



REPUBLIC OF KENYA



**Gulu v Republic (Criminal Appeal E034 of 2023)  
[2024] KEHC 4403 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4403 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E034 OF 2023  
JN ONYIEGO, J  
APRIL 26, 2024**

**BETWEEN**

**OSMAN HARUN GULU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence delivered on 12th June 2023 by Hon.J.Omwange in Garissa CM's court in sexual offences Case Number 39 of 2020)*

**JUDGMENT**

1. The appellant herein was charged in Garissa Chief Magistrate's Court Sexual Offence Case No. 39 of 2020 with the offence of defilement contrary to section 8(4) of the Sexual Offences Act No 3 of 2006.
2. The particulars of the offence were that on diverse dates and time between 31.07.2020 and 16.08.2020 at [Particulars withheld] village in Garissa Sub County within Garissa County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of YAC, a child aged 16 years.
3. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of Sexual Offences Act in respect of which he was discharged.
4. The appellant denied the charges and upon full hearing, the trial court convicted him of the offence and sentenced him to serve (15) years' imprisonment. The evidence as presented before the court was as summarized here below.
5. YAC, (PW1) the complainant herein testified that sometime in April 2020, she got to know the appellant who had visited their village in Garsen for what she referred to as Matanga. That during that time, she had a relationship with the appellant who happened to be staying in Garissa then. That in July 2020, she also visited her sister who was staying in Garissa.



6. She stated that during her stay in Garissa, she again met with the appellant on Idd day which was, 31.07.2020 at Bulla Iftiin from where they went to Madogo at Feisal's house where they had sex. That upon reaching 9.30 p.m., she boarded the appellant's motor bike to her aunties' place where she spent the night and the following day, her sister went for her. They again met on a different day that she could not remember during the month of August 2020 as they were from Ziwani. That while at her sister's place, Neema, wife to the appellant went for her and took her to Ziwani, where she had sex once more with the appellant.
7. It was her evidence that she spent three days in the appellant's house after which elders from the appellant's side took her to her sister who took her to the police station and thereafter to the hospital. On cross examination, she stated that they had agreed to marry one another and that the appellant was ready to wait for her to complete her studies.
8. PW2, NMI testified that on 13.08.2020, the complainant herein went missing from her house and upon reaching the following day, she made calls to the family of the appellant. That the appellant had previously taken the complainant on 31.07.2020 and again on 13.08.2020. It was her evidence that after four days, the family of the appellant brought the complainant to her home with a fine of Kes. 5,000/- which she declined to take and instead, reported the matter to Iftiin Police station.
9. PW3, Jeremiah Mosibei, a medical officer testified that he examined the complainant who at the time of examination was in good health, the genitalia was normal though the hymen was broken bearing an old scar. That from the history, the complainant had been having sex with the appellant but for the reason that the complainant was a minor, the offence of defilement was positively confirmed. On cross examination, he stated that the complainant informed him that she had eloped with the appellant.
10. PW4, No. 107304 P.C Stephen Kinyanjui testified that on 14.08.2020, a person reported of a missing child, a student who had come from Garsen. That he was instructed to investigate the matter but on 16.08.2020, the reportee informed him that the missing child had been returned and so, he told the reportee to avail the child to the station. He stated that he interrogated the child who stated that she was at the appellant's home during that time and were involved in sex. That he took the child to the hospital where upon examination, it was determined that the child had been defiled. He recorded statements and then started looking for the appellant who had fled away but later on was arrested.
11. When placed on his defence, the appellant (DW1) gave a sworn statement denying defiling the complainant. He told the court that the same was a frame up. On cross examination by the prosecution, he stated that he knew the complainant as they came from the same village in Garsen. On further cross examination by the court, the appellant stated that together with Neema and the complainant, they once slept under one roof but in different rooms. That the complainant had gone there to visit Neema. That his sister slept in a different room from his.
12. DW2, Mohamed Harun testified that he worked at Gawasco as a machine operator. That he was aware that what was being alleged against the appellant was not true.
13. DW3, Mohamud Gulu Maleyio stated that the charge against the appellant was not true. Additionally, he stated that he did not know anything about the case.
14. The trial court evaluated the evidence and found that the prosecution had proved all the ingredients of the offence and convicted the appellant thus sentencing him to serve 15 years in jail.
15. The appellant felt aggrieved and filed this appeal raising the following grounds namely:
  - i. That the learned trial magistrate erred in law and fact by convicting and thereafter sentencing him when the prosecution did not prove its case to the required standards.



- ii. That the learned trial magistrate erred in both law and fact by convicting him while relying on contradicting evidence.
  - iii. That his rights under article 50(2)(g)(h) of *the constitution* were violated.
  - iv. That the sentence imposed on him was excessive and harsh in the given circumstances.
16. Directions were issued that the appeal be canvassed by way of written submissions. The appellant in his submissions filed in court on 12.02.2024 urged that for one to be found culpable of the offence of defilement, the essential ingredients that must be proved are penetration, age and the identity of the assailant. He urged that the age of the complainant is critical as was held in the case of Hudson Ali Mwachoni vs Republic (2016) eKLR. That in the case herein, the age of the complainant was not ascertained as she only claimed that she was sixteen years old without any evidence in form of a birth certificate to support the same.
  17. That the parents of the complainant were not called to testify to confirm whether indeed the complainant was a minor as alleged. According to the appellant, the only document produced in court to ascertain the age of the complainant was the age assessment report which approximated the age of the complainant to be sixteen years. He further contended, that the maker of the said document was not brought to court to testify or disclose how the said age was arrived at. To that end, support was placed on the case of EK vs Republic (2018) eKLR where it was held that medical evidence would require a disclosure of the procedure applied and the margin of error by the witness for the court to determine where to place such kind of evidence. It was appellant's contention that the age of the complainant was not ascertained to support the sentence meted out.
  18. On penetration, it was submitted that PW3 who examined the complainant in as much as he reached a determination that the complainant had been defiled, his evidence was not conclusive. Reliance was placed on the case of PKW vs Republic (2012) eKLR where it was held that...in most cases of sexual offences, we have dealt with counts which tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge...there can also be natural tearing of the hymen...
  19. That the complainant's credibility as a truthful witness was eroded as there was a possibility that she was coerced by other persons into testifying. That the crucial question that arises under such circumstances is whether the arrest and detention had any impact on the credibility of the evidence by the complainant. To that end, reliance was placed on the case of Gerald Muchiri Kiruma vs Republic (2006) eKLR where it was held that for a court to find that the detention of the witness had no impact on the credibility of the evidence is, with respect, highly speculative and probably erroneous.
  20. On contradictions of the prosecution evidence, it was submitted that the documents of identification varied in details in regards to the age of the appellant. That he was aged seventeen years at the alleged time of the commission of the offence while the complainant was aged 16 years. That he was unfairly condemned yet he was a minor just like the complainant. That it was unfair for the prosecution to place reliance on the alleged identification card as opposed to the birth certificate produced before the court.
  21. On the third ground, the appellant argued that he was neither accorded an advocate nor his rights read to him. That the same was contrary to the provisions of *the constitution* as he was charged with a serious offence whose sentence upon conviction was severe and therefore, it was incumbent upon the court to inform him of his right to legal representation. He relied on article 50(2)(g)(h) of *the constitution* and section 43 of the *Legal Aid Act*. In the same breadth he relied on the case of Jared Onguti Nyantika vs Republic [2019] eKLR where it was held that it is a fundamental issue in the trial process that an



accused person be informed of his right to an advocate of his own choice and the failure to facilitate the same amounts to an injustice.

22. On the ground that the sentence meted out was harsh and excessive in the circumstances herein, the appellant argued that in as much as sentence is an exercise of the judicial discretion, the sentence meted out by the court ought to be fair. That in as much as sentence imposed must have deterrence and retributive force which of course are legitimate elements of punishment, a convict should not be sacrificed at the altar of deterrence and retribution. In the end, this court was urged to allow the appeal as prayed.
23. The appeal was opposed by Mr. Kihara, the learned prosecution counsel who urged that it was devoid of merit and thus the same should be dismissed. The respondent submitted that all the ingredients of the offence of defilement were proved. Reliance was placed on the case of Hudson Ali Mwachongo v Republic [2016] eKLR where proof of the age of victim of a defilement case was over emphasized.
24. On sentence, he urged that the same was appropriate and the trial magistrate did not err in any way. He urged this court to uphold both conviction and sentence against the appellant.
25. I have considered the grounds of appeal and the submissions thereof. The duty of this court being the first appellate court is well stated in the case of Okeno v Republic (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“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 1975) 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 junction 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 1978) E.A 424.”

26. The issues for determination in this appeal are as follows;
  - i. Whether the prosecution proved the elements of the offence of defilement beyond reasonable doubt.
  - ii. Whether the sentence imposed was proper.
27. Given the nature of the offence herein, the prosecution was required to prove 3 crucial elements which are: a. Age b. Penetration c. Identification of the perpetrator.
28. On the question of age and the importance of proving the same in sexual offences, the same was emphasized in Alfayo Gombe Okello v Republic (2010) eKLR where the court stated that;

“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 is a 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)...proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.”



29. The appellant argued that the complainant's age was not conclusively proved as the prosecution failed to call persons such as the parents of the minor to prove that indeed, the complainant was a minor.
30. The court in the case of Francis Omuroni vs Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, was explicit on proof of age of the sexual victim that:
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”
31. What emerges from the above authority is that age may be proved through certificate of birth or age assessment by a qualified doctor or through other credible evidence such as baptismal card, notification of birth or school records or the evidence of parents or guardian.
32. In the instant case, the complainant at the time of trial indicated that she was sixteen years of age. In the same breadth, the P3 Form and the treatment notes produced by PW3 also noted that the complainant was of sixteen years old at the time when she was allegedly defiled. It is my finding therefore that indeed, the complainant was a minor aged sixteen years.
33. On penetration, section 2 of the *Sexual Offences Act* defines penetration as: “the partial or complete insertion of the genital organ of a person into the genital organ of another person.”
34. The complainant testified that on Idd, 31.07.2020 at Bulla Iftiin she had sex with the appellant in the house of Feisal at [Particulars withheld] area. She further stated that, around August, 2020, she went to the appellant's house in company of Neema whom she referred to as the wife to the appellant. That she spent 3 days in the appellant's house during which period they made love.
35. PW3 a medical officer testified that he examined the complainant who at the time of examination was in good health, the genitalia was normal however the hymen was broken with an old scar. That from the history, the complainant had been having sex with the appellant but for the reason that the complainant was a minor, the offence of defilement was positively confirmed. Additionally, PW4, who investigated the matter testified that in the process of his investigations and upon interrogating the complainant, she told him that she was at the appellant's home and during that time, they engaged in sexual activities.
36. From the evidence on record, save for the evidence of the complainant, nobody saw the appellant defile the complainant. However, under section 124 of the *evidence Act*, evidence of a single witness being a victim of a sexual offence is sufficient to convict without corroboration as long as the trial court is satisfied that the witness was truthful. Equally, a court can convict based on evidence of a single witness generally as long as it cautions itself of the consequences of relying on such evidence. See Abdallah Bin Wendo & another vs Republic (1953)20 EACA166.
37. In the instant case, given the detailed testimony of the complainant who talked passionately of her agreement with the appellant on how they were to get married after her finishing school, it cannot be a cooked story. Even the appellant was in agreement that the complainant had visited his home but as a friend to the sister. This is a story created to escape liability. I have no doubt that the evidence of pw1 that she was defiled is true and unchallenged. Her testimony is further corroborated by the evidence of her sister who stated that the appellant had eloped with pw1 twice and that on her return with the elders from the appellant's side they offered her Kes 5000/= for peace making but she declined.
38. On identification, it was not controverted that the appellant and the complainant herein were not strangers. It was noted that they knew one another as they were neighbours from Garsen and later on,



in Garissa when they met again. On this score, I am guided by the decision of *Mwaura v Republic* (1987) KLR 645 in which the Court of Appeal adopted the finding in *Wangombe v Republic* (1980) KLR at 150, that;

‘... In this case guilt turned upon visual identification by one or more witnesses...a reference to the circumstances usually requires the Judge to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged...

39. From the foregoing, there is no doubt in evidence of identification of the perpetrator as the person who penetrated the complainant. I therefore find that this ingredient too was proved beyond reasonable doubt.

40. The appellant urged that the trial magistrate convicted him by relying on contradictory evidence. It is trite that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Of importance to note is the fact that the alleged contradictions pointed by the appellant were not tenable. I say so for the reason that the essential elements of defilement as was desired to be proved by the prosecution were all met. It therefore follows that grounds 1 and 2 as enumerated on the petition of appeal are hereby dismissed.

41. On whether the right to have legal representation was infringed, the Court of Appeal in the case of *David Njoroge Macharia v Republic* [2011] eKLR stated that:

‘Art 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result’, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.’

42. Similarly, in *Nakuru HCCRA No 9 of 2020 Hezron Kipkemoi Mutai v Republic* [2022] eKLR, Chemitei J. stated that:

“Having looked at the court records, I see no application by the applicant during the lower court trial requesting for representation by an advocate. I note further that the trial was conducted in a language clearly understood by the appellant and as a result he was able to cross examine the witnesses.

Further, the record does not also indicate that he was a minor at the time of the offence. In essence this court does not find any prejudice he suffered during the entire trial process. At the same time, I find that the appellant’s right to legal representation at the state expense was not infringed.”

43. It is my considered view that the appellant’s right to a fair trial was not infringed by the trial court as he played an active role in the whole of the hearing process and at no point did he raise the issue of not being in the know of what was happening. Legal representation is not mandatory in sexual offences. It can only apply if the trial court finds it just in the circumstances of the case to so direct. The appellant had the choice of engaging an advocate of his choice. As the same is just an afterthought, I find the ground unmeritorious.



44. On the ground that the trial magistrate imposed a harsh sentence, he correctly noted that sentence is a preserve of the trial court and the same depends on the facts of each case. In the same breadth, on appeal, the appellate court will not easily interfere with the sentence unless, the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.
45. 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. [See Bernard Kimani Gacheru v Republic [2002] eKLR].
46. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
47. In as much as the appellant argued that this was a Romeo Juliet scenario and therefore the trial court condemned him unfairly, this court declines to be attracted to this narrative as it was determined that the appellant was found to be an adult at the time of the commission of the offence herein.
48. The above notwithstanding, the question that I ask myself is whether the sentence imposed by the trial court was fair in the given circumstances.
49. The Court of Appeal in the case of JH vs Republic, Criminal Appeal 18 of 2019 [2024] KECA 228 KLR set aside the life imprisonment meted on an appellant who had been convicted of the offence of incest.
50. The court stated that sentence for incest is predicated upon the age of the complainant. If the complainant is an adult, that is over 18 years old, the court has discretion to mete out a sentence of imprisonment of any length but not being less than 10 years. If the complainant is under eighteen years of age, the court has discretion to mete a sentence of up to life imprisonment. [See M. K vs Republic [2015] eKLR].
51. The court further noted that given the foregoing, ‘we are satisfied that the sentence imposed was harsh and excessive thus inviting this court’s intervention.’
52. Of importance to note is the fact that the matter for determination before the court was that of defilement and not any other. I therefore find that this appeal is bereft of merit on conviction. However, given the age of the complainant and circumstances surrounding the commission of the offence including the complainant’s behavior, I find 15 years to be excessive and therefore do substitute the same with five years to be calculated from the date of his sentence.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF APRIL 2024

**J. N. ONYIEGO**

**JUDGE**

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