



REPUBLIC OF KENYA



**Juma v Republic (Criminal Appeal E013 of 2024)
[2025] KEHC 3252 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E013 OF 2024
AC MRIMA, J
FEBRUARY 13, 2025**

BETWEEN

JOHN NYONGESA JUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. T.O. Omonu (RM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 113 of 2022 delivered on 12th October 2022)

JUDGMENT

1. John Nyongesa Juma, the Appellant herein, was charged with two offences and an alternative one. The first count was on the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on the 18th day of July 2022 at Mito Mbili Farm in Trans-Nzoia East Sub county within Trans-Nzoia County, you intentionally and unlawfully committed an act by inserting your male genital organ namely penis into the female genital organ of ACM a child aged 7 months which caused penetration. The alternative count was committing an indecent act with a child contrary to section 11(1) of Sexual Offences Act No. 3 of 2006 whose particulars were that on the on the 18th day of July 2022 at Mito Mbili Farm in Trans-Nzoia East Sub-County within Trans-Nzoia County, you intentionally and unlawfully touched the Vagina of ACM a child aged 7 (seven) months with your penis.
2. The second count was grievous harm contrary to section 234 of the Penal Code whose particulars were that on the 18th day of July 2022 at Mito Mbili farm in Trans-Nzoia East sub county within Trans-Nzoia County, unlawfully did grievous harm to Ann Chebet Mercy.
3. SK, RC and SN testified as PW1, PW2 and PW3 respectively. Kennedy Okango, a Clinical Officer testified as PW4. Jane Birich, a village elder testified as PW 5. No. 95529 P.C Sharon Maloi was the Investigating Officer. He testified as PW6. Jackline Nyanduko, a neighbour of the complainant testified



- as PW6. At the close of the prosecution's case, the trial Court established that the Appellant had a case to answer and was placed on his defence. He gave unsworn evidence and did not call any witness.
4. Upon analysing the evidence, the trial Court was of the conclusion that the Appellant was guilty of grievous harm. He was sentenced to 25 years imprisonment.
 5. Through an undated Petition of Appeal, the Appellant expressed dissatisfaction with the findings of the trial Court. He urged his conviction and sentence be set aside on the following grounds: -
 1. That I pleaded not guilty.
 2. That the trial magistrate erred in both law and fact by failing to note that the prosecution evidence was full of contradictions and inconsistency.
 3. That trial magistrate erred in both law and fact by failing to note that the prosecution failed to avail the crucial witnesses.
 4. That the trial magistrate erred in both law and fact by failing to note that the element of defilement was not proved beyond reasonable doubt.
 5. That the trial magistrate erred in both law and fact by failing to consider provision of Judiciary sentencing policy guidelines during sentencing.
 7. In his written submissions, the Appellant stated that no evidence was laid before the Court to support the claim that he caused grievous harm to the complainant. It was his case that due to the contradictions that arose at the hearing of his case, justice was denied. He further submitted that PW1's evidence failed to capture the commission of the offence. As regards the evidence of PW2, it was his evidence that he had a quarrel with her. He submitted that the entire episode was done under instruction and control of PW3 organized and controlled the rest of the witnesses. The Appellant further submitted that the Clinical Officer indicated that the victim suffered knee injury and was returned to the facility by her mother, village elder and neighbour, persons who never testified.
 8. The Respondent challenged the appeal through written submissions dated 14th May 2024. From the outset it was its case that the main offence of defilement and its ingredients of age, penetration and identity of the perpetrator as was observed in Daniel Wambugu Maina -vs- Republic were proved.
 9. On the aspect of age, it was its submission that the Birth Notification of the victim produced as PExh. 1 established her age. To that end, the Court of Appeal decision in Mwalango Chichoro -vs- Republic was relied upon where it was observed that age is settled by among other things, documentary evidence including birth certificate.
 10. On the aspect of penetration, the Respondent submitted that the law does not envisage absolute penetration into the genitalia or the release of spermatozoa or screening of the male organ for the act of penetration to be complete. The decision in Lang'at Dinyo Domokonyang -vs- Republic (2017) eKLR was relied on.
 11. The Respondent relied on the evidence of PW7, the Clinical officer who stated that the he examined the baby and found that her right leg was swollen and her private parts had injuries and that her hymen was broken.



12. To further assert the foregoing, the decision in Bassita Hussein -vs- Uganda Supreme Court Criminal Appeal No. 35 of 1995 was cited. In the case it was observed that the act of sexual intercourse or penetration may be proved by direct and circumstantial evidence. It was observed;

...usually the sexual intercourse is proved by the victims evidence and corroborated by medical evidence or other evidence
13. On the last ingredient, the Respondent submitted that the circumstances were tenable to enable identification and recognition of the Appellant. The decision in Roria -vs- Republic was relied upon to buttress that position.
14. The Respondent asserted that the contradictions and the inconsistencies that were in the case were minor and would not case material doubt on the Prosecution's case. The decision in Twehangane Alfred -vs- Uganda Criminal Appeal No. 139 of 2001 and the one in Philip Nzaka Watu -vs- Republic were cited where it was observed that not every contradiction warrants rejection of evidence.
15. It was further the Respondent's case that the claim that crucial witnesses were not availed is without basis since the choice and number of witnesses is a decision within the discretion of the prosecution, a position adopted by the Court of Appeal in JuliusKalewa Mutunga -vs- Republic (2006) eKLR.
16. The Respondent further submitted that the trial Court's sentence ought not be interfered with.
17. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In reassessing the evidence this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court. It therefore ought to make due allowance that respect as so held in Ajode v. Republic [2004] KLR 81.
18. Before delving deep into the reanalysis, this Court notes that both the Appellant and the Respondent strenuously challenged the main charge of defilement yet the Appellant was not convicted of the same. Nonetheless, since this is an appeal, I will re-appraise the dispute holistically.
19. It is established by law and settled judicial precedents that the offence of defilement carries three components. The prosecution must prove the age of the victim, penetration and identity of the perpetrator. I will look at each in turn.

Penetration:

20. The Appellant was charged under Section 8(1)(2) of the *Sexual Offences Act*. It provides as follows;

8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
21. The term 'penetration' is defined by Section 2 of the said Act in the following way;

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
22. This position was fortified in Mark Oiruri Mose vs R (2013) eKLR when the Court of Appeal stated thus: -

... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of



the offence is demonstrated, and penetration need not be deep inside the girl's organ....
(emphasis added).

23. Later the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng -vs- Republic (2014) eKLR* held as such on the aspect of penetration: -

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

24. I now turn to the evidence. SK, a twelve-year-old boy testified as PW1. Upon being subjected to voir dire examination, it was his evidence that on 18th July 2022 at around 11am, he was at home and the victim was in the house. It was his case that his other siblings were at school and his grandmother had gone to fetch firewood. He stated that he remained at home with the Appellant who is his cousin. It was his evidence that he was carrying the victim and when she fell asleep, he laid her on the couch and stepped out to go to the toilet. He stated that when he came back, he heard the baby screaming. He found the Appellant holding the baby's ear and shaking her. It was his case that that the Appellant slapped the baby on the face and threw her down. Upon confronting him, the Appellant stated that the baby was disturbing him. It was his evidence that he took the baby and the Appellant went help his grandmother fetch firewood.
25. Further to the foregoing, PW1 stated that when his grandmother came back, he informed her what had happened. He stated that she quarrelled the Appellant and that a neighbour came and looked at the baby and said that she had a broken leg. He also stated that the next day, the victim's leg, above the knee, was swollen. She was taken to the hospital at Ziwa by her mother.
26. RC, the mother to the minor testified as PW2. It was her evidence that she was assaulted by the Appellant on 17th July 2022 over food and thereafter called her mother to inform her that he would do something to go to prison. It was her evidence that on 18th July 2022, when she came back from school, she found the victim crying and on asking PW1 the reason, he informed her that the Appellant had defiled her and had put a piece of cloth in her mouth so that she could not cry. She further testified that when she went home on Tuesday, a neighbour, Jackline, told her that the baby had broken her leg. She stated that she took the baby to Ziwa Hospital where an X- ray was performed and the doctor put plaster on her leg. It was her evidence further that her neighbour Jackline asked if she had checked the baby's genitals but she informed her that she had not. it was her case that the neighbour brought another lady who checked the minor's genital area and said that the baby had been defiled. PW2 stated that the area chief was present.
27. Pursuant to the foregoing, she testified that she was advised to take the baby to hospital and to report to Kachibora Police Station.
28. SN, PW3 testified that on the material date, she had gone to a friend's house to fetch firewood and food and on returning home she found the baby, whom she had left with PW1, crying. She stated that her leg had been broken and on asking PW1 what had happened, he stated that the baby had fallen down. It was her case that the baby was taken to the hospital by her mother.
29. Kennedy Okang'o, the Clinical Officer Cherangany Sub County hospital testified as PW4. It was his evidence that on 19th July 2022, the baby was brought to the hospital with injuries on her right knee near the joint. That his colleague noted that it was soft tissue injuries and recommended x-ray. When the minor was taken to Ziwa Hospital and on performing X-ray, it showed that the minor had a fractured femur.



30. It was his evidence that on 25th July 2022 the minor was brought back to the hospital in the company of her mother, a neighbour called Mercy and a village elder and the Appellant was informed that the minor had been defiled on 18th July 2022 and that they discovered the injury on the same day.
31. On examining the minor, it was his evidence that her external genitalia were normal but her hymen was broken. He estimated the injuries to be seven days old. He produced the treatment notes, the X-ray and P3 Form as exhibits.
32. Jane Birich, a village elder, testified as PW5. It was his evidence that on 24th July 2022, Jackline Nyanduko informed her that the minor had ben defiled. She stated that she called the Area Chief and went to the scene of crime and found that the baby's leg was broken. She claimed that the Appellant is her neighbour and is known to be a trouble maker in the village and had several cases against him.
33. PW6 the Investigating Officer stated that when the minor was brought to the Police station, she had a plaster on her leg. She narrated the story as per the evidence of PW1. He produced the child birth notification as an exhibit. On cross-examination, it was her evidence that she was told by a family member of the minor that he defiled the child.
34. Jackline Nyanduko, a neighbour of the minor stated that on 19th July 2022 at about 10am, she heard a child crying in her neighbour's house. Upon going to check, she heard PW1 asking the Appellant why he had beaten the baby. She testified that the following day she was told that the baby was still crying and on checking her she found that her leg was swollen. It was her evidence that the grandmother informed her that the baby had defecated on herself and on checking her further, she established that her private parts had injured. She stated that she asked the minor's grandmother about the injuries and asked her to take the baby to the hospital.
35. Jackline testified further that after the minor had been taken to hospital, she followed up with PW2 on where she told the doctor of the injuries on her private parts but she (PW2) informed her that she did not do so.
36. In his defence, the Appellate testified that on the material date he went to work on the farm as usual and on coming back home, she quarrelled with PW2 over food and hit her with a can and thereafter went to stay with his uncle's place at Wechuli.
37. Having thoroughly re-appraised the evidence, it is the apparent that the only eye witness to the incident was PW1.
38. In his evidence-in-chief, he informed the trial Court that he laid the baby on the couch and when he came back he found the Appellant assaulting the her. The Appellant slapped the baby on the face and threw her down.
39. When PW1's grandmother arrived, he informed her exactly the foregoing events.
40. The evidence of PW1 before the trial Court sharply contradicted the information he gave the minor's mother, PW2. He told her, a day after the incident, that the Appellant had defiled her and had put a piece of cloth in her mouth. The foregoing evidence did not come out during the trial Court. An important aspect before the eyes of the Court for purposes of establishing the element of penetration.
41. Despite the medical evidence that the minor's hymen was torn, it is curious that a Medical professional would miss genital injuries on a minor's body more so when the same minor had a fractured leg above the knee, a position very proximate to the genital area given her age. It is even more perplexing that the medical professional took an x-ray of the fractured leg but it is only until the minor was brought



back a week later that he observed that there was a slight endometria labia minora and that her hymen was broken.

42. The incidence of penetration is further weakened by the evidence of PW2. She stated in Court that her neighbour, PW7, informed her that her baby had suffered sexual assault and was advised that she takes her to hospital for a check-up. However, in her evidence when PW7 asked her whether he informed the doctor of the defilement, she stated that she did not.
43. Unlike the trial Court, this Court takes the view that the Appellant was positively identified. The witnesses that testified before the trial Court knew and recognized him. There was no incidence of error or mistake. Similarly, the age of the minor was not brought to question.
44. Crucially, however, the ingredient of penetration was shrouded in serious contradictions and inconsistencies. The evidence was disjointed and incoherent. Even the medical evidence as adduced by the Clinical Officer raised reasonable doubt on the occurrence of penetration. It would appear that it was choreographed to fit a certain narrative. Nothing would have been easier than PW1 to testify to the Court that he saw the Appellant defile the minor. This Court finds it unsafe to make the conclusion that the element of penetration was proved beyond reasonable doubt.
45. The Court of Appeal in *Ndungu Kimani -vs- Republic* [1979] KLR 282 warned Courts of relying on untrustworthy witnesses by remarking as follows: -

.... The witness upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person or raised a suspicion about his trustworthiness or say or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.
46. With the foregoing, this Court makes the conclusion that the glaring and contradictory evidence ought only to be interpreted as damaging the standard of proof required for both the offence of defilement and indecent act.
47. I now turn to the alternative offence of grievous harm contrary to section 234 of the penal code.
48. There is ample evidence that the minor indeed suffered harm. She broke her right leg and the evidence adduced both by PW1, despite not being believable on the claim of defilement, was corroborated by that of PW3 and importantly the medical evidence which was done promptly, just a day after the incident.
49. Section 4 of the *Penal Code* sets out the ingredients of the offence of grievous as follows: -

Any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external and internal organ, membrane or sense.
50. The Appellant did not controvert any of the evidence of assaulting the minor. He did not even dispute the evidence of PW2, the minor's mother, that they had a dispute over maize flour. In this Court's assessment the Appellant had some vengeance over PW2 which he took out on the minor. The Appellant's conduct is inexcusable. He unleashed his anger on an innocent, defenceless 7-month-old baby.



51. Section 234 of the *Penal Code* prescribes the punishment for the offence of Grievous Harm as follows.
- Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
52. The trial Court in this case exercised discretion and sentenced the Appellant to 25 years imprisonment. That was a determinate period less than life imprisonment prescribed by the *Penal Code*.
53. Before the eyes of this Court, a more lenient sentence would have ensued in view of the injuries suffered, however, the huge age imbalance between the Appellant and victim was an aggravating circumstance. The baby could have easily lost her life.
54. In the premises, this Court finds the appeal to be without merit and is hereby dismissed. The trial Court's conviction and sentence under Section 234 of the Penal is hereby upheld.
55. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

John Nyongesa Juma, the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.

