



REPUBLIC OF KENYA



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**Milugo v Republic (Criminal Appeal E035 of 2024)
[2025] KEHC 2906 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E035 OF 2024
DK KEMEL, J
MARCH 14, 2025**

BETWEEN

WILLIAM OKONG'O MILUGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. Eric Malesi (P.M) in Madiany Principal Magistrate's Court Sexual Offence Case No. E015 of 2023 delivered on 20th November 2023)

JUDGMENT

1. The Appellant herein William Okongo Milugo was charged with an offense of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offense were that on the 28th May 2023 at around 20.00hrs at [particulars withheld] center, [particulars withheld] sub-location, East Uyoma location, Rarieda Sub-County within Siaya County, intentionally caused his penis to penetrate the vagina of M.A. a child aged 14 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offense [Act No. 3 of 2006](#). The particulars of the offence were that on the 28th May 2023 at around 20.00hrs at [particulars withheld] center, [particulars withheld] Sub-Location, East Uyoma location, Rarieda Sub-County within Siaya County, intentionally touched the vagina of M.A. a child aged 14 years with his penis.
3. After a full trial, the Appellant was convicted and sentenced to 20 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant lodged the present appeal wherein he raised the following grounds of appeal:
 - i. That the trial magistrate erred in law and in fact in not considering the contradictions, inconsistencies, and discrepancies and thus not safe to warrant a conviction.



- ii. That the trial magistrate erred in law and in fact in not finding out that the medical report tendered was not water tight and therefore unsafe to warrant a conviction.
 - iii. The trial magistrate erred in law and fact by failing to consider that the sentence imposed was not mandatory in nature and that the same had been declared unconstitutional.
 - iv. The trial magistrate erred in law and fact in failing to consider that the offender was a first offender and therefore ought to have benefited from the least prescribed form of punishment.
 - v. That the trial magistrate erred in law and fact in failing to consider the mitigation of the Appellant.
5. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court to arrive at its independent finding and conclusion. (See *Okeno vs. Republic* [1974] EA 32) In doing so, 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 and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
6. The prosecution called seven witnesses in support of its case.
7. PW1 M.A (name withheld) gave a sworn statement and stated that she is a grade six pupil at [particulars withheld] Primary School and 14 years old. She stated that she knew the Appellant as William and that he owned a barber shop at [particulars withheld] Center. That on 28/5/2023 at about 4.00pm she went to the Appellant's barbershop to be shaved. That the que was very long and that she was shaved around 8.00pm. That she then went with the Appellant to his home which was not far from the Barber shop. That at the Appellant's house, they had sex and that the appellant did not force her. She stated further that the appellant instructed her not to tell anyone about what had happened. That when she was getting out of the Appellant's house she met her classmate GA. That she reached her home at about 10.00pm. The following day in school, she didn't tell anyone but Madam Catherine called and asked her about what had happened. That she informed her that she had been raped and or defiled. That the teacher then called her uncle and then together they went to the chief who directed them to go to Madiany Hospital. She identified her birth certificate which was marked as PMFI1, treatment notes marked as PMFI 2, P3 form marked as PMFI-3, and PRC form marked PMFI-4, and Lab request marked as PMFI 5. That she then reported to the police.

On cross-examination, she stated that GA had also been at the barber shop from 8.00pm until about 9.00pm. That she had never had sexual intercourse except with the Appellant. That the act happened on the bed and that she felt pain but did not bleed. That it was GA who informed the teacher.

On re-examination, she stated that she left the barbershop with the Appellant. That she saw GA when she was leaving the Appellant's house. That GA stays in the same plot as the Appellant.

8. PW2 GA gave an unsworn statement. She stated that she was a grade six pupil at [particulars withheld] primary school and that PW1 is her classmate while she lives in the same rental plot with the Appellant. That on that day at about 6.00pm she was sent to the appellant to collect money. That the appellant was busy shaving and that PW1 was also there. That the Appellant instructed her to return later. She returned later at 8.00pm at the appellant's barbershop and found the appellant still shaving while PW1 was also there. That the Appellant gave her the money and she left. Later that night, she saw PW1 entering the Appellants house. The following day, she informed her friend Vero about it.

On cross examination, she stated that the money was for mandazi the Appellant had bought. That she later saw PW1 knocking the appellants door and that the appellant opened the door then he left. That she had never seen PW1 entering the appellant's house before.



9. PW3 CM stated that she is a resident of [particulars withheld] and a teacher at [particulars withheld] primary school. That she knows PW1 and PW2 as they are grade six pupil at [particulars withheld] primary school. That on 29/5/2023 she was in school when Vero, a grade six pupil reported to her that there is a barber who had done bad manners to PW1. That she reported the information to the headteacher.

On cross examination, she stated that she had received the information from Vero who had received it from Pw2. That she did not talk to PW1. That she did not know the Appellant.

10. PW4 HO stated that he stays with the complainant and her grandmother and that the complainant's parents had died. That he was pw1's uncle. That on 29/05/2023 he was called to PW1's school and that he met with the assistant chief who directed him to take PW1 to hospital. That PW1 went home late on 28/5/2023 at 10.00pm but he never asked her where she had been.

On cross examination, he stated that he knew the Appellant as a barber at [particulars withheld] center and that he was the only barber in the vicinity. That after being summoned to PW1's school by the headteacher, he took Pw1 to Madiany hospital. That the appellant had been charged with defilement.

11. PW5 Linus Onyango the Assistant chief stated that he received information on 29/5/2023 at 11.00am from the head teacher of [particulars withheld] Primary on a defilement case against one of the pupils. That at noon, PW4 went to him and reported that PW1 had been defiled and that he advised them to go to the hospital and later report to the police. That he later summoned the Appellant, arrested him and handed him over to the police.

On cross examination, he said that he first learnt of the incident from PW1's head teacher. That he's the one who arrested the Appellant at his barbershop.

12. PW6 Joyce Obiero stated that she is a clinical officer at Madiany hospital and the one who attended to PW1. She had a P3 form for PW1, lab request, PRC. That on 29/5//2023 at 3.00pm a 14 years old girl was presented to her with a history of having been defiled by a person known to her the previous day. She had a pink under pant with brown stains. That she sent for lab tests. From the tests, pregnancy was negative, VDRL negative, HVS-epithelial cells seen, urinalysis- leucocytes seen, HIV –negative. She filled the P3 form on 30/5/2023. The documents were produced as follows: Treatment notes- exhibit 2, P3 form - P exhibit 3, PRC form exhibit 4, lab request form exhibit 5.

On cross examination, she stated she had eight years' experience. That she did not receive any exhibits. That the pus cells and epithelial cells were indicative of an infection. That the hymen was not intact. There was history of condom use as there were no tears. That condom use prevented tears. That it would be ideal for the appellant to be presented before her for examination.

13. PW7 No. 257258 PC Martin Sirengo from Madiany police post stated that he is the investigation officer in the matter. That he received the report on the alleged defilement on 29/5/2023 at about 5.30 pm when a 14 year old girl and her uncle went to make the report. That he issued the P3 form which was later returned duly filled. That he visited the scene of crime and confirmed that the appellant operated a barber shop and lived at a rental house at [particulars withheld] center. That on 30/05/2023 the assistant chief informed him that the Appellant had been arrested and escorted to Aram police station. That the complainant was born on 07/12/2008, making her 14 years old.

On cross examination, he reiterated the above adding that the offence was committed in the Appellant's rental house and that the victim indicated that a condom was used. That no samples were collected at the scene.



14. The trial court later ruled that a prima facie case had been established against the Appellant who was subsequently put on his defence. The Appellant opted to tender sworn evidence and called one witness.

15. DW1 William Okongo stated that he is a farmer and a resident of Gem, Akala. That he did not know PW1 and PW2. That on 28/05/2023 he was in Gem, Akala and was arrested on 30/05/2023 by the area assistant chief when he was sent to buy millet. He was never taken for medical examination and that the police never went to his home.

On cross-examination, he stated that he is a farmer and does not operate a barber shop. That he was in Akala, Gem when the incident is said to have happened.

On re-examination, he denied having a barbershop, reiterating that he stays at Akala at their home. He was not a prosecution witness.

16. DW 2 Ezekiel John Ombogo stated that he stays in Gem, Akala with the Appellant. That he had sent the Appellant to [particulars withheld] when he called him claiming that he had been arrested for an alleged defilement case that had occurred on 28/5/2023. That on 28/5/2023, the Appellant was home working on the farm which he finished at 11.00 AM, later went grazing cattle then they went watching TV together.

On cross-examination, he stated that the Appellant has never stayed in [particulars withheld] and has never owned a barbershop. That he had sent him to purchase millet.

17. The appeal was canvassed by way of written submissions. The appellant's submissions expounded on his grounds of appeal. He relied on a myriad of authorities including but not limited to Arthur Mshila's case, Absolom Ambaka Okila vs Republic (2020) eKLR and Sawe vs. Republic (2003) eKLR. In conclusion, he submitted that the appeal be allowed, conviction quashed, sentence set aside and that he be set at liberty.

18. The Respondent submitted on the ingredients of the offence of defilement being age, penetration and identity of the perpetrator. As regards the issue of age, it was submitted that exhibit 1 proved that the minor was 14 years old and thus a child within the meaning of section 2 of the *Children Act* as she was below the age of 18 years. On penetration, it was submitted that PW6 stated that the hymen was absent thus penetration was proved. Further, it was the evidence of the complainant that she and the Appellant had engaged in sex. On identity, it was submitted that PW1 and PW2 knew the Appellant well as he lived in the vicinity and the only barber around.

Based on the foregoing, it was submitted that the appeal lacked merit and that the same must be dismissed.

19. Having considered the proceedings, rival submissions and authorities by both parties, I find that the issue for determination is whether the offence of defilement was proved beyond reasonable doubt against the Appellant.

20. The elements that must be proved in a defilement case are, age of the complainant/victim, penetration and the identity of the perpetrator.

21. As regards the element of age, PW7 produced the birth certificate of the minor as exhibit 1. The same showed that the minor was born on 07/12/2008 thus, she was about 14 years old at the time of the offence. In the case of Omuroni versus Uganda Criminal appeal no. 2 of 2000, the court held that a birth certificate was a prima facie proof of age; and it was sufficient as proof of age. (See also Mwalango Chichoro vs. Republic MSA C. Appeal no. 24 of 2015). That being the position, the complainant was a child within the definition of section 2 of the *Children Act* and a minor as she was below the age of



18 years and thus she had no capacity to consent to the sexual intercourse. I find that this ingredient was proved beyond reasonable doubt by the Respondent.

22. As regards the element of penetration, the minor/complainant (PW1) testified in her examination in chief that at the Appellant's house they had sex, that the appellant did not force her. On cross-examination, PW1 stated that she had never had sexual intercourse except with the accused. That the act happened on the bed, she felt pain but did not bleed.

On the aspect of penetration, the appellant submitted that the same was not proved. In response to that, I am guided by the case of *Kassim Ali vs Republic* [2006] eKLR where the Court of Appeal observed as follows:

“So the absence of medical examination to support the fact of rape or defilement is not decisive as the fact of rape or defilement can be proved by oral evidence of a victim of rape or circumstantial evidence.”

23. It was PW1's evidence in chief that she had sexual intercourse with the Appellant. That PW2 saw her getting out of the Appellant's house that night and that the Appellant asked Pw1 not to tell anyone about it. PW6 likewise stated that there was a history of condom use which means that the victim had disclosed that they had used a condom during the sexual intercourse. The evidence of the clinical officer confirmed that indeed penetrative sex had occurred.

24. Further, Section 124 of the *Evidence Act* provides thus:

“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.”

25. The effect of the proviso to Section 124 was considered by the Court of Appeal in the case of *Robert Kabwere Kiti v Republic* [2012] eKLR, where the Court observed as follows:

“Turning to corroboration as a requirement for the minor's evidence as complained by the appellant, in the *Mohamed versus Republic* case (2005 2 KLR 138) the Court of Appeal made the following observations:

‘By legal notice No.5 of 2005 which introduced the proviso to Section 124 of the *Evidence Act*, Parliament drastically qualified Section 124 of the *Evidence Act* to enable a court in a sexual offence case to convict on the sole evidence of a child of tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be hamstrung by requirements of corroboration where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful’.”

From the foregoing, it is clear that the ingredient of penetration was duly proved beyond reasonable doubt by the Respondent.

26. As regards the element of identity of the perpetrator, it is evident from the record that the Appellant owned a barber shop at [particulars withheld] trading centre. This is evident from the evidence of PW1 and PW2. PW5, the assistant chief likewise testified that he arrested the Appellant at his barbershop



on 30/5/2023. In defence, the Appellant pleaded an alibi defence claiming that he was not around and does not even own a barbershop. However, upon confirming that he was arrested by the assistant chief, he does not rebut the fact that he was arrested in his barber shop. Indeed, the Appellant confirms in his evidence that he had been sent by DW2 to go and buy millet at the trading centre. DW2 also confirmed having sent him there to buy millet. This thus casts doubt on his alibi defence and places him at the scene of crime. The complainant was forthright that it was the Appellant who defiled her on the material date. PW2 also stated that she saw the complainant and the Appellant entering the Appellant's rented house and later saw the complainant emerging from the Appellant's house. There was no evidence to the effect that a grudge existed between the Appellant and the complainant or her family to suggest a frame up. It is thus clear that the Appellant ran a barber shop in the area and that he was arrested by the chief while at that barber shop. I find that the Appellant was positively identified as the perpetrator of the crime and was placed squarely at the scene of crime. I find this ingredient was proved beyond any reasonable doubt.

27. As regards sentence, the Appellant claimed that the same was unconstitutional. In addressing this, I am guided by the landmark case by the Supreme Court in Republic vs. Mwangi Gichuki Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus Curie) (PetionE018of 2023) 2024 KESC34 (KLR) (12 July 2024) (Judgment) where the Supreme court stated that all minimum mandatory sentences under the Sexual Offences Act No. 3 of 2006 are lawful unless otherwise amended.
28. Under section 8(3) of the Sexual Offences Act No. 3 of 2006 the punishment provided for is a sentence of twenty years' imprisonment. The Appellant was ordered to serve twenty years imprisonment. I find that the sentence is neither harsh nor unlawful. It is noted that the Appellant posted bail soon after taking the plea and thus did not remain in custody during the trial. It is instructive that the Appellant took advantage of the complainant and defiled her. The complainant whose parents are all deceased has been psychologically scarred and traumatized. The Appellant had used his barber shop to lure young girls into sex. I find the twenty years' imprisonment is commensurate with the moral blameworthiness of the Appellant
29. In the result, it is my finding that the Appellant's appeal is bereft of merit. The same is dismissed.

DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of :

William Okong'o Milugo.....Appellant

Mocha.....for Respondent

Ogendo.....Court Assistant

