



**Gitau v Republic (Criminal Appeal 20 of 2024)
[2025] KEHC 3655 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 20 OF 2024
DR KAVEDZA, J
MARCH 24, 2025**

BETWEEN

WILLIAM KIRAGU GITAU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 26th February 2024 by Hon. M. Maroro (SPM) at Kibera Chief Magistrate's Court Criminal Case No. E067 of 2021 Republic vs William Kiragu Gitau)

JUDGMENT

1. The appellant William Kiragu Gitau was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on 15th May 2021 in Dagoretti Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of DJS a child aged 4 years. He was sentenced to life imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the prosecution did not adequately prove that he had defiled the complainant and that he was meted a harsh and excessive sentence which he finds to be against the spirit of rehabilitation and reintegration.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



4. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child.
5. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
6. Further, section 8(1) and (2) of the [Sexual Offences Act](#), No 3 of 2006 provides thus: -
 8. Defilement
 - (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.
7. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.

Regarding the ingredients, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
8. PW1, the complainant DD, gave unsworn evidence after a voir dire. She identified the appellant, stating he removed her clothes after finding her at Mama Fay's, lay on her on the grass, and used his 'dudu' on her. She struggled to testify, showing discomfort. She said he did 'bad things' to her ('alinidiginya Kwa susu'), then told her mother, leading them to the hospital and police. PW1 confirmed the appellant was responsible. On cross-examination, she said she first saw the appellant at Mama Fay's, not before.
9. PW2, LA, PW1's mother, testified next. On 15th May 2021, PW1 was playing outside and went missing from 11 a.m. to 3 p.m. She returned alone, crying, saying someone defiled her. PW2 knew the appellant as he visited his grandmother. PW2 noticed grass and mud on PW1's clothes. PW1 pointed out the appellant, who denied it. PW2 took her to the hospital and reported it. PW1, born 13 July 2016, was four at the time. On cross-examination, PW2 confirmed that PW1 returned at 3 p.m., crying and struggling to speak. She couldn't identify the culprit herself. In re-examination, PW2 said PW1 singled out the appellant among three boys. The appellant's trousers also had mud.
10. John Njuguna, a clinician at Nairobi Women's Hospital, presented PW1's medical records from 15th May 2021. She was calm, with no visible physical injuries. A healed 6 o'clock tear was found on her hymen, with normal outer genitalia and clear discharge. He submitted the P3 form and PRC form. On cross-examination, he noted that PW1's clothes were clean, with no grass or soil, despite no change or shower. In re-examination, he highlighted the healed hymen tear and 3, concluding it showed penetration. Based on this evidence, I find penetration was sufficiently proven.
11. PW4, Investigating Officer Naliaka Wangwe, took charge of the case and summoned the minor's mother and PW1, the complainant. PW1 stated the appellant took her to an abandoned house and defiled her. PW4 presented a birth notification dated 13th July 2016, confirming that PW1 was four years old. On cross-examination, PW4 noted the appellant was initially at large, identified solely by PW1, and the crime occurred near a thicket by an abandoned house. Despite the appellant's plea for mercy and admission, PW4 was unaware he and PW2 were business associates.
12. PW5, Samuel Mbugua, conducted an ID parade on 3rd June 2021 with eight men, including the appellant. PW1 identified him consistently, even after he switched positions and clothes from eight to three, and again after another change. PW5, who only met the appellant at the parade, produced



the report, confirming that PW1's recognition was solid. PW1's repeated, positive identification across three attempts, despite alterations, is sufficient to convince the court that the appellant was correctly identified reasonable beyond doubt. I therefore hold that the appellant was properly identified.

13. In his defence, the appellant stated that on 15 May 2021, he attended college from 8 a.m. to 3 p.m., arriving home by 4 p.m. He then visited his mother's beauty shop, staying until 5 p.m., and remained there until she returned at 8 p.m. They closed at 9 p.m. and went home together, his mother present in court. He mentioned fixing a motorbike with faulty brakes for Njombi and returning it by 7 p.m. He visited his grandmother's place on Wambiri Road, where PW1 and PW2 also lived. A week later, he was arrested at Satellite Police Station for defilement, and PW1 identified him twice in an ID parade. On cross-examination, he admitted knowing PW1 from his grandmother, confirmed changing clothes and positions three times during the parade, and denied any grudges with her family.
14. DW2, his mother VWK, recalled that on 15th May 2021, the appellant, a Form Two student, was sent home for fees. He joined her at the salon, then left for his grandmother's at 4 p.m. At 5 p.m., the grandmother reported a defilement. DW2 found no details from PW2 at the scene. After his arrest, she learned he allegedly defiled PW1 three times. On cross-examination, she confirmed no disputes with PW1's family, was unsure why her son was accused, and noted three ID parades occurred in her presence.
15. The trial court considered this defence and found it to be baseless.
16. I have already found above that PW1's testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court.
17. I therefore find that defilement was proved to the required legal standard.
18. The foregoing analysis demonstrates that the prosecution discharged its burden, proving the case beyond reasonable doubt. The elements of penetration, the complainant's minority, and the appellant's identity were each established with requisite particularity. Accordingly, the conviction stands affirmed.
19. On sentence, the appellant was sentenced to serve life imprisonment. During sentencing, the court considered the pre-sentence report and the appellant's mitigation. In the premises, I see no reason to interfere with the sentence.
20. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant

