



**Gituma v Republic (Criminal Appeal E009 of 2023)  
[2024] KECA 1917 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1917 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL E009 OF 2023  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
OCTOBER 11, 2024**

**BETWEEN**

**PETER GITONGA GITUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered by on 15th September 2021 in Criminal Appeal No. E026 of 2020)*

**JUDGMENT**

1. The appellant, Peter Gitonga Gituma was charged with the main charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act*. The particulars were that on the night of 21<sup>st</sup> and 22<sup>nd</sup> June 2018, the appellant intentionally and unlawfully caused his penis to penetrate the anus DMM, a child aged 9 years and in the alternative he committed an indecent act with DMM by touching the child's anus with his penis. The appellant denied the charges and the matter proceeded to full trial, where the prosecution called 5 witnesses.
2. After a voire dire examination, DMM, PW1, the complainant stated that on 21<sup>st</sup> June 2018 he was returning from school accompanied by his friends. As they passed by the appellant's house, they saw the appellant's bicycle, and decided to ride away with it. After a while, his friends told him to return the bicycle to the appellant's house. Whilst returning it, he met with the appellant who was angry and demanded to know whether to tie the complainant up on the bed outside or inside. PW1 asked for forgiveness but the appellant would not hear of it. He gave the complainant, khat "miraa" to chew and forced him to swallow it. By this time, it was getting dark and PW1 was afraid. The appellant then forced him to chew and swallow 4 cigarettes. The complainant stated that the appellant would beat him when he refused to cooperate. At one point the complainant fainted, and the appellant then put



- a stick in between his legs, tied him to a chair and defiled him repeatedly by inserting his 'mdudu wake mbaya' (penis) in the complainant's anus.
3. PW1 also told the court that the appellant had put miraa in his mouth and covered it with a cloth and that in the middle of the night when he untied him, he warned him that he would beat him if he spat out the miraa; that he even went to the extent of pulling his genitals.
  4. At dawn, PW1 was released to go back home. When his mother asked him where he had been, he told her what happened to him and she accompanied him to the appellant's home and later to the police station.
  5. PW2 and PW3, the complainant's mother and father had been looking for their son all evening. The next morning, PW2, the complainant's mother went to the police station to report her missing child. On her way from the police station, she met with her husband in the company of the complainant and the accused. She saw that her child's clothes were blood stained and he had a wound on his head. When the complainant told her what had happened, she took him to Mariakani Sub County Hospital where he was examined. She went on to state that they were referred to Port-Reitz Hospital for further treatment because the complainant was psychologically disturbed by the ordeal that he had undergone. PW2 produced the complainant's Health Card in court in support of his age.
  6. At Mariakani Sub County Hospital, the minor was examined by Mwangolo Chigulu PW5, a clinical officer who found that the child had a painful bruise on the anal orifice with a minor tear. The child was also diagnosed to have developed depressive psychosis and was referred to Port-Reitz Hospital for treatment. A P3 form was filled by Mr. Chigulu on the 23<sup>rd</sup> June 2018 and presented in court. It indicated the child's age as 9 years old and it concluded that PW1 was sodomised.
  7. PW4 Sgt Anderson Mwaro received all the evidence brought by the complainant, recorded witness statements and preferred the charges against the accused person.
  8. Upon being placed on his defence, the appellant stated that the complainant's father had come to his place to ask whether that was the place where the owner of the bicycle damaged by his son lived. He showed him the damaged bicycle and a short while later, the complainant and his mother arrived. The appellant stated that the complainant told a sitting of four men that his mother had beaten him and forced him to confess that he had done 'tabia mbaya' to him. According to the appellant, they had gone to the police station to report the damage of his bicycle but the case was turned against him to frame him for the charges he was facing because PW3 did not want to pay for the damage to his bicycle.
  9. The trial Magistrate upon considering the evidence, convicted the appellant of the offence of defilement and sentenced him to serve life imprisonment.
  10. Aggrieved, the appellant filed an appeal to the High Court for the reasons that the trial Magistrate failed to consider that the prosecution did not prove its case to the required standards; that the investigations were not properly conducted; that the charges preferred against him were borne out of ill will and malice and that the sentence was harsh and excessive.
  11. The first appellate judge upon considering the appeal, dismissed it for want of merit and upheld both the conviction and sentence. The appellant was again dissatisfied with the decision of the High Court and has appealed to this Court on grounds that; the source of arrest was not canvassed at the trial court to conclusion; that PW1 was not a credible witness and his evidence did not warrant the conviction and sentence; that the confession was inadmissible; for failing to find that the medical evidence was unreliable, and that the life sentence imposed was unconstitutional.



12. The appellant and the respondent filed written submissions, and when the appeal came up for hearing on a virtual platform, both the appellant who appeared in person, and learned prosecution counsel for the State Ms. Nandi informed the court that they would entirely rely on their written submissions.
13. In his written submissions, the appellant stated that the evidence of the prosecution witnesses was contradictory and inconsistent, and their evidence was intended to frame him for an offence that he did not commit. It was further submitted that PW1's evidence was not credible and did not support his conviction, and therefore, the offence against him was not proved. The appellant further submitted that the first appellate Judge was wrong to assert that the appellant "...confessed to punishing the complainant for stealing his bicycle," and that the alleged confession was inadmissible. It was also submitted that the life sentence imposed was unconstitutional, and contrary to the law. Finally, it was submitted that the medical evidence was not supportive of the offence of defilement as the medical report did not disclose the degree of harm suffered by the complainant.
14. The respondent opposed the appeal and in the written submissions it was submitted that, the offence of defilement against the appellant was proved to the required standard; that the complainant was a child aged 9 years which was proved by PW2; that the appellant was identified through recognition, and that the prosecution evidence proved that the appellant defiled the complainant.
15. Regarding the appellant's assertion that the complainant's evidence was not credible as it was not corroborated by other evidence, it was submitted that not only did the trial court believe the complainant and convict the appellant under section 124 of the *Evidence Act*, there was other corroborative evidence in the form of the P3 form that showed that as a result of being sodomised, the complainant sustained bruises and a minor tear on the anal orifice; that the appellant did not demonstrate in what way the medical report was unreliable. Turning to whether the life sentence imposed on the appellant was unconstitutional, it was submitted that the life sentence was by law prescribed by section 8 (2) of the *Sexual Offences Act* and as such was constitutional.
16. This is a second appeal, where the jurisdiction of this Court is limited to consideration of matters of law only. Accordingly, this Court is bound by the concurrent findings of fact by the two courts below, and may only depart from findings on matters of fact if the findings are not based on any evidence, or that they are derived from a misapprehension of the evidence, or are plainly untenable. (See: *Karingo vs Republic*) [1982] KLR 219 and section 361 of the *Criminal Procedure Code*). Having considered the record, the submissions, and the law, the issues for determination are: i) whether the offense of defilement was proved; ii) whether PW1 was a credible witness; iii) whether the prosecution witness evidence was contradictory and inconsistent; iv) whether the medical evidence was reliable; v) whether the confession was admissible; and vi) whether the life sentence imposed was constitutional.
17. With respect to the first issue, the appellant was charged with the offence of defilement of a child aged 9 years under section 8 (1) and (2) of the *Sexual Offences Act* which provide:  
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  - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  2. 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.
18. Therefore, for the prosecution to prove the offence of defilement, it was required to establish three elements namely: the age of the complainant, proof of penetration and positive identification of the perpetrator.



19. In so far as PW1's age, was concerned, this was not at any time disputed. PW1 testified that he was 9 years old at the time of the assault. This was corroborated by PW1's Health Card that PW2 produced in court that indicated that he was 9 years old. Therefore, his age was therefore sufficiently proved.
20. On identification of the appellant, the record shows that the appellant was a neighbour to PW1, and that he was a person that was known to him and to PW3. Furthermore, having been brutalized and violated by the appellant from early evening and for the entire night, during which time he was able to see and recognize him, clearly, this was a case of recognition of the appellant which is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See *Anjononi & Others vs Republic*, (1976-80) 1 KLR 1566, 1568. Hence, there is no question that the appellant was properly identified.
21. The ingredient of penetration is defined under section 2 of the *Sexual Offences Act* as "...The partial or complete insertion of the genital organ of a person into the genital organs of another person."
22. During the trial, the lower court that had the privilege of seeing and hearing the witnesses convicted the appellant on the basis of PW1's evidence. In determining the question of penetration, the trial court stated,

"When the complainant testified before this court he passed me as a truthful witness. The court believes in his evidence given at the trial. Coupled together with the evidence of the clinical officer contained in the P3 form produced before the court Pexhibit 2, the court finds that the prosecution proved that there was penetration beyond an iota of doubt."
23. For its part upon re-evaluation of the evidence, the High Court was satisfied that the trial court rightly concluded that penetration was proved.
24. For our part, PW1 gave a graphic and detailed description of the ordeal that he had faced at the hands of the appellant. His evidence was that the appellant defiled him by sodomising him severally during the night. The evidence of Mr. Chigulu, PW5, the clinical officer and the medical report showed that, his anus had bruises and a tear was present. The report concluded that the complainant was sodomised. Contrary to the appellant's assertions that PW1 was not a credible witness, the trial court found PW1 to be a truthful and believable witness and in so finding, rightly went on to convict the appellant under section 124 of the *Evidence Act*. We find that the appellant's assertions on PW1's credibility to be baseless and unfounded and we accordingly dismiss them.
26. The appellant also contended that the medical report was unreliable since it did not disclose the degree of harm suffered by the complainant. A consideration of the report shows that it clearly indicated that the complainant was sodomised and had sustained injuries, as a result which penetration was proved. In this regard, we agree with the learned judge's observation that:

There was no obvious reason need for the clinical officer to ascertain the degree of harm. In any event the appellant has not shown how he was prejudiced by that mission (sic) or error to address the degree of harm in the P3 form".
27. Consequently, when the medical evidence and PW1's testimony are considered together, we agree with the trial court's findings which were upheld by the High Court that the prosecution proved penetration to the required standard, notwithstanding that the degree of harm was not indicated. Based on the concurrent findings by the two courts, we are satisfied that both courts came to the right conclusion that the prosecution proved all the ingredients of the offence of defilement of PW1 by the appellant. We too have reached a similar conclusion and accordingly dismiss this ground.



28. As concerns the allegations that the evidence of PW2 and PW3 were contradictory and inconsistent, whilst addressing inconsistencies, this Court in the case Philip Nzaka Watu vs Republic [2016] eKLR stated thus:

...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

29. Our consideration of the evidence does not disclose any material discrepancies that were not capable of being cured by section 382 of the *Criminal Procedure Code*. This ground also fails.

30. Turning to the complaint that the learned Judge found that the appellant had “...confessed to punishing the complainant for stealing his bicycle,” and that the alleged confession was inadmissible, we find that nothing turns on this because the learned Judge reevaluated and considered all the prosecution evidence in its entirety against the appellant’s defence which both the two lower courts dismissed as an afterthought, and came to the conclusion that the appellant had committed the offence. This ground is therefore without basis.

31. Finally, on the sentence, and whether it is lawful and constitutional, the appellant was convicted for the offence of defilement. Section 8 (2) of the *Sexual Offences Act* prescribes a life sentence for the offence of defilement of a child age 11 years and under. PW1 was 9 years old when the appellant subjected him to the beastly and inhuman assault, for which he suffers indelible psychosocial effects. Given that the sentence is prescribed by law, it is a lawful and sentence which does not warrant interference by this Court.

32. In sum, the appeal against conviction and sentence is without merit and is accordingly dismissed in its entirety.

33. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C. Arb, FCI Arb**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original



signed

**DEPUTY REGISTRAR**

