Dismas Mochama Kenyanya v Republic (Criminal Appeal E284 of 2023)
[2025] KEHC 2782 (KLR) (Crim) (12 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2782 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E284 OF 2023

CJ KENDAGOR, J

MARCH 12, 2025

BETWEEN

DISMAS MOCHAMA KENYANYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. L.K Gatheru in Makadara Sexual Offences Case No. 109 of 2019 delivered on 29th August, 2023)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the offence are that on diverse dates between 24th February, 2019 and 10th April, 2019 at Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of EK, a child aged 13 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars being that on diverse dates between 24th February, 2019 and 10th April, 2019 at Nairobi County, the Appellant unlawfully touched the vagina of EK, a child aged 13 years.

3. The Appellant was found guilty of the main count after trial. He was sentenced to fifteen (15) years' imprisonment and, collectively noting that he had been in custody for about a month, he was sentenced to serve 14 years and 11 months imprisonment.

4. The Appellant, aggrieved by the conviction and sentence, preferred the present appeal. He argued that the learned trial magistrate erred in both law and fact by basing the conviction on a flawed charge sheet that did not clearly specify the dates when the offences occurred, pointing out that while the offences

were alleged to have taken place on 10th April 2019, the initial report was filed on 24th April, 2019. He faulted the learned trial magistrate for failing to consider the testimony of PW2 that other factors could break the hymen and not just sexual activity, that no swabs were taken that would have linked the Appellant with the alleged offence. Further, he argues that the trial Court considered uncorroborated hearsay evidence of PW3, which contradicted the testimony of PW2. Further, that the sentence was harsh, excessive and discriminatory.

5. The Court directed that the parties file written submissions at the appeal hearing. The Appellant filed submissions and also highlighted them before the Court. He asserted that the prosecution had not proved the case beyond reasonable doubt and that the trial Court convicted him based on suspicion.

6. The Appellant contends that PW1's testimony was procured by coercion by PW3 and doctors, and thus, the complainant did not voluntarily link him to the incidents. He maintained that PW2, a doctor at Nairobi Women's hospital, stated that this was a case of late presentation and stated that the child had already changed clothes and no swabs were taken. He went on to state that PWI's hymen was indeed broken, but he clarified that a hymen can be ruptured by various factors, not solely sexual activity.

7. It was his argument that the prosecution failed to call crucial witnesses such as Norah, Nickie, Mama Nickie and Virginia to support the prosecution's case, who allegedly were witnesses to the incident. The Appellant invited the Court to make a finding that, considering the totality of the evidence and the specific circumstances of this case, there was insufficient evidence presented to prove the case against the Appellant. He relied on the authorities in Mary Wanjiku Gichira v Republic, Criminal Appeal No 17 of 1998, BUkenya & Others Vs Uganda (1972) EA 549, Arthur Mshila Manga (2016) eKLR.

8. On the other hand, the Respondent made oral submissions that the elements of the offence of defilement had been proved and urged the Court to uphold the conviction and sentence. The Respondent invited the Court to examine the evidence presented and asserted that the Court had rightly convicted the Appellant after determining that the complainant was a truthful and credible witness.

9. I have considered the appeal before me and the submissions by both parties. The duty of this Court while exercising its appellate jurisdiction was set out in the case of Mark Oiruri Mose v R (2013) eKLR thus: -

> " This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it, and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

10. The prosecution called four witnesses to support their case, and the Appellant testified in his defence.

11. PW1 was the Complainant; The Complainant was a child of tender years who gave sworn evidence. The record shows that the trial Court conducted a voire dire examination and recorded it in terms. I am satisfied that the trial Court employed the correct procedure in ascertaining the Complainant's competence to give evidence. She told the trial Court that she was 14 years old and was born on 1st July, 2015.

12. Her evidence was that on 24th February, 2019 she had gone to visit her friend Norah, who asked that they visit her neighbour's house, which was next to their own. She stated that when they entered, they found the Appellant, who was introduced by Norah, seated on the couch. She testified that the Appellant and Norah conversed in Kisii language and Norah left the house and stated that she would be coming back. At that point, the Appellant locked the door and told her that he would not open

the door unless she undressed. She obliged and the Appellant lay on her on the bed and inserted his penis into her vagina. She stated that whereas she resisted, she couldn't scream as theAappellant turned the volume of the radio to be louder. She stated that on 10th April, 2019 Norah pulled her into the Appellant's house and left her inside and she described similar events and that the Appellant inserted his penis into her vagina.

13. The Complainant stated that she did not report the incident to her mother for fear of being reprimanded and narrated that her mother took her to the police and subsequently to the hospital after she was not in the house on several occasions that the mother had looked for her.

14. During cross-examination, she acknowledged that one Aboo, the Appellant, Norah, Nickie, and she would be at the Appellant's house, where they used to meet as a group. She denied communicating with the Appellant by phone and stated that the messages sent to the appellant were from her cousin Virginia, with whom she had once visited Norah. She further stated that her two cousins sent the other messages to the Appellant.

15. PW2 was a medical officer at N.W Hospital. He told the Court that the Complainant was examined on 24th April, 2019 with a history of repeated penal-vaginal penetration. No injuries were noted and a conclusion of late presentation of penal-vaginal penetration was made.

16. PW3 was the Complainant's mother. She testified that she was alarmed after seeing a message on 24th February 2019, on the phone used by her daughter (PW1). The message was from a number saved under the Appellant's name, warning the Complainant against going to his house, as it would lead to undesirable consequences, and another message advising her not to concern herself with the stupidity of Mama Nicky, as he would show her how to deal with it. According to PW3, the Complainant did not respond comprehensively to the messages. The following day, when she vanished from the house after being sent to buy washing powder, she resolved to seek out Mama Nickie, mentioned in the text message. She obtained this identity from Virginia, a friend of her daughter.

17. She mentioned that she went to her house and found it was someone she had known for a while; Mama Nickie then informed her that she had meant to contact her to let her know that the Complainant had been visiting the Appellant's house, which Mama Nickie showed her.

18. PW3 subsequently interrogated the Complainant, and after the Complainant declined to disclose how she knew the Appellant, she accompanied her to the police station, where she filed a report that resulted in the Appellant's subsequent arrest.

19. The investigating officer testified as PW4 and stated that PW3 took the Complainant to the police station and requested a notice to be issued, accusing the Complainant of exhibiting unusual behaviour. She mentioned that she asked what the contents of the Occurrence Book should include and referred to the messages on the phone used by the Complainant. She stated that she advised PW3 to take the Complainant for a medical examination due to suspicions that she might have been sexually abused by the Appellant. According to the investigating officer, the Complainant had disappeared from home on 23rd April after being sent to the shops. The Appellant's arrest was in the presence of Mama Nickie and the Complainant's mother. The Appellant's arrest occurred in the presence of Mama Nickie and the Complainant's mother. Contrary to the Complainant's statement that the Appellant's house is in a flat, she told the Court that the house is situated on a plot and not within a flat setup.

20. The Appellant, in his defence, denied knowing the appellant. He challenged the prosecution's evidence presented against him. He insisted that the witness who led to his arrest, Mama Nickie, should have been called to testify alongside the others mentioned - Norah and Virginia. The Appellant submitted

the statements recorded by the Complainant and her mother for the Court's consideration, as well as the investigation diary.

21. I have considered and analyzed the evidence tendered in the trial Court by the prosecution and the Appellant, the grounds of appeal, and the written submissions by the parties herein. The issues for determination are two pronged;

    I. Whether the prosecution proved their case to the required

    II. Whether the sentence was appropriate.

22. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of George Opondo Olunga v Republic [2016] eKLR that the ingredients of an offence of defilement are:

    i. Age of the victim

    ii. Penetration

    iii. Positive identification of the perpetrator

23. The age of the minor was established by PW3 producing a copy of the minor's birth certificate (pexh-3), which settled that the complainant was born on 1st July, 2005, and therefore, as at the time of the incident, she was 13 years old.

24. The other issues are whether the prosecution has established proof of penetration of the complainant and the identity of the perpetrator, beyond reasonable doubt.

25. Penetration is established through the evidence provided by the victim, which may be supported by medical or other corroborative evidence. Nevertheless, this Court requires proof of facts that the offence was committed.

26. I am convinced that despite the Appellant's assertion that he did not know the Complainant, there exists compelling circumstantial evidence that connects the two individuals. One significant piece of evidence is the series of phone communications that transpired between the Appellant and the Complainant, which ultimately prompted the Complainant's mother to take the step of escalating the matter. This communication, which was also noted by the court during the hearing and led to Protection and Care proceedings regarding the minor, showed an ongoing interaction. Furthermore, the testimonies provided by witnesses PW3 and PW4 offered accounts of the events leading up to the Appellant's implication in the case and subsequent arrest.

27. The medical officer highlighted that the case was marked by a delay in the Complainant's presentation to the hospital.

28. The Complainant's mother did not clearly state that the Complainant had failed to return home on the date she was reported to have been sent to buy washing powder. The investigating officer provided this clarification, mentioning that the Complainant's mother brought her to the station, claiming that she had exhibited bad behavior.

29. The Complainant was escorted by her mother and taken into custody, an experience that was likely intimidating for her. It is important to approach her testimony with caution, especially concerning the details of the sexual activity and the identification of the perpetrator.

30. The evidence referenced additional witnesses, including Mama Nickie who allegedly indicated the Appellant's residence and informed PW3 that the Complainant had visited his house. There was also mention of Norah, who purportedly lured the Complainant into the Appellant's house and left her there. Furthermore, the Complainant testified about other individuals who were her friends and with whom they would meet as a group. And finally, the cousins whom the Complainant asserted were the ones sending the messages to the Appellant.

31. The provisions of Section 124 of the *Evidence Act* are informative that a conviction can rest squarely on the sole testimony of the victim. See Daniel Maina Wambugu v Republic [2018] KEHC 5656 (KLR). The Courts have, however, noted that this Section should be applied only when the Complainant's testimony is exceptionally clear and beyond doubt. This Section cannot be employed to save a weak prosecution case.

32. There are significant loopholes in this case that raise considerable doubt about the credibility of the Complainant's testimony. For instance, no tangible evidence supports her claim that she was forced to go to the Appellant's house. Furthermore, her testimony indicates that she was at Norah's house rather than the Appellant's on the date that PW3 stated she had gone missing from home.

33. Furthermore, the cross-examination called into question the likelihood that the Complainant had interacted with other males during the stated meet-ups, which were said to occur twice or three times a week, as well as the possibility of any sexual relations with another. Was the Appellant an easy target? Moreover, why didn't the prosecution call Norah as a witness? Her testimony would have been crucial to the case.

34. The police may well have proposed the necessary intervention for medical examination, but a charge cannot be advanced merely through insinuation regarding whether a fact has occurred or not. The primary issue is the evidence or complaint put forth by the Complainant that an offence took place and that the culprit is known. It cannot be that a case is constructed the other way around.

35. Furthermore, the report to the police was filed on 24th April, 2019 while the Complainant stated that the last sexual activity occurred on 10th April, 2019. This gap, when examined in light of the circumstances of the case mentioned in the previous paragraphs, raises several questions and invites speculation regarding the prosecution's case and the Appellant's guilt.

36. The standard of proof requires that all elements of the offence be established beyond a reasonable doubt. This high threshold means the evidence presented must be compelling enough to leave no room for reasonable uncertainty regarding the accused person's guilt.

37. The trial Court failed to examine the case as a whole and the conviction was not safe. The prosecution failed to prove its case beyond reasonable doubt. The benefit of the doubt is afforded to the Appellant.

38. Accordingly, the appeal succeeds and the conviction is quashed and the sentence is set aside. The Appellant shall be released unless he is otherwise lawfully held.

39. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 12TH DAY OF MARCH, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Kimuthia for Appellant

Mr. Omondi ODPP for Respondent