Katana v Republic (Criminal Appeal E032 of 2023)
[2025] KEHC 10078 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KEHC 10078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E032 OF 2023

JN NJAGI, J

JUNE 27, 2025

BETWEEN

ROBERT JUMA KATANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L. N. Wasige (Mrs), Principal Magistrate, in Garsen SPM`s Court Sexual Offence Case No. E008 of 2022 delivered on 30/11/2022)

JUDGMENT

1. The Appellant herein 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 and was sentenced to serve 20 years imprisonment. The particulars of the offence were that on diverse dates between 24th March 2022 and 14th April 2022 at Tana Delta sub-county within Tana River County, he intentionally caused his penis to penetrate the vagina of NNW (herein referred to as the complainant), a child aged 15 years.

2. The appellant was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal as per the appellant`s amended grounds of appeal are that:

   (1) The learned trial magistrate erred in law and in fact by allowing the victim PW3 to give sworn evidence without conducting a voir dire examination to determine whether she was possessed with sufficient intelligence to understand the importance of telling the truth.

   (2) The learned trial magistrate erred in law and fact by convicting the appellant without finding that the mandatory minimum nature of section 8(3) of the *Sexual Offences Act* is unconstitutional.

(3) The learned trial magistrate erred in law and fact by convicting the appellant without finding that the mandatory minimum nature of section 8(3) of the *Sexual Offences Act* deprives the court of its legitimate power of discretion given to it by sections 216 and 329 of the *Criminal Procedure Code*.

3. The case for the prosecution was that the complainant was at the material time aged 14 years and was a primary school pupil. That on the 24/3/2022 she was sent by her mother, PW1, to deliver food stuff and water to workers at her mother`s farm. That she called the appellant who operates a motor cycle taxi to take her to the farm. The appellant took her to the farm. That after delivery, the appellant pulled her to the bush and told her that he loved her. He asked her to go back to her parent`s house, pick her belongings and go to his house at Vibao Viwili for him to marry her. That she went back to her parent`s home and packed her clothes. She went to the house of the appellant and started to stay with him. On 27/3/2022 they engaged in sex. She stayed there for 3 weeks during which time they engaged in sex severally.

4. Meanwhile, the mother to the complainant PW1 and her father PW2 were looking for her after she failed to return home. On 10/4/2022 her father made a report at Hurara police post. PC Laparang PW4 received the report. Her parents later received information that the complainant was staying at a house near Hurara primary school. Her father went with policemen and found her in the forest. She said that it is the appellant who had hidden her in the forest. They took her to the police post. The appellant was found and arrested. She was taken to Ngao sub county hospital where she was examined by a clinical officer, PW5. PW5 found her with normal genitalia with no hymen. The examination revealed presence of many epithelial cells which made PW5 form an opinion that she had engaged in sex severally and therefore that she had been penetrated. PW5 completed a P3 form. The appellant was charged with the offence.

5. During the hearing in court the clinical office PW5 produced the P3 form and treatment notes as exhibits, P.Exh.1 and 2 respectively. The investigating officer, PW4 produced the complainant1s birth certificate as exhibit, P.Exh.3. It showed that she was born on 18/8/2007.

6. When placed to his defence the appellant stated in a sworn statement that he was a boda boda rider. That he did not know the complainant before and saw her for the first time on 24/3/2022 when she requested him to take her to their farm at Gricheda. That he ferried her to the farm and left her there. That on 15/4/2022 her received a report that police were looking for him. He went to the police post where he was informed of the accusations of the complainant. He denied them and he was charged. He said that the complainant lied to the court that he had sex with her. He denied that she stayed at his house for 3 weeks. He said that the father to the complainant owed him Sh.2,000/= for work he had done for him but he only paid him Ksh.500.

Submissions

7. The appeal proceeded by way of written submissions. The appellant submitted that the trial court allowed the complainant to give sworn evidence in court without subjecting her to voir dire examination. That it is not clear from the evidence whether the complainant possessed sufficient intelligence to justify her reception of her evidence and that she understood the duty of speaking the truth. The appellant cited the case of Johnson Muiruri v Republic (1983) KLR 445 where the court explained the purpose of conducting voir dire examination.

8. It was submitted that failure to conduct voir dire examination rendered the evidence of the complainant not credible.

9. The appellant further submitted that the mandatory sentence provided by section 8(3) of the *Sexual Offences Act* 2006 is unconstitutional as it deprives the trial court of the discretion to consider the peculiar circumstances of each case in order to arrive at an appropriate sentence. The petitioner urged the court to so find in this case and impose upon him a lesser sentence.

10. The respondent on the other hand submitted that the birth certificate of the complainant was produced that proved her age at 15 years. That the complainant gave evidence that she stayed at the house of the complainant for three weeks during which time she had sexual intercourse with him on several occasions. That the clinical officer PW 5 confirmed that the complainant`s hymen had been broken.

11. It was submitted that the appellant was well known to the complainant as she stayed with him in his house for 3 weeks. Therefore, that she positively identified the appellant as the perpetrator of the offence.

12. The respondent submitted that the appellant`s assertion that there was a grudge between him and the complainant`s father PW2 was an afterthought as he never brought up the issue during prosecution case.

13. On sentence it was submitted that the appellant was given the minimum sentenced imposed by the Act for defiling a child aged between 12 and 15 years. The prosecution urged the court to dismiss the appeal.

Analysis and determination

14. This being a first appeal, this court is mandated to analyze and re-evaluate afresh the evidence adduced before the trial court in line with the holding in the case of Odhiambo v Republic Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

15. The ingredients of the offence of defilement are proof of the age of the victim, proof of penetration and proof of identity of the perpetrator, see George Opondo Olunga v Republic [2016] eKLR.

16. The complainant (PW4) and her parents (PW1 and PW3) said in their evidence that the complainant was at the material time aged 15 years. A birth certificate was produced that showed that the complainant was born on 18/8/2007. This means that by 14/4/2022 she was aged 14 years and 8 months. The trial court in its judgment found the complainant was by April 2024 aged 14 years. The age of the complainant was therefore proved at 14 years at the time the appellant was charged with the offence. The age of the complainant was thereby proved to be at between 12 and 15 years for the purposes of the *Sexual Offences Act*, 2006.

17. The trial court found that the appellant defiled the complainant on the period stated in the charge sheet.

18. Penetration is defined in section 2 of the *Sexual Offences Act* as insertion of the genital organs of a person into the genital organs of another person. Penetration can be proved by oral evidence or by circumstantial evidence which can be corroborated by medical evidence. The medical evidence adduced against the appellant in this case is that the complainant had a normal genitalia. The hymen was missing but there was no evidence to proof that it was freshly torn. Though the clinical officer said

that there were many epithelial cells found on the complainant on laboratory examination, I do not think that that was conclusive evidence of penetration. There was thus no medical evidence to support penetration.

19. However, lack of medical evidence in support of defilement is not fatal to a charge of defilement as the same can be proved by the oral evidence of the victim. In Kassim Ali V Republic [2006] eKLR the court noted that:

> "....absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

20. More so, the proviso to Section 124 of the *Evidence Act* allows a court in sexual offence cases involving children to convict an accused where the only evidence in the case is that of the child victim if the court is satisfied that the child is telling the truth. The court is required to record down the reasons for believing that the child is truthful. The section provides as follows:

> 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.

21. In this case the trial magistrte believed that the complainant was telling the truth that she had been staying with the appellant during the time she went missing from her parents` home. The court believed her evidence that she and the appellant had been engaging in sex during that period. The court found that the complainant identified the appellant as the boda boda rider who ferried her to the farm and convinced her to go and stay with him at his house where she stayed for three weeks. The court found that her evidence was not shaken in cross-examination. Consequently, the court found her to be a credible witness.

22. I have re-examined the evidence adduced by the prosecution and the defence in the case. I have no reason to differ with the trial court on its finding on the credibility of the complainant. It is clear that the complainant was telling the truth that the appellant is the one who ferried her to the farm after which he convinced her to stay with him at his house which she did for three weeks. The appellant admits to have ferried the complainant to the farm. The fact of absence of the complainant from her parents` home was corroborated by her parents, PW1 and PW3. The was then no reason of disbelieving her evidence as to where she had been for the period she had been away from home. The complainant was a credible witness.

23. The appellant faulted the trial court for allowing the complainant to give sworn evidence without undergoing voir dire examination to establish whether she knew the meaning of an oath.

24. The record of the trial court indicates that the trial magistrate conducted a voir dire examination in the following manner:

> Voir dire
>
> I have orally examined the complainant minor who informs me she is 16 years old. She is in class 7 at (particulars withheld) primary school. She is an intelligent girl who has answered my questions correctly. She is aware of her court environment and understands the importance of telling the truth in court. She also appreciates the meaning of taking oath. She shall be sworn.

25. The law requires voir dire examination be conducted on children of tender age before their evidence is taken in court. A child of tender age was defined in the case of Kibageny Arap Kolil v Republic [1959] EA 92 to mean a child under the age of fourteen years.

26. The purpose of voir dire was explained by the Court of Appeal in Johnson Muiruri vs Republic [1983] KLR 445 as follows:

> 1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
>
> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
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> 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
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> 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
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> 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

26. The complainant herein was of the age of 14 years. The court record indicates that after the voir dire examination, the trial magistrate recorded down her opinion in the proceedings that the child understood the importance of telling the truth and appreciated the meaning of taking oath. She then ordered that child gives sworn evidence. The question is whether failure by the trial court to record the questions and answers during voir dire examination was fatal to the prosecution case.

27. In the case of DMK V Republic (Criminal Appeal E056 of 2022 (2023) KEHC 25235 (KLR) (19 November 2023) (Judgment) the trial magistrate conducted a voir dire examination in a similar manner as in this case in the following words:

> Court- 'I have orally examined the complainant minor who informs me she is 13 years old and in grade 4 at (particulars withheld) Primary School. She is aware of her court environment. She is an intelligent girl who has answered all my questions satisfactorily. She is aware that she must tell the truth in court and that lying is a sin. She therefore understands the importance of telling the truth in court and appreciates the meaning of taking oath. She shall be sworn.'

28. In an appeal against the judgment, Justice A. Ndung`u cited the Court of Appeal decision in DWM v Republic (2016) eKLR where the court expressed itself as follows on the manner of conducting voir dire examination:

> "It is evident from the above that the learned trial magistrate did not reflect in the record the questions put to HW during the voir dire administration but reflected her responses to those questions. The need for the administration of voir dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In Sula v 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. In Patrick Kathurima v Republic Nyeri CRA 137 of 2014 this Court after reviewing case law on the subject observed thus:-
>
> > It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina v Compell (Times) December 20, 1982 and Republic v Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.
> >
> > On account of the above observation this court in the Kathurima case vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory evidence and on that account allowed the appeal in its entirety. There was however no hard and fast rule laid down by this Court in the Kathurima case (supra) that in all cases where voir dire procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-
> >
> > > It is best though not mandatory in our context that the question put and the answers given by the child during the voir dire examination be recorded...
> > >
> > > The trial magistrates' failure to reflect on the record the questions put to HW during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt....
> > >
> > > In this appeal, in response to a questions put to HW. during the voir dire examination, she responded that she would answer all questions put to her correctly. She was five (5) years old. Her testimony was coherent. When the appellant stood to cross-examine her she at first broke down. She was stood down for a while. After she composed herself and then took the witness stand again, she was cross-examined

> at length by the appellant but never faltered in her responses to questions put to her by the appellant. She was coherent. All the answers she gave were sensible. This is a clear indication that HW 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. Both courts below believed HW was truthful. We find no justification to interfere with that finding. The appellant's trial was therefore not vitiated by the learned trial magistrate's failure to conduct the voir dire examination of HW in a particular manner, as asserted by the appellant."

29. The court in DMK V Republic (supra) followed the above cited Court of Appeal decision and came to the conclusion that the manner the voir dire examination was conducted was not fatal to the prosecution case. I am also of a similar view in the instant appeal. Though the manner the voir dire examination was conducted was not the best, it was not fatal to the prosecution case though the question and answer format is to be preferred. It is clear from the evidence of the complainant as given in the trial court that she was an intelligent girl. She ably answered the questions put to her by the appellant during cross-examination. The argument by the appellant that the manner the voir dire examination was taken was defective is dismissed.

30. On the third issue on whether the complainant identified the appellant as the person who defiled her, it was the evidence of the complainant that she stayed with the appellant for a period of three weeks. She cannot have failed to identify him after staying with him for that long. The appellant was thereby positively identified as the perpetrator.

31. The trial court dismissed the appellant`s defence that he had grudges with the complainant`s father as being an afterthought as he did not put such a question to him during cross-examination. Indeed, if there was such an issue, the appellant would not have failed to put it to the witness during cross-examination. Neither did he put the same question to the complainant. The finding of the trial court that the defence was an afterthought was well founded.

32. I find the evidence adduced against the appellant to have been overwhelming and he was in the premises convicted on solid grounds. The conviction is thus upheld.

33. The appellant was charged under section 8(3) of the *Sexual Offences Act* which provides for a sentence of not less than 20 years imprisonment for defiling a child aged between 12 and 15 years. The complainant was aged 14 years and the appellant was sentenced to the mandatory sentence of 20 years.

34. The appellant argued that the mandatory sentence of 20 years as provided in the *Sexual Offences Act* is unconstitutional as it does not give discretion to a trial court to impose appropriate sentences in deserving cases. In the case of Republic v Joshua Gichuki Mwangi, Petition No. E018 of 2023, the Supreme Court stated unequivocally that the minimum sentences prescribed under the *Sexual Offences Act* remain lawful until such time that they are declared unconstitutional. This court is bound by the decisions of the Supreme Court. The appellant`s argument on that issue is therefore dismissed. The sentence of 20 years imprisonment imposed on him is lawful.

34. The upshot is that I find no merit in the appeal herein and the same is dismissed accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 27TH DAY OF JUNE 2025

J. N. NJAGI

JUDGE

In the presence:

Mr. Oluoch for Respondent

Appellant –present virtually and in person from G.K. Prison Manyani

Court Assistant - Ndonye