**Kibet v Republic (Criminal Appeal E017 of 2022)**
**[2025] KEHC 11903 (KLR) (11 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11903 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL E017 OF 2022**

**RN NYAKUNDI, J**

**AUGUST 11, 2025**

**BETWEEN**

**IAN KIBET ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the Conviction and Sentence in Eldoret Chief Magistrates' Criminal Case (SO) No. 153 on 2019 by Hon. D. Milimu on 06/08/2020)***

## JUDGMENT

1. The Appellant was charged in Eldoret Chief Magistrate's Court Sexual Offences Case No. 153 of 2019 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. It was alleged that the Appellant, on 30/10/2016, at [Particulars withheld] in Kapseret Sub-County, within Uasin Gishu County intentionally and unlawfully caused his penis to penetrate the anus of, KK a boy aged 15 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

3. The Appellant pleaded not guilty to all the charges and the case then went to full trial in which the prosecution called 4 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and put him on his defence under Section 210 of the Criminal Procedure Code. The Appellant gave an unsworn statement and didn't call any witness. By the Judgment delivered on 06/05/2020, he was convicted on the main charge and sentenced on 06/08/2020 to serve 20 years imprisonment.

4. Dissatisfied with the said decision of the trial Court, the Appellant instituted this appeal on 16/09/2022, against the conviction and sentence on 8 grounds reproduced verbatim as follows:

i. That (I) am aggrieved that the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.

ii. That the trial court erred in law and facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.

iii. That the trial court erred in law and facts by convicting in manifestly insufficient prosecution evidence.

iv. That the trial court erred in failing to consider the appellants' defence evidence.

v. That (I) am aggrieved the trial court erred in law and facts as it failed to hold that the evidence of identification and recognition was not conclusive.

vi. That the learned trial magistrate erred in law and facts by shifting the burden of prove from the prosecution backyard to the appellant when the evidence failed to link him to the offence.

vii. That other grounds will be raised during the hearing

**Prosecution evidence before the trial Court**

5. Before the trial Court, the prosecution called 4 witnesses.

6. PW1 was the father of the minor PL. He testified that the minor was 15 years old on 29/10/2016 (hereinafter referred to as the material date). He produced his immunization card as PMFI-1 and stated that his son was born on 19/09/2001. When he arrived home on the material date he was told his son had not been home and they began looking for him. That on 31st, the Appellants' employer called him and told him that the minor had slept at his house, upon which he went and collected him. They found him with condoms and he told them that the appellant kept sending him to buy condoms. They took him to the AP camp where he was questioned and thereafter, he was taken to hospital. They were told to go to Kaplelach hospital after which they were told to go to Mosoriot where he was attended to. He produced the P3 form as PMFI2.

7. PW 2 was the minor-complainant (victim). Because of his age, she was taken through a voire dire examination after which the Magistrate recorded that he understood the meaning of an oath and directed that the minor would give sworn evidence which he then proceeded to do. He testified that he was 15 years old and on 25/10/2016 at around 6pm, he asked his mother permission to go pick a book at his grandmothers' house and while returning, he met his mother who wanted to cane him. He ran to the Appellants' house, as he used to work for a neighbour and on that day, he slept with him in the same house but they did nothing. However, on the second day, he had sex with him (the witness pointed at his anus). He stated that the following day, he was found and taken to the police station then to Mosoriot hospital. Additionally, he stated that he had known the Appellant for three months.

8. In cross-examination, PW1 stated that the Appellant had sex with him in his house and did not ask him.

9. PW3 was Abraham Katana, a clinical officer who filled the P3 form at Mosoriot hospital. He stated that the complainant was brought to the station and he filled a P3 form for him. He examined him and found that he had a swelling but there was no blood. That there were bruises and lacerations and in his opinion, the child had been defiled. He produced the form as exhibit 2.

10. PW4 was Police Constable Emmanuel Katana, the investigating officer. He stated that he produced the witnesses and the file in court.

**Defence evidence**

11. After the Prosecution case, the Court found that the Appellant had a case to answer and placed him to his defence. Pursuant thereto, the Appellant gave sworn testimony as DW1 and called no witnesses.

12. The Appellant denied committing the offence and stated that he was told to agree in the case so that it ends. During cross examination, he stated that the complainant came to his place on the material date, saying his father wanted to beat him. He gave him a place to stay and he was later arrested. He attributed the case to a misunderstanding with the complainants' father over a motorbike issue.

**Judgment of the trial Court**

13. After analysing the evidence, on 06/05/2020 the trial Court found the Appellant guilty and convicted him. The Appellant was then given an opportunity to mitigate which he did. On 06/08/2020, the trial Court then sentenced the Appellant to serve 20 years imprisonment.

**Hearing of the Appeal**

14. The Appeal was canvassed by of written Submissions. There are no submissions on record for the Appellant while the State filed submissions on 28/05/2025 through Prosecution Counsel, G. Kirenge.

**Respondent's Submissions**

15. On her part, the Prosecution Counsel submitted that the offence of defilement was proved beyond reasonable doubt.

16. Counsel submitted that the state concedes that the appellant was charged under section 8(2) as opposed to 8(3) given that the victim was 15 years of age. However, that this defect was cured by the Learned Magistrate who stuck to the maximum sentence during sentencing. Counsel cited section 179 of the Criminal Procedure Code and the cases of IAE vs Republic (Criminal Appeal 159 of 2018) [2023] KECA 127 (KLR) (10 February 2023) (Judgement) and Supreme Court Petition No. E018 of 2023, urging the court to uphold the conviction and sentence and dismiss the appeal

**Determination**

17. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32)

    Issues for determination

    a. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.

    b. Whether the sentence of life imprisonment imposed against the Appellant was justified.

18. I now proceed to analyse and determine the said issues

**Whether the charge sheet was fatally defective**

19. The Appellant contends that the charge sheet was fatally defective. The prosecution equally conceded that there was a defect as to the sections stated therein. I have noted that from the evidence in court,

the complainant was 15 years old yet section 8(2) of the sexual offences stipulates punishment for defilement of a child aged 11 years and under.

20. Section 382 of the Criminal Procedure Code provides that unless an error in the judgment has occasioned a failure of justice, the order or sentence of a court shall not be reversed. I hereby invoke the provisions of that section. The Section provides as follows:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

21. The trial court sentenced the appellant for the offence under section 8(1) as read with section 8(3) and therefore, it is my finding that the defect in the charge sheet and the judgement was not fatal.

**Whether the charge was proved case beyond reasonable doubt**

22. It is trite law that for the offence of defilement to be established, 3 ingredients must be proved, namely, the age of the victim, penetration and positive identification of the offender.

23. Section 8(1) and 8(2) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

24. The importance of proving age was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic [2016] eKLR, as follows:

> " The importance of proving the age of the victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that 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. In Alfayo Gombe Okello v Republic Cr. App 203 of 2009 (Kisumu) this Court stated as follows: -
>
> "In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)".

25. In instant case, PW1, the Complainants' father, testified that he was born on 19/01/2001 and produced his immunization card as PMFI-1. The complainant confirmed the same and produced his

immunization card. The alleged offence having occurred on 29/10/2016, PW2 was indeed 15 years old as at the time of the offence. This dispenses with the first ingredient as adequately proven. However, I note that this proved the offence with regards to section 8(3) and not section 8(2) under which he was charged.

26. With regard to penetration. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

27. In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).

28. Medical evidence was provided by PW3, the clinical officer who filled the P3 form and conducted the medical examination on the minor at Mosoriot Hospital. He testified that the injuries observed informed his opinion that the complainant had been defiled. This corroborated the testimony of the Complainant and thus, this ingredient was adequately proven.

29. On the issue of identification, the Court of Appeal in the case of Cleophas Wamunga v Republic [1989] eKLR expressed itself as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

30. In the instant case, the complainant testified that he knew the Appellant and that he used to work at a neighbour's house. It is evident that the identification of the appellant was by way of recognition. The Court of Appeal, in the case of Anjononi and Others vs Republic [1976- 1980] KLR 1566 held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. That given the prevailing circumstances it cannot be said that his recognition was free from the possibility of mistake.

31. It is my considered view that this ingredient was adequately proven.

**Whether the sentence of life imprisonment was justified**

32. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR, in the following terms:

> " It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that

the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist".

33. In applying the above guidelines, I observe that Section 8(2) of the *Sexual Offences Act* provides as follows:

> "(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

34. However, as the Complainants' age was 15 years, the relevant section under which his sentence is proffered ins section 8(3) of the *Sexual Offences Act* which provides as follows;

> (3) 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.

35. In view of the above, it is clear view that the sentence imposed by the trial Court was within the law. The trial court did not overlook any material factor or act on the wrong principle when meting out the sentence.

36. In assessing whether the totality of the evidence in record both the prosecution evidence as well as the evidence by the Appellant it proves the crime charged established beyond reasonable doubt. It is important to recall that to raise a reasonable doubt as defined above, the Appellant is not required to have demonstrated that his version of events are probable. Instead his version of events must only ultimately be reasonably true. The test therefore is whether there is any reasonable possibility that the Appellant version may have been true but the trial court failed in appreciating the reliability and credibility of the evidence. In the present case I find that the case at the trial court was established beyond reasonable doubt in so far as conviction is concerned for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. However my further reading of the elements of the offence on penetration and age of the victim it is very clear that the facts of the case indicates an error of fact or mistake on the face of the record by reasons that the victim was aged 15 years old. The rationale of this that the Appellant proper provisions on punishment shall be Section 8(3) of the *Sexual Offences Act*. The prescribed sentence by the Legislature is that of not less than 20 years. Although the sentence imposed by the learned trial Magistrate was 15 years imprisonment in exercising that discretion there are no reasons given why the departure from the provisions which sets 20 years as the minimum mandatory sentence. The statutory scheme does not allow for flexibility of the sentence by the trial court unless there are wholly exceptional circumstances. This court in adopting the approach of the law reviews the unlawful sentence and have it substituted with the correct sentence as per the statute of 20 years' imprisonment. I have borne in mind the prescribed law, the aggravating factors, the mitigation and the assessment whether a different period of sentence can be imposed by a trial court. It is significant to note that the basis upon which a trial court imposes the sentence is the legislative scheme which provides the metrics on sentencing and the Sentencing Policy of the Judiciary 2023 is only part of the tools to be invoked primarily in providing an holistic approach on this pillar in the criminal justice administration of Kenya.

**Final Order**

37. In the circumstances, I make the following Orders shall flow from the analysis; That

i. The Appeal against conviction succeeds and for sentence there is a review to substitute the unlawful punishment of 15 years imprisonment and have it enhanced to 20 years imprisonment in consonant with Section 8(3) of the *Sexual Offences Act*. That means both the appeal on conviction and sentence fails. The right of appeal explained to the Appellant. This decision has been amended as a topographical error on the face of the record under Section 80, 99 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules as further read in conjunction with Section 362, 364 and 382 of the Criminal Procedure Code. The derivative provisions under the *Civil Procedure Act* and Rules has been ordained under the doctrine of Pari Materia to nuance the law.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 11th DAY OF JULY 2025**

**.....**

**R. NYAKUNDI**

**JUDGE**