Atandi v Republic (Criminal Appeal 52 of 2023)
[2025] KEHC 12281 (KLR) (27 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12281 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 52 OF 2023

RC RUTTO, J

AUGUST 27, 2025

BETWEEN

ELVIS NYANGURE ATANDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment and decree of Hon L.M Wachira Chief Magistrate) at Gatundu Law Court in Sexual Offence No 25 of 2018 delivered on 21st September 2021)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on 3rd September 2018 at [Particulars Withheld] Centre Gatundu North Sub-County within Kiambu County, the Appellant intentionally caused his penis to penetrate the vagina of MK a child aged 14 years. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the 3rd September 2018 at [Particulars Withheld] same day and in the same place, the Appellant intentionally touched the breasts of MK, a child aged 14 years.

2. The Appellant pleaded not guilty to the charges and a trial ensued. After a full trial, he was convicted of defilement and sentenced to 25 years imprisonment.

3. The Appellant being dissatisfied, filed his petition of appeal dated 4th October 2021. He raised 10 grounds of appeal, summarised as follows, that: the prosecution failed to discharge its burden of proof to the required standard; the trial magistrate shifted the burden of proof to the Appellant; the prosecution's evidence was marred with grave contradictions, discrepancies and inconsistencies as to cast doubt on its evidence entirely; the Appellant's defence was not considered and; the sentence meted

out was harsh and excessive. For those reasons, the Appellant urged this Court to allow the appeal, quash the conviction and set aside the sentence.

4. The appeal was disposed of by way of written submissions. The Appellant filed his written submissions dated 2nd May 2024. Counsel for the Appellant, Mr. Maina holding brief for Mr. Omao, argued that the ingredients of the offence of defilement, namely: age of the complainant, penetration, and the identity of the perpetrator, were all not proved to the required standard. He submitted that looking at the totality of the evidence, nothing could sustain a conviction as there were loopholes in that evidence. Finally, that the sentence meted out was excessive and went against the Sentencing Policy Guidelines. He prayed that the appeal be allowed.

5. The Respondent on its part filed its written submissions dated 30th July 2024. Learned Counsel for the State, Miss. Emisiko submitted that the prosecution discharged its burden of proof to the required standard, being proof beyond reasonable doubt. She urged this Court to uphold the conviction and affirm the sentence.

6. The duty of this Court as a first appellate court was enunciated by the Court of Appeal for Eastern Africa in the case of Pandya vs. Republic[1957] EA 336 as follows:

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different."

7. To ably discharge that duty, I will first evaluate the evidence before the trial court. The prosecution called five witnesses in a bid to prove its case. The complainant PW1, MK testified that she was born on 4th June 2004. That she was a class five student aged 14 years. She stated that on 3rd September 2018, she left school at 5:00 p.m. and went home. She realized that she had forgotten to carry back home the bulb she had taken from the house in the morning. Fearing that she would be beaten by her mother, she left the house.

8. That on her way to Gituamba, she met three men who followed her to a shop where she bought mandazi. The Appellant was one of them. She observed that the Appellant was speaking on phone. The Appellant then asked her to accompany him to his house. Obliging, PW1 walked together with the Appellant while the two other men walked ahead of them. She stated that when they all gained access to the Appellant's compound, the other two men left.

9. It was her testimony that the Appellant then took her to his house, put her on the bed and had sexual intercourse with her. She stated that the Appellant asked her not to inform anyone about the offence promising to get her a job in Nairobi. PW1 testified that she left the Appellant's house at 11:00 p.m. and went to Gatukuyu. She sat near a slaughter house and started crying. She was found by a lady who took her to her house and she ate.

10. She stated that the following day, she went to Gakoe. That she stayed in another lady's house until the following morning. She was given Kshs. 50.00 which she used to travel from Matara to Gituamba. She slept at the center where some women rescued her. They called her mother who came for her. She was then taken to a hospital in Igegania after informing the chief and her mother what had transpired. Together, they traced the Appellant at his place of work. She stated that she did not know the Appellant but knew his place of work and residence. That she used to see him whenever she went to church.

11. PW2, John Njoroge Kamau, Assistant Chief Gituamba sub location testified that he received a report from Pw1's mother that PW1 had gone missing on 3rd September 2018. It was then reported on 7th September 2018 that PW1 had resurfaced and was found in Gituamba center. Upon interrogating PW1, she stated that one of the workers in a neighboring school had been staying with her and they had been having sex intercourse. The worker, was identified as the Appellant, was traced on phone and arrested at his place of work which was a school and taken to Kanjeria police post on 7th September 2018.

12. PW3 PC, Bernard Kamau stationed at Gituamba police post recalled that on 8th September 2018, PW2 came with PW1 who reported that she had been missing and she had been locked in a house by the appellant who worked in a school. That together they went to Samrose Academy where the Appellant was a resident and arrested him. He then took him to the station and preferred the present charges against him. On cross examination he stated that it was PW1 who gave the details of the appellant's name and where he resides. After arrest, he was then moved to Kanjeria where statements were recorded and to Kamwangi where he was remanded.

13. PW4, PC Charity Kabengi of Kanjeria Police Post, the Investigating Officer, testified that on 6th September 2018, PW1's mother reported that the complainant had been missing from 3rd September 2018. That come 7th September 2018, PW1, her mother and the area assistant chief came and reported about the incident to PW4. That she had the Appellant placed in custody and conducted her own investigations. She stated that PW1 informed her that she had sexual intercourse with the Appellant on 4th and 5th September 2018 at his home. She produced PW1's birth certificate and testified that the child was about 14 years old according to the mother but the birth certificate, indicated that the minor was born on 3rd July 2007 hence 11 years.

14. PW5 Steven Mwangi, a Clinical Officer working in Igegania Level 4 Hospital testified in behalf of Dr. Chege, who was away on maternity leave. According to the history, the complainant was seen on 8th September 2018. On observation, the minor's private parts were not bleeding. Her hymen was broken. There was a foul-smelling discharge. She was given treatment. The P3 form was filled on 10th September 2018. The P3 form, the treatment card and lab report were produced as evidence. The conclusion was that there was defilement.

15. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the Appellant. He was placed on his defence. His un-sworn testimony was that at the material time of the offence, he was a school chef. That on 7th September 2018, he was at work when he was called and informed that someone was looking for him. He was escorted to Gituamba Police Post and later transferred to Karigiri Police Post at night. He was then charged on 10th September 2018. He recalled that PW1's mother had been asking him to work with her but he declined. He denied committing the offence.

16. It is on the basis of the foregoing evidence that the trial court found the Appellant guilty, convicted him and sentenced him to 25 years imprisonment. This Court is now called upon to consider whether the conviction was safe and the sentence appropriate.

17. To prove a case of defilement, the prosecution must establish three crucial ingredients: the age of the complainant, the aspect of penetration, and the identity of the perpetrator.

18. Starting with penetration, PW5 evidence was that on being observed, PW1's hymen was broken and she had a foul-smelling discharge. The conclusions in the P3 form was that there was defilement. I find that the medical evidence supports the aspect of penetration as defined in section 2 of the *Sexual Offences Act*. It also corroborates the testimony of the complainant, victim, PW1, whose evidence before the trial court was not rebutted by the Appellant. Notably the unchallenged evidence of PW1 was sufficient pursuant to section 124 of the *Evidence Act* as proof of penetration. I thus find that Penetration, as the first ingredient of defilement was proved.

19. The second ingredient is the age of the victim. It is trite law that age of the complainant is as crucial an element as any of the other ingredients. It must therefore be proved beyond any shadow of a doubt. The centrality of proving age of the victim is twofold: first age has to be proved to demonstrate that indeed the victim was below the age of majority. That is, that he/she is a minor/child below the age of 18 years old. This threshold of below 18 years is what gives raise to the offence of defilement as proscribed in section 8(1) of the *Sexual Offences Act*, thus: "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

20. Secondly, prove of age of the victim is also essential as it determines the sentence that the convicted will be given as proscribed under sections 8(2), 8(3) or 8(4) of the Act. Hence the need for the trial Court to be satisfied as to the age of the victim as at the time of the incident. In the case of Martin Okello Alogo vs. Republic [2018] eKLR the court stated:

> " On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See Alfayo Gombe Okello v Republic Cr. Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated:
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> "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8 (1) ...."

21. Before the trial court, the complainant, Pw1 testified that she was born on 4th June 2004. However, the birth certificate adduced in court revealed that the minor was born on 6th December 2007. PW4 testified that the minor was born on 3rd July 2007. It thus emerges that the age of the complainant was a "moving target". Was this fatal? I do not think so.

22. Whether the victim was born in 2004 as stated in her testimony, would have made her 11 years old at the time of the incident, while if 2007 is taken as her year of birth, placed her at 14 years old at the time of the incident. Both the chargesheet and the birth certificate refers to the 14 years of age. The learned magistrate relied on the birth certificate produced in evidence as proof of age. It is accepted that age may be proved in various ways and a birth certificate is among the best modes of proving age. In Bosco Rioba Nyaitika v Republic [2021] eKLR, it was stated, thus: "Age can be proved by a doctor, documentary evidence like by a birth certificate, birth notification or through oral evidence of people who know the person well for example a mother or a guardian."

23. Consequently, despite the victim having stated her date of birth that gave her age as 11 years, I find that the trial court did not err in relying on a birth certificate that was duly produced in court as proof of age. The veracity of the birth certificate was never impugned at any time during the trial. Hence it was well admitted in evidence.

24. I hasten to add that whether the victim was 11 or 14 years old does not put the offence outside the definition of defilement as these two ages are below 18 years old. Secondly, I find that the court accepting the age of the victim as being 14 years old and not 11 years old did not prejudice the Appellant, since the sentence for a conviction where the victim is below 12 years old is more severe to where the victim is 14 years old. Consequently, I find that the age of the victim was proved to be 14 years old.

25. The third ingredient is the identity of the assailant. Was the Appellant the perpetrator? PW1's evidence was that the Appellant was known to her. She used to see him on her way to church. Her evidence was that on 3rd September 2018, she left school at 5:00 p.m. and went home. She realized that she had however forgotten to carry back home the bulb she had taken from the house in the morning. Fearing that she would be beaten by her mother, she left the house after changing. That on her way to Gituamba, she met three men, the Appellant being one of them. That the Appellant approached her and took her to his house, where she was defiled.

26. The proviso to section 124 of the *Evidence Act* states that an accused person can be convicted of a sexual offence on the evidence of a single identifying witness if the court is satisfied that the witness is deliberate as to the truth. The credibility of PW1 was never thrown into doubt before the trial Court. Notably, the incident happened around 5pm. The victim saw the Appellant well and even spoke to him. She knew both the Appellant's residence and where he worked at a school. The Appellant was thus not a complete stranger to the victim as to cast doubt on her identification. I have no hesitation in finding that the Appellant was well identified. Notably, the Appellant never challenged the victim, PW1, as to whether she knew him in cross-examination. I also note that in his defence, the Appellant testified that the victim's mother had been asking him to work with her. While this was the Appellant's attempt to wave the card of a grudge and/or bad blood as a defence, it confirms that indeed the Appellant was known to the victim and her mother. I thus find that the identity of the Appellant as the perpetrator was positive.

27. I consequently, find the conviction safe and find no sufficient reason to interfere with it. The same is upheld.

28. Turning to sentence, the Appellant was sentenced to 25 years imprisonment. The Appellant urges that the same was harsh and excessive. Section 8(3) provides that: "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." Notably, this section gives the mandatory minimum sentence. It therefore follows that while a court cannot go below 20 years imprisonment, in pronouncing sentence, it has the discretion to go higher. The question is whether, in exercise of that discretion, the court can be said to have acted harshly and excessively.

29. It is trite law that sentencing is an exercise of discretion, which discretion cannot be interfered with by an appellate court without sufficient reason. In this case, save for stating that the sentence was harsh and excessive, it has not been demonstrated how harsh and excessive it was. The sentence is legal since it does not fall below the mandatory minimum and the discretion exercised upwards to 25 years imprisonment, has not been shown how it was whimsically exercised. I find no reason to interfere with the sentence.

30. This court also notes that the appellant remained in custody throughout trial. While the trial court acknowledged the appellant's mitigation and the seriousness of the offence before sentencing him to 25 years imprisonment it failed to explicitly state that it had considered the time the appellant had already spent in custody as required under section 333(2) of the Criminal Procedure Code as well as the The Judiciary Sentencing Policy Guidelines.

31. In Bethwel Wilson Kibor vs. Republic (2009) eKLR the Court of Appeal emphasized that the period spent in custody prior to sentencing must be taken into account in line with section 333 of the Criminal Procedure Code. The court held;

> " By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence..."

32. Accordingly, I find that the appellant is entitled to have the time spent in remand custody considered and factored in, the computation of his sentence period. In conclusion, while the appeal lacks merit and is dismissed in its entirety, the period the appellant spent in custody prior to sentencing shall be taken into account in line with section 333(2) of the Criminal Procedure Code, when computing the duration of his imprisonment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF AUGUST, 2025.

RHODA RUTTO

JUDGE

In the presence of;

Appellant present from Kamiti Maximum prison

Ms Torosi for Respondent

Selina Court Assistant