Mwangi & another v Rebuplic & another (Criminal Appeal E026 of 2024) [2025] KEHC 5692 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5692 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E026 OF 2024

FN MUCHEMI, J

APRIL 30, 2025

BETWEEN

JOHN KAMAU MWANGI ..... 1ST APPELLANT

JOHN KAMAU MWANGI ..... 2ND APPELLANT

AND

REBUPLIC ..... 1ST RESPONDENT

REBUPLIC ..... 2ND RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Gatundu by Honourable R. N. Ng'ang'a (SRM), in Criminal Sexual Offence Case No. E020 of 2023 on 7th February 2024)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Gatundu where he was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to thirty (30) years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 6 grounds which can be summarised thus: -

    a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case.

    b. The learned trial magistrate erred both in law and in fact by sentencing the appellant to thirty years imprisonment which is harsh and excessive.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant relies on the cases of Bakare vs State (1987) 1 NWLR (PT 52) 579 and MTG vs Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15th March 2022) (Judgment) and submits that the testimony of PW1 who alleges that she told her mother that she was defiled days after the incident contradicts the contents of charge which provides that the complainant was defiled on 5th July 2023 and a report was made at the police station on the same date. The appellant further submits that the complainant's mother PW2 gave contradictory testimony as she went home at around 5 pm and had left work at around 2pm. PW1 is said not to have gone home until 3.30pm.

5. The appellant further submits that although PW1 testified that she never bled, PW7 the clinical officer testified that the minor's clothes were soiled with mud and blood. The complainant testified that she could not recall whether the appellant inserted his penis in front or behind yet she testified that she felt pain from her rear carnal used or discharge of human waste during long calls. Further, the minor testified that she was lying on her stomach at the time of the sexual assault. The appellant submits that the complainant thus meant that he inserted his penis in her anus and not her vagina and therefore the medical evidence contradicts that testimony as the evidence indicated that there was a tear of the hymen with a fresh wound.

6. The appellant argues that since the minor did not use specific terms in narrating the events of the fateful day, instead she used terms such as "pipe" and "tabia mbaya", the trial court failed by interpreting those terms to mean defilement and therefore, wrongly convicted him.

7. The appellant relies on the cases of Criminal Appeal No. 59 of 2011 Henry & Manning vs Republic and Kimani Ndungu vs Republic [1979] KLR 282 and submits that the trial court failed on basing his conviction on the sole testimony of PW1 as she was not a credible witness.

8. The appellant submits that the element of penetration was not proved as the medical evidence did not corroborate PW1's testimony. Furthermore, the medical evidence did not link the appellant to the commission of the offence. The appellant argues that he was not examined or treated at Gatundu Level 3 Hospital meaning that there was no credible evidence to link him to the offence.

9. The appellant relies on the cases of Lonjerat Leura Dira vs Republic (2008) eKLR and James Bani Munyonis vs Republic (2010) eKLR and submits that PW7 testified and produced the PRC Form and P3 Form yet he was not the maker of the documents.

10. The appellant argues that he was framed with the offence because the family of the complainant had a long standing dispute with him over land. The appellant further submits that the prosecution witness namely PW2, PW3 and PW1 confirmed the issue of land dispute. The appellant relies on the cases of Ouma vs Republic (1986) KLR 619 and Uganda vs Ssebyala (1969) EA 204 to support his argument of a grudge.

11. The appellant further relies on the case of Criminal appeal No. 22 of 2018 Evans Nyamari Ayako vs Republic and submits that he ought to have benefitted from a sentence less than thirty years. Furthermore, the appellant argues that he ought to have been charged with sexual assault and not defilement and thus sentenced to ten years imprisonment.

The Respondent's Submissions

12. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent refers to Section 8(1) and 8(2) of the Sexual Offences Act and the case of Kyalo Kioko vs Republic (2016) eKLR and submits that it proved the ingredients of the offence of defilement. Th respondent submits that PW2 produced as an exhibit, the complainant's birth certificate serial number 8922001 which shows the date of birth as 23/3/2014. At the time of the offence, the complainant was nine years and 4 months old which is approximately ten years as borne by the charge sheet and therefore in the bracket defined by Section 8(2) of the Sexual Offences Act. The respondent relies on the case of Mwalango Chichoro Mwanjembe vs Republic (2016) eKLR and submits that the prosecution proved the age of the complainant.

13. Relying on Section 2 of the Sexual Offences Act and the case of Mark Oiruri Mose vs Republic (2013) eKLR, the respondent submits that PW1 testified that on 5th July 2023 she was at her grandmother's house when her grandfather who was, well known to her by the name Kabuda went to the home. He found PW1 watching television and asked the minor about the whereabouts of her family members. She told him that they were away. He then requested PW1 he asked her to remove her underwear. The complainant testified that the appellant proceeded to remove his trousers. On sensing danger, PW1 tried to escape but the appellant pulled her and laid her on the couch with her hands pulled to the front. The complainant further testified that the appellant removed his pipe referring to his penis, but she did not know whether he inserted it from the front or behind. She stated that she felt pain in her anus after the act.

14. The respondent submits that PW7 adduced medical evidence which proved penetration. The doctor stated that the examination revealed the complainant's hymen was freshly broken and tender. PW1's clothes were soiled with mud and blood according to PW7. The doctor further deduced the sexual assault with degree of grievous harm. He further produced medical documents to wit treatment notes form, psychological assessment form and the P3 Form evidence which proved penetration. Thus, the respondent submits that the element of penetration was proven.

15. The respondent submits that proof of participation of an accused person is crucial as it enables one to determine who to attach criminal responsibility to. The respondent submits that the evidence on record is that the minor knew the accused person very well. The appellant was well known to the complainant and her family. The complainant testified that the appellant is their neighbour and also brother to her grandfather. Further they live in the same area and they fondly call him Kabuda. This information was well corroborated by PW2, PW3 and PW4. The complainant stated that the appellant found her in the house watching television alone. Upon confirming that the other family members were away, the appellant asked the complainant to remove her underwear and proceeded to have carnal knowledge with the complainant. The complainant testified that the appellant removed his "pipe" referring to his penis but she did not know whether he inserted it from the front or behind. She further added that she felt pain in her anus after the act. The respondent submits that PW1 was well known to the appellant and the trial court came to the right conclusion that it was the appellant who defiled the victim.

16. The respondent submits that from the evidence that was adduced at trial, it is clear that the appellant is the person who defiled the victim and there was no possibility of mistaken identity.

17. The respondent submits that all the prosecution witnesses were consistent and corroborated each other.

18. The respondent argues that the appellant's defence was considered by the trial court but did not in any way challenge the prosecution's case which was proven beyond reasonable doubt.

19. The respondent relies on the cases of Abdalla vs Republic KECA 1054 (KLR) and Supreme Court Petition No. E108 of 2023 Republic vs Joshua Gichuki Mwangi and submits that the sentence was legal and in line with Section 8(2) of the Sexual Offences Act. The respondent urges the court to enhance the sentence of thirty years to life imprisonment as prayed for in its notice of enhancement of sentence dated 4th April 2025.

Issues for determination

20. The appellant has cited 6 grounds of appeal which can be compressed into two main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the sentence meted out against the appellant is justified.

The Law

21. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

22. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of
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> a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

23. In order to establish whether the prosecution proved its case beyond reasonable doubt the following issues as raised by the appellant will be addressed.

    a. Whether there was conclusive evidence of all the ingredients of defilement;

b. Whether the prosecution case was filled with contradictions and inconsistencies;

c. Whether the trial court considered the defence evidence.

Whether there was conclusive evidence of all the ingredients of defilement.

24. Relying on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013 where it was stated that:- "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

25. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

> " ....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

26. PW1 testified that she was 9 years old and PW3, the complainant's mother testified that PW1 was born on 23rd March 2014 and was aged nine (9) years, PW4, the investigating officer testified that the minor was born on 23rd March 2014 and was ten years old. The investigating officer produced the minor's birth certificate in evidence which shows that the minor was born on 23rd March 2014. By the date of the offence on 5th July 2023 the minor was aged nine years and four (4) months. In my considered view the prosecution proved the age of the minor as rquired.

27. 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."

28. On the element of penetration, PW1 testified that on 5th July 2023 she was chased from school and went home where she lived with her mother, grandmother, grandfather and uncle. Where the appellant found her and sexually molested her. The appellant had at first confirmed that the child was alone in the home. The minor testified that she tried to escape but the appellant held her hand and pulled her to his seat. The appellant lay on top of her and did bad manners to her by inserting his pipe (male organ) in her. The minor stated that she was lying on her stomach and she could not recall whether the appellant inserted his penis in front or behind. She further testified that she felt pain from behind where she goes for a long call after the appellant inserted his pipe. The minor testified that the appellant threatened to kill her if she told anyone.

29. Dr. Gibson Irungu, a doctor at Gatundu Level 3 Hospital, PW7 testified that the minor was examined on 5th July 2023 and the Post Care Rape Form filled. The P3 Form was filled on 5th July 2023. The doctor testified that the minor reported that she was defiled on 5th July 2023 by her grandfather who she referred to as Kabuda. The minor said that the appellant started touching her private parts but she resisted. The appellant then proceeded to defile her. He threatened to kill her should she tell anyone. PW7 testified that on examination, he found that PW1's hymen having been freshly broken and torn. The minor's clothes were soiled with mud and blood and were torn. The clothes were taken to the police on the following day. The doctor testified that the injuries were classified as grievous harm. PW7 produced the Post Rape Care Form, the P3 Form and treatment notes as exhibits.

30. Thus the evidence of PW1 was corroborated by that of the doctor PW7 who out that upon examination, PW1 was found to have a freshly torn and broken hymen which was evidence of penetration of the penile. Thus the inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration.

31. Furthermore, the appellant argues that the PRC Form was filled by Biachi yet PW7, Dr. Gibson Irungu is the one who testified and produced the medical evidence. The maker of the document did not testify. It is evident that the PRC Form was filled by one Biachi on 5th July 2023 whereas Dr. Irungu filled the P3 Form. PW7 testified that Biachi was a clinical officer at the hospital and he knew him, his signature and his handwriting. The witness further testified that he worked with Biachi for 3 years. Upon production of the documents as exhibits, the appellant stated that he did not object to PW7 producing the documents. The document PRC was therefore produced with the approval of the appellant As such, the appellant should not drag this issue of the document not being produced by the maker in this appeal. He consented to the production by Biachi and he is estopped from opposing it at this stage of appeal. In my view, no prejudice was occasioned to the appellant through the doctor PW7 who was the supervisor of Mr. Biachi.

32. On the issue of identification, PW1, PW3 and PW4 testified that the appellant was PW1's grandfather who they all referred to as Kabuda. PW3 testified that the appellant was a brother to her father. As for PW4, he testified that the appellant was a brother to her husband. PW1 further testified that they lived at home with PW3, PW4, her uncle and the appellant. Thus the appellant was well known to the complainant. This was a case of recognition and not simple identification as her grandfather. The appellant further in his defence admitted the relationship between him and the victim thus confirming the evidence of PW3 and PW4. In my considered view, the appellant was identified positively by recognition by the victim.

33. The appellant has complained that the medical evidence did not implicate him and no tests were carried out which were necessary. As the Court of Appeal noted in Geoffrey Kioji vs Republic Nyeri Criminal Appeal No. 270 of 2010 (UR):-

    Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to Section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

34. The appellant further argues that the prosecution's case was filled with material inconsistencies and contradictions thus causing doubt on the alleged offence. Relying on the case in the Court of Appeal Tanzania of Dickson Elia Nsamba Shapwata & Another vs The Republic Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

    > "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

35. The appellant argues that the testimony of PW1 is contradictory as to when the offence was committed. It is clear from the record that the offence was committed on 5th July 2023 and was reported at Kiamworia police station. The minor was further examined in hospital on the same date and the PRC

Form filled. Furthermore, the complainant gave a consistent and reliable evidence on the incident. The minor said she told her mother, PW3 that the appellant had defiled her later as her mother was washing the clothes of the victim. The medical evidence further corroborates the evidence of PW1 as the doctor concluded that the minor had been defiled as her hymen was freshly torn and broken. The allegations by the appellant on the inconsistencies do not go to the root of the matter. The complainant was very consistent in giving her evidence as to how the appellant defiled her and describing the occurrence in detail. Her testimony was cogent, consistent and was not shaken during cross examination.

36. The appellant further submits that the trial court did not consider his defence. He said in hi defence that on 5th July 2023 he went to work and returned home at 2pm. The following day he went to work and when he returned home, he found police officers waiting for him at the gate of their home. He was then arrested and taken to Kiamworia police station. He alleged that the charges were fabricated against him because the complainant's family hated him and wanted his land and blamed him for the death of one of their family members. The appellant further testified that it was not possible for the minor to have been defiled in the posture that she had described and it was not possible for her to play and pick fruits after the incident. The appellant further testified that PW7 did not examine him and the clothes that were taken from the complainant were not produced as exhibits.

37. I have perused the court record and noted that the trial magistrate in his judgment noted the appellant's defence of alibi and stated that the same was not substantiated. The appellant had been squarely placed at the scene and there was no issue of mistaken identity. On perusal of the record, the minor's testimony was not shaken during cross examination and she gave a clear account of her ordeal linking the appellant to the commission of the offence. Thus the trial court found the defence not plausible and believed the evidence of the prosecution witnesses which it found credible and reliable. In my considered view, the trial court took into account he defence of the appellant as required by the law.

38. Consequently, the prosecution witness adduce overwhelming evidence against the appellant. The evidence of the minor was consistent and credible.

39. Accordingly, I find that the prosecution proved its case beyond reasonable doubt before the trial court. The conviction was based on cogent evidence and is hereby upheld.

Whether the sentence is harsh and excessive

40. The Court of Appeal, on its part in Bernard Kimani Gacheru vs Republic [2002] eKLR restated that:-

> " 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 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."

41. The appellant was charged with the offence of defilement contrary to Section 8 (2) of the Sexual Offences Act No. 3 of 2006 which provides: -

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.

42. The Supreme Court decision in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) held that:-

> Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regards to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence.
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> The judgment of the Court of Appeal delivered on October 7, 2022 was one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remained lawful as long as Section 8 of the Sexual Offences Act remained valid. The court of Appeal had no jurisdiction to interfere with that sentence.

43. The respondent has filed a Notice of Enhancement of Sentence dated 4th April 2025 urging this court to enhance the sentence of thirty 30 years imprisonment to life imprisonment. In this regard, this court is aware of the Supreme Court Petition E013 of 2024 where the sentence of thirty (30) years imprisonment by the Court of Appeal was held to be unlawful in a conviction of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The sentence was set aside and that of life imprisonment imposed by the trial court and affirmed by the High Court was reinstated. This court is bound by the decisions of the Supreme Court under Article 163 (7) of the Constitution. However, it is noted from the record that this matter was fixed for judgement on 12/03/2025 to be delivered on 24/04/2025. As such, the notice of enhancement came a bit late in the day and the court saw it as it was preparing its judgment. Under Section 274 of the Criminal Procedure Code, a Notice of enhancement ought to be served in advance or during the hearing of the appeal so as to afford the appellant a chance to respond to it which was not done herein. It is also noted that there is no evidence of service of the said notice on the appellant. For those reasons, this court shall not interfere with the sentence.

44. I find no merit in this appeal and I hereby dismiss it accordingly.

45. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE