



**Thagichu v Republic (Criminal Appeal E058 of 2023)
[2025] KEHC 114 (KLR) (14 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E058 OF 2023
GL NZIOKA, J
JANUARY 14, 2025**

BETWEEN

BERNARD CHEGE THAGICHU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon. Wilson Rading Principal Magistrate (PM) delivered on; 5th July, 2023, vide Chief Magistrate’s Criminal Case S/O No. E019 of 2021)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate’s Court charged vide Chief Magistrate’s Criminal Case S/O No. E019 of 2021, with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence *Act No. 3 of 2006* (herein “the Act”).
2. The particulars of the charge are that on the 24th day of January 2021, within Nakuru County, unlawfully and intentionally did cause his genital organ namely penis to penetrate the genital organ namely vagina of NMT a girl aged 15 years old (herein “the complainant”).
3. The appellant is also charged in the alternative count with the offence of indecent act with a child contrary to section 11(1) of the Act.
4. The particulars of the alternative count states that on 24th day of January 2021 ,within Nakuru County, unlawfully and intentionally did cause his genital organ namely penis to come into contact with the genital organ namely vagina of NMT a girl aged 15 years old.
5. The charges were read to the appellant who pleaded not guilty to both counts and the case proceeded to full hearing.



6. The prosecution case is that on the material day at around 6:00 p.m. the complainant was on her way to a classmate's house to borrow a textbook in order to do her homework when she met her friend H and requested him to accompany her.
7. That, they took a shortcut but were confronted by the appellant who was armed with a rungu and demanded to know why they were trespassing on his land. That he ordered them to sit down, opened their shoes laces and tied their hands and legs with the shoelaces and then led them to nearby bushes.
8. That the appellant took Kshs. 3,000 from H's pocket and then ordered the complainant to remove her trouser, underpants and t-shirt which she did. Thereafter he removed his trousers and defiled the complainant.
9. That after the appellant was defiling the complainant a good samaritan came to her rescue by throwing stones at the appellant who fled and helped untie the complainant's hands and legs. That the complainant wore her clothes and they reported the matter at Kinungi Police Station. That PW2 STC took the complainant for medical examination at Naivasha District Hospital.
10. According to the evidence of PW3 Preston Otega the Clinical Officer based at Naivasha District Hospital, the medical examination revealed that the complainant's lower leg had injuries with the knees being painful on palpitation. Further that she had bruises and injuries on her private parts and that the injuries were classified as grievous harm.
11. Further, PW4 No. 10xxxx PC Gladys Musyoka the investigating officer testified that the appellant was identified by a good samaritan WW, who was working at a farm near the place where the incident happened and who saw the appellant after the incident. That the appellant was arrested by police officers from Kinungi Police Station and was positively identified by the complainant after his photograph was sent to PW2 via WhatsApp.
12. At the close of the prosecution case, the appellant was placed on his defence. He gave an unsworn testimony and denied committing the offence. He stated that he resided in Narok but in December 2020 he visited his parents at [Particulars Withheld] and bought two sheep for them from a broker SK for Kshs. 14,500.
13. That sometime during the same month while still at his parents' home, he was called by a neighbour at the gate and found three men who told him that the sheep he had bought had been stolen. That he tried to contact S but his phone was off and was taken to the police station and instructed to release the sheep until S was found. That on 6th January 2021 returned to Narok.
14. The appellant averred that on 27th January 2021, he was called by someone from Stock Theft Unit and informed that S had been arrested at Mirera and was requested to go there. That when he went he asked to see S but was informed that there was no one by that name and ordered to wait.
15. However, the story was reversed and he was transferred to Naivasha Police Station where he was detained for two days and his phone taken for investigations. That, on 1st February 2021, he was taken to hospital where his blood sample was taken and informed he was suspected of defilement. Subsequently he was arraigned and charged with the offence before the court.
16. At the conclusion of the trial, the Hon. Learned Trial Magistrate delivered a judgment dated 5th July 2023 held that the prosecution had adduced adequate evidence in proof of its case and convicted the appellant on the main count. He was then sentenced to serve twenty (20) years imprisonment.
17. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds as verbatim reproduced;



- a. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the age of the complainant was not conclusively proved.
 - b. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that identification of the assailant was not proved by either identification or recognition.
 - c. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that penetration was not proved.
 - d. That, further grounds shall be adduced at the hearing of this appeal.
 - e. That I wish to be present during the hearing and determination of this appeal
18. However, the appeal was opposed by the respondent based on the grounds of opposition dated; 12th February 2024 which states: -
- a. That the learned Magistrate properly convicted the appellant on the count of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* after carefully analysing the evidence on record.
 - b. That the prosecution proved the case against the appellant to the required standard beyond reasonable doubt.
 - c. That the sentence meted out by the trial court was legal.
 - d. That the appellant's appeal lacks merit and should accordingly be dismissed.
19. The appeal was disposed of vide filing of submission. The appellant submitted that the ingredients of the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant as set out by the High Court in the case of; Dominic Kibet Mwareng vs Republic [2013] eKLR.
20. The appellant conceded that age of the complainant was proved but argued that identification and penetration was not proved.
21. On identification, the appellant cited the case(s) of, Ogeto vs Republic [2004] KLR 19 and Roria vs Republic [1967] EA 583 where it was stated that the court can convict on the evidence of identification by a single witness, however the court needs to test the evidence with greatest care and satisfy itself that in the circumstance it is safe to act on such identification
22. The appellant submitted that, the complainant was not in a position to identify her attacker having testified that the attacker was a stranger to her and she had never seen the appellant nor did she know where he lived. Further, the offence occurred at 6:00 p.m. when it was getting dark and that the road the complainant was using was bushy.
23. Furthermore, the police did not conduct an identification parade despite the fact that the complainant never informed the police that she could identify her attacker. That she only identified him through a photograph.
24. On penetration, the appellant relied the case of, Alex Chemwotei Sakong vs Republic [2018] eKLR where the High Court relied on the definition of penetration as provided in section 2 of the Act.
25. The appellant argued that while the prosecution produced medical evidence to corroborate the complainant's evidence that she was defiled, the said evidence did not link him to the commission of the offence considering he was taken to hospital and examined.



26. Further, the medical documents were not produced by their makers contrary to section 77 of the Evidence Act (Cap 80) Laws of Kenya. That, PW3 Preston never told the trial court that he examined the complainant nor did he inform the trial court if he knew the persons who filled the P3 form and the PRC form. That failure to call the makers denied him an opportunity to cross examine them thus denying him an opportunity to challenge evidence contrary to Article 50(2)(k) of the Constitution of Kenya 2010.
27. The appellant further submitted that the prosecution failed to call two crucial witnesses. That, the complainant's friend H who was with her when the offence was committed and WW who allegedly identified the perpetrator at the scene of crime.
28. That, the trial court ought to have found that the failure by the prosecution to call these witnesses was out of fear that their evidence would have adversely affected their case and therefore the court should acquit him.
29. The appellant relied on the case of, *Bukenya & Others vs Uganda* where the Court of Appeal of Uganda held that where evidence adduced is barely adequate, the court may infer that the evidence of uncalled witnesses would have been adverse to the prosecution's case.
30. Finally, the appellant submitted that the trial court failed to consider his defence of alibi. That it was the duty of the prosecution to displace his defence of alibi and prove that he was present at the place of crime at the time the offence was committed.
31. However, the respondent in submission dated 17th May 2024; argued that the prosecution proved its case beyond reasonable doubt in particular the elements of the defilement being; penetration, identification of the perpetrator and the age of the victim.
32. That, the complainant's age was proved by the birth certificate produced in the trial court indicating she was born on 18th August 2005 and the offence committed on 24th January 2021, therefore complainant was 14 years and 5 months old.
33. Further, penetration was proved by the evidence of the complainant who narrated how the appellant defiled. That her evidence was corroborated by the P3 form produced by PW3 which indicated that the complainant had bruises and injuries on her private parts. That in any case, section 124 of the Evidence Act does not require the complainant's evidence to be corroborated to prove penetration.
34. On the element of identification, the respondent submitted that, the appellant was positively identified by the complainant as she had spent sufficient time with him during the incident which occurred between 5 p.m. and 6 p.m. when there was natural light and visibility was clear. That in any event, the complainant did not know the appellant and there was therefore no issue of bad blood arising that would have led the appellant being framed.
35. Lastly, the respondent submitted that, the sentence meted out was proper, legal and sufficient as it is the minimum sentence provided for under the Act. The respondent urged the court to not to interfere with both conviction and sentence pronounced by the trial court.
36. At the conclusion of the arguments by the parties and in considering the material placed before the court, I note that the role of the 1st appellate court as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that this court did not benefit from the demeanour of the witnesses.
37. In evaluating the evidence herein I find that, the appellant was convicted of the offence of defilement. The elements of the offence were settled in the case of; *Agaya Roberts vs. Uganda*, Criminal no. 18 of



2002, and *Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995*, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved:

- (i) the facts of the sexual intercourse
- (ii) the age of the victim being under 18 years
- (iii) participation by the accused in the alleged sexual intercourse.

38. As regards age, I note that, a birth certificate was produced which indicates that the complainant was born on 18th August 2005. The offence is alleged to have been committed on 24th January 2021. Therefore, she was aged 15 years. A child is defined under the *Children Act* as “an individual who has not attained the age of eighteen years”. Therefore, as regards the first element there is proof the complainant was a minor.

39. The second element of defilement is supported by the evidence of PW1 that the perpetrator removed her clothes, the sweater, trouser pant, T-shirt and “raped” her. PW2 S C, the victim’s father testified that when they visited the scene they recovered PW1’s orange trouser. Finally PW3 Preston Otega the clinical officer testified that when PW1 was examined it was observed that she had bruises and lacerations in her private parts, which is consistent with defilement.

40. The afore evidence proves defilement as defined under the Act as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

41. The issue question is whether the appellant was positively identified as the perpetrator of the offence. From the evidence of the four witnesses who testified it is only PW1 who had contact with the perpetrator.

42. I note from the judgment at paragraph 36, the trial court states that:

“On the question I note that despite the prosecution having relied on the testimony of various witnesses who placed the accused at the scene of the incident, only the victim was able to recognize and/or identify the perpetrator.”

43. I further note that in convicting the appellant the trial court relied on the provisions of section 124 of the *Evidence Act*, and held that the offence took place by stating that: -

“...as it was getting dark, thus inferring proper illumination for the victim to properly see the perpetrator. Further when the victim was shown the appellant’s brother she was able to differentiate him from the accused, a pointer that the accused was well known to her following the incident. Finally as the victim’s hands were tied the victim had proper opportunity to familiarize with the accused person.”

44. However, I note the following from PW1’s evidence that, “she did not know the appellant before the incident.” Further she stated in cross-examination that she did not know where the appellant lived and that she was not there when he was arrested. Further that she saw his photo on WhatsApp group within Kinungi Police Officers. Furthermore, there was no identification parade. PW1 maintained in re-examination she did not know the appellant nor his name and never saw the appellant after the incident until she came to court.



45. It is noteworthy that evidence herein reveals that when PW1 was defiled as stated, she was in the company of one H. Further she was assisted by a good Samaritan who was attracted to the incident and threw stones at the accused who then ran away.
46. However, none of these two key witnesses testified to corroborate the evidence of PW1 as to the identity of the perpetrator. The provisions of section 124 of *Evidence Act* cannot be invoked where the prosecution had an opportunity to call corroborative evidence and opted not to do so.
47. Furthermore, PW4 PC Gladys Musyoka whom I presume was the investigation officer stated that:
- “the complainant as at then did not know the accused but was later identified by a good Samaritan WW who was employed at a farm near the incident and saw the accused after the incident, he noted and marked him and he partially identified him when he was arrested.”
- She further stated:
- “the complainant later identified the accused after he was arrested”
48. Notably PW4 does not testify as to how the appellant was arrested. Furthermore, at no time is it in evidence that, the complainant gave the description of the perpetrator at the time of recording her statement, or attended any identification parade or led to his arrest. It is not clear where the photograph she was shown came from and there is nowhere in her evidence that, she distinguished him from the brother as stated at paragraph 42 of the trial court judgment.
49. Indeed, the prosecution did not even explain why key witnesses, H and Wekesa were not called. In the given circumstances I find and hold that the identity of the appellant as the perpetrator in this crime herein is in doubt.
50. Consequently, I quash the conviction of the appellant and set aside the sentence imposed upon him. He shall be set free unless otherwise lawful held.
51. It is so ordered

DATED, DELIVERED AND SIGNED THIS 14TH DAY OF JANUARY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Wanga & Ms. Chepkonga for the respondent

Mr. Komen: court assistant

