



**Gitau v Republic (Criminal Appeal 47 of 2019)  
[2024] KEHC 8010 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8010 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL 47 OF 2019  
AM MUTETI, J  
JUNE 27, 2024**

**BETWEEN**

**PAUL KIBUTHI GITAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgement of the learned Honourable M. Wachira Chief Magistrate in Murang'a Criminal Case No. 14 of 2019. Republic -vs- Paul Kibuthi Gitau.)*

**JUDGMENT**

1. The appellant in the case was charged with defilement contrary to section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) no 3 of 2006. He also faced a second count of Indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) no 3 of 2006. At the conclusion of the trial the learned Hon. Magistrate convicted the Appellant in the first count on Defilement. It is against that conviction and sentence that the appellant has appealed to this court.
2. The appellant in his memorandum of appeal raises 7 grounds of appeal. The grounds of appeal may be summarized as hereunder;-
  1. That the learned honourable magistrate erred in law by failing to have a voire dire examination conducted before the child witness testified.
  2. That the learned honourable magistrate failed to find that the elements of the offence of defilement were not proved to warrant a conviction.
  3. That the learned honourable magistrate erred in law and fact by failing to hold that very essential witnesses were not called to testify
  4. That the learned honourable magistrate erred in law by failing to warn himself that suspicion however strong cannot form the basis of a conviction.



5. That the learned honourable erred in law by failing to uphold his defence to the charge.
  6. That the learned honourable magistrate erred in law and fact by failing to find and hold that the prosecutions' case was marred with contradictions.
  7. That the learned honourable magistrate erred in law by failing to exercise his discretion in sentencing and sentence him to a lesser term than the minimum mandatory term.
3. In determining this appeal, the duty of the court as a first appellate court is to analyse and re-evaluate the evidence on record with a view to drawing its own conclusions and finding remaining cognizant of the fact that unlike the learned honourable magistrate this court did not have the opportunity to see and hear the witnesses. This is the duty placed on the shoulders of a judge in determining the appeal, *Okeno v R* [1972] EA 32 followed.
  4. On the issue of the court not having conducted a *voire dire* examination this court finds guidance in the decision of the court of appeal in *Maripett Loonkomok v Republic* [2016]eKLR where the learned judges stated as follows:
 

'We turn to consider the effect of failure by the trial court to administer *voir dire* on the complainant. It is firmly settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi v R*, Criminal Appeal no 10 of 2014.
  5. In the instant case the victim of the offence was aged 15 years at the time of the offence. The evidence of PW4, David Mwangi Githinji a clinical officer who produced the P3 form as PEX 1 confirmed the age of the accused to be 15 years. It was therefore not necessary for the trial court to conduct a *voire dire* examination on the victim before she testified for she did not fall within the category of a child of tender years. The ground of appeal therefore fails.
  6. In his second ground of appeal, the appellant contends that the elements of the offence of defilement were not proved. I have perused the record and noted that PW1 who was the victim testified in great detail that the appellant had sexual intercourse with her multiple times the last being on an undisclosed date in August 2016 when PW3 the mother of the victim discovered the illicit interaction between her daughter PW1 and the appellant behind their toilet at night. According to PW1, the accused had been defiling her since March 2016. Her evidence reveals that during every sexual encounter with the appellant there was penetration.
  7. The evidence of penetration was corroborated by the clinical officer PW4 who testified that he found that the hymen of PW1 was broken consistent with defilement. The identity of the appellant was not in question and therefore the offence of defilement was proved beyond reasonable doubt. PW2 Samuel Njoroge Wambui uncle to PW1 corroborated the evidence of PW1 and 3 the effect that the victim disclosed to them the fact that her father had been defiling her.
  8. It is therefore the finding of this court that the offence of defilement was proved beyond reasonable thus the conviction of the appellant was safe in the circumstances.
  9. The court has also considered the issue of contradictory evidence and I note whereas the P3 form indicates the age of the victim as 15 years, the prosecution produced through PW6 an age assessment report dated 9<sup>th</sup> July 2018 indicating the age of the victim as between 13 -14 years. Notably, the age assessment report is not signed and therefore one cannot tell who the author was. Further, P. EX3 a



general outpatient card from Muranga district hospital indicates the age of the Victim as being 15 years. It is my finding that although the age assessment report indicates the victims age as being 13-14 years, the document is suspect for want of signature and I find it as being of no evidential value to this court.

10. In view of the above, I am satisfied that the charge of defilement was sufficiently proved against the appellant and his defence to the same amounted to a mere denial and could not therefore displace the cogent and consistent evidence adduced by the prosecution. The learned honourable magistrate considered the defence and just like this court dismissed the same.
11. The upshot of the above analysis of the evidence and the law applicable is that the appeal by the appellant is unmeritorious and is therefore dismissed on both conviction and sentence.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JUNE 2024.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Mwangi SPPC for the Appellant

Present in person virtually for the Appellant from Prison

.....Appellant

