



**Abdikadir v Republic (Criminal Appeal E035 of 2023)
[2025] KEHC 2499 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E035 OF 2023
JN ONYIEGO, J
FEBRUARY 20, 2025**

BETWEEN

MOHAMMED ALI ABDIKADIR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. Masiga J.J (PM) at Dadaab
SPM'S court in Sexual Offences Case No. E007 of 2022 delivered on 19.09.2023)*

JUDGMENT

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) has lodged this appeal against his conviction and sentence to serve fifty years imprisonment. The appellant prays that the appeal be allowed, conviction quashed and sentence set aside.
2. The appeal is premised on the grounds set out in the petition filed in court as follows;
 - i. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, prosecution failed to prove its case beyond reasonable doubt.
 - ii. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.
 - iii. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding the plausible defence of the appellant which was not given due consideration.
3. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#). The particulars of the offence were that on 03.05.2022



- in Dadaab sub county within Garissa County, he intentionally and unlawfully caused his penis to penetrate the vagina of HAH, a child aged 14 years.
4. In the alternative, he 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 03.05.2022 in Dadaab sub county within Garissa County he intentionally touched the breasts and vagina of HAH, a child aged 14 years.
 5. The appellant pleaded not guilty to the charge and the prosecution called 5 witnesses to prove its case. At the close of the prosecution's case, the trial court found that a prima facie was established. Subsequently, the appellant was placed on his defence. He gave sworn testimony and opted not to call any witness.
 6. Brief facts of the case are that, on 03.05.2022 at 8.00 p.m., the complainant herein(PW1) was at home cooking pasta. With her in the same house was her sister, the appellant and his brother. At that point, she took a jerrican to go to the toilet but before she could enter, the appellant appeared and told her to wait. The appellant then carried her on his shoulder to a nearby mathenge bush and asked her to remove her pants.
 7. Upon refusing, he threatened to beat her. That it was at this point that he proceeded to remove her pants, put his fingers in her vagina and thereafter inserted his penis into her vagina. He thus defiled her and thereafter tied her neck using her pants. She testified that she crawled up to a neighbour's house where she found her mother. The mother allegedly carried her home and thereafter reported the matter to Ifo police station. On cross examination, she denied the claim that the case was fabricated because of a boundary dispute between her family and that of the appellant.
 8. PW2, FAA, PW1's mother testified that on the material day she was not at home. That the complainant arrived where she was while crawling at about 9.00 p.m. That she carried her home. She then called three people who helped her check the complainant. It was her testimony that they confirmed that she was bleeding from her vagina. That upon being asked, PW1 stated that the appellant had defiled her. She then reported the matter to Ifo police station where they were issued with a medical document and thereafter referred to the hospital.
 9. PW3, MA, elder sister to PW1 stated that on the material day, she was at home when she saw her mother arrive with the complainant who had been defiled. She stated that she was told that the person who defiled the complainant was the appellant. It was her testimony that prior to the incident, the appellant was at their home where he was served supper but thereafter left.
 10. PW4, Fauzia Ibrahim Ahmed, a clinical officer on behalf of one Mercy who examined the complainant testified that upon being presented at the hospital, it was noted that PW1 had no signs of soft tissue injuries on any part of her body. There were no spermatozoa spotted in the urine in as much as the hymen was freshly broken. The labia majora were intact and there was a mild laceration and discharge emanating from the vagina. On cross examination, she stated that semen was spotted in the vagina.
 11. PW5, No. 75xxx Cpl. Leonard Busoro stated that on 04.05.2022, a report was made in reference to a defilement case and he was thus tasked to investigate the same. He simply restated the evidence of the complainant and her mother. He issued them with a P3Form and then escorted the complainant to the hospital for medical treatment.
 12. According to him, the appellant was placed at the scene of crime for the reason that prior to the occurrence of the incident, he was at pw1's home where he was served food. On cross examination, he stated that there was no grudge that existed between the appellant and PW1's family.



13. In his defence, the appellant gave sworn statement and did not call any witness. He stated that in as much as he heard all the accusations against him, he did not commit the offence. He averred that there existed a land dispute between him and PW1's father thus he was simply framed. On cross examination, he confirmed knowing the family of the complainant and that he used to visit them.
14. The appellant in his submissions dated 09.05.2024 urged that the sentence meted out by the court was excessive in consideration of the offence committed. In arguing his case, he relied on the case of Ali Abdullah Mwanza vs Republic, Criminal Appeal No. 259 of 2012 where the court substituted a forty-year sentence with that of twenty years. He contended that having been in remand since arrest, the period of time that he spent therein was equally not considered by the trial court when meting out the sentence. He thus urged this court to ensure that justice is served.
15. On the ground that the prosecution did not prove its case to the required standards, it was submitted that clearly the prosecution failed to shift the burden. In arguing his case, the appellant pointed out that no DNA was conducted to link him with the offence herein. He contended that the prosecution's case suffered a blow when it failed to take his blood sample to match the alleged semen that was found in the complainant's genitalia to enable proper corroboration of the evidence by PW1. In the end, he urged this court to allow the appeal, quash his conviction and set aside the sentence by the trial court.
16. The respondent opposed the appeal in its entirety and relied on their submissions dated 24.06.2024. It was submitted that the critical ingredients constituting the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant. That the complainant was aged 11 years at the time when the offence was committed and the same was supported by the evidence of the complainant and corroborated by PW4 who produced the age assessment report which indicated that PW1 was aged 11 years.
17. On penetration, it was urged that the victim's evidence was corroborated by the evidence of PW4 who examined her thus confirming that indeed, PW1 was defiled. On identification, it was submitted that the appellant was a person known to the complainant.
18. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give due regard to the fact that it has neither heard nor seen the witnesses testify. [See the cases of Pandya vs R {1957} EA 336; Ruwalla vs R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu vs Republic [2010] eKLR.
19. Having considered the record of appeal as well as the rival submissions by parties, I discern the following issues for determination:
 - i. Whether the prosecution failed to prove its case beyond reasonable doubt.
 - ii. Whether the sentence meted out on the appellant was harsh, excessive and unconstitutional.
20. In the case of George Opondo Olunga vs Republic (2016) eKLR the ingredients for the offence of defilement were set out as: a. Proof of the age of the victim; b. Proof of penetration or indecent act; c. Identification of the perpetrator.
21. On the issue of age, the record shows that the age assessment document presented as Pex.1 confirmed that the minor was 11 years at the time when the offence was committed. From the record, the appellant did not dispute the production of the age assessment document or challenge its veracity. He did not equally challenge the age of the complainant. It is trite law that there is no one particular preferred means of proving age. [See Court of Appeal decision in the case of Mwalango Chichoro Mwanjembe



vs Republic, Mombasa Criminal Appeal No. 24 of 2015 [2016] eKLR]. This court therefore, agrees with the finding of the trial court that this ingredient was fully and sufficiently established.

22. On penetration, Section 2 of the *Sexual Offences Act* defines it as the partial or complete insertion of the genital organ of a person into the genital organs of another person. Penetration in this case is supported through the evidence of the victim corroborated by medical evidence. PW4 testified that there were no spermatozoa spotted in the urine in as much as the hymen was freshly broken. That labia and majora were intact and there was a mild laceration and discharge emanating from the vagina. On cross examination, she stated that semen was spotted in the vagina of PW1.
23. The trial court in its determination held that the circumstances revealed that the appellant forced PW1 to the sexual act which was unlawful. The medical evidence confirmed that there was penetration hence the ingredient had been proved beyond peradventure. This evidence does corroborate the testimony of pw1 and the mother (pw2) who observed her genitals before taking her to the police station to report.
24. In the case of *Bassita Hussein vs Uganda*, Supreme Court Criminal Appeal No 35 of 1995, the court held that; “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim’s evidence and corroborated by medical evidence or other evidence.”
25. The appellant submitted that his DNA sample analysis was never done, yet this would have led to his acquittal. Section 36 of the Act that provides for DNA testing is not couched in mandatory terms but rather grants the trial court discretion to order for medical testing and evidence, which include DNA testing. [See the Court of Appeal in the case of *IMA vs Republic* [2019] eKLR.
26. Consequently, I find that the evidence of the victim and the medical doctor were sufficient to prove the ingredient of penetration. I have no reason to disturb the finding of the trial court. I affirm that penetration was proved.
27. On identification of the perpetrator, from the record, it is noted that the appellant was not only known as a neighbour to the complainant and her family, but also, he used to eat at the complainant’s house. That even at the material time that the offence herein occurred, he had been served supper. In his defence, the appellant also concurred that he knew the family and that he also used to visit them. The element of bad blood between the two families does not arise.
28. Based on the above set of facts, I find that the appellant was positively identified as the person who defiled the complainant. The identification was not only by way of dock identification when PW1 identified the appellant in court but more fundamentally, it was by recognition.
29. Although the complainant was the only eye witness, the court believed in the evidence of the victim whom he observed had no reason to lie. Under Section 124 of the *evidence Act*, a court can convict based on the evidence of a single witness in a sexual offence as long as it is satisfied that the witness is truthful. In such a scenario, corroboration is not mandatory. That position was upheld by the court of appeal decision in *JMM V Republic* (2020) e KLR.
30. Flowing from the foregoing, I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court. It therefore follows that the prosecution’s evidence was not marred by any irregularity or inconsistencies. It is my finding that prosecution evidence was not only convincing but also proved that the appellant was responsible for the offence herein. The appellant’s defence that the case was a fabrication is not supported by any evidence save for his word of mouth which is not convincing. The same is intended to run away from liability.



31. On sentence, I note that the same was not listed as a ground of appeal but nevertheless, the court has taken the liberty to address the same. The appellant was sentenced to 50 years imprisonment. The appellant argues that the court was wrong in appreciating that the number of years went against the life expectancy of a person. Additionally, that the court did not take cognizance of time spent in lawful custody from the time of arrest.
32. From the record, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The offence does attract a penalty of life imprisonment.
33. While previously the courts enjoyed judicial discretion in sentencing in sexual offences since the decision in Maingi & 5 others *vs Director of Public Prosecutions & another (Petition Eo17 of 2021)* [2021 KEHC 13118 (KLR)] that had declared the minimum mandatory sentences in the SOA unconstitutional, this court is bound by the recent Supreme Court decision in Petition No. E018 of 2023, Republic vs Joshua Gichuki Mwangi & 3 others (Unreported) Judgment dated 12th July 2024, in which the apex Court held that the mandatory sentences under the SOA were constitutional.
34. Consequently, I find no reason to interfere with the trial court's decision on sentencing in as much as I sympathize with him. Given that the appellant was in custody since the time of his arrest on 05.05.2022 till when judgment was delivered, it is my view that this period should be considered in computing sentence in accordance with Section 333 (2) of the *Criminal Procedure Code*. [See the case of Ahamad Abolfadhi Mohamed & another v Republic [2018] eKLR.
35. The upshot of it all is that, I do not find merit in this appeal. Accordingly, the appeal herein is dismissed and conviction and sentence upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2025

J. N. ONYIEGO

JUDGE

