SKN v Republic (Criminal Appeal 31 of 2020) [2025] KEHC 5268 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5268 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 31 OF 2020

PN GICHOHI, J

APRIL 29, 2025

BETWEEN

SKN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence in S. O. Case No. 107 of 2018 in the Chief Magistrate's Court at Nakuru by Hon. E. Kelly (SRM) on 16{{^th}} July, 2020)

JUDGMENT

1. SKN (herein referred to as the Appellant) was arraigned before the trial court on 18th June 2018 where he 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 of the offence were that on the 15th day of June 2018 at Nakuru North District within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ namely penis into a female genital organ namely vagina of S.N.M a child aged 15 years which caused penetration.

2. In the alternative, he charged with the offence of indecent act with a child contrary to Section 11 (1) of the *Sexual offences Act* No. 3 of 2006. The particulars of the offence were that on the 15th day of June 2018 at Nakuru North District within Nakuru County, unlawfully and intentionally committed an indecent act to one S.N.M by touching her private parts namely vagina with his penis.

3. After hearing both the prosecution and the defence case, the trial court found the Appellant guilty of the main charge, convicted him and sentenced him to serve 12 years imprisonment.

4. Dissatisfied with that judgment, the Appellant preferred this Appeal seeking to have Appeal allowed and the conviction quashed, sentence set aside and he be set on liberty on three grounds as per his Amended Appeal:-

1. That the learned trial magistrate erred in law and in fact by relying on uncorroborated, incredible, contradictory and unreliable evidence of a single witness to convict the appellant.
2. That the learned trial magistrate erred in law and in fact in failing to appreciate that in totality, the prosecution case was not proved beyond any reasonable doubt as prescribed by law.
3. That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's defence and dismissing it without giving any cogent reasons.

Appellant's Submissions

5. In his submissions which are on the body of the Amended Grounds of Appeal filed on 29/10/2024, the Appellant systematically covered the three grounds stated above.

6. On the first ground, he submitted that the complainant stated that at one time she was defiled while sitting on a chair in the sitting room and that on the other two occasions, she was defiled at her bedroom while her mother was asleep in her bedroom about 3m away.

7. Further the Appellant submitted that the Complainant testified that it was about 4.00 pm after taking supper and at one point she alluded that the room had electricity but on the other hand, she stated that she used a torch.

8. In those circumstances the Appellant questioned the evidence as to whether there was electricity or not and wondered how the Appellant would have been sleeping with the alleged wife and go to a room three metres apart to defile the complainant.

9. Further, he submitted that that the Complainant's evidence was that she was taken to hospital on 16th June 2018 and the P3 Form was returned to the police on the same day. The Appellant questioned why the P3 Form was returned to be signed on 20th June 2018. He therefore questioned the credibility of the complainant and the medical report. He cited the case in Augustine Njoroge v Republic Criminal Appeal No. 185 of 1982 where the Court of Appeal held that contradicted evidence is unreliable.

10. The Appellant further questioned the trial court's reliance on sole evidence of the single witness (Complainant) which evidence the Appellant termed contradictory and lacked corroboration hence unreliable. In support he cited the case Roria v Republic 1967 EA 583 where it was held that "Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness."

11. In further support of his argument, the Appellant cited the case of Chila v Republic 1969 EA 722 where the Court held that the Judge should warn himself of the danger of relying on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if the is satisfied that her evidence is truthful. If no such waring is given, that the conviction will honestly be set aside unless court is satisfied that there has been no failure of justice.

12. The Appellant further cited the case of Maina v Republic [1071] EA 370 where Mwendwa CJ held that:-

> " It has been said again and again that in cases of alleged sexual offence it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women do sometimes tell an entirely false story which

is very easy to be fabricated but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all."

13. On proof of the case beyond reasonable doubt, he maintained the general submissions on the other grounds of appeal and submitted that the complainant's scanty evidence of the occurrence of the offence was not credible and should not have been relied on to convict him. It was his submissions that "the trial court was duty bound to examine the credibility of the complainant as the complainant ought to have stated the sensory details touching on the act, that is; her mental state of mind in the three alleged incidents that is; how she felt during the alleged acts; what happened to her after the alleged first incident e.g was there blood?; was there pain; how she coped with the incidence; did the child have the real meaning of a vagina? ; were the clothes stained?; were the complainant's details on the accused inserting his penis into her vagina be held to mean defilement ?"

14. He therefore submitted that in absence of such details from the complainant, the scanty, ambiguous and wanting evidence relied on by the court could not be used to convict the him.

15. In support of that argument, and while arguing as to what was required to prove penetration, the Appellant cited the Case of Julius Kioko Kivuva v Republic [2015]eKLR where P. Nyamweya J (as she then was) held: "Evidence of sensory details, such as what the victim heard, saw, felt and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases..."

16. He therefore submitted that penetration was not proved and absence of hymen ought not have been relied on as proof of penetration. In support, he relied on the Court of appeal decision in PKW v Republic [2012]eKLR where the Court of Appeal held:-

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769. "

17. Ultimately, he submitted that the evidence on record created no nexus between him and the alleged offence.

18. Regarding his unsworn defence, he submitted that the trial court failed give it adequate consideration yet he testified that his girlfriend, who was the mother of the complainant herein, fabricated this case to settle scores with him and which defence he maintains was plausible. Lastly, he reiterated his prayer that the appeal be allowed and he be set at liberty.

Respondent's Submissions

19. These submissions are dated 15th October 2024 and filed by Mr. Kihara, the learned Prosecution Counsel. It was his submissions that in order to discharge its burden of proof, the Respondent had to prove the ingredients of the offence under which the Appellant was charged and these are the age of the victim, penetration and the identity of the perpetrator.

20. In doing so, and in regard to the ground of appeal that the Appellant was convicted on contradictory and insufficient evidence, the Respondent submitted that the issue in contention was whether the Appellant defiled the minor and whether the doctor's assessment was in the P3 Form and whether the Minor's evidence was found to be truthful.

21. He submitted that the Appellant was a stepfather to the Minor and according to her evidence, the Appellant had sexual intercourse with her, twice in the house they lived in and the third time in his residence and that on each occasion, he held a knife and threatened her with dire consequences should she reveal what had happened to her. The Minor narrated the incident to her mother and aunt.

22. It was his submissions that the doctor examined and confirmed that her hymen had been broken and the injury was one-week old which information was captured both in the P3 Form and PRC Form.

23. Regarding the Appellant's allegation that evidence was contradictory and inconsistent, he submitted that none existed and that in any event, it is not expected that witnesses will be able to testify and align to each other. On that issue, he cited that case of Twehangane Alfriend v Uganda Criminal App. No. 139 of 2001]UGGA, 6 where the Court of Appeal held:-

> " With regard to contradictions in the prosecution's case the law as set out in the in numerous authorities is that grave contradictions unless satisfactorily explained will usually lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

24. Further, it was submitted that Section 124 of the *Evidence Act* allowed the trial court to convict the Appellant on the evidence of the Sexual Offence Victim (PW2) alone, if for reasons to be recorded, the court was satisfied that she was telling the truth.

25. Regarding the Appellant's allegation that the Minor's mother used this case to coerce the Appellant to marry her (Minor's mother), the Respondent submitted that this was only raised in the Appellant's defence and therefore, it can only be construed as an afterthought.

26. On the burden of proof, the Respondent submitted that there were no gaps in its case and therefore, the case was proved beyond reasonable doubt that the Appellant defiled the Minor, not once but thrice with menace and threats.

27. Regarding the Appellant's claim that the trial court failed to consider his defence, the Respondent submitted that the allegation is an afterthought as the Appellant's alibi defence that he was in a meeting on the day when the Minor was allegedly defiled was not raised during the prosecution case but only in his defence thus not giving the Prosecution a chance to counter it. That indeed, the trial court's judgment shows that the defence was considered and found without any basis and indeed held: - "The Appellant did take the trial process seriously and hoped to deride and mock the witnesses into fear and intimidation." The Respondent therefore submitted that the Appellant's testimony lacked credibility and therefore, he urged this Court not to interfere with the conviction.

28. On the sentence of 12 years imprisonment imposed on the Appellant, the Respondent submitted said sentence was lenient and guided by Muruatetu case which was no longer applicable. He urged that it be enhanced to 20 years imprisonment pursuant to the Supreme Court decision in Petition NO. E018 of 2023- Republic v Joshua Gichuki where the Court reversed the initial 15 years imprisonment to 20 years. Likewise, he urged that te sentence herein be reviewed and an appropriate sentence issued.

Analysis and determination

29. As the first appeal, this Court's duty is clear as stated by the Court of Appeal in the case of Okeno v. R [1972] EA 32 thus: -

> " 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 v. R [1957] E A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own 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 v. Sunday Post [1958] EA 424."

30. As this Court carries out the above duty in this appeal, it is also born in mind that from the grounds of appeal and submissions by the parties, the broad issues for determination are:-

    1. Whether the offence of defilement was proved to the required standard thus warranting a conviction.

    2. Whether the sentence imposed was appropriate.

31. On the first issue, and this being a case of alleged defilement, the Court of Appeal in John Mutua Munyoki vs Republic (2017) eKLR emphasised on the ingredients of the offence that the prosecution must prove when it held that:-

> " For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:-
>
> i. The victim must be a minor.
>
> ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

32. Regarding proof of age of the victim, the Court of Appeal in the case of Edwin Nyambogo Onsongo [2016]eKLR held: -

> " ... 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."

33. In this case, the charge sheet indicated that the complainant (S.N.M) was 15 years old. After voire dire examination, the court ascertained that she understood the importance of speaking the truth. In her sworn statement, she told court that she was 15 years old and that was going to class 8. The Birth Certificate produced in evidence indicated her date of birth as 01/04/2003.

34. The P3 Form and PRC Form indicated her age as 15 years. There is no doubt or dispute that the complainant was aged 15 years as at the time of the alleged offence and therefore a minor within the meaning of the Children's Act.

35. As regards penetration, the complainant told the court that the Appellant was her stepfather. Regarding this case she testified:-

> "On 15/6/2018 at about 4.00 pm we had supper and went to bed. My step father came to my room.He was using a torch. He ordered me to stand up. I stood up. He ordered me to remove trouser. He threatened me using a knife. He forced me to lie on my bed. He gave me oil to apply on my vagina. He forcefully inserted his penis into my vagina severally. He then warned me against disclosing the occurrence to anyone. He gave me his white vest to wipe my vagina. He took the vest away. In the morning, I went to the toilet. I was in deep pain as I urinated. I began to cry. My mother heard my cry, came and ordered me to open the door. I did. She demanded to know why I was crying. I told her that my step father had inserted his penis into my vagina forcefully last night and threatened against disclosing the same to anyone. My mother sat me to explain my ordeal to my aunt. I went to my aunt wearing my school uniform. My aunt called my sister. We went to Bahati Police Station where I reported the matter.
>
> We were given P3 Form and OB."We went to Maili Kumi hospital. I was examined by the doctor. He confirmed that I had been defiled. I had not bathed. The doctor gave me medicine....It was the third time accused was defiling me."

36. She went on to explain: "There is another date I was sleeping in my bedroom. Accused came and took a photo of me naked while I was asleep. He showed me the photos the following day, photos of my lower body, from waist downwards, showing me naked."

37. In cross examination by the Appellant, she responded:-

> "You had taken photos of me naked before you defiled me. By the time you were arrested, you had deleted the photos... You have so far defiled me three times on different dates. On 2 dates, you held a knife to my head. The first time my mother was around... you defiled me on a chair in the sitting room. You sent my mother to the posho mill to buy unga. You sent your son S to buy meat. We were left in the house with you. My mother and your son came back after a long time. It was day time. They left about 12.30 pm. I don't remember which day of the week it was. You threated to kill me if I disclosed that you had defiled me. We were at your house."

38. In re-examination, she explained:- "The 2nd time he defiled me in our house where we live with my mother. The 3rd time at his house. His house is not far from ours then. We later moved. He always threatened to kil me and my mother if I disclosed."

39. Penetration is defined in Section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organ of another person." The evidence herein is conclusive on the issue of penetration. The decisions cited by the Appellant including the case of Julius Kioko Kivuva (supra) do not support the Appellant on this issue.

40. On identity of the perpetrator, the Appellant brought about an alibi defence. Regarding such defence, the Court of Appeal in Erick Otieno Meda v Republic [2019] eKLR had this to say:-

> " In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt."

41. The Court of Appeal then went on to say: -

> " In considering an alibi, we observe that:-
>
> (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

42. In his sworn statement, the Appellant told the Court that the complainant's mother (PW2) was his girlfriend and the complainant was her daughter. On the morning of 15/6/20218 at around 8.00 am, PW2 came for water and she told him that she would come later to do his laundry. He went for a meeting and came back at about 2.00 pm. He found that the complainant and her mother (PW2) had finished laundry. He left the house and went to the shopping centre at about 3.00 pm and watched football with his friends from 4.00 pm to 7.00 pm. He went back to his house. There was no one. His son came later and prepared supper.

43. This is an alibi defence in regard to the events of 15/6/2018 on the grounds that he was away from his house on the material date. This defence was not raised during the prosecution case. The rest of his defence comprised attacks on the evidence by the prosecution witnesses, how he was arrested and how the complainant's mother always pestered him to marry her but he declined thus the reason he was framed in this case.

44. There is nothing to show that the minor had a grudge with him. There was no mistaken identity and his defence did not in any way shake the complainant's evidence which this Court finds properly corroborated. The Appellant's defence had no effect on the evidence by the prosecution witnesses.. It was an afterthought. The alleged contradictions raised by the Appellant herein are not material so as to affect this case.

45. With the three ingredients proved, the offence of defilement was proved as required by law. The trial court properly analysed the evidence on record including the Appellant's defence before arriving at his finding that the prosecution had proved its case beyond any reasonable doubt. That decision cannot be faulted. The conviction was safe and therefore upheld.

46. On the sentence, the Appellant was charged under Section 8 (1) and (3) of the *Sexual Offences Act* which provides that:-

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) 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.

47. Regarding an appellate Court's interference with a sentence passed by the trial court, the Court of Appeal in Bernard Kimani Gacheru vs Republic [2002] eKLR 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, 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."

48. In this case, the learned prosecutor informed the court that he had no records of the accused's previous conviction. In his mitigation, the accused (Appellant herein) stated:- "I pray for leniency."

49. In sentencing the Appellant on 16/7/2020, the learned Magistrate held:-

> " I have considered the charge sheet the contents of the court's judgment as delivered on 11/6/2020, the mitigation of accused, the presentence report dated 15/7/2020 and relevant provisions of the law. The accused is a 1st time offender and for the said reason, I find it fair to and deviate from the mandatory sentence for the offence as prescribed in section 8 (3) of the *Sexual Offences Act*, guided by the decision in Muruatetu case. I sentence him to serve 12 years imprisonment."

50. The above reasoning is a misdirection of the law in light of the Supreme Court decision that Muruatetu case decision only applies to murder cases.

51. Further, the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) dealt with two issues being:-

i. Whether mandatory minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional; and,

ii. Whether courts have discretion to impose sentences below the minimum mandatory sentences as prescribed in the *Sexual Offences Act*.

52. In so doing, the Supreme Court held:-

> " 58. The amici...submitted, and we agree, that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. They cite instances in which

> the courts have been influenced by myths that; attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and, the alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability.
>
> ..., the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.
>
> We take cognizance of the fact that upon delivery of the judgment of the Court of Appeal reducing the Respondent sentence from 20 years to 15 years, the Respondent had since been released from prison. The consequent effect of our decision herein of setting aside the judgment of the Court of Appeal would be reinstating the initial sentence of 20 years and it is upon the relevant organs of State to abide by our decision.
>
> ... The Respondent, Joshua Gichuki Mwangi, should complete his 20-year sentence from the date of imposition by the trial court."

53. Flowing from the above, this Court is satisfied that the trial court did not have jurisdiction to reduce the sentence as it did and that would call for interference by this Court in regard to the sentence of 12 years and substituting it with the mandatory sentence of 20 years imprisonment.

54. However, this issue was only raised by the Respondent in his submissions. There is no cross-appeal and therefore, the issue cannot be used against the Appellant who had also filed this appeal long before the Supreme Court decision above delivered on 12th July 2024. Without notice and warning on the consequences of the appeal, enhancing the sentence so as to comply would be prejudicial to him in the circumstances.

55. Lastly, this Court notes that the Appellant was arrested on 16/6/2018 and brought to Court on 18th June 2018 where he pleaded not guilty. He was given a bond of Kshs. 300,000/= with a surety of similar amount with an alternative of a cash bail of Kshs. 150,000/=.

56. The terms were ultimately reviewed on 9/7/2018 to a cash bail of Kshs. 70,000/= which he deposited and was released on 19/7/2018. The trial court did not take that period into account during sentencing.

57. In compliance with Section 333 (2) of the *Criminal Procedure Code* the period spent in custody be and is hereby taken into account..

58. Consequently, the Appeal is disposed of in the following terms:-

    1. The Appeal be and is hereby dismissed in its entirety.

    2. The period the Appellant spent in custody from 16th June 2018 being the date of arrest to 19th July 2018 when he went out on bond be taken into account in computation of the said sentence of 12 years imprisonment issued by the trial court..

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF APRIL, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

SKN - Appellant

Mr. Kihara for Respondent

Ruto, Court Assistant