



**Kibugi v Republic (Criminal Appeal 41 of 2018)
[2024] KECA 1713 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1713 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 41 OF 2018
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
NOVEMBER 28, 2024**

BETWEEN

OCTAVIOUS WAWERU KIBUGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Kerugoya
(L.W. Gitari, J.) dated 16th March, 2018 in HCCRA No. 14 of 2015)*

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*.
2. The particulars of the offence were that on 15th September 2013 within Kirinyaga County the appellant intentionally and unlawfully caused his penis to penetrate the vagina, of JWB a girl, aged 7 years.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act*.
4. After the appellant pleaded not guilty to the charge, the case proceeded to full trial in which the prosecution called six witnesses with the appellant giving unsworn evidence with no witnesses. At the conclusion of the trial, the appellant was found guilty on the main charge, was convicted and sentenced to life imprisonment.
5. Dissatisfied with the conviction and sentence, the appellant appealed to the High Court at Kerugoya. In a judgment dated 16th March 2018, the High Court (L.W. Gitari, J.) dismissed his appeal and affirmed the conviction and sentence.



6. Still dissatisfied, the appellant moved to this Court on his second and last appeal. In his amended grounds of appeal dated 4th December 2023, the appellant faults the first appellate court for, inter alia, not considering that the case was not proved beyond reasonable doubt hence occasioning a miscarriage of justice; and for rejecting his defence without a cogent reason to do so.
7. Briefly, JWB, a 7-year-old girl, testified that she knew the appellant, who lived next to her home. She recounted that her aunt sent her to buy flour, and on her way back, the appellant, who was hiding in a maize plantation, accosted her, pushed her into the maize plantation, removed both their pants, and sexually assaulted her. He covered her mouth to prevent her from screaming, and threatened to kill her if she told anyone.
8. JWB went home and narrated to her sister JN what had happened to her JN then went and reported the matter to their mother who testified before the trial court as PW2. Her mother examined the child and after confirming that from her physical appearance the child appeared to have been defiled, took her to the hospital for examination and treatment. The child was admitted at Kerugoya County Hospital for three days. Her mother confirmed that JWB was 7 years old and produced the child's P3 form in support thereof.
9. The matter was reported to the police station and a P3 Form was issued to the child's mother. The P3 Form was filled by the doctor, who produced it before the court as exhibit. The appellant was later arrested by members of public and taken to the police station where he was subsequently charged with the offences we mentioned earlier.
10. Dr. Ogoye Madaraka who examined the child testified that at the time the child was examined, her clothes were blood stained and dirty; the minor had a perforated hymen and that there was no visible discharge. He stated that the injuries were consistent with defilement.
11. When put on his defence, the appellant gave an unsworn statement and called no witness. He stated that he did not know what he had done and that he was just drunk. That he went home after drinking and that in the morning members of the public claimed that he had defiled a child. He stated that he did not defile a child as he was drunk and asleep in his house that night.
12. When the appeal came up for hearing on 6th December 2023, the appellant was present in person, whereas Mr. Naulikha, Assistant Deputy Director of Public Prosecutions was present for the respondent. The parties relied on their respective written submissions.
13. In his written submissions, the appellant submitted that he was once married to PW2's sister and that they parted due to disagreements. That the family was not happy and hence alleged that he defiled the child. He submitted that he did not recall anything as he was drunk and went to sleep at his house and that in the morning members of the public went to his house and took him to the police station alleging that he had defiled a child. He stated that he did not defile a child and that the case was fabricated against him. He further added that it is known that sexual offences are often used to score imaginary grudges and for extortion purposes. He relied on Eliud Waweru -vs- R. [2019] eKLR.
14. The appellant asserted that the prosecution did not prove both penetration and the identity of the perpetrator as their evidence was based on the evidence of a single identifying witness. That there was need to test her evidence with great care as held in Maitanyi -vs- Republic [1986] eKLR.
15. He stated that his defence was not considered by the two courts below for the reason that as he had stated before he was drunk and did not know what happened as members of the public came to his house claiming that he had defiled a child.



16. Finally, in regard to sentence the appellant submitted that the sentence imposed was harsh and excessive as held in the case of Julius Kitsao Munyesio -vs- R. [2023] eKLR which declared life imprisonment unconstitutional. He urged us to remit this matter to the trial court for sentencing.
17. Opposing the appeal, the respondent submitted that the prosecution relied on lawfully professionally collected and recorded pieces of evidence in the trial of the appellant. Further that the appellant was not tortured to obtain a confession or make any self-incriminating statement that was used in the trial. It was submitted that the evidence was corroborated with no contradictions or inconsistencies.
18. Further, it was submitted that the trial court considered the appellant's defence and rejected it on account of the same being unconvincing and an afterthought.
19. We are urged to dismiss the appeal and to uphold the conviction and sentence.
20. 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 -vs- 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.”
21. 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 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.
22. 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 proved. For the offence of defilement to be established, the prosecution must prove each of the above elements. See Charles Karani -vs- Republic, Criminal Appeal No. 72 of 2013.
23. 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.
24. In the case of Kaingu Elias Kasomo -vs- 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.
25. In this case, the child's age was proved through her evidence, that of her mother and through the birth certificate which sealed the age issue. The child was born on 14th December 2005 and she was, therefore, seven years and nine months old at the time when she was defiled.
26. On whether penetration was proved, the child narrated how she was defiled by the appellant. This evidence was corroborated by that of her mother and by the doctor, PW5 who produced the P3 Form



indicating that the complainant's hymen was perforated, and in his expert opinion, PW5 concluded that there was penetration. We are of the considered view that this evidence was sufficient proof of penetration, as found by the two courts below.

27. As regards the identity of the appellant, the child and her mother knew the appellant as their immediate neighbour. When the complainant talked about what had happened, she referred to the appellant as someone she used to see and that he used to live next to their home. She was confident that the appellant was the person who defiled her. PW2 also stated that she had known the appellant for about 24 years since she had been married in their village.
28. The appellant's defence did not help his case. Infact, he admitted being closely acquainted to the child's family and said he could not remember what had happened on the night in question because he was drunk. Both courts below considered his evidence but they were not persuaded that he was telling the truth. We find that the appellant was positively identified through recognition.
29. 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 concurrent findings by the two courts below. The appellant's conviction was safe.
30. On the issue of the sentence, we defer to the recent decision of the Supreme Court in the Republic - vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) where the Court held that the minimum mandatory sentences under the Sexual Offences Act remain lawful until determined otherwise by the Supreme Court when the matter is properly escalated to that Court. That being the case, this being a second appeal, severity of sentence becomes a question of fact which is, by dint of section 361(2) of the Criminal Procedure Code, outside our remit. In any event, in view of the child's age and the trauma caused to her by the appellant's actions, the appellant deserves no leniency.
31. Accordingly, we uphold the appellant's conviction and sentence.
We consequently dismiss his appeal in its entirety.

DATED AND DELIVERED IN NYERI THIS 28TH DAY OF NOVEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

