Gitari v Republic (Criminal Appeal E009 of 2024)
[2025] KEHC 6951 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E009 OF 2024

JK NG'ARNG'AR, J

MAY 28, 2025

BETWEEN

KENNEDY KARIUKI GITARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Wanjiru M. N. (SRM) at Gichugu Law Court Sexual Offence Case No. E015 of 2022 delivered on 23rd January 2024)

JUDGMENT

A. Introduction

1. The Appellant was convicted for 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 27th day of February 2022 at [particulars withheld] Village, Kiaruri Sub Location, Karumandi Location in Kirinyaga East Sub County within Kirinyaga County unlawfully and intentionally caused his penis to penetrate the vagina of NWG, a child aged 14 years old. The Appellant was sentenced to serve 20 years' imprisonment. He was aggrieved by the conviction and sentence and lodged this appeal.

2. The grounds of appeal are that:

    a. The learned trial magistrate erred in law and facts by making judgment against the weight of evidence.

    b. The learned trial magistrate erred in law and facts by failing to consider that the evidence produced in court was full of contradictions and inconsistencies.

    c. The learned trial magistrate failed to consider that the evidence adduced by the prosecution was not proved beyond reasonable doubt.

d. The learned trial magistrate erred in law and facts by not considering that the ingredients of defilement where not proved, the age of the complainant was not proved, no document was produced to prove the age of the complainant.

e. The learned trial magistrate erred in law and facts by failing to consider that the investigations done were shoddy.

f. The learned trial magistrate erred in law and facts by failing to consider my defence and mitigation factors.

g. The learned trial magistrate erred in law and facts by giving a harsh and excessive sentence and not considering judiciary sentencing policy during sentencing.

3. The Appellant however had a change of mind for he filed an amended grounds of appeal dated 13th March 2025 in which he raised the following grounds:

a. That the trial magistrate erred in law and facts by placing PW1 under oath without ascertaining if she understood the nature of oath contrary to the decision of this court in the case law of PMK v Republic HCCRA No. 13 of 2016 at Nairobi [2018] eKLR.

b. That the trial magistrate erred in law and facts by convicting and sentencing the Appellant herein without observing that the prosecution in this matter failed to prove all 3 ingredients of the charge.

c. That the trial magistrate erred in law and facts by accepting the evidence of PW1 without observing that light in her evidence was not proved beyond reasonable doubt.

d. That the lower court below faulted in the matters of law and fact by convicting and sentencing Appellant herein on the basis of the prosecution case that was contradictory in material particulars.

e. That the trial magistrate erred in law and facts by failing to accord the Appellant a right to a fair trial and by failing to not that the instant case was not proved beyond any reasonable doubt.

B. Prosecution case

4. The prosecution called 3 witnesses starting with the minor complainant who testified as PW1. After voire dire was conducted, PW1 testified she was 15 years old having been born on 31st May 2007 and used to live at home with her parents and siblings. That it was the night of 27th February 2022 she was in the kitchen at around 10pm and since there was a blackout, she was using a lamp. Further, that their kitchen was detached from the main house and with the door being unlocked, the accused entered the kitchen, held her neck tightly then pushed her towards the coffee farm belonging to Chomba.

5. It was then he made her to lay on the ground while facing up, he removed her panty and when she tried to scream he grabbed her neck. She begged him to stop hurting her but he ordered her to keep quiet or else he was going to kill her. It was then he inserted his penis in her vagina for which he took time and once he was done, he let her go as she added that every time she tried to scream he would grab her neck as he continued to threaten to kill her. It was dark and so when she returned home she found her cousin whom she narrated to what had transpired and he in turn called her parents.

6. Her father and brother went there and took her to hospital as she insisted it was the Appellant who had defiled her and whom she knew very well as their neighbour. All along Appellant used to go to their shop where they could talk for a while but there was no time he ever asked her to be his girlfriend and

her father had warned her about entertaining him. That during the defilement, he had told her he was doing so for he had a grudge with her father. However, in her cross examination she had vehemently denied having been defiled by Kevin for she had seen him well using the lamp in the kitchen before he led her to the farm and she also knew his voice well.

7. Once at the hospital she was examined by Jane Wakuthii Muthoni (PW2) who testified of how PW1 was taken there on 28th February 2022 at 12.13am. She gave a history of having been found in the kitchen by the assailant who went on to pull her into a coffee plantation where he defiled her at around 8pm on 27th February 2022. On examination of her genitalia it revealed the vagina was inflamed and the hymen was freshly torn as a result of which she was bleeding.

8. Once at the laboratory urinalysis revealed fresh blood though the pregnancy and STDs tests were negative. Although her clothes were not torn, they had a yellowish discharge and so she concluded she had been defiled for which she produced the medical documents as exhibits. She further insisted that the blood seen was not menstrual and although she did not ask of the name of the assailant, she had been informed that he was well known to her and her parents.

9. PC Dorcas Nyaga (PW3) corroborated PW1's evidence as she had narrated the ordeal to her as she added of how the Appellant had continued to defile her until he ejaculated then he left her there. Her further testimony was that PW1 returned home without her panty and shoes which had gotten lost during the ordeal though by the time she was taken to the station she had changed her clothes. She however did not record the statement of the first person she reported to being her uncle Munene for the statements she had recorded she found them to be sufficient and PW1 has reported to her that the assailant was known to her as Ken.

C. Defence case

10. The Appellant gave sworn defence wherein he testified he had worked the entire day of 27th February 2022 until 8.30pm when he returned home. The next day he went to work and on his way back he met with his neighbour Munene who told him of the rumours he had heard that he had slept with PW1 whom he knew well as a neighbour. This made him to go to PW1's home where he met with PW1's father who declined to talk to him for defiling his daughter. It was on the morning of 20th June 2022 when he was arrested by the chief and police with the allegations of defilement which he continued to deny.

11. That PW1 had said she had been defiled by Kelvin and since his name was Kennedy, he had been wrongly arrested. Further, that the witnesses stated in the charge sheet were never called for they knew the evidence against him was false as he asked the court to find him innocent and have the investigating officer arrest the correct assailant. However, in cross examination he said he was also known as Ken and that he was PW1's immediate neighbour though she had confused him with another being Kelvin. He also denied having gone into hiding since February 2022 until June 2022 but that he had gone to work.

D. Appellant's submissions

12. He submitted that the trial magistrate erred in not asking PW1 if she understood the nature of oath and an appeal was allowed on that one point alone in PMK v Republic HCCRA No. 13 of 2016 at Nairobi [2018] eKLR. That when PW1 was asked if she understood the meaning of taking oath she stated that it meant forgiven and so the court ought to have ascertained she understood the duty to speak the truth. Since that was not done, PW1 ought to have given unsworn statement of defence for she did not understand the nature of an oath. He contradicted himself that although voire dire was properly conducted, the trial magistrate was wrong in finding PW1 understood the making of an oath

and she gave sworn evidence. Therefore, the entire trial was a mistrial thus this Court should allow his appeal.

13. The prosecution failed to prove the ingredient of identification as PW1 in her first report never recorded she had recognized him as the assailant. She also failed to demonstrate how she recognized his alleged voice for which he relied in the case of Choge Republic [1985] eKLR, Maghenda Republic, Criminal Appeal No. 55 of 1986, Francis Muchiri Joseph Republic [2014] eKLR, Remmy Wanyonyi Wanjoki Republic, Bungoma Criminal Appeal No. 53 of 2019 as he insisted the prosecution failed to prove all the 3 ingredients herein and urged the Court to allow the appeal.

14. Further, that PW1 failed to state the light, size, nature and position relating to him as the suspect as he relied in the case of *John Muriithi Nyaga Republic, Nairobi Criminal Appeal No. 201 of 2007* for PW1 testified there were no lights and she was using a kerosene lamp and later stated it was dark. Also, PW1 testified it was 10pm but the clinician testified the offence occurred at 8pm which contradiction was material. He thus relied on the case of Ndungu Kimani Republic [1979] eKLR 282 as he asked the Court to set him at liberty and allow his appeal in totality.

E. Respondent's submissions

15. It submitted that it had proved PW1 was 15 years old by production of her birth certificate as an exhibit hence her age was undisputed. On the issue of penetration, PW2 testified PW1 was taken to the hospital a few hours after the ordeal and on examination she confirmed the vagina was inflamed, hymen freshly torn and that she was bleeding thus they had proved penetration. As to the identification of her assailant, PW1 testified she knew the Appellant very well for they were neighbours and also knew him by name as he also used to go to their shop. She had also used the light from the lamp to identify him hence they had relied on identification of the Appellant by way of recognition as was held in the case of Anjononi Republic [1980] thus they had proved all the 3 ingredients of the offence of defilement.

16. She added that their case had no inconsistencies so substantial to create doubt in the mind of the Court that the Appellant will be entitled to benefit from it. Appellant's mitigation was also considered by the trial magistrate who noted he was a first offender and Section 8(3) of the *Sexual Offences Act* was clear as to the sentence to be meted out and which sentence was mandatory. It thus urged the Court to find and hold the appeal has no merit and dismiss it.

F. Analysis and determination

17. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. For this see the case of Okeno Republic [1972] EA 32. In that regard considered the evidence as recorded by the trial court, the grounds of appeal, submissions filed and case law cited. In my re-evaluation of the evidence, I have factored that I never saw nor heard the witnesses testify and I have given due allowance for that.

18. The Appellant in his submissions raised a preliminary point of law. He claimed that voire dire was not conducted according to the procedure as the trial magistrate failed to establish that PW1 was intelligent and understood the meaning of the oath. From the trial court record, the trial magistrate recorded as follows during voire dire of PW1: "I am NW. I am 15 years old. I go to school at (particulars withheld)

secondary school. I am in form one. I know that I am in court. I have come for a case. I go to church. I am aware that am supposed to be truthful. I will tell the truth.

> Court: The court finds that the minor is sufficiently intelligent. She understands her environs and why she is in court. She understands the oath. She shall be sworn."

19. It is clear that the trial magistrate indeed did not record the questions she asked the complainants as she only recorded among others that the complainant was intelligent, that she was aware that she was required to be truthful and that she understood the meaning of the oath. Section 19(1) of the Oaths and Statutory Declaration Act is the provision under which voire dire examinations are underpinned to determine the child's understanding of the nature of an oath. The provision states:

20. "Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure."

21. This provision does not of itself provide for the format to be applied in voire dire examination. The format used has basically evolved through case law. In Sula Uganda [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter.

22. In this appeal, in response to a question put to PW1 during the voire dire examination, she responded that she would answer all questions put to her correctly. She was 15 years old and her testimony was coherent and never faltered in her responses to questions put to her by the Appellant with all the answers she gave were sensible. This is a clear indication that PW1 was intelligent, she had a good grasp of the events that occurred during the defilement and was obviously truthful in what she was telling the court. It is therefore my finding that the Appellant's trial was not vitiated by the learned trial magistrate's failure to conduct the voire dire examination of PW1 in a particular manner, as asserted by the Appellant.

23. As to whether the prosecution had proved the charge against the Appellant to the required standard, I do hasten to point out right at the outset that the factual evidence led by the prosecution proved all the requisite ingredients of the charge of defilement beyond reasonable doubt. The three (3) ingredients of the offence of defilement, namely: the age of the victim; penetration; and the identity of the accused, were all proved in accordance with Section 8(1) and (3) of the *Sexual Offences Act*, 2006. I make these findings on well-founded reasons after careful examination of the record as put to me, the evidential material from which points of law arise and, more importantly, cognizant of my mandate to pronounce ourselves on points of law only.

24. On the question of identity or recognition, it is indubitable that the Appellant was a well-known neighbour to PW1 and her family and PW1 added that she not only used to know him as a neighbour but he also used to go to their shop where he would talk to her for long to the point her father discouraged her from entertaining him. It was her further evidence that even at the time of the ordeal, she was able to see him using the light from the lamp since there was a blackout and she also recognized

him by his voice. She further testified in court as having seen her assailant and confirmed it was Ken and which name the Appellant in his cross examination admitted he was also known as Ken. Addressing himself to the perennial and pivotal issue of identity or recognition of an accused, Madan JA. in Anjononi & Others The Republic [1980] KLR 59 had this to say: "...This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

25. In the same vein, the High Court of Kenya at Voi in AHM Republic [2022] KEHC 12773 (KLR) correctly observed that: "... the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before." The Appellant in his own defence corroborated PW1's evidence by admitting that he was indeed her neighbour and even after he was informed by Munene the next day of his alleged defilement of PW1, he just walked into their home where he met PW1's father whom he said refused to talk to him as all he said was that he was going to report to the police. The above thus proves that indeed both the Appellant, PW1 and their families would relate and interact freely as trusted neighbours. The Appellant was therefore not a stranger to PW1 and therefore to my mind, his identity is a non-issue and I need not say more.

26. As to the alleged contradictions and inconsistencies in the prosecution case, it is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) it was held:

> " On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in Joseph Maina Mwangi Republic Criminal Appeal No. 73 of 1993, that:
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> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of Section 382 of the *Criminal Procedure Code* to determine whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences..."

27. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the Appellant. I thus wish to rely in a decision of the Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR where the appellate court cited with approval the Ugandan case of Twahangane Alfred Uganda Cr. Appeal No. 139 of 2002 [2003] UGCA, 6, it was held that: "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily 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's case".

28. Guided by the above, this court has noted the above allegations of inconsistencies and contradictions do not go into the substratum of the matter. The contradictions referred to by the Appellant is not material for it was that PW1 testified to having been defiled at 10pm while the clinician who examined her – PW2 testified of her having been defiled at around 8pm the same night. Looking at the evidence adduced holistically, against the alleged contradictions and inconsistencies, I find the contradictions remote and not prejudicial to the Appellant. They do not go to the substratum of the case. The alleged contradictions do not in any way cloud the fact that PW1 was taken from their kitchen and defiled in a neighbouring coffee farm belonging to Chomba and immediately after she returned home, she was

rushed to the hospital where it was proved by PW2 that she had indeed been defiled. Consequently, this ground of Appeal fails.

29. In the end, I uphold both the conviction and sentence. The appeal is thus dismissed for the same is unmerited.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).