Gathungu v Republic (Criminal Appeal 102 of 2023)
[2025] KEHC 6989 (KLR) (Crim) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6989 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL 102 OF 2023

KW KIARIE, J

MAY 29, 2025

BETWEEN

WILSON MWANGI GATHUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E031 of 2022 of Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala–Principal Magistrate)

JUDGMENT

1. Wilson Mwangi Gathungu, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on diverse dates between 16th and the 17th day of February 2022, in Olkalou within Nyandarua County, intentionally caused his penis to penetrate the vagina of B.W.K., a child aged five years.

3. The appellant was also convicted of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence were that on diverse dates between the 16th and the 17th day of February 2022, in Olkalou within Nyandarua County, unlawfully did grievous harm to B.W.K.

4. The appellant was sentenced to serve life imprisonment in count one and ten years in count two. The sentences were ordered to run consecutively. He has appealed against both conviction and sentence. He was represented by Ndegwa Wahome & Company Advocates. He raised the following grounds of appeal:

    a. The learned trial magistrate erred in both law and in fact by finding the appellant guilty against the weight of evidence on record.

b. The learned trial magistrate erred in both law and fact by finding and failing to appreciate that the prosecution had not proved the main ingredient of the offence charged to the required degree.

c. The learned trial magistrate erred in law and fact by failing to find that the prosecution's evidence did not support the charge against the appellant.

d. The learned trial magistrate erred in law and in fact in failing to find that the complainant's evidence was not corroborated in any material way by direct evidence of other prosecution witnesses.

e. The learned trial magistrate erred in law and in fact by failing to appreciate that the evidence on record pointed to the presence of other witnesses who were never brought to court without any explanation.

f. The learned trial magistrate erred in law and in fact by failing to appreciate that the appellant was arrested before any investigation had been carried out and was only used as a scapegoat.

g. The trial magistrate erred in law and considered the prosecution's evidence in total disregard of that of the defence.

h. The trial magistrate erred in both law and fact by finding a conviction against the appellant when the evidence of prosecution witnesses contained glaring contradictions.

i. The conduct of the trial herein and subsequent judgment and conviction of the appellant on the charge before the court were oppressive and caused a serious miscarriage of justice.

j. That the sentence of the appellant to life imprisonment was unlawful as he was a minor and a form four student during the purported commission of the alleged offence, and he should have been sentenced under sections 190 and 191 of the Children's Act if at all.

k. That the learned trial magistrate erred in law and fact by receiving the evidence of the complainant without making a specific finding that she was possessed of sufficient intelligence to justify the reception of such evidence, which could cause a serious miscarriage of justice.

l. The learned trial magistrate erred in both law and fact by receiving the evidence of the complainant without fully complying with the provisions of section 19 of the *Oaths and Statutory Declarations Act*, Cap. 15 of the Laws of Kenya.

m. The learned trial magistrate erred in both law and fact by failing to draft issues for determination by the Honourable Court and failing to find that the medical evidence was produced by a doctor who was totally different from the one who treated the complainant. The said doctor was from a different institution.

n. The learned trial magistrate erred in fact and law by failing to appreciate the evidence of alibi adduced by the appellant during the trial.

o. The learned trial magistrate erred in law and failed to appreciate the evidence of the defence, specifically that the complainant was coached into identifying the appellant as the perpetrator by visiting him at school during his National examination (KCSE) period.

5. The state opposed the appeal on the grounds that:

a. There was sufficient evidence on both counts.

b. The sentence was not excessive.

6. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of Okeno vs Republic [1972] E. A 32 to guide my decision-making process.

7. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

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

An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:

a. That there was penetration of the complainant's genitalia;

b. That the accused was the perpetrator, and;

c. The victim must be below eighteen years old.

This position was echoed in the case of Fappyton Mutuku Ngui vs Republic [2012] eKLR when Joel Ngugi J. said:

> Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients that the prosecution must prove against an accused person.

8. The copy of the birth certificate produced as an exhibit indicates that B.W.K. was born on August 8, 2016. As of February 16, 2022, she was 5 years and six months old. The victim's age was proven to meet the required standards.

9. The complainant was examined at the J.M. Kariuki Memorial Hospital. Dr. Catherine Wangari Kibunja (PW6) examined her and completed a P3 form dated February 23, 2022. The complainant had a broken hymen but no lacerations.

10. B.W.K. (PW3) testified that at about 3 p.m., she left school with other children. On her way home, she went to play in a tuk-tuk with Gakii and Irungu. The appellant appeared at the scene, and they left. She, however, forgot her bag. When she went for it, the appellant hit her with a stone on the head. He then took her to a quarry. The appellant's mother hit her on the head with a stone. This is how she narrated the ordeal:

> " I remember the day I left school. I was with Gakii and Irungu. We went to play in the Tuk-Tuk. Willy came when I went for the bag Willy hit me with a stone on right side of the head. When sun came out Willy's mother came. She took me to the quarry. Mama Willy while the quarry she took a stone and hit me on the eyes and left side of the head. I was feeling pain in the abdomen, demonstrated by hand signs. I could not be able to walk. I heard screams 'Uwii" I found myself in an ambulance. After Willy hit me with a stone when I went for the bag, he took me to his bed. When he took me to his bed he removed my trousers, she hit me with stone while in his bed she hit me at the hips (the child points at both side of the hips. I felt pain on both sides of the hips. Willy had his clothes on. He did not remove his clothes.

> She did not touch any other place. I felt pain at my vagina 'susu" I felt pain because Willy took a stone and hit me at hips both sides. I had not known Willy before, there I can see Willy, (minor pointing at accused person in the dock.) Willy took a stone and hit me with it at the vagina. Child points in between her legs."

11. Several issues arise from the complainant's evidence. Her evidence was that she had not known Willy before; however, during cross-examination, when she mentioned that she used to see him along the road, this did not clarify much. The fact that she identified him as Willy in court was not accompanied by an explanation of how she learned his name, while in her recorded statement, she referred to him as Kijana. Doubts arose about the perpetrator's identity after IP Margaret Wachiuri (PW5) testified that she established the appellant's presence at Kamande Secondary School on the 16th of February 2022. He left school between 5 and 6 p.m.

12. Had the prosecution called the children who were in the complainant's company, the issue of identity could possibly have been resolved. The Court of Appeal in the case of Bukenya vs Uganda [1972] EA 549 (Lutta Ag. Vice President) held:

> The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.
>
> Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

13. In the instant case, I am persuaded to infer that had they called the two children to testify, their evidence would have been unfavourable to the prosecution's case.

14. The second issue arising from the complainant's evidence is her inability to testify coherently. Her evidence suggests that she could not appreciate time and the sequence of events. The learned trial magistrate was required to look for material corroboration. Section 124 of the *Evidence Act* provides:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support
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> thereof implicating him:
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> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, 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.

In view of the contradictions, the trial magistrate's reasons for believing the minor required corroboration.

15. The complainant introduced the appellant's mother to the offence, but no explanation was given why she was not charged. One is persuaded to conclude that the investigating officer may not have believed the complainant on this allegation.

16. In her recorded statement, the complainant did not discuss defilement. She only talked of being hit with a stone. This is another issue that ought to have raised a red flag.

17. Certainly, the complainant was seriously injured; however, for justice to be seen to be done, thorough investigations were required so that the identity of the perpetrator could not be left to guesswork.

18. The upshot of the analysis of the evidence on record is that the conviction on both counts was unsafe. The same is quashed, and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA THIS 29TH DAY OF MAY 2025

KIARIE WAWERU KIARIE

JUDGE