



REPUBLIC OF KENYA



KENYA LAW
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**Agalo v Republic (Criminal Appeal E002 of 2024)
[2025] KEHC 9727 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 9727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E002 OF 2024
AB MWAMUYE, J
JANUARY 23, 2025**

BETWEEN

CHRISTOPHER OKOTH AGALO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and sentence for the offence of defilement contrary to section 8(1) as read with section 8(3) of the sexual offence act no.3 of 2006 and sentenced to 25years imprisonment by Hon Christopher Yalwala (SRM) Judgment delivered on 28th December 2023)

JUDGMENT

Introduction

1. This appeal arises from the conviction and sentence passed by Hon. Christopher Yalwala, Senior Resident Magistrate, Kisumu Law Courts, in Criminal Sexual Offence Case No. E68 of 2023. In the judgment delivered on the 28th day of December, 2023, the Appellant, Christopher Okoth Agalo, was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to twenty-five (25) years imprisonment.
2. Being dissatisfied with the Trials court judgment, the appellant filed this appeal on grounds that;
 - a. The trial learned magistrate erred in both law and in facts by both convicting and sentencing the appellant relying on inadequate evidence which could not prove the prosecution's case beyond reasonable doubt.
 - b. That the trial learned magistrate erred in facts by being persuaded by the prosecution to go through wrong procedures making the entire trial process to be unfair and unjust.



3. The Respondent, represented by the prosecution, opposes this appeal, contending that the conviction was safe, founded upon credible evidence, and that the appellant's trial was conducted fairly, transparently, and in strict compliance with due process. The Respondent further maintains that the sentence of twenty-five years imprisonment imposed by the trial magistrate was both lawful and justified in the circumstances.
4. This Court, being the first appellate court, is duty-bound under the principle established in *Okeno v Republic* [1972] EA 32, to subject the entire record of the trial to a thorough re-evaluation and fresh scrutiny, to draw independent conclusions and determine whether the conviction and sentence passed by the trial court should stand.

Submissions by the Appellant

5. The Appellant, in challenging his conviction and sentence, submitted that the trial magistrate erred both in law and in fact by convicting and sentencing him based on inadequate evidence that failed to prove the prosecution's case beyond reasonable doubt. He argued that the evidence presented by the prosecution was inconsistent, unreliable, and insufficient to establish his guilt conclusively.
6. The Appellant further submitted that the complainant's testimony contained substantial contradictions, making her evidence unsafe for reliance without corroboration. He argued that there was no direct forensic linkage between him and the offence, and thus the conviction purely rested upon circumstantial evidence that did not meet the required threshold.
7. Additionally, the Appellant contended that his identification as the perpetrator was not sufficiently established by the prosecution. He asserted that the circumstances surrounding the identification were questionable and did not exclude the possibility of mistaken identity or wrongful implication due to a grudge or other external influences.
8. On procedural fairness, the Appellant asserted that the trial magistrate allowed the prosecution to employ improper procedures and irregularities, thus prejudicing his right to a fair trial. He argued that these procedural lapses were orchestrated or influenced by the prosecution, resulting in a miscarriage of justice.
9. The Appellant specifically raised concerns regarding the conduct of the trial, asserting that at certain stages, he was inadequately represented or not represented at all, severely affecting his ability to effectively defend himself. He submitted that due to this procedural unfairness, the entire trial should be considered flawed and the resulting conviction unsafe.
10. Finally, the Appellant contended that the sentence of twenty-five years imposed upon him was manifestly excessive, unjustified, and harsh, considering the mitigating circumstances that ought to have been taken into account. He pleaded for leniency, seeking reduction or quashing of the sentence.

Submissions by the Respondent

11. In response, the Respondent (Republic), represented by prosecution counsel, submitted that the prosecution had successfully proven all essential elements of defilement beyond reasonable doubt. The Respondent emphasized the clear and consistent testimony of the complainant, whose evidence was corroborated by the medical reports confirming penetration.
12. The Respondent asserted that the complainant's evidence alone, under Section 124 of the *Evidence Act*, was sufficient to sustain a conviction provided the court recorded reasons for believing the



minor's testimony. The prosecution cited *George Kioji v Republic* [2018] eKLR to emphasize that corroboration was not mandatory if the victim's testimony was credible, clear, and consistent.

13. On the identification of the Appellant, the prosecution maintained that the circumstances favored reliable recognition, noting the Appellant was a neighbor well known to the complainant, and the offence occurred in daylight. The Respondent submitted that the evidence on record provided reliable identification devoid of mistaken identity, as established in *Anjononi & Others v Republic* [1980] KLR 59.
14. The prosecution firmly refuted allegations of procedural unfairness, asserting that the trial was conducted fairly, openly, and in accordance with established legal principles. The Respondent contended that the Appellant was adequately represented at critical stages of the trial and was fully informed, having confirmed his readiness and ability to proceed when required.
15. The Respondent further submitted that the trial magistrate judiciously exercised discretion in sentencing. The prosecution argued that the sentence of twenty-five years imprisonment, though above the statutory minimum, was appropriate, given the gravity of the offence, the vulnerability of the victim, and the breach of trust involved, citing *Jared Koita Injiri v Republic* [2019] eKLR in support.
16. In conclusion, the prosecution urged the court to dismiss the appeal, affirming the trial court's judgment. The Respondent argued that the appeal lacked merit, as the conviction was based on cogent, reliable, and compelling evidence, and the sentence imposed was lawful, proportionate, and just in the circumstances of the offence.
17. The court identifies these issues for determination
 - a. Whether the Prosecution Proved the Charge of Defilement Beyond Reasonable Doubt
 - b. Whether the Sentence Imposed was Lawful and Just

Analysis

Whether the Prosecution Proved the Charge of Defilement Beyond Reasonable Doubt

18. In addressing the issue of whether the prosecution proved the charge of defilement beyond reasonable doubt, this court is guided by established judicial principles which require the prosecution to prove all the ingredients of the offence of defilement conclusively. In the case of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006, the prosecution is required to prove three critical elements: Age of the victim, Proof of penetration and Identity of the perpetrator.
19. These three elements have been succinctly enumerated in the landmark Kenyan decision of *Charles Wamukoya Karani v Republic* [2016] eKLR, where the court stated clearly that the proof of age, penetration, and identification must be established beyond reasonable doubt.

Proof of Age of the Complainant

20. The law is clear that the age of the complainant in a defilement case is crucial because it informs the sentencing regime. The prosecution, therefore, bears the burden to establish the victim's age beyond reasonable doubt. This principle was affirmed in *Alfayo Gombe Okello v Republic* [2010] eKLR, where the court emphasized that "age is a critical component in sexual offences and must be specifically proved by credible evidence."
21. In the present appeal, the prosecution produced documentary evidence (Birth Certificate) clearly indicating that the complainant was fourteen (14) years at the time of the offence. This document was



duly admitted as an exhibit without any credible challenge by the appellant. Accordingly, the age of the complainant was sufficiently proved beyond reasonable doubt.

Proof of Penetration

22. 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. The element of penetration is generally proven by direct evidence of the victim, corroborative medical evidence, or both. The Court of Appeal in *Mark Oiruri Mose v Republic* [2013] eKLR, reiterated that penetration can be proven either by medical evidence or by the direct testimony of the victim or both, and corroboration is not mandatory provided the victim is believed by the court.
23. In the present appeal, the complainant's testimony clearly indicated penetration. Her account was coherent, consistent, and remained firm during cross-examination. Furthermore, the medical evidence presented through the clinical officer, who produced the Post-Rape Care (PRC) and P3 forms, confirmed fresh hymenal tears consistent with penetration and presence of spermatozoa, thus corroborating the complainant's testimony. The medical evidence presented was compelling and uncontroverted by any evidence from the defence. Accordingly, the element of penetration was proved beyond reasonable doubt.

Identity of the Perpetrator

24. In defilement cases, positive identification of the perpetrator is critical. It is imperative that the identification of the accused is clear, unambiguous, and reliable. The Court of Appeal in *Francis Kariuki Njiru & 7 Others v Republic* [2001] eKLR underscored the necessity for accurate and reliable identification, especially where the offence is serious and carries heavy penalties.
25. In this case, the complainant clearly identified the appellant as a known person who lived within the neighbourhood. The offence occurred during daylight, removing any doubts associated with visual identification under challenging conditions. Additionally, the complainant immediately disclosed the appellant's identity to her mother, reinforcing the reliability of her identification. The trial court's finding of fact in accepting the complainant's identification evidence was reasonable and well-grounded in the circumstances, and this court finds no reason to disturb it.
26. The appellant, in his defence, failed to displace or meaningfully challenge the prosecution's identification evidence, which remained strong and convincing throughout the trial.

Credibility and Reliability of the Witnesses

27. Under Section 124 of the *Evidence Act*, the proviso allows a conviction based on the sole testimony of a child victim of a sexual offence provided the court is convinced of the credibility and truthfulness of such testimony and records reasons for such belief. This was affirmed in *George Kioji v Republic* [2018] eKLR, where it was emphasized that the evidence of the complainant in a sexual offence, if found credible, need not be corroborated.
28. In this appeal, the trial magistrate clearly recorded reasons for believing the complainant's evidence, explicitly highlighting her composure, consistency, and clarity in narrating the ordeal. This finding, in my view, was sound and justified based on the record.
29. Taking into account the foregoing analysis, this court finds that the prosecution effectively discharged its evidentiary burden of proof beyond reasonable doubt regarding the essential ingredients of defilement. The age of the complainant, penetration, and identity of the perpetrator were all convincingly and conclusively established.



30. Consequently, the appellant's assertion that the trial magistrate convicted him on insufficient or inadequate evidence lacks merit. The standard of proof beyond reasonable doubt as prescribed in criminal law and affirmed in various judicial pronouncements cited above was fully satisfied by the prosecution. This ground of appeal therefore fails.

Whether the Sentence Imposed was Lawful and Just

31. The appellant herein, was sentenced to serve twenty-five (25) years imprisonment for the offence of defilement contrary to Section 8(1) as read together with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

32. It is trite law that sentencing is a judicial discretion that must be exercised judiciously, taking into account the law, the circumstances of the offence, and the offender. The appellate court's jurisdiction to interfere with the discretion of the trial court in sentencing is limited to situations where it is evident that the sentencing court acted on wrong principles, overlooked material factors, or the sentence is manifestly harsh or excessive. This principle was clearly articulated in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR, where the Court of Appeal held:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, it is trite law that the appellate court will only interfere with sentence if it is shown that it is illegal, manifestly harsh or excessive as to amount to miscarriage of justice.”

33. The law applicable in this appeal, specifically Section 8(3) of the *Sexual Offences Act*, provides clearly that:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

34. In this particular case, the complainant was fourteen years old at the time of the offence, thus placing the sentence within the ambit of Section 8(3) of the *Sexual Offences Act*. The trial court correctly identified the applicable provision and imposed a sentence of twenty-five years imprisonment, exceeding the statutory minimum sentence by five years.

35. The issue thus arises as to whether the sentence of twenty-five years imprisonment, being five years above the statutory minimum, was justified. In the case of *Jared Koita Injiri v Republic* [2019] eKLR, the Court emphasized that while the *Sexual Offences Act* prescribes minimum sentences, courts still retain discretion to impose higher sentences depending on aggravating circumstances attendant to the commission of the offence.

36. Similarly, the Court of Appeal in *MK v Republic* [2015] eKLR stated that the discretion to impose sentences above statutory minimum should be exercised judiciously, based on clear aggravating factors disclosed during trial.

37. The trial magistrate, in imposing the sentence, noted the severity of the offence and the appellant's breach of trust, being a neighbor known to the complainant and her family. The learned magistrate further considered the trauma caused to the minor victim as well as the need for deterrence in cases of sexual offences involving minors.

38. Having considered the justification provided by the trial court, it is apparent that the trial magistrate carefully exercised his discretion in sentencing. This court finds no error in principle, nor was there an



omission of relevant mitigating factors during sentencing. Indeed, the court was entitled to consider the aggravating factors relating to the breach of trust and vulnerability of the victim, as was aptly stated in the case of John Irungu v Republic [2016] eKLR, where the court affirmed that aggravating factors such as breach of trust justify a sentence above the statutory minimum.

39. In conclusion, this court finds that the sentence of twenty-five (25) years imposed by the trial magistrate was lawful, justified by the aggravating circumstances, and was neither excessive nor harsh in the circumstances of this case. The trial court did not err in principle nor overlooked any material consideration in exercising its discretion. Accordingly, this ground of appeal also fails.

Conclusion

40. I find that there was proof of penetration, proof of identity of the perpetrator and the trial process was fair. From the record it is seen that the appellant was actually represented at some stage during the trial process and that despite having been served with the witness statements and documents of the trial day the appellant confirmed that he was ready and willing to proceed with the hearing therefore, this court is satisfied that the trial process was just and fair.
41. From the foregoing analysis I'm satisfied that the appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit in the appeal. In the result I affirm the judgment of the trial courts below and dismissed the appeal in its entirety.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 23rd DAY OF JANUARY 2025.

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BAHATI MWAMUYE

JUDGE

In the presence of:-

Appellant- Mr. Agalo present at Kisumu Maximum

Respondent – Ms. Kagali

Court Assistant – Mr. Guyo

