



REPUBLIC OF KENYA



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**Gitabi v Republic (Criminal Appeal E022 of 2024)
[2025] KEHC 7436 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E022 OF 2024**

HI ONG'UDI, J

MAY 28, 2025

BETWEEN

DAVID MWANGI GITABI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence in Nakuru CM's Court MCRA No. E085 of 2022 a Judgement delivered on 30th January, 2024 by Hon. Kibelion PM)

JUDGMENT

1. David Mwangi Gitabi the appellant herein was charged with defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between July, 2022 and 4th September, 2022 at xxxxxxx area Nakuru county the appellant intentionally caused his penis to penetrate the anus of M.N.M. a child aged 14 years.
2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 4 of 2006. The particulars were that on even dates the appellant intentionally touched the anus of M.N.M a child aged 14 years with his penis.
3. The appellant pleaded not guilty and the case proceeded to full hearing with the prosecution calling seven (7) witnesses. He gave a sworn statement of defence without calling any witness. Finally, the trial Magistrate delivered his Judgment on 30th January, 2024 and convicted him of the main count and sentenced him to twenty (20) years imprisonment.
4. Being aggrieved by the conviction and sentence, the appellant filed this undated appeal citing the following grounds:
 - i. That the learned trial Magistrate erred in law and facts during the trial of this case when he relied on the evidence adduced by the prosecution side which was not true at all.



- ii. That the learned trial Magistrate erred in matters of law and facts during the trial of this case when he put more reliance on the medical evidence which was not supported by any other evidence.
 - iii. That the learned trial Magistrate erred in law and facts during the trial of the case when he relied on the evidence adduced without realizing that some of the vital witnesses did not testify to prove the allegation.
 - iv. That the learned trial Magistrate erred in matters of law and facts by failing to consider the appellant's defense yet the same were cogent, plausible and strong enough to water down the prosecution case.
 - v. That the learned trial Magistrate erred in matters of law and facts by relying on the evidence of the witnesses without cautioning himself/herself on the dangers of relying on such evidence.
5. Later on 12th March, 2025 this court received the appellant's amended grounds of appeal. They are hereunder:
- i. That the learned trial Magistrate erred in law and fact by convicting the appellant yet failed to appreciate that the prosecution case was marred with inconsistencies which prejudiced the appellant.
 - ii. That the learned trial Magistrate erred in law and fact by convicting the appellant yet failed to find that the evidence adduced did not establish that the appellant committed the offence, it was devoid of belief.
 - iii. That the learned trial Magistrate erred in law and fact by failing to consider the appellant's defence which was cogent and believable.
 - iv. That the sentence imposed is not only harsh but excessive but was imposed in mandatory terms and mandatory minimum sentences under section 8(3) of the *Sexual Offences Act* were declared unconstitutional in *Wachira & 12 others V Republic & 2 others* (Petition 97, 88, 90 & 57 of 2021 (Consolidated) [2002] KEHC 12795 (KLR) (31 August 2022) Judgement).
6. A summary of the prosecution case is as follows: PW1 M.N. M. is a minor aged 14 years and is the victim herein. In his sworn evidence he testified that the appellant was brought to the church xxxxxxxx by the minor's sunday school teacher in July, 2022. He was introduced as a musician called D.M.G. The appellant asked him to subscribe to his You Tube channel. On his next church visit PW1 confirmed to him that he had subscribed to the You Tube. They left the church together talking. Its then that the appellant told him there was some work he wanted him to do. They agreed to meet in church the following saturday.
7. They met, and the appellant left with him on a motorbike to an unfinished house where he showed him a pornographic video on his mobile phone. He tried to get him into doing what he saw and when he refused the appellant threatened to kill him or throw him into the maize plantation. He told PW1 to remove his clothes (blue short and a tee-shirt) which he did. The appellant also removed his trouser and boxer and inserted his penis into PW1's anus. He felt pain and even cried but he was told to shut up. The appellant promised to be giving him Ksh 600/= after every such encounter.
8. When the appellant was done, he told PW1 to dress up and he took him home which was near the church. He never told his parents about the encounter, due to the threats received. After this encounter the appellant made it a habit to pick him and defile him every saturday. He did it about six (6) to eight (8) times.



9. He further stated that on 28th August, 2022 he reported the matter to Githioro police station. He confirmed that the appellant used to give him Ksh 600/= per encounter. Upon reporting he was taken to a hospital in Nakuru for examination and treatment.
10. In cross examination he said the appellant used to be brought by DJ Auto who was their dance teacher. The home he used to take him to was under construction and the workers would leave at 1.00pm on Saturday. The appellant would take him there at 2.00pm after the dance practice. He said he took police officers to the scene of defilement.
11. PW1's mother testified as PW2. She was not aware of what PW1 was going through until she was called by the police on 5th September, 2022. She met PW1 and the police at Nairobi Women's Hospital where PW1 was being attended to. In cross examination she denied demanding for any money from the appellant in order to finish the case. She confirmed having seen the appellant once in church. PW3 a sister to PW1 and with whom he was staying made mention of a day she had sent him to the shops at around 5.00pm but he never showed up until 8pm after she called their mother (PW2). She later learnt the next day that PW1 was at the police station. She went there and learnt of some one who was sodomizing PW1. He was taken to Nairobi Women's Hospital.
12. PW4 – No. 246763 P. C Veronica Gathihi on 5th September, 2022 received PW1's complaint of sodomization. This was at Githioro police station. They went to Studio 254 where the Sunday school teacher used to operate from. The teacher confirmed knowing the appellant whom he called to the studio. The appellant came and was arrested and taken to the police station where PW1 identified him. She carried out more investigations and had PW1 taken to Nairobi Women's Hospital as exhibited by the P3 & PRC form (P.Exb 2 & 3). She also produced PW1's birth certificate (P.EXB 1) and confirmed that PW1 was born on 22nd August, 2009.
13. In his cross-examination she said when they went to the defilement scene they found no one there.
14. PW5 ANK a DJ and Calligraphy teacher, stated that he knew the appellant as an Artist. He confirmed what PW4 had told the court and part of PW1's evidence especially his introduction to xxxxxxxx Lanet church, and asking the children to subscribe to his You Tube channel. He further confirmed that the appellant's arrest was conducted through him and that the appellant had a motorbike as stated by PW1.
15. PW6 No. 240351 P. C Charles Kibuga gave similar evidence to that of PW4. PW7 Dr. Njoroge Ruku, based at Nairobi Women's Hospital Nakuru confirmed PW1's attendance at the said hospital. On 5th September, 2022 at 10.59am PW1 gave them a history of his defilement encounters. His anus was examined and found to have laceration at 6 o'clock position. Tests on PW1's clothes did not reveal anything. The boy told him the defiler had told him to smear vaseline on his anus and thereafter wipe it on reaching home. His finding was that there was anal penetration of PW1. He produced the P3 form plus the PRC form as PEXB 2 & 3 adding that the results in both are similar.
16. The appellant in his sworn defence denied the charge. He admitted having been invited to the said church by PW5 for performance. He admitted having told the children to subscribe to his You Tube. He denied going back to the church nor ever meeting PW1 nor giving him any money. He stated that on the alleged date of incident he was at the stage, carried passengers who even sent him money via Mpesa. Later his motorbike broke down and was still down on the day of his arrest. He explained that this case began when PW5 said he should meet the expenses for audio recording. That there was a case where PW1 had complained and reported a case of him having been sodomized by a class 7 pupil but the same was resolved at the police station. That PW1 tried to extort money from him to finish the case.



17. In cross examination he denied knowing PW1 from church and that his stage name was B.M.G. He admitted having a motorbike though he could not recall the registration number. He confirmed there being an incomplete house close to PW1's home. He said he only went there after his release from remand.
18. The appeal was urged through written submissions.

Appellant's submissions

19. The Appellant filed his undated submissions alongside the amended grounds of appeal on 12th March, 2025. The first two grounds were argued together. He urged that PW1 was not a reliable witness. He pointed out the differing dates of the occurrence of the incident from the evidence of PW1 and PW3. Further that if indeed PW1 was carried on a motorbike as he claims then someone ought to have witnessed that. He referred to the construction and wondered why none of the workers nor even the watchman/security person saw them.
20. He referred to PW3's police statement which was never annexed to his submissions. He challenged the medical assessment saying it did not reveal that PW1 had been defiled several times, since the anal muscles had not been widened. Finally, on this ground he contended that his alibi defence was never displaced. He claimed to have produced Mpesa statements before the trial court. The record does not have any such statements.
21. On ground 4 the appellant submitted that the sentence imposed on him being a mandatory minimum sentence was discriminatory and unconstitutional. Further that it did not take into account his mitigation. Thus, he was entitled to review. He made reference to the case of Wachira & 12 others V Republic & others (Petition Nos 57, 88 & 97 of 2021 (Consolidated) [2023] KEHC 12795 (KLR) (31st August, 2023) (Judgment).

Respondent's submissions

22. These were filed by M/s Emma Okok principal prosecution counsel and are dated 24th April, 2025. Counsel identified two issues for determination namely:
 - i. Whether the offence of defilement was proved to the required standard.
 - ii. Whether the sentence that was meted by the trial court was harsh and excessiveOn the first issue counsel gave background facts of the case. In analyzing the facts, she linked them to proof of three main ingredients which are penetration, age of minority and identity of the culprit. On penetration she contended that PW1's evidence was corroborated by PW7 a medical doctor who examined him. He also produced the P3 and PRC forms (PEXB 2 & 3).
23. To prove age, she argued that the same had been proved by production of the birth certificate (PEXB 1) which showed PW1 was born on 22nd August, 2009. Further that since the incident occurred between July 2022 – September, 2022 the boy was 13 years old and not 14 years as shown in the charge sheet. It was her submission that was not fatal and it still fell under section 8(3) of the *Sexual Offences Act*. The other issue addressed was the identity of the appellant. On this she referred to the evidence of PW1, PW2, PW5, and specifically where PW5 said he was the one who had introduced the appellant to PW1 and his group in church.
24. Referring to the appellant's defence counsel argued that it was not strong enough to rebut the prosecution's case. That PW1 and PW2's evidence remained unshaken even during cross – examination. She submitted that the evidence by the prosecution witnesses was credible, consistent,



reliable and well corroborated, and if any inconsistencies existed they were minor and did not go to the root of the case.

25. On sentence counsel referred to section 8(3) of the *Sexual Offences Act* and submitted that twenty (20) years was the minimum sentence for the offence the appellant was charged with, and this had to be adhered to. She further referred to the Supreme Court case of Republic V Mwangi Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) in support of this submission.
26. She urged the court to confirm the conviction and invoke section 333(2) *Criminal Procedure Code* which was not applied by the trial court. Besides that, she urged the court to dismiss the appeal.

Analysis and determination

27. I have had an opportunity to consider the evidence on record, the amended grounds of appeal and the submissions filed. This being a first appellate court I have a duty to analyze and re-evaluate all the evidence on record and draw my own conclusion. I should do this while bearing in mind that I did not hear nor see the witnesses testify. In *Okeno V Republic* [1972] E.A 32 the Court of Appeal laid down the duties of a first appellate court which are as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* [1957] EA 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 court’s 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.”

Also see *David Njuguna Wairimu V Republic* [2010] eKLR

28. The issues falling for determination are mainly two i.e.
 - i. Whether the charge against the appellant was proved
 - ii. Whether the sentence meted out was harsh and excessive
29. Section 8 (1) of the *Sexual Offences Act* provides as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement”

Section 8(3) of the same Act provides thus:

“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”

From these two provisions it follows that the prosecution has to establish three (3) ingredients for the offence of defilement to be proved and these are:

- a. That the victim was a minor (age)



- b. Penetration of the victim's genitals
- c. Identity of the culprit

See Charles Wamukoya Karani V Republic Criminal Appeal No. 72 of 2013

Proof of age

30. In his evidence PW1 told the court that he was 14 years old. The birth certificate (PEXB 1) shows that he was born on 22nd August, 2009. He was thus 13 years of age at the time of the commission of the offence. The P3 form (PEXB 2) which was filled by the doctor (PW7) who examined PW1 shows his estimated age to be 13 years. The charge sheet reads 14 years and not 13 years. Is this fatal to the charge? My answer is the negative for two reasons. In a charge of defilement first thing to prove is that the victim is a minor, which has been established here. The next thing is the age for purposes of sentence and in this case it's for establishment that the number of years is covered under the bracket in section 8(3) of the *Sexual Offences Act*. The documents PEXB1 and 2 have proved the age of PW1 and the 13 years are still covered under section 8(3) of the Act, under which the appellant was charged. I therefore find the defect not to be fatal.

Proof of penetration

31. It was PW1's evidence that his anus was penetrated by a penis, not once, not twice but severally. His evidence was backed by the evidence of the doctor (PW7) who conducted the medical examination. He found the anus to have laceration at 6 o'clock position. The minor confided in him that the culprit would advise him to smear vaseline on his anus and thereafter wipe it on reaching home. The conclusion was that there was anal penetration of PW1. The evidence of PW1 was clearly corroborated by the medical evidence of the doctor (PW7). PW1 was also treated at the Nairobi Women's Hospital where PW7 works.

Proof of identity of the culprit

32. From the evidence of PW1 these ordeals took place during the day, and they occurred about six - eight times. Secondly that the person who was doing all this to him had been introduced to them at their sunday school at PCEA Tabuga, by their sunday school teacher. This teacher testified as PW5 and he admitted having invited the appellant who is an Artist to their function and introduced him to the church. After performing he left. He said he would not know if anyone came to the church between monday and saturday because he only came there on sundays.
33. PW4 and PW6 who are police officers said the minor (PW1) came to the Githioro police station on 5th September, 2022 at 06.45hrs while crying. He was not brought there by anyone. It was through his information that they were able to link up with the sunday school teacher (PW5) who confirmed knowing the appellant as an Artist whom he called to his studio and he came there. At the police station PW1 confirmed that the appellant was the person who had been defiling him and giving him money. Secondly PW5 identified PW1 who told him he had known the appellant who had been introduced in church. Therefore, the PCEA church Tabuga Lanet was the 1st meeting point of the appellant and PW1. PW5 further confirmed that indeed on the day the appellant was at their church he requested the children to subscribe to his You Tube Channel. This is exactly what PW1 told the court in his evidence in chief.



34. From the evidence of PW1 these several ordeals took place during day time. Further more it was never an attack but rather PW1 was simply lured by promises of money. In his defence the appellant stated this at page 24 of the typed proceedings:

“The complainant tried to extort money from me so as to finish the case”

I have perused the evidence on record and note that nowhere in his cross-examination did he ask PW1 about the alleged extortion.

35. Putting all these pieces of evidence together brings me to the conclusion that the appellant was properly identified as the culprit. There is no doubt about that.

36. The next issue is on sentence. The appellant has submitted so much on the court’s discretion and the element of separation of powers. On separation of powers he blames the Legislature for putting minimum sentences for sexual offences.

37. In the most recent decision of the Supreme Court of Kenya in the case of Republic V Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) and 3 others (Amicus Curiae) – (supra) which is binding on this court, this is what the said court stated at paragraph 57 of the Judgment.

“Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor or rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the court to impose a harsher sentence. Infact to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term “mandatory minimum” can be found used in different jurisdictions including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances”

38. Finally, the Supreme Court stated thus at paragraph 69 of the said Judgment

“Our findings hereinabove effectively lead us to the conclusion that the Judgment of the Court of Appeal delivered on October 7, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the fist appellate court was lawful and remains lawful as long as section 8 of the [Sexual Offences Act](#) remains valid”.

39. There is no evidence that section 8 of the [Sexual Offences Act](#) has been amended. Moreover, when the issue of Constitutional rights comes up the court considers the rights of both the victim and the culprit. It should never lean on any one side. As pointed out by the respondent and which is confirmed from the record the trial court overlooked section 333(2) [Criminal Procedure Code](#) while passing sentence. That will be corrected.

40. The upshot is that the Appeal lacks merit and is dismissed. The conviction and sentence are upheld with a rider that the sentence runs from 6th September, 2022.

41. Orders accordingly



DELIVERED, DATED AND SIGNED THIS 28TH DAY OF MAY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

