



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ali v Republic (Criminal Appeal E040 of 2023)  
[2025] KEHC 1466 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1466 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E040 OF 2023  
JN ONYIEGO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**HASSAN MOHAMED ALI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence in Sexual Offence Case Number E001 of 2023 by Hon. Aganyo R (PM) in the Principal Magistrate's Court in Wajir)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the charge were that on the night between 31.12.2022 and 01.01.2023 in Wajir East Sub - County within Wajir County, he intentionally caused his penis to penetrate the vagina of M.B.H, a child aged 16 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on the night between 31.12.2022 and 01.01.2023 in Wajir East Sub - County within Wajir County he unlawfully and intentionally touched the vagina of M.B.H, a child aged 16 years.
3. He pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case. The appellant gave sworn testimony and did not call any witness.
4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the appellant and he was put on his defence.
5. He denied committing the offence herein but in its judgment delivered on 23.10.2023, the trial court convicted and consequently sentenced him to serve 12 years' imprisonment.



6. Being aggrieved with the determination by the trial court, the appellant, through an undated petition of appeal filed in court on 19.12.2023 appealed against his conviction and sentence on the grounds summarized as follows:
  - i. The learned magistrate erred in law by convicting him and yet the offence was not proved to the required standard.
  - ii. The evidence of the prosecution witnesses was contradictory in nature.
7. The court directed that the appeal be canvassed by way of written submissions.
8. In his oral submissions, the appellant submitted that he had not been linked to the offence and neither did he commit the offence as alleged. That the evidence by the prosecution did not establish that he was responsible for the offence. The respondent on the other hand submitted that the appellant gave sworn testimony and did not avail any witness to corroborate his evidence. That the appellant's defence did not challenge its overwhelming evidence.
9. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusions without losing sight of the fact that the trial court had the advantage of listening to and hearing the witnesses testify so as to be able to assess their General demeanour. This position was clearly set out by the Court of Appeal in *Kiilu & Another vs Republic* (2005)1 KLR 174.
10. Briefly, PW1, RBH, a business woman and an elder sister to the complainant stated that on 31.12.2022, she sent the complainant to go visit her sick mother who was admitted at Wajir Hospital. That at 7.00 p.m., she closed her business and went home. At 9.00 p.m., her brother called and informed her that the complainant had not yet reached home and therefore, they embarked on a process of searching for her. Her brother, HB and cousin D reported the matter to the police station.
11. She went further to state that On 01.01.2023, one H called and informed her that the complainant had gone to her house. She took a vehicle to Wagberi where H resides and brought the complainant home. She stated that upon enquiring from the complainant, she told her that she had met the appellant the previous day at the hospital gate who offered her a lift in his taxi vehicle. That while in the said taxi, the appellant gave her some drinking water which upon consuming, made her become unconscious.
12. She further informed her that when she woke up in the morning, she found herself in the appellant's house and without her trouser on. The matter was reported to the police station from where the complainant was taken to the hospital for examination and medical treatment. According to her, the doctor stated that it could not be determined whether indeed the complainant was defiled as time had lapsed.
13. PW2, M.B.H testified that she was aged 16 years and was no longer going to school because of the ridicules from other students. She stated that on the material day, she had visited her sick mother at Wajir Hospital and on her way back, she met with the appellant. That he followed her from behind asking her if he could offer her a lift which offer she accepted. According to her testimony, she drove to a shop where the appellant bought her some water and then offered her to drink. It was her testimony that, after finishing drinking the water, she felt dizzy and lost consciousness. That when she regained her consciousness, she found herself lying in a bed without her trouser on.
14. It was further her evidence that she suffered some abdominal pains and so she asked the appellant to take her home. That he complied and took her to a place near her sister's house and that she could not remember what exactly ensued while in the hands of the appellant. She further confirmed that she was taken to the hospital after a period of one week.



15. PW3, 87851 Cpl. Fardowza Mohamed, the investigating officer stated that when the matter was reported at their gender office, it was assigned to her to carry out investigations. She reiterated the evidence of PW1 and PW2. That she recorded statements from the witnesses and thereafter took PW2 to the hospital for examination and medical treatment. It was her evidence that she interrogated both the complainant and the appellant who confirmed that they did not have sexual contact on the alleged night that the complainant was reportedly missing.
16. PW4, Julius Kipsan Kalia, a clinical officer stated that on 03.01.2023, the complainant was brought to the hospital and he was required to examine her. That on his assessment, the complainant was in general good condition. That on further assessment, she had normal external genitalia, no bruises, no scars, no blood stains and no discharges. He further testified that; the hymen was broken although not fresh; a high vaginal swab was done and no spermatozoa was seen; there were few epithelial cells seen which signified infection which could be caused sexually or urinary infection.
17. According to him, there was no evidence of recent penetration. He produced the P3 Form, Lab report and PRC Form as Pex. 3,4 and 5 respectively. On cross examination, he reiterated that there were no visible vaginal injuries. That the complainant told him that she had never had sexual intercourse there before in as much as physical examination showed that there was a history of penetration.
18. The appellant in his sworn testimony denied perpetrating the offence. According to him, while at the taxi parking at the hospital, he met the complainant whom he had met the last three days. That the complainant entered into his vehicle and relaxed together for some time. That she informed him that she wanted to visit her mother who was admitted at the hospital. That noting that she was to spend time with her mother in the hospital and she had spent some time with him, she could not visit her mother at that time because the brothers and sisters who were with her would ask her where she was coming from.
19. That the complainant requested for a lift so that he could drop her home. While driving, the complainant informed him that her sister lived around Hudheif mosque but upon reaching there, they found her absent. She then asked him to take her home at the university area but she again changed her mind on grounds that nobody was home. He then told her to go sleep at the neighbour's place but the complainant declined. They then argued but noting that he feeling unwell, he decided to take her to his mother's house. That after two days, he was arrested and thereafter charged with the offence herein.
20. I have gone through and considered the trial court's record, the undated petition of appeal and oral submissions by the parties; In my view, only three grounds manifest for determination.
  - i. Whether the prosecution proved its case beyond reasonable doubt.
  - ii. Whether the appellant's defence placed doubt on the prosecution case.
  - iii. Whether the sentence preferred against the appellant was just and fair.
21. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the perpetrator have to be proved. See Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013 where the court held that the critical ingredients forming the offence of defilement are; age of the complainant; proof of penetration and positive identification of the assailant.
22. On age, PW1 testified that the complainant was aged 16 years. PW3 also testified that the complainant was aged 16 years and further produced a birth certificate. From the birth certificate, it is clear that the complainant was born on 05.11.2007 while the offence herein was allegedly committed on 31.12.2022.



It therefore follows that the complainant was a minor roughly aged 16 years at the time of the occurrence of the offence herein.

23. On penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
24. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, a court can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons. See Section 124 of the *Evidence Act*.
25. In the instant case, PW3, the medical personnel testified that on his assessment, the complainant was in general good condition and on further assessment, she had normal external genitalia, no bruises, no scars, no blood stains and no discharges. He further testified that the hymen was broken although not fresh. A high vaginal swab was done and no spermatozoa was seen. There were few epithelial cells seen which signified infection which could be caused sexually or urinary. According to him, there was no evidence of recent penetration in as much as the complainant told him that she had never had sexual intercourse there before. According to him, the physical examination showed that there was a history of penetration.
26. The above finding however is not fatal as the law allows the court to base a conviction solely on the testimony of the victim if the court is convinced and satisfied in the victim's truthfulness. Such testimony need not be corroborated. Section 124 of the *Evidence Act* provides:-Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".
27. I have keenly gone through the victim's evidence and therein, she stated the person who offered her a lift was the appellant. From the statement, she confirmed that she did not know what ensued on the material night and that they did not have any sexual intercourse. According to her, she had never experienced any sexual contact in as much as PW4's finding was contrary to that position. PW3 who investigated the matter also was unsuccessful in adducing evidence that could support the charge herein. According to her testimony, the complainant told her that she did not have sex during the time in question.
28. Having perused the record, I note that the trial magistrate on her part noted that she was convinced that indeed, the appellant defiled the complainant. Of importance to note is the fact that she stated that the appellant abducted the complainant and thereafter administered some drugs in her drink thus making the complainant unconscious before defiling her.
29. The investigating officer on her part did not see the need to investigate whether the complainant was indeed stupefied and consequently defiled. In the same breadth, the complainant denied being defiled while the medical officer stated that there was no evidence of recent penetration in as much as the complainant had a history of being penetrated.



30. The foregoing notwithstanding, this being a criminal matter, it was incumbent upon the prosecution to prove all the essential ingredients of the offence with which the appellant was charged. Having failed to do so, it was unfounded for the trial court to act on probabilities to convict the appellant. [ See section 107 of the *Evidence Act*; the case of *Woolmington vs DPP (1935) A.C 462*]. The trial court did not even caution itself on the danger of convicting based on the evidence of a single witness as set out in the case of *Abdallah Bin Wendo & Another vs Republic (1953)20 EACA 166*.
31. Besides, the learned magistrate did not state whether the victim who is the sole witness was believable under Section 124 of the *Evidence Act* so as not to require corroboration. As it were, it was pw2 alone who alleged that pw1 was defiled contrary to pw1’s testimony.
32. Having reviewed the evidence on record in totality, I find that the evidence by the prosecution witnesses was insufficient to support the charge against the appellant. In the case of *Richard Munene vs Republic (2018) eKLR*, the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness as follows:
- “Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favor of the accused. It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it”
33. In my considered view, the case herein must be resolved in favour of the appellant as the prosecution failed to prove its case beyond any reasonable doubt.
34. In view of the above holding, I am inclined to uphold the appeal herein, quash the conviction of the appellant as the same was not well grounded in law and set aside the sentence. Consequently, the appellant is set free forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025**

**J. N. ONYIEGO**

**JUDGE**

