Ndunge v Republic (Criminal Appeal E028 of 2024)
[2025] KEHC 1601 (KLR) (4 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1601 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E028 OF 2024

NIO ADAGI, J

FEBRUARY 4, 2025

BETWEEN

ALLOYS WAEMA NDUNGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. D. N. Sure (PM) in Kangundo CMC S.O Case. No. E061 of 2021 delivered on 31/1/2024)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge are that on 1st November 2021 at[Particulars Withheld Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of E.N.M a child aged 16 years in violation of section 8(1) as read with section 8(4) of the Sexual Offence *Act No.3 of 2006*.

2. He was charged in the alternative with the offence of Committing an Indecent Act with a child c/s 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge are that on the 1st November 2021 at[Particulars Withheld Machakos County intentionally and unlawfully touched the vagina of E.N.M a child aged 16 years with his penis contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006.

3. The Appellant pleaded not guilty to the main charge and the alternative charge and the matter was set down for hearing. The prosecution called four witnesses in proving its case. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* and sentenced to 15 years in prison on 31st January 2024.

4. Being aggrieved by the said judgment, the Appellant lodged the undated Memorandum of Appeal herein challenging both the conviction and sentence.

5. The appeal is based on three grounds that :-

    1. The learned trial magistrate erred both in fact and law by convicting the Appellant on evidence that didn't meet the minimum threshold to uphold a conviction.

    2. The learned trial magistrate erred both in fact and law by not considering the Appellant's defence.

    3. The learned trial magistrate erred in law by sentencing the Appellant by virtue of the minimum mandatory sentence provisions.

Summary of Evidence .

6. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See Okeno v Republic (1972) EA 32).

Prosecution's Case

7. The prosecution's case can be summarized as follows:

> (PW1), the Complainant, testified that on 1/11/2021 at about 7.00pm, she left school and went home. She took of her uniform and her parent sent her for milk. She met a friend V who asked her if she could go fetch water and she answered her that it was late. When she was about to reach the shop, someone pulled her from behind. The person said PW1 usually ignored him and never talked to him. He pulled her to the coffee farm and started undressing her. When she tried to scream, he covered her mouth. He forcefully had sex with her. He held one of her hands and she told him she would report him but he told her not to. He said he would give her money. When he let her go, she went and reported him and he was arrested. He did not use protection. He inserted his penis into her vagina and not the anus. She called her mother and informed her that a boy had defiled her. He was near the shop on a motor bike. Her mother came and called others, he was arrested and they went to the police station. The police went back to the scene. The Appellant said he had used a condom but the police did not find it at the scene. PW1 was taken to the hospital by a police called W and she was examined by a doctor. PW1 testified that it was the Appellant who defiled her and that he was known to her as he hailed from their village. She stated that she was born on 13/12/2004 and had a Birth Certificate.

8. In cross examination, the PW1 stated that the Appellant had a motor bike which he parked and went to her. PW1 did not stop the Appellant. The Appellant defiled her and when they came back with her mother, they found the Appellant by the road side with his motor bike.

9. PW2, JK testified that on 1/11/2021 at 7.00pm she was from work and met her child who was from school. She sent her for milk and battery. After a while she heard screams. She told MN that she had screams but she had sent her child to the market. N told her to be patient the child would return. They stood there talking and after a while her child came at the gate and told her to go and ask the boy why he did that to her. She got alarmed and went with her to the side of the road. She told her it was the Appellant. The Appellant knew her. The Appellant called her "Mama M nisamehe". She called others and the Appellant was arrested. She took her child to a nearby hospital and they were referred to Kangundo Level 4 hospital. Her child was crying. While still arguing and asking the Appellant why he did that to a child, the police came and arrested the Appellant and took over the matter. She reported

and the child was taken to hospital. PW1 had told her that the Appellant had been asking her to be his girlfriend, so on that day when he saw her, he alighted from his motor bike and came to her. She screamed twice, it had rained. PW1 told her, the Appellant had assaulted her sexually. PW1 was born in 2004 and had a Birth Certificate. She continued that it was the Appellant who committed the offence. The Appellant was not known to her before.

10. In cross examination, PW2 stated that she believed what her child told her. If it wasn't true she wouldn't have told her. The Appellant told the police he had used a condom. The Appellant took the police to the scene but no condom was found. The police found the Appellant with unused condom. The Appellant pleaded with her not to report him.

11. The case having been partly heard before a court that went on transfer, on 14/6/2023 pre-trial directions were taken under Section 200 of the *Criminal Procedure Code* for the matter to proceed from where it had reached and a further hearing date was set for 5/7/2023.

12. PW3, Dr. Maureen Musili a Clinical Officer from Kangundo Level 4 hospital testified. She had the P3 Form which she had filled. She stated that she saw PW1 on 1/11/2021. She was accompanied by a police officer. On examination PW1 was defiled by a known person whom she met and the suspect forced her into the forest and penetrated her vagina. PW1 was calm and there was dirt on the clothes and shoes. The genetalia had bruises at the vulva, bruises at 6.00 o'çlock, whitish discharge and other systems were normal. Tests showed few pus cells in urinalysis, no spermatozoa, pregnancy and other tests were negative. She produced the P3 Form as PExbt.2

13. PW3 also testified that she examined the Appellant on 1/11/2021 and filled a P3 Form for him. Examination showed he had whitish discharge from the urethra, reddening of the penal shaft and other examinations was normal. PW3 opined that the Appellant was involved in rape because of the reddening of his shaft and discharge. She produced the P3 Form as PExbt.5 and Treatment notes as PExbt.6.

14. On cross examination, PW3 stated that PW1's clothes were dirty and she had injuries in her genitalia. (not penetration).

15. PW4, Mariam W, the Investigating Officer testified that she was attached to Kangundo police station. On 1/11/2021, they received a telephone call from Kangwari police post over the arrest of a boy and girl. They were informed the boy had raped the girl. They rearrested the boy and took him and the girl to Kangundo Level 4 Hospital and they were both examined. She narrated what PW1 had told her about the incident and that after the rape, the Appellant gave her Kshs.100/= and directed her not to disclose. PW1 managed to run home and alerted her mother of the defilement. Mother and daughter returned to the scene and found the Appellant who wanted to run away but was detained by members of the public. She testified that PW1 was 16 years old at the time and produced her Birth Certificate as Pexbt.1.

16. In cross examination, PW4 stated that she was told the Appellant was arrested by members of the public. The scene was near the market. The area is a coffee field which was near a market. The act took place at around 7.00pm, The Complainant PW1 is the only witness to what happened. PW1 alerted the mother and they returned to the scene, and luckily, they found the Appellant and he was arrested by the assistance of the public. She rearrested the Appellant from Kangwari police post and brought him to Kangundo police station. The members of the public who arrested the Appellant declined to record statements and she could not compel them. That there was a witness who recorded her statement but could not be traced on her phone.

17. The prosecutor then informed the trial court that they had been unable to trace PW1 for recalling as had been requested by the trial magistrate on her own motion. However, upon the trial Magistrate asking the Appellant whether the matter could proceed from where it reached without recalling PW1, the Appellant had no objection.

18. The Prosecutor applied to dispense with the evidence of MN who could not be traced and closed the prosecution case.

19. In the ruling dated 19/7/2023, the trial court found that the prosecution had established a prima facie case and the Appellant had a case to answer.

20. The Appellant opted to give unsworn evidence. He testified as DW1 and stated that he was a boda boda rider. He could not recall the dates but it was in 2021, he was going home at around 7.00pm when a girl stopped him and requested that he takes her to Kangundo the next day. While they were talking, they differed and the girl told him she would report him to her mother. Her mother came and found her on the road and she accused the Appellant of defiling her child. They took the Appellant to a nearby hospital to verify the report. They were assisted by members of the public and that is when the police were alerted and the Appellant was arrested. While the Appellant was talking to the Complainant, he refused the things she was saying and that is when she implicated her to her mother.

21. The Appellant then closed his case and indicated that he didn't know what submissions are.

Analysis and Determination

22. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. See Okeno –vs- Republic (1972) E.A 32.

23. Having carefully and cautiously considered and analysed the trial court's record, the grounds of appeal and the Parties' rival submissions on the appeal the issue for determination is whether the Appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

24. Again, this being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt. I will determine:

    a. Whether the prosecution proved its case beyond reasonable doubt;

    b. Whether the sentence was illegal

25. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of Woolmington v DPP 1935 AC 462 and Miller v Minister of Pensions 2 ALL 372-273.

Whether the prosecution proved its case beyond reasonable doubt.

26. Section 8(1) of the *Sexual Offences Act* provides as follows regarding the offence of defilement:

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

27. In determining this offence, the court is required to consider whether the prosecution proved the following ingredients to the required standard:

    i. age of the victim (minor)

ii. proof of penetration and

iii. the positive identification of the appellant as the perpetrator of the offence.

Age of minority

28. The incident herein occurred on 1/11/2021. A Birth Certificate PExbt.1 was produced in evidence showing the Complainant PW1 was born on 13/12/2004 and was 16 years at the time of the incident. There is no doubt that the Complainant was at the time a minor. This ingredient of age of minority was therefore proved.

Proof of penetration

29. On the ingredient of penetration; Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

30. The Appellant in his submissions dated 28/20/2024 on this appeal, invited the court to review and scrutinize afresh the evidence of PW1 with regard to truthfulness of her evidence. As regards penetration, I have perused the proceedings before the trial court. PW1, testified that on 1/11/2021 at about 7.00pm, she left school and went home. She took off her uniform and her parent sent her for milk. PW2, JK her mother testified that on 1/11/2021 at 7.00pm she was from work and met her child who was from school and she sent her for milk and battery. These testimonies in themselves are contradictory in that whereas PW1 says she had come from school, gone home, taken off her uniform and even met a friend V who asked her if she could go fetch water and she answered her that it was late, PW2 stated that she was from work and met her child who was from school and she sent her for milk and battery. According to the testimony of PW2, she met PW1 who was from school and not as stated by PW1 that she had gone home and changed her uniform.

31. PW1 testified that the Appellant inserted his penis into her vagina and not the anus. She called her mother and informed her that a boy had defiled her.

32. PW4 in cross examination stated that PW1 managed to run home and alerted her mother of the defilement. PW2, the mother stated that as she stood with MN talking, she heard screams and after a while PW1 came and stood at the gate and told her to go and ask the boy why he did that to her. They went to the side of the road and PW1 told her that the Appellant defiled her. What is not clear here, is why PW1 did not at the first instance mention the name of the boy and what he had done to her.

33. PW3 stated that she saw PW1 on 1/11/2021 whereas the P3 Form shows PW1 was sent to hospital on 2/11/2024. On examination, PW1 was calm and there was dirt on the clothes and shoes. PW3 did not say which dirt it was.

34. The genetilia had bruises at the vulva, bruises at 6.00 O'çlock, whitish discharge and other systems were normal. Tests showed few pus cells in urinalysis, no spermatozoa, pregnancy and other tests were negative. She produced the P3 Form for PW1 as PExbt.2.

35. This court has perused the said P3 Form, the time and date of alleged offence are shown as 1/11/2021 at around 0745HRS and that PW1 was sent to the hospital on 2/11/2021 and the medical history indicates that on 1/11/2021 she was defiled by a person known to her at around 7.30PM in a forest at Kikamburi and the approximate age of the injuries was 3HRS. In addition, it shows bruises at the vulva, bruises at the perinium 6.00 O'çlock (the court does not seem to understand this), Cervix normal,

hymen old torn, labia mash. PW1 and PW2 testified that the incident took place on 1/11/2021 at 7.00PM.

36. What this court is grabbling with and cannot comprehend is how PW1's P3 Form showed the hymen to be old and torn only Three (3) Hours in the absence of evidence to show the tear was as a result of the act of the alleged defilement.

37. PW3 also testified and produced the Appellant's P3 Form-PExbt.5 and concluded that the Appellant was involved in rape because of the reddening of his shaft and discharge. PW3 did not also attempt to indicate in the P3 Forms or explain what the whitish smelly discharge from both PW1 and the Appellant was. She did not explain the reddening of the Appellant's penile shaft. This court in as much as it lacks medical knowledge, it has somehow found it hard to agree with PW3's conclusion that the reddening of the Appellant's penile shaft was proof of rape or defilement

38. On penetration, the trial court in its judgment observed that PW3 stated that PW1 was taken to the facility on 1/11/2021 and on examining her, she saw bruises on the vulva and a whitish discharge. PW2 stated in her opinion, penetration had taken place because of the bruises, discharge and epithelial cells. Further, PW3 stated that PW1's clothes were dirty. The trial court went on to state:

> " I have carefully considered the evidence of PW3 and she has corroborated PW1's evidence of penetration having taken place".

39. Based on this court's analysis above, it follows therefore that the trial court misapprehended the evidence and misdirected itself in finding that penetration had been proved based on the testimonies of PW1 and PW3 without proper scrutiny of the same thus wrongly convicted the Appellant. See the case of Bukenya -vs- Uganda [1972] E.A.549 in which it was held that:-

> " it is not the duty of the court to stage manage the case for the prosecution, nor is it the duty of the court to endeavour to make a case where there is none to an accused person. The duty of the court is to hold the scale to see that justice is done according to the law on evidence before it".

40. Consequently, it is my finding that penetration as an element for prove of defilement was not established beyond reasonable doubt and in the circumstances, it is my finding that the prosecution evidence in this regard is not watertight. I am guided by the finding of the court in Titus Karani v Republic [2021] eKLR which cited the case of PKW versus Republic [2012] eKLR, in which the Court of Appeal observed that:

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."
>
> 13) From the foregoing, it is apparent that the evidence of missing hymen is not automatic proof of penetration through a sexual act. In this case, it was upon

the prosecution to establish beyond reasonable doubt, that complainant's hymen was torn by an act of defilement by the Appellant.

14) The clinical officer's evidence was that the hymen was not freshly torn and did not give the age of the tear. His evidence during cross-examination that the tear was two days old was not supported by his own report."

the positive identification of the appellant as the perpetrator of the offence.

41. The answer as to whether the Appellant was identified as the perpetrator herein, PW1 testified that she called her mother and informed her that a boy had defiled her. She again stated that it was the Appellant who defiled her and that he was known to her as he hailed from their village. On the other hand, PW2 testified that after a while her child came and asked her to go ask the boy why he did that to her. She got alarmed and went with PW1 to the side of the road. PW1 told her it was the Appellant. That the Appellant knew her and called her "Mama M nisamehe". No evidence or explanation was led by the prosecution to establish who "M" was in the circumstances of the case. Again, the incident is said to have taken place in the coffee farm, forest and or bush but not on the side of the road where PW2 says they went without stating the exact road.

42. The record shows that after the prosecutor applied to make a copy of the Birth Certificate, PW2 continued to testify and stated that it was the Appellant who committed the offence and that the Appellant was not known to her before. Again, the evidence of PW1 and PW2 on identification of the Appellant as the perpetrator is shaky considering that whilst PW1 testified that the Appellant hailed from their village, PW2 testified that the Appellant was not known to her before. PW2 stated that PW1 told her the Appellant had been asking her to be his girl friend. PW2 did not state when PW1 told her this, whether it was before or after the incident.

43. This court is alive to the fact that on the ingredient the positive identification of the Appellant as the perpetrator of the offence or rather the involvement of the Appellant in the defilement is established by virtue of Section 124 of the *Evidence Act* which empowers a trial court in a sexual offence case to convict an accused person on the sole evidence of the victim if the court is satisfied that the victim is telling the truth. The record shows that the trial Magistrate who wrote and delivered the judgment herein did not have the benefit of observing PW1's demeanour when her evidence was taken.

44. The record further shows that the members of the public who arrested the Appellant declined to record statements and PW4 (Investigating Officer) could not compel them to do so. One would be left wondering why PW4 or the prosecution would not apply for summoning of such crucial witnesses to attend court. That there was a witness who recorded her statement but could not be traced on her phone. The Prosecutor applied to dispense with the evidence of MN who from the record was with PW2 when she alleges that PW1 came and told her about the defilement. The prosecutor also informed the trial court that they had been unable to trace PW1 for recalling as had been requested by the trial magistrate on her own motion. However, upon the trial Magistrate asking the Appellant whether the matter could proceed from where it reached without recalling PW1, the Appellant had no objection.

45. This court has also established that the incident is alleged to have taken place at around 7.00 PM in the night in a coffee farm, forest and or bush as is expressed from the record which means that the circumstances prevailing at the time were not favourable for positive identification. In addition, this court is of the view that the trial court having not had the benefit of observing the demeanour of PW1 when her evidence was recorded could not be in a position to confidently say that PW1's testimony

was believable and consistent to be relied upon. See the case George Kamau Kinyua v Republic [2006] eKLR where it was stated that:

> " Where the only evidence of identification of an accused person is that of a single witness, the court should scrutinize the evidence under two tests. See Olweno Vs. Republic (1990) KLR 509.
>
> The first test should be whether the conditions under which the single witness claims to have identified the accused person were such that there was positive identification.
>
> The second test to which the evidence of a single witness should be subjected to is whether it could be relied upon without any other evidence, to sustain a conviction.
>
> These tests should be applied, in our view, even where the single identifying witness claims to have known the accused person prior to the incident. The circumstances under which the Complainant saw the Appellant are clearly alluded to in evidence. It was at night and that is why the Complainant had to flash a torchlight before he could see the people he met inside his compound".

46. This court finds that the evidence on identification of the Appellant as the perpetrator of the defilement herein was not proved beyond reasonable doubt and the trial court's finding on the same was erroneous and has to be disturbed.

Appellant's defence

47. Although the Appellant did not make any submissions as regards his defence. I have perused through the trial court's judgment in regard to the Appellant's defence and I observe that although the court considered the defence, it did not make any finding on the same. That notwithstanding, this court's view is that the Appellant's evidence could only be taken on its face value and based thereon, fault if any could only be found based on that evidence taken as the truth. See the case of Sekitoliko vs. Uganda (1967) EA 53 where it was held that:

> " The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case."

48. The sum total of the above is that the prosecution's evidence against the Appellant was not sufficient to hold a conviction on the offence of defilement.

b)Whether the sentence was illegal;

49. Lastly on the ground of appeal that the learned trial magistrate erred in law by sentencing the Appellant by virtue of the minimum mandatory sentence provisions. The Appellant submitted that it is a non-rebuttable fact that he was sentenced by virtue of the minimum mandatory sentences as provided for in the *Sexual Offences Act* by dint of Section 8(3) of the Act. The Appellant cited the decision by Learned Lord Justice G.V. Odunga (as he was then) in Petition No. E017 of 2021 and as such, the Respondent should be privy to the fact that minimum mandatory sentences were declared unconstitutional and he never rebutted this analogy which is in tandem with the judiciary sentencing policy guidelines and Section 216 of the CPC with regard to consideration of the Appellant's case.

50. In a nutshell, its the Appellant's position that the trial court never exercised discretion during sentencing, an issue he warrants this court to fault the lower court findings as it went contrary to the tenets of a fair trial and the inherent dignity of the Appellant by dint of Article 28 of *the Constitution*

and hereby find that the sentence was harsh and manifestly excessive and thus revise it to a more lenient sentence in lieu of an acquittal.

51. Section 8 (4) of the *Sexual Offences Act* which provides that:-

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years".

52. The Respondent submitted that in the circumstances and the evidence tabled before the learned magistrate, the sentence meted on the Appellant was lawful as per the law and sufficient thus the Respondent urged this court to confirm the same and dismiss the appeal for lack of merit.

53. This court is in agreement that the 15-year sentence imposed on the Appellant was the minimum and lawful sentence at the time and had this court upheld the conviction, the sentence would have been confirmed. By virtue of the supreme court judgment in Republic v Joshua Gichuki Mwangi the courts are bound by the minimum mandatory sentences as provided for by the law.

54. In light of my earlier findings, this appeal therefore succeeds. The conviction is quashed and the sentence set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 4TH FEBRUARY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS .4TH FEBRUARY 2025

In the presence of :

Present virtually at Machakos Main prison- for Appellant

.Agatha..... for Respondent

Millygrace..... Court Assistant