



**Birgen v Republic (Criminal Appeal E041 of 2024)  
[2025] KEHC 2903 (KLR) (11 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2903 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E041 OF 2024  
AC BETT, J  
MARCH 11, 2025**

**BETWEEN**

**ROBERT KIMARU BIRGEN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence from the Judgement of Hon. V. Amboko (SRM) in Kakamega CMC.S.O. No. E088 of 2020 delivered on 21st day of March 2024)*

**JUDGMENT**

1. The Appellant Robert Kimaru Birgen was convicted of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) and sentenced to serve 15 years imprisonment.
2. The brief facts of the case were that Appellant approached the Complainant and lured her with money as a result of which they became friends. On 29<sup>th</sup> September 2020, he had sex with her. While she was at home on 2<sup>nd</sup> October 2020, he called her and sent her fare to his place. The Complainant used the money to travel to Sichirai where she found the Appellant in his house. She stayed with him for a period of one week during which time he would have sex with her. The Complainant's father was looking for her and the Appellant directed her to hide. On 15<sup>th</sup> October 2020, the Appellant handed over the Complainant to his brother who took her to a woman in Chavakali and left her there. The Complainant then called her mother and her father came to take her home. The sexual encounters with the Appellant led to conception and in June 2021, the Complainant gave birth to a baby girl.
3. The Appellant was dissatisfied with the decision of the trial Magistrate and lodged a petition of appeal in which he seeks to quash the said conviction and sentence on the following grounds:-
  1. That the learned trial Magistrate grossly erred in both law and facts by convicting me in a case where the main ingredients of defilement were not proved beyond reasonable doubt.



2. That the learned trial Magistrate grossly misdirected herself in law and facts by convicting me without considering that it has a judicial discretion to sentence me to a lesser sentence considering the circumstances of the offence.
3. That the learned trial Magistrate grossly erred in both law and facts by convicting me with insufficient medical evidence in that there was pregnancy and the DNA was necessary to help court establish the father of the said daughter before her death.
4. That the learned trial Magistrate grossly erred in both law and facts by convicting me without considering that crucial witnesses were not called to testify and there was no proper identity of the said whistleblower to assist court to establish the truth in this case, i.e. the said whistleblower who assisted the victim with the phone at Chavakali.
5. That the learned trial Magistrate grossly erred in both law and facts by failing to fully comply with Section 333 (2) of the CPC, the court failed to consider that I was in custody from 23/11/2020 to March 2021 before I was released on bond.
6. That the learned trial Magistrate grossly erred in law and facts in rejecting my defence and that of my defence witness without proper evaluation and shifting burden of proof to me.
7. That more grounds to be adduced upon receipt and perusal of the trial court proceedings and judgement.

#### **Submissions**

4. The appeal was canvassed through written submissions.

#### **Appellant's Submissions**

5. The Appellant submitted on the issue of identification and the issue of sentence. He submitted that the medical examination done on 20<sup>th</sup> November 2024 was too remote to connect the Appellant to the defilement. He submits that given that there were no independent witnesses on the defilement and the lapse of time between the alleged time of defilement and the time of reporting, there was need for higher vigilance to prevent an injustice.
6. The Appellant further stated that it was his defence that he was framed up by PW2 who is the Complainant's father. He contended that PW2 was suspecting him of having an affair with his wife as was evident from his testimony before court. The Appellant therefore submitted that since PW1 and PW2 were not credible witnesses, the conviction is not safe.
7. Additionally, the Appellant submitted that the failure by the prosecution to call crucial witnesses rendered its case weak. He relied on Section 150 of the *Criminal Procedure Code*, the case of Donald Majiwa Achilwa & 2 others v. Republic [2009] eKLR and Bukenya & others v. Uganda [1972] EA 549. The Appellant submitted that failure to call the woman who hosted the Complainant meant that her evidence was not corroborated.
8. The Appellant further submitted that due to his defence that he was framed for the offence, the prosecution was under duty to carry out DNA examination matching the Appellant and the Complainant's baby since the baby was said to have been allegedly conceived as a result of the defilement of the mother by the Appellant. The Appellant relied on the case of Emmanuel Japala v. Republic [2019] eKLR. It was the Appellant's submissions that the failure to carry out a DNA examination was the result of shoddy investigations by the Investigating Officer who failed to carry out independent investigations.



9. In regard to the sentence, the Appellant submitted that the three months that he spent in custody were not factored into account.

### **Respondent's Submissions**

10. The Respondent submitted that although the Appellant only disputed the element of identification, it is the duty of the appellate court to re-evaluate the entire evidence and make an independent finding on whether the charge was proved beyond reasonable doubt.
11. The Respondent submitted that there are various tools that the prosecution can use to prove the age of the victim. The Respondent relied on the case of *Mwalango Chichoro Mwanjembe v. Republic and Evans Wamalwa Simiyu v. Republic* [2016] eKLR and submitted that the production of the birth certificate was sufficient proof of the fact that the minor was 17 years at the time of the incident.
12. The Respondent further submitted that the fact that the minor was pregnant at the time of examination was a sufficient to prove penetration and relied on the case of *WLN v. Republic* [2021] eKLR.
13. The Respondent further submitted that the failure to conduct DNA on the child to link the Appellant to the child does not exonerate the Appellant from the offence and cited the case of *Denis Osoro Obiro v. R.* [2014] eKLR and *Changtoek & Another v. Republic* [2023] KEHC 25442 (KLR) in which the courts held that DNA testing is not the determining factor in a case of defilement.
14. It was the Respondent's submissions that the Appellant was identified by recognition as the Complainant testified that she left her home in the month of September and stayed with the Appellant until the month of November when she was abandoned by the Appellant and found by her father. The Respondent submitted that the evidence was clear and there was nothing to create doubt as to who impregnated the victim.
15. On the Appellant's ground that the prosecution had failed to call crucial witnesses and his defence not considered, the Respondent relied on the case of *Low v. Republic* [2022] eKLR. According to the Respondent, the Appellant did not demonstrate that the failure to call the witnesses occasioned him prejudice. The Respondent contended that the right to call witness is within its discretion.
16. In regard to the Appellant's defence, the Respondent contended that the alibi was an afterthought as it was raised when the matter had reached defence hearing and it was therefore unreliable. The Respondent cited the case of *Charles Anjare Mwamusi v. Republic* [2003] eKLR and *Victor Mwendwa Mulinge v. Republic* [2014] eKLR.
17. Finally, the Respondent submitted that the sentence was proper and the trial Magistrate had complied with Section 333 (2) of the *Criminal Procedure Code*.

### **Analysis and Determination**

18. This is a first appeal and it is therefore within my purview to analyze and review the evidence which was adduced before the trial court so that I arrive at my own independent conclusion. This duty was elaborated in the case of case of *Okeno -vs- Republic* [1972] EA 32 when the court stated:-

“The duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the 1st appellate court may, depending on the circumstances of the case come to the same conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered



the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision”.

19. There are several issues raised by the Appellant for consideration:-

- i. Whether the charge of defilement was proved beyond reasonable doubt.
- ii. Whether the failure by the prosecution to call certain witnesses was fatal to their case.
- iii. Whether the police carried out shoddy investigations.
- iv. Whether the trial court considered the Appellant’s defence.
- v. Whether the Sentence was proper.

20. Section 8 (1) of the *Sexual Offences Act* defines defilement as:-

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

Further, Section 8 (4) of the *Sexual Offences Act* provides as follows:-

“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.”

21. Based on the provisions of Section 8 (1) and Section 8 (4) of the *Sexual Offences Act*, the vital elements or ingredients of the offence that must be proven by the prosecution are the age of the victim, the existence of penetration, and the identity of the perpetrator.

22. The issue of age was considered in the case of *Mwalango Chichoro Mwanjembe v. Republic* (supra) when the Court of Appeal held thus:-

“...The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v R*, Cr. Appeal No.19 of 2014 and *Omar Uche v R*, Cr. App. No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda*, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable.”

In this matter, the victim testified that she was 17 years old at the time of the incident. Her birth certificate was produced in evidence. It indicated that she was born on 16<sup>th</sup> February 2003. The P3 form that was also produced indicated the victim’s estimated age at 17 years. The age of the complainant was therefore proved to the required standard.



23. As to whether there was penetration, it was the Complainant's evidence that she had sex with the Appellant on several occasions. PW4, the Clinical Officer who produced the P3 form and PRC form testified that on examination, the victim's hymen was absent and that she was pregnant and therefore she concluded that PW1 had been defiled.

24. Section 2 of the *Sexual Offences Act* defines penetration as, "The partial or complete insertion of the genital organs of a person into the genital organs of another person."

The fact that there was a conception that occurred is proof that there was penetration.

25. In the case of *WLM v. Republic* [2021] eKLR, the court held that conception is sufficient prove of penetration and stated as follows:-

"46. P3 form produced showed she was normal, no bruises, her virginity and hymen was long broken. The broken hymen and the fact that the girl conceived confirmed that her genitalia was penetrated."

26. The Appellant has faulted the prosecution for failing to conduct a DNA test on the child borne by the Complainant. The Court of Appeal in the case of *AML v. Republic* [2012] eKLR held that:-

"The fact of rape or defilement is not proved by way of DNA test but by way of evidence."

A DNA test would at most determine whether the Accused is the father of the child.

27. My view is that a DNA test would be necessary where the identification of the perpetrator is in doubt. This brings us to the other vital ingredient in the offence of defilement, which is identification.

28. According to the Complainant, she met the Appellant when she visited her father at Sichirai while on a school break. A relationship ensued from the meeting that eventually resulted in sexual intercourse that led to conception. The Complainant's relationship with the Appellant was such that he convinced her to hide from her father who lived in the same neighbourhood with him.

29. The Appellant kept the Complainant in his house for one week. He therefore was familiar to the Complainant and there was no doubt as to his identity. She knew him and referred to him as Robert during the proceedings, he called her using her mother's mobile phone and also her friend's phone.

30. Where a victim identifies her assailant by recognition, the issue of identification is settled. In *Peter Musau Mwanzia v. Republic* [2008] eKLR, the Court of Appeal held thus:-

"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."

31. Additionally, in the case of *Anjononi & others v. Republic* [1989] eKLR, the Court of Appeal held as follows:-

...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant



in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).”

32. The Appellant was not a stranger to the Complainant. They cohabited together as lovers. Her identification is sound.
33. I have also considered the other issues raised by the Appellant. During the hearing, the victim referred to a woman in Vihiga whom she said housed her after she had been taken there by the Appellant’s brother at the latter’s request. The Appellant faults the prosecution for failing to call that woman as a witness.
34. There is no prescribed number of witnesses that the prosecution must call in order to prove its case. Once it has availed sufficient witnesses to prove their case, they need not call others for that would be superfluous and would not be prudent use of resources. In the case of *Bukenya & Others v. Uganda* [1972] EA 549, the Court of Appeal of Eastern Africa stated: -

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”
35. The key words in *Bukenya Case* is, “necessary to establish the truth” and in that case the court held that an adverse inference can only be made by the court if the evidence by the prosecution is not or is barely adequate.
36. In the case of *Keter v. Republic* [2007] 1 EA 135, the court held inter alia that:-

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond reasonable doubt.”
37. In the present case, I find that the evidence was sufficient and therefore there was no need for further witnesses. In *Julius Kalewa Mutunga v. Republic* [2006] eKLR, the Court of Appeal held that:-

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
38. I find that the court could not hold any adverse inference due to the Prosecution’s failure to call the said witness nor the Complainant’s mother.
39. The Appellant has argued that there are doubts as to the identity of the perpetrator but he has not demonstrated what the doubts are. If it is the inconsistencies as to the dates, I find and hold that those inconsistencies were minor and attributable to error in witnesses’ memories. These inconsistencies were resolved by the medical evidence which tallied with the key witnesses’ testimonies.
40. In the case of *Richard Munene v. Republic* [2018] KECA 186 (KLR), the Court of Appeal held thus:-

“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.”



41. The Appellant argues that PW1 and PW2 were not credible. I have examined their evidence. PW1 was consistent and steadfast. She did not waver in her evidence. The Appellant did not challenge her claims that he approached her for a relationship. She even referred to him by his first name. Her evidence was corroborated by her father PW2's evidence which did not waver under cross-examination. Moreover, the Complainant's evidence was further corroborated by the medical evidence tendered by the prosecution. The evidence as a whole points to the guilt of the Appellant.
42. In regard to the Appellant's defence, I have analyzed the same and find it to be an afterthought. The Appellant did not lay any basis for his defence during cross-examination of the witnesses. When cross-examining PW2, he alluded to a grudge and to having given PW2 a loan. In his defence, he averred that he had disagreed with PW2 over a motorbike that he had on a loan. This averment was an afterthought as it did not feature during cross-examination nor did his averment that he did not live anywhere near PW2's house. As to the submissions that PW2 framed the Appellant because he thought the Appellant was in a relationship with his wife, PW2 had clearly stated in his evidence that the Appellant had seduced his wife and he had warned him. It was not put to him that he had framed the Appellant for that reason. It is my finding that the defence was not credible and the trial court did not err in rejecting it.
43. Having reviewed the entire evidence, I find and hold that the evidence against the Appellant was overwhelming and the conviction was safe.
44. As to whether the sentence imposed upon the Appellant was proper, the sentence was for fifteen (15) years which is the minimum sentence prescribed for the offence. The trial court stated that the sentence should run from 21<sup>st</sup> March 2024 when the Appellant was placed in remand pending sentence. On perusal of the record, I find that the Appellant was arrested on 20<sup>th</sup> November 2020. He was released on bond on 14<sup>th</sup> January 2021. He therefore spent almost two months in custody pending trial. Those days should be credited to his sentence.

### **Determination**

45. In the end, I find that the appeal against conviction lacks merit and it is therefore dismissed. On the issue of sentence, I order that the period spent in remand between 20<sup>th</sup> November 2020 and 14<sup>th</sup> January 2021 be also taken into account in computing the sentence in compliance with Section 333 (2) of the [Criminal Procedure Code](#).

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11<sup>TH</sup> DAY OF MARCH 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Mr. Biwott for the Appellant

Ms. Chala for the Respondent/Prosecution

Court Assistant: Polycap

