



**Yegon v Republic (Criminal Appeal 45 of 2018)
[2024] KECA 1271 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1271 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 45 OF 2018
FA OCHIENG, JM MATIVO & WK KORIR, JJA
SEPTEMBER 20, 2024**

BETWEEN

MICHAEL KIPKORIR YEGON APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kericho
(Mumbi Ngugi, J.) dated 27th June 2018 in HC.CR.A. No. 46 of 2014)*

JUDGMENT

1. The appellant herein 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.
2. The particulars of the offence were that on 11th April 2012 at about 1800 hours at Kericho County, the appellant intentionally and unlawfully caused his genital organ (penis), to penetrate the genital organ (vagina), of C.C. a girl, aged 10 years.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
4. The appellant pleaded ‘not guilty’ to the charges. Three prosecution witnesses testified in a bid to advance the case against the appellant. At the end of the trial, the appellant was found guilty, he was convicted, and sentenced to life imprisonment.
5. PW1 was the complainant. She was a class one pupil and stayed with her grandmother. She told the court that on the material day, she was grazing goats when the appellant, whom she referred to as Michael, her neighbor, came and held her. He, the appellant did ‘tabia mbaya’ to her private parts and then left. She confided in her friend Lydia who then told her grandmother. Her grandmother took her to the hospital.



6. PW2 was the complainant's grandmother. She informed the court that the complainant's parents were deceased. On the material day, she went to the shamba and left the complainant grazing goats near their home. After two days, the complainant told her that she was unwell and her private parts had injuries. The complainant told her that she had been defiled by the appellant. She then took the complainant to the hospital. The appellant was their immediate neighbor but he had disappeared.
7. PW3 was a clinical officer at Kericho District Hospital. He examined the complainant on 16th April 2012. He observed that the complainant had difficulty walking and had a torn hymen. The tear was fresh and she had bruises on the external genitalia and vaginal wall. He concluded that the complainant had been defiled, and there was complete penetration of her genitalia.
8. When put to his defence, the appellant opted to remain silent.
9. Being aggrieved by the conviction and the sentence, the appellant appealed to the High Court. His appeal was dismissed and his conviction and sentence were upheld.
10. In dismissing the appeal, the learned Judge held that Section 36 of the *Sexual Offences Act* gives the court the discretion to determine whether samples should be taken from an accused person for purposes of medical tests. Therefore, the lack of a medical report on the appellant did not amount to an error by the trial court as there was sufficient evidence that the appellant committed the offence.
11. The learned Judge held that the issue of there being a grudge between the appellant and the complainant's mother lacked merit as it was confirmed that the complainant was an orphan.
12. The learned Judge also held that the court did not rely on hearsay evidence as each prosecution witness gave an account of what happened from their own knowledge, thus comprised direct evidence.
13. The learned Judge found the assertion by the appellant that the witnesses were from the same family was factually untrue as PW2 testified as the complainant's caregiver while PW3 was an independent witness.
14. The learned Judge also held that the evidence before the trial court was not contradictory.
15. As regards the defective charge sheet, the learned Judge held that although the name in the charge sheet did not correspond to the name of the complainant, an error which the prosecution ought to have noted and amended the charge sheet, the defect did not cause prejudice to the appellant such as to warrant a reversal of the conviction and the sentence. The defect could be cured under Section 382 of the Criminal Procedure Code.
16. Consequently, the learned Judge upheld the appellant's conviction and the sentence.
17. Being dissatisfied with the judgment, the appellant lodged the appeal herein in which he raised the following supplementary grounds of appeal:
 - a) The learned Judge erred in failing to find that the interpreter who translated the complainant's testimony was not sworn.
 - b. The Judge erred in failing to appreciate that the appellant was not given the opportunity to cross-examine the unsworn testimony of the complainant.
 - c. The learned Judge erred in failing to find that the charge sheet was defective.
 - d. The learned Judge erred in failing to find that penetration was not proved.



e. The sentence imposed against the appellant was harsh and excessive as it was applied in mandatory terms.”

18. When the appeal came up for hearing on 16th April 2024, the appellant was present in person, whereas Mr. Omutelema, Assistant Deputy Director of Public Prosecutions was present for the respondent. The parties relied on their respective written submissions.
19. In his written submissions, the appellant submitted that the person who was alleged to have been defiled was not the one who testified in court.
20. The appellant submitted further that penetration was not proved as the complainant did not explain what she meant by ‘tabia mbaya’.
21. Finally, the appellant asserted that the life sentence imposed against him be substituted with a definite lenient term of imprisonment, which ought to run from the date of his arrest.
22. Opposing the appeal, the respondent submitted that penetration was proved through the evidence of the complainant and PW3 who examined the complainant and concluded that she had been defiled.
23. The respondent further submitted that the age of the complainant was proved to be 10 years through the immunization card produced by PW2 which indicated that she was born on 2nd March 2002.
24. The respondent pointed out that the trial Court, after conducting *voire dire*, found that the complainant could not give sworn testimony and as such the appellant could not be allowed to cross-examine her. The complainant was a child of tender years within the meaning of Section 19 of the [*Oaths and Statutory Declarations Act*](#).
25. The respondent submitted that the error in the charge sheet was curable under Section 382 of the Criminal Procedure Code.
26. In conclusion, the respondent urged us to impose a severe sentence of imprisonment equivalent to a life sentence.
27. This is a second appeal. Section 361(1) of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

“ 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.”

28. We have carefully considered the record of appeal, the written submissions by both parties, the authorities cited, and the law.

The issues for determination are whether or not this Court can determine issues not raised before the 1st appellate court, whether or not the defective charge sheet was prejudicial to the appellant, whether the prosecution proved the offence of defilement against the appellant beyond reasonable doubt, and whether or not this Court ought to substitute a life sentence with a definite term of imprisonment.

29. As grounds 1, 2 and 5 were not raised before the first appellate court, we find that this Court has no jurisdiction to determine the said issues as this Court sitting as a second appellate court can only



entertain matters which were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.

30. In the case of *Peter Kihia Mwaniki v Republic* [2010] eKLR, this Court stated thus:

“Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter... By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit.”

31. Similarly, in the *John Kariuki Gikonyo v Republic* [2019] eKLR case, this Court held that:

“Similarly from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her” This Court when faced with a similar issue in *Alfayo Gombe Okello v. Republic* [2010] eKLR *Criminal Appeal No. 203 of 2009*; held as follows:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.” Page 11 of 20 [18] In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal.”

32. The appellant contended that the charge sheet was defective. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence, to enable him appreciate the nature of the charge(s) against him and to enable him to prepare an appropriate defence. It follows, therefore, that a charge sheet that was deficient in substance would prejudice an accused person’s right to a fair trial as provided for in Article 50(2)(b) of *the Constitution*. This was the rationale behind Section 134 of the Criminal Procedure Code. The Section provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”



33. In determining whether a charge sheet was defective or not, this Court in the case of *Sigilani v Republic* [2004] 2 KLR, 480 stated that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence.”

34. Having perused the charge sheet in this case, we note that the appellant was charged with; “defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006”. The charge sheet indicated the statement of the offence that the appellant was charged with. The said offence is known in law. The charge sheet also contained the particulars of the offence. The appellant was alleged to have inserted his penis into the vagina of the complainant, a child aged 10 years. The issue in contention was that the name in the charge sheet, C.C was different from the name given in court by the complainant and the name on the immunization card, which was J.C.

35. In the case of *Peter Ngure Mwangi v Republic* [2014] eKLR, the court stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in *YONGO v R*, [198] eKLR that:

‘In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- i. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charged offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- ii. when for such reason it does not accord with the evidence given at the trial.”

36. It follows, therefore, that the question to be determined was whether the variance in the names of the complainant was prejudicial to the appellant. In the case of *Peter Sabem Leitu v R, Cr. App No. 482 of 2007* (UR) the court held that:

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

37. Section 382 of the Criminal Procedure Code provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any



inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

38. In the case of *JMA v Republic* [2009] KLR 671, the court observed that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective, to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions.
39. In the case of *Benard Ombuna v Republic* [2019] eKLR the court held that:

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”
40. From our perusal of the record, we hold the considered view that the appellant cannot be said to have misunderstood the nature of the charges against him. It is evident that the appellant understood that he was being accused of having committed the offence of defilement, against the complainant. In our view, the omissions did not render the charge sheet fatally defective.
41. Therefore, we find that the error in the charge sheet did not occasion a failure of justice and the same was curable under Section 382 of the Criminal Procedure Code.
42. With regard to the offence of defilement, Section 8(1) of the *Sexual Offences Act* provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
43. Under the *Sexual Offences Act*, the elements of the offence of defilement are as follows: the victim must be a minor, there must be penetration of the genital organ, but such penetration need not be complete, partial penetration will suffice, and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above elements. In the case of *Charles Karani v Republic*, Criminal Appeal No. 72 of 2013, the Court stated that:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant.”
44. It is trite that the burden of proof regarding the age of the complainant lies with the prosecution. According to Section 8(1) of the *Sexual Offences Act*, a person is considered to have committed defilement if the person engages in an act that involves penetration with a child. The definition of a child is as outlined in Section 2(1) of the *Children Act*, which means any person under the age of 18 years.
45. In the case of *Kaingu Elias Kasomo v Republic*, Criminal Appeal No. 504 of 2010, the court emphasized the importance of proving the age of the victim of defilement, as the sentence imposed upon conviction depends on the victim’s age.
46. In this case, the complainant testified that she was 10 years old.



This evidence was corroborated by the evidence of PW2, the complainant's grandmother, who produced an immunization card showing that the complainant was born on 2nd March 2002. The evidence adduced pointed to the complainant having been 10 years old at the time when she was defiled. In the case of *Richard Wabome Chege v Republic, Criminal Appeal No 61 of 2014*, the court held that:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by the production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself.”

47. In the case of *Francis Omuron v Uganda*, (supra), the Court of Appeal of Uganda held that:
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian, and by observation and common sense.”
48. We find that the complainant's age was proved beyond reasonable doubt to be 10 years at the time of the incident.
49. The complainant narrated to the court how she was grazing goats when the appellant came and held her and proceeded to defile her. This evidence was corroborated by the evidence of PW3 who produced the P3 form indicating that the complainant's hymen was broken, and in his expert opinion, PW3 concluded that there was penetration. We are of the considered view that this evidence is sufficient proof of penetration.
50. As regards the identity of the appellant, the complainant and PW2 knew the appellant as their immediate neighbour. When the complainant talked about what had happened, she referred to the appellant as Michael, and stated that that was the person who had defiled her.
51. This is sufficient proof that the appellant was well-known to the said witnesses. The risk of mistaken identity was non-existent. Therefore, this was a case based on recognition as opposed to identification by a stranger. In the case of *Anjononi & Others v Republic (1976 -1980) KLR 1566*, the court held that:
- “...when it comes to identification, the recognition of an assailant is satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”
52. In the circumstances, we find that the appellant was positively identified through recognition.
53. In the result, we find that all the ingredients of the offence of defilement were proved beyond any reasonable doubt. We find no reason to interfere with the findings of fact by the two courts below. The appellant's conviction was safe.



54. As regards the sentence meted against the appellant, Section 8(2) of the *Sexual Offences Act* provides that:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

55. The issue of the sentence was not raised before the High Court which was the first appellate court. In the result, that court did not render any determination on the issue of the sentence. It therefore follows that an appeal cannot arise before us on a matter which was not determined by the court from whose decision the current appeal arises. Our said decision is informed by the decision of the Supreme Court in the case of Republic v Joshua Gichuki Mwangi, *Petition No. E018 of 2023*. We decline the appellant’s invitation to make a determination on the issue of the sentence.

56. In the instant appeal, we have given due consideration to the evidence on record and the circumstances of this case. It is unfathomable that a man would defile a child of such tender years and blame it on a grudge.

57. Accordingly, we uphold the appellant’s conviction and sentence.

We consequently dismiss his appeal in its entirety. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

