This evidence conclusively confirmed that at the time of the offence, the complainant's age was a few months shy of sixteen years. The question then is which age to ascribe to the complainant in the circumstances. To resolve this conundrum, we associate with the reasoning in Hadson Ali Mwachongo vs. Republic [2016] KECA 521 (KLR), where the Court held that:

> " Section 2 of the *Interpretation and General Provisions Act* defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the *Sexual Offences Act*, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning,

the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old."

18. Borrowing from the above decision and applying the interpretation to the facts of this appeal, we come to the conclusion that the complainant was at the time of the offence aged 15 years.

19. We will address the issue of penetration and identity concurrently. The evidence of PW2 was that she stayed in the appellant's house between 28th August 2013 and 23rd September 2013. It was her testimony that during this period, they copulated every night. Dr. Joseph Imbezi (PW3) presented a P3 form, which revealed that the appellant had old hymenal tears at 6 o'clock and 9 o'clock. There were also lacerations at the posterior behind the vagina. Even though the appellant denied having sex, it is inconceivable that the complainant would have had sex elsewhere, yet she was always locked in the appellant's house. Additionally, as pointed out by the learned Judge, it was inconceivable that the appellant presented the complainant to his parents as his wife without consummation. We therefore find that both penetration and the appellant's identity as the perpetrator were proved.

20. The other issue for determination relates to the appellant's assertion that his defence was not considered. In his evidence in chief, the appellant denied ever committing the offence. When cross-examined, he stated as follows:

> " It's true I took the complainant to my house. I stayed in with her for 1 month. I lived with her for 1 month. We were called to the Chief's place. I knew M before but I did not know her age. Later on, I decided that she was 15 years, before I did not know her age. Now she is 19 years old. We did not play sex. I never had sex with her. I heard the Doctor's Testimony. It's not true that I had sex with her. I took her for introduction to my parents as a wife. M did not speak the truth. I have the witness statement and Charge Sheet."

21. We have read the learned Judge's analysis of this defence in light of the provisions of section 8(5) and (6) of the *Sexual Offences Act*, and we agree with his finding that the defence provided in the two sub-sections was not available to the appellant. In addressing the defence under section 8(5) and (6) of the *Sexual Offences Act*, the Court in Mghanga vs. Republic [2022] KECA 367 (KLR) appreciated that it was a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. The Court proceeded to hold that the appellant had the evidential burden to establish, albeit on a balance of probabilities, that the complainant deceived him into believing that she was an adult. This was also the holding in Sammy Chacha Chacha vs. Republic [2020] KECA 886 (KLR).

22. In the case at hand, we do not think that the appellant discharged this burden on a balance of probabilities. It was the evidence of PW2 that she had known the appellant for a while and that he was aware she was a school-going girl. The appellant additionally testified that he did not know the complainant's age, but later discovered she was 15 years old. There was no indication of when he made the discovery and the steps he took thereafter. In the circumstances, the appellant did not establish the defence that was available to him under section 8(5) and (6) of the *Sexual Offences Act*.

23. From the foregoing, we find that the appeal against conviction is meritless. We therefore agree with the two courts below that the charge against the appellant was proved beyond reasonable doubt.

24. The final issue is in regard to the sentence meted upon the appellant. The appellant argued that he should have been sentenced under sub-section 8(4) instead of sub-section 8(3) of section 8 of the *Sexual Offences Act*. This submission was made on the assumption that the minor was over 16 years. As we have already established, the proper interpretation of the law indicates that she was 15 years old at the

time of the defilement. In the circumstances, the proper sentence was that provided for under section 8(3) of the *Sexual Offences Act* and which the trial court duly passed.

25. Finally, even though we are not under any obligation to address the ground on the constitutionality of the sentences under the *Sexual Offences Act*, it is necessary that we refer the appellant to the Supreme Court holding in Republic vs. Mwangi (supra) that:

> " 57. ... Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence...
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> 67. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law.... Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

26. The foregoing establishes the law as regards sentences under the *Sexual Offences Act*. As held by the Supreme Court, the sentences under the *Sexual Offences Act* remain lawful, and the appellant, having been charged and convicted under section 8(1) as read with 8(3) of the *Sexual Offences Act*, was liable to receive the minimum sentence, which in this case was 20 years imprisonment. We will add that even if it was established that the complainant was between the age of sixteen and eighteen years and, the appellant, was upon conviction liable to imprisonment for a term of not less than fifteen years, as provided under section 8(4), we would still find no fault with the learned Judge's upholding of the sentence, for he correctly held that:

> " On sentence, the Appellant contended that the sentence of 20 years imprisonment meted on him was unlawful since the sentence provided for under Section 8(3) (sic) of the *Sexual Offences Act* is instead a term of imprisonment of 15 years. I do not find that argument holding since the said term of imprisonment of 15 years is the minimum. The sentencing court was within its rights to sentence the Appellant to a term of 20 years in prison. The appeal on sentence must fail."
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> For the stated reasons, we decline the appellant's plea that we interfere with the sentence.

27. The upshot of the foregoing is that the appellant's appeal lacks merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY, 2025.

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR