



**Kipkurui v Republic (Criminal Appeal E001 of 2024)
[2025] KEHC 2931 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E001 OF 2024
MS SHARIFF, J
FEBRUARY 27, 2025**

BETWEEN

AMOS KIPKURUI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 the particulars being that between 4th October 2021, and 6th October 2021, at Kisumu East Sub-County within Kisumu County, he intentionally caused his penis to penetrate the vagina of FOK a child of 12 years.
2. The Prosecution called four (4) witnesses in support of its case and in his defense, the Appellant gave a sworn testimony and called one witness.
3. The trial Court after considering the evidence adduced by both parties found that the Prosecution had proved their case against the Appellant beyond reasonable doubt. The Appellant was convicted and sentenced to serve Fifteen (15) years in prison.
4. Aggrieved by the conviction and sentence, the Appellant filed his Petition of Appeal dated 28th October 2013, in which he raised the following grounds of appeal:
 - a. That the trial magistrate erred in both law and facts by failing to consider that the ingredients forming the offence of defilement were not proved to the required standard.
 - b. That the trial magistrate erred in both law and facts by failing to consider that mitigating factors that called for leniency.
 - c. That the trial magistrate erred in both law and facts by failing to that the Appellant was a first offender, remorseful and as such for a non-custodial sentence.



- d. That the trial magistrate erred in both law and facts in convicting the Appellant on the basis of presumptions without observing that no medical evidence was tendered in respect of the Appellant.
 - e. That the trial magistrate erred in both law and facts by failing to note and consider that the evidence tendered by the Prosecution was full of contradictions.
5. He prayed that this Court allows his appeal, quash his conviction, set his sentence aside and set him at liberty.
 6. The appeal was canvassed by way of written submissions. Both parties complied.
 7. As a first appellate Court; I shall re-evaluate and reassess the evidence afresh and arrive at my own independent conclusions. I am however reminded that unlike the trial Court, I neither saw nor heard the witnesses and give due regard for that. See *Okeno v R.* (1972) E.A. 32.
 8. The Complainant testified as PW1 stating that her date of birth is 20th May 2009 and that she was in class 5. She referred to the Appellant as her mother's customer and stated that she used to see him on Saturday's when she was not going to school and was at her mother's stall helping her run her hotel.
 9. It was her testimony that on 4th October 2021 at 6.30 p.m. while heading to back home for church where she attends her dancing practices, she met the Appellant at her mother's hotel and he asked her to accompany him so that he could show her his house. She followed him and on reaching the door, she told him that since she had seen the location of his house, she wanted to head back home. At that juncture the Appellant pushed her inside his house closed the door, held a knife against her, pushed her onto his mattress and proceeded to defiled her. She told the Court that on that fateful day she wore a skirt, red t-shirt and blue pants. According to her, the Appellant removed his trouser, held her hand, lay on top of her and placed his penis inside her vagina. After he was done, the Appellant locked her inside his house and when he returned he defiled her yet again. She told the Court that she stayed in the Appellant's house for 2 days and returned home on Tuesday. She narrated her ordeal to her mother who then took her to Jaramogi Oginga Odinga Teaching Referral Hospital for examination and treatment. The Appellant was then arrested. She identified the man who defiled her as the Appellant in Court.
 10. On cross-examination, she told the Court that the Appellant was his mother's customer and that they used to talk, and that he had sex with her 3 times.
 11. PW2 NO testified that the Complainant herein is her daughter and she run a business in [Particulars Withheld]. She told the Court that on 4th October 2021, at 12.00 p.m. she received a call from the Complainant telling her that there was no charcoal at the hotel. As she was out of her business premises attending a house fellowship she sent the Complainant and at 6.00 p.m. she proceeded to the hotel. When she got home at 8.00 p.m. she did not find the Complainant and she thought she might be at her sister's house. The next day she asked her son to go check if the Complainant was at her sister's house but her son did not find her there. She told the Court that the Complainant returned home on Tuesday and after telling her of what had transpired between the complainant and the appellant PW2 proceeded to file a report at the police station and thereafter took her daughter to Jaramogi Oginga Odinga Teaching Referral Hospital for examination and treatment. She identified the man who the Complainant told her defiled her as the Appellant in Court.
 12. PW3 Dr. Lucy Ombok testified that and that she is attached to Jaramogi Oginga Odinga Teaching Referral Hospital. She told the Court that she filled the P3 form of the Complainant herein on 19th October 2021 and that the Complainant was in the company of PW2. According to her, the



- Complainant was brought in with a history of defilement by a person known to her. On vaginal examination, it was observed that PW1 had normal external genitalia but the hymen was broken and a presence of whitish discharges. The urinalysis test revealed presence of epithelial cells but no spermatozoa. She produced the P3 forms as PEXH 1 (a).
13. On cross examination, she testified that the offence occurred on 4th to 6th of October 2021, but the Complainant's examination was done for the 1st time on 7th October 2021 and the 2nd time on 19th October 2021. She told the Court that presence of whitish discharge meant an infection as a result of spermatozoa.
 14. PW4 No. 70539 CPL Samson Murilo testified that he is currently station at Kabete but at the time if the incident he was station at Kasagam Police Station. He told the Court that he was the investigating officer in this matter and that on 6th October 2021 at 10.00 P.M. he received a report from the Complainant in the company of PW2. According to him, the Complainant said that while on her way home from dancing practice she met the Appellant herein who was well known to her as he used to eat at PW2's hotel. The Appellant led her to his house wherein he pushed her inside and proceeded to defile her and that he did so 4 times up to 6th October 2021 before he released her. The complainant rushed home and recounted everything that had occurred to his mother who brought her in to lodge a report. On 7th October 2021, PW2 informed them that the Appellant was successfully apprehended by members of the public and he went and re-arrested him and took him to the police station. He produced in Court the birth certificate of the Complainant as PEXH.3.
 15. On cross-examination, he told the Court that the Complainant identified the house of the Appellant but they did not find him there and that according to her the Appellant defiled her without protection.
 16. In his defense, the Appellant denied committing the offence. He testified that on the 4th October 2021, he left for his place of work in the morning at 7.00 a.m. and came back home at 7.00 p.m. He insisted that he never saw the Complainant and that he knew her as she used to be with PW2 who operates a kiosk. He told the Court that his brother visited him of 5th October 2021 and that on 6th October 2021 he was at work.
 17. On cross-examination, he told the Court that on the 4th October 2021, he left for his place of work in the morning at 7.00 a.m. and came back home at 7.00 p.m. It was his evidence that he was with 5 of his colleagues on that day from 4th to 6th of October 2021. He told the Court that he is married and that on 2nd October 2021, he left his house keys with mama Willy who usually washes his clothes and that she had a set of his keys
 18. DW2 Doris Aoko Waswate testified that she operates kiosk and washes clothes for people. She told the Court that she knows the Complainant herein and PW2, and that the Appellant is her neighbor. According to her, between 4th and 6th of October 2021, she recalled she was washing clothes as usual and that she washed the Appellant's clothes on 2nd October 2021 and his work clothes the following Tuesday. She stated that there was no one in the Appellant's house when she returned the clothes. She told the Court that on 4th October 2021, she was at the kiosk and she only heard the police were looking for the Appellant on Wednesday.
 19. On cross-examination she told the Court that the Appellant is his neighbor and the plot has about 100 houses, and that she usually washes his clothes on Sunday and have them returned that same evening. She confirmed that she had the Appellant's house keys. She told the Court that the Appellant's house only came once and left.



20. On re-examination, she reiterated that that Tuesday, she took clothes from the Appellant's house and returned them after washing.
21. I have considered the Appellant's grounds of appeal, the evidence adduced before the trial Court as well as the submissions and the applicable law. In the circumstances, it is my view that the issues for determination emanating therein are as follows:
 - i. Whether the Prosecution's case against the Appellant was proven beyond reasonable doubt and
 - ii. Whether the sentence meted out on the Appellant was excessive and harsh.

Whether the Prosecution's case against the Appellant was proven beyond reasonable doubt

22. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. The section provides that:
 - “(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 between the age of twelve and fifteen is liable upon conviction to imprisonment for a term not less than twenty years.”
23. To sustain the charge of defilement against the Appellant, the Prosecution needed to prove the following essential ingredients of the offence of defilement:
 - a. That the Complainant was, at the material time, a child as defined under section 2 of the Children's Act and of the age between 12 years and 15 years
 - b. That there was penetration of the child's vagina; and;
 - c. That it was the appellant who caused such penetration of the complainant's vagina or genitalia.
24. On the age of the Complainant, the Complainant testified that she was 13 years old. PW2, testified that the Complainant was born on the 29.5.2009. PW4, the investigating officer testified that as per the Complainant's birth certificate, she was born on 21st June 2009 showing that she was 12 years 3 months 13 days old which meant she was still aged 12 years at the time of the incident. He produced in Court a copy of the Complainant's birth certificate as PEXH. 3.
25. In *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:
 - “Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
26. Rule 4 of the Sexual Offences Rules of Court Rules is explicit that:
 - “When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”



27. Therefore, in this case, in the absence of any other evidence to the contrary, I find that Complainant was aged 12 years 3 months 13 days old when the alleged incident of defilement occurred.

28. On penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

29. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

30. In the instant case, the victim gave sworn testimony that the Appellant was the one who defiled her on 4th October 2021 to 6th October 2021. The Complainant testified that the Appellant asked her to accompany him to his house so that she could see it and on getting to the door of his house, she told him that she has seen it and wanted to go back home. The Appellant proceeded to push her inside his house, lock his door, hold a knife against, hold of her hand down, covered her mouth and laid her on the bed where he removed his trousers and underwear as well as her skirt and panty then he inserted his penis into her vagina. PW3 confirmed that that the Complainant had been grossly violated and recommended counselling.

31. On the P3 form and PRC form, it was noted, that the minor required trauma counselling suffered a broken hymen and there was presence of presence of whitish discharges with the urinalysis test revealing presence of epithelial cells but no spermatozoa. In the case of *Mark Oiruri Mose v R* [2013] eKLR, the Court of Appeal stated that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”

32. In this case, it is clear from the evidence adduced before the trial court that the Complainant’s evidence was adequately corroborated by the medical evidence. More so, the victim, upon being defiled, she went and reported to PW2 who proceeded to the police station and notified PW4 of what had transpired to her daughter. Further, the Complainant’s evidence remained unchallenged even under cross-examination.

33. The aforementioned all point to the fact that the Complainant’s testimony was the truth, it was well corroborated. Accordingly, the evidence undoubtedly proved that indeed the Complainant was penetrated/ defiled through beastly act of an adult.



34. As to whether the Appellant was the perpetrator, the Appellant's testimony was that he knew the Complainant as she used to be with PW2 who operates a kiosk which he clearly used to frequent. It is thus clear that the Complainant knew the Appellant well and recognized him as the perpetrator hence his testimony that she knew him not was a lie. In the circumstances, I find that the Appellant was properly recognized as the perpetrator of the offence.
35. The Appellant pleaded that there were inconsistencies and contradiction in the testimonies of the Prosecution witnesses. However, it is evident as laid out hereinabove that the evidence adduced by the Prosecution witnesses corroborated each other. The Appellant did not even say what contradictions he found fatal to the conviction being challenged.
36. On contradictions, the Court of Appeal addressed itself on the issues of contradictions in the case of *Richard Munene v Republic* [2018] eKLR that:
- “... only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”
37. Accordingly, it is my opinion that there were no contradictions and inconsistencies sufficient to create doubt in the mind of the trial Court as to the Appellant's guilt. This ground of appeal therefore fails and is dismissed.
38. In the end, I find and hold that the prosecution proved the guilt of the Appellant herein beyond reasonable doubt and therefore the appeal against conviction fails and is hereby dismissed. The conviction of the appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* was sound and the same is hereby upheld.

Whether the sentence meted out of the Appellant was harsh and excessive

39. The Appellant has impugned the judgment of the trial Court in imposing a sentence of 15 years' imprisonment. He argues that the trial Court failed to consider the mitigating factors as raised. On my perusal of the lower Court proceedings, on 9th October 2023, the Court took mitigation, a presentence report was availed by the Probation and Aftercare services. Subsequently, the trial Court on 23rd October 2023, proceeded to sentence the Appellant to Fifteen (15) years imprisonment.
40. It is thus clear that the appellant was given a chance to mitigate hence it cannot be said that his right to mitigation was violated.
41. The sentence provided for under Section 8 (3) of the *Sexual Offences Act* is as follows:
- “A person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term not less than twenty years.”
42. It has been stated time and again that sentencing is a discretionary exercise by the trial Court, and that an Appellate Court will not necessarily interfere with the sentence meted out, unless it is demonstrated that the trial Court acted on some wrong principles or overlooked some material facts. For instance, in *Bernard Kimani Gacheru v Republic* [2002] eKLR; the Court of Appeal stated:
- “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, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a sentence unless that sentence is manifestly excessive in the circumstances of the case, or that



the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist.”

43. The issue before me is not a novel issue. The Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) addressing minimum sentences prescribed by section 8 of the *Sexual Offences Act* had this to say:

“66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in the Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”

44. I note that the sentence was passed on 23rd October 2023 and the trial Court in sentencing the Appellant did consider the mitigations. The upshot of the above is that this appeal fails as the Court finds no justification for this to interfere with the sentence that was imposed upon the Appellant.

45. In the result, the appeal is devoid of any merit. It is dismissed.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Ms Muema for the state

Mr Maumbe for the appellant

Appellant present virtually in Kisumu maximum prison

Diana/Juma/David Court Assistants

