



**Lepuyapui alias Kolele v Republic (Criminal Appeal 188 of 2017)
[2024] KECA 1708 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1708 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 188 OF 2017**

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

NOVEMBER 28, 2024

ACCORDINGLY, WE UPHOLD THE APPELLANT'S CONVICTION AND SENTENCE.

BETWEEN

RICHARD LEPUYAPUI ALIAS KOLELE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Nanyuki
(M. Kasango, J.) dated 4th October, 2017 in HCCRA No. 85 of 2016)*

JUDGMENT

1. The appellant was charged, tried and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* in Maralal Principal Magistrate's Court Criminal Case No. 526 of 2013. It was alleged that on 10th January, 2011, he unlawfully and intentionally caused his penis to penetrate the vagina of TL, a child of 7 years.
2. After pleading not guilty to the charge, the case proceeded to full trial in which the prosecution called six witnesses with the appellant giving an unsworn statement of defence with no witnesses. At the conclusion of the trial, the court found the charges proved, convicted the appellant and sentenced him to life imprisonment.
3. Being dissatisfied with both conviction and sentence, the appellant appealed to the High Court at Nanyuki. In a judgment dated 4th October, 2017, the High Court (M. Kasango, J.) dismissed his appeal and affirmed the conviction and sentence.
4. Still aggrieved, the appellant moved to this Court on second appeal relying on grounds, inter alia, that: the two courts below erred in law and fact when they convicted and upheld the sentence imposed without considering that there was a grudge between PW1 and him; the two courts below erred



- when they convicted and upheld the sentence of life imprisonment whereby medical evidence was inconclusive.
5. Briefly, the facts before the trial court were as narrated by (PW1) ML, who testified that she was the minor (TL)'s mother and that she knew the appellant as they were neighbours and that he frequently came to their home. She stated that on 10th January 2011 she took her other daughter JW to hospital leaving TL at home to take care of her two other siblings, and that when she returned home at around 4.00pm she did not find her children at home.
 6. She testified that after a short while she heard her child TL then aged 7 years crying from the trench and when she went to check, she found her having bled a lot from the vagina and that she had been seriously injured and had blood all over her body including on her face.
 7. On enquiring from the other children what had happened to TL, she was told that the appellant had gone to their home and given them sweets and chased them away and that he demanded to remain with TL. When they went back home, they did not find TL at home.
 8. She testified that together with TL they went to the chief's office and that he advised them to take TL to hospital. And that on 11th January 2011 they reported the matter to the police and took TL to Wamba Mission Hospital where TL was hospitalised for one month and was later transferred to Kijabe A.I.C. Mission hospital where she was treated and given medicine and was admitted for 3 days. She was later referred to Kenyatta National Hospital.
 9. She stated that the appellant disappeared and remained at large for over two years before he was apprehended.
 10. ML, the child's father testified in similar vein. He was in the company of his wife, PW1 when they found their daughter having been defiled. He corroborated PW1's evidence in every detail. Both witnesses said that TL and the other children told them that it was the appellant who had committed the heinous act against TL.
 11. Dr. Robert Sifuna Nato a medical officer at Wamba Mission Hospital who examined the child and completed the P3 form testified that on examination he established that TL had a perianal laceration with anal sphincter torn. He said that there was penetration of the vagina. He stated that she had blood present on the vaginal area. His conclusion was that the child had been defiled.
 12. Corporal Nicholas Mbungu, an officer stationed at Wamba Police station received the report on the defilement of T.L. on 10th January 2011. He recorded the witness statements and started looking for the suspect. The appellant is said gone into hiding and he was arrested in the month of August 2013 around Nairobi and later charged with the offences he was convicted of.
 13. In his defence, the appellant denied committing the offence and maintained that the case was fabricated against him by TL's parents following a long-standing grudge. He stated that he had moved to Nairobi in 2008 and never went back to Samburu County till his arrest in Nairobi where he was working as a night guard.
 14. The trial magistrate was unpersuaded by this defence and in view of the evidence adduced by the prosecution before the court, the appellant was convicted and sentenced to Life imprisonment.
 15. The appeal before us was urged by way of written submissions and brief oral highlights. The appellant appeared in person at the plenary hearing of the appeal while Mr. Naulikha, Assistant Director of Public Prosecutions, represented the respondent.



16. The appellant's submissions are mainly on matters of fact, and this being a second appeal, those submissions that challenge factual aspects of the evidence must fall on the wayside. We have nonetheless considered the submissions that address points of law, particularly the submission that the prosecution failed to prove the elements of defilement beyond reasonable doubt.
17. The appellant submitted that penetration was not proved; the child's age and the identity of the assailant were also not proved to the required standard. Finally, he submitted that the life sentence imposed on him be set aside and he be set free.
18. In response, Mr Naulikha for the respondent submitted that the appellant's conviction was safe and the sentence lawful and not punitive or excessive in the specific circumstances of the case bearing in mind the age of the victim who sustained life threatening and permanent injuries physically, psychologically, emotionally and mentally and that she would have to live with the trauma her entire life because at the time she was only 7 years old.
19. It was submitted that at the time of the trial the victim was still traumatised and she could not talk as she lost her speech and that she testified through an intermediary who testified that the scene was bloody and messed up. Further, that the prosecution proved its case against the appellant beyond reasonable doubt because the evidence on record was corroborated and it was direct, consistent, cogent, reliable, believable and overwhelming.
20. Further, it was submitted that there was no evidence of mistaken identity of the appellant by the minor or the other prosecution witnesses especially PW1, PW2 and PW3. That it was the evidence of recognition and not identification by strangers. That both the victim and the appellant were neighbours. It was submitted that the appellant took advantage of that knowledge of the victim to lay a trap for her and tricked her to remain behind while her peers were sent away by the appellant before he committed the barbaric act.
21. We were urged to dismiss the appeal.
22. We have considered the record of appeal in its entirety, the grounds of appeal, the rival submissions by both parties and the law. We are restricted to consideration of matters of law only by dint of section 361 of the Criminal Procedure Code. The Court will also not interfere with concurrent findings of fact arrived at in the two courts below unless such findings were based on no evidence. (See *Chemogong -vs- R.* [1984] KLR 61; *Ogeto vs. R* [2004] KLR 14 and *Koingo -vs- R.* [1982] KLR 213). The test to be applied on second appeal is whether there was any evidence on which the trial court could not reasonably find as it did. (See *Reuben Karari S/o Karanja -vs- R.* [1956] 1 E.A.C.A. 146).
23. For the offence of defilement to be proved, the following elements must be proved: 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. See this Court's decision in *Charles Karani -vs- Republic*, Criminal Appeal No. 72 of 2013, where 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.”
24. With regards to penetration the appellant complains that the medical evidence was insufficient to prove penetration as it was conducted 2 ½ years later. That was, nonetheless, not correct. The medical officer, who examined the child, testified that the child had been treated at the hospital earlier on the date she was defiled. The P3 form was, however, completed later after the child was deemed to have sufficiently recovered.



25. It is also noted that investigations in the matter remained open for a long time because the appellant escaped and went into hiding for over two years. That delay did not affect the original medical report and the findings of the doctor as contained in the P3 form. The medical officer produced both the P3 form and the medical treatment notes. This evidence was circumstantially corroborated by the testimonies of PW1 (the mother of the victim), PW3 and PW4 (the victim's siblings) who had seen the child bleeding.
26. There was, thus, sufficient evidence upon which the two courts below could rationally conclude that penetration had been proved beyond reasonable doubt. In our view the evidence of penetration was overwhelming. We have no reason to depart from the concurrent findings of the two courts below to the effect that penetration was proved.
27. Turning to the issue of age, we note that while it is true that no birth certificate or age assessment report was produced in evidence, there is no requirement in law that the age of a child be proved only through production of a birth certificate or age assessment report. This Court in *Edwin Nyambogo Onsongo -vs- Republic* [2016]eKLR dealt with that vexing issue with finality when it stated as follows :

“...the question of proof of age has finally been settled by recent decision of this court to the effect that it can be proved by documents, evidence such as birth certificate, baptism, card or by oral evidence of the parents or the guardian or medical evidence among other credible form of proof. We think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victims age it has to be credible and reliable.”

28. In the present case, the P3 form gave the approximate age of the child as 7 years. PW2, the medical Officer who examined the child also testified that he approximated her age as 7 years old. Similarly, the child's parents testified that she was 7 years old. The cumulative effect of all these pieces of evidence is that the age of the minor was established as 7 years old or at least below twelve years old – which is the cut off age for charges under section 8(2) of the *Sexual Offences Act*.
29. As regards the identity of the appellant, the child and PW1, PW3, PW4 and PW5 all knew the appellant as their immediate neighbour. Even the appellant did not deny that he was well known to the child and the witnesses before the defilement incident. His defence was that there was a grudge between him and the family of the victim and so they fabricated the charges against him. 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 - vs- 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.”
30. In the circumstances, we find that the appellant was positively identified through recognition.
31. The other grievance of the appellant was that T.L. did not testify.

We note that when the complainant went to court to testify on 28th August 2013, the trial magistrate tried to conduct voire dire examination but it was noted that the child had difficulties speaking in court. The trial magistrate noted in the proceedings as follows;

“Court: I have to put this on record-the minor victim T.L. attended court today. The prosecutor attempted to put her on the stand. However, the minor is not able to talk hence cannot testify.”



32. In this Court’s decision in M.M. -vs- Republic [2014] eKLR it was held that: -

“Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to find a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of *Robinson Tole Mwakuyanda V. R. H. C. Cr. Appeal No. 227 of 2007*, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak.”

33. In the absence of the complainant’s testimony, there was independent evidence of PW1, the complainant’s mother, PW3, PW4, the complainant’s brothers, PW5, the complainant’s father and the PW2, the medical officer that linked the appellant to the defilement of the complainant. It was sufficient to rely on their evidence. The adoption of the evidence was therefore proper in the circumstances of the above quoted authority as the victim, a child of tender years aged 7 years old was unable to testify in court. She was obviously still traumatized when she appeared before court.

34. 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.

35. 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.”

36. The issue of the sentence although raised before the High Court was not canvassed. 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 -vs- Joshua Gichuki Mwangi, Petition No. E018 of 2023. We decline the appellant’s invitation to make a determination on the issue of the sentence. The life sentence meted against the appellant was lawful and merited in the circumstances of this case and we are disinclined to interfere with it.

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

We consequently dismiss his appeal in its entirety

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

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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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

