



**Ndulu alias Kelvin v Republic (Criminal Appeal E091 of 2022)
[2025] KEHC 9395 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 9395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E091 OF 2022
TM MATHEKA, J
MARCH 7, 2025**

BETWEEN

PATRICK KYALO NDULU ALIAS KELVIN APPELLANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. The appellant Peter Kyalo Ndulu alias Kelvin was charged in Makueni MCRC (S.O) 010 of 2020 with defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on the 17th day of February 2022 at about 1500 hours at [particulars withheld] village Mbukoni sub-location Makinya location in Mbooni – East sub-county within Makueni county intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of A.M.N a girl aged 10 years.
2. In the alternative he was charged with Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 17th day of February 2022 at about 1500hrs at [particulars withheld] village Mbukoni sub-location Makinya location in Mbooni East sub county within Makueni county intentionally and unlawfully did an indecent act by touching a private part (vagina) of A.M.N a girl aged 10 years.
3. He denied the charge.
4. After a full trial where the prosecution called 6 witnesses: PW1 M. The complainant; PW2 DN from World Vision NGO; PW3 NP complainant’s grandmother; PW4 No. 234376 PC Jane Mutie; PW5 Jackson Kathenge the Clinical Officer; PW6 FM – the complainant’s teacher.
5. The appellant was put on his defence, where he denied the offence through a sworn statement and did not call any witness.



6. The appellant was sentenced to 25 years' imprisonment.
7. Against his conviction and sentence the appellant brought this appeal on the following grounds: -
 1. That the learned trial magistrate erred in both law and fact when he convicted and sentenced the appellant without observing that the charge sheet before court were defective for both being at great variance with the evidence on record.
 2. That the learned trial magistrate erred in both law and facts by convicting him without considering that there was no evidence to prove the offence of defilement to the required standard in law of both reasonable doubt.
 3. That the learned magistrate erred in both law and fact by shifting the burden of prove to the appellant and misapprehending and misdirecting himself on the evidence hence arrived at the wrong conclusion.
 4. That the learned trial magistrate erred in both law and facts when she dismissed the defence case which contained the possibility of being framed up without giving cogent reasons.
8. The case for the prosecution was that the complainant was in grade 3, and aged 10 years at the material time. That on 17/2/2022, when she left school around 3-4 pm somewhere along the way she broke up from the group of children and took a short cut home, this short cut passed near the accused's gate. The accused grabbed her, stuffed papers in her mouth, lay her on the floor of his kitchen floor. He removed her clothes, removed his and she said in Kikamba – “aginda”, with his “musilu” – these interpreted that he inserted his urinating thing into her vagina after which he dressed her up, told her to go home and not to tell anyone. He had previously defiled her when she was in grade 2.
9. She did not tell anyone but when she went to school the following day the teacher noticed that she was unusually quiet and on inquiry she told her teacher PW6 what had happened. She also told her mother, she told her grandmother. The matter was reported to the police – she was taken for treatment, the P3 and PRC were completed.
10. The Clinical Officer PW5 confirmed that upon examination there was evidence of penetration. Treatment cards, P3, PRC were produced. The treatment card for Makueni County Government hospital showed that she was taken to hospital on 25/2/2022. The P3 was filled on 28/2/2022. Evidently there was no bleeding – hymen was broken (not freshly) and there were no bruises.
11. PW4 No. 234367 PC Jane Mutie from Kalawa police station was the Investigating Officer. She testified that the report was made on 25/2/2022. She confirmed that according to her investigation the appellant had defiled the child. She took a statement from the child who told her how she took the shortcut to go home. She told the court that when the child first saw the accused – she ran away because he had defiled her before but he followed her, pulled her to his house and defiled her. She told the court that accused had said his name was Kelvin Kyalo – but investigations revealed that his name was Peter Kyalo. She said the child was born on 6/11/2011 as per the certificate of birth. The police officer told the court that the child told her that appellant's name was Kevin Kyalo.
12. In his defence– the accused made a sworn statement and he denied committing the offence. He said his name was Peter Kyalo, and he was not the alleged Kevin Kyalo who had committed the offence. He testified that the case was fabricated against him by his enemies because they knew that he had a pending murder case in Machakos high court and was acquitted. He said that the villagers did not like the fact that he had been acquitted – that he had been ordered to be reporting to the chief and when he did, the chief summoned the assistant chief - and he was arrested on 14/3/2022 and taken to the station where he was told that he had defiled the child.



13. On cross examination he told the court that he knew the complainant as the daughter of his neighbour. He confirmed that he did not have issues with the family of the complainant, but that the minor was coached to identify him. He denied that he was Kevin Kyalo.
14. I have read the submissions by the appellant and by the State.
15. The appellant submits that the charge sheet as drawn is defective because the particulars are not supported by any evidence – that there is no evidence that he tried/attempted to insert his penis into the vagina of the complainant or even touch the complainant’s vagina. He submits further even the spelling of vagina was confusing as it reads vigina and virgina – and that this was confusing to him.
16. In its submissions the State relied on the evidence on record where the complainant described clearly what the appellant had done to her.
17. From the evidence, it was submitted that it is clear that there was no doubt what the complainant was a 10-year-old whose testimony was that the appellant penetrated her vagina. The Clinical Officer who examined her confirmed that there was evidence of penetration but more importantly the description of by child left no doubt that there was penile penetration of her vagina. It was submitted that the appellant’s argument that there was no evidence of penetration or touching of the child’s vagina was untenable.
18. The appellant submitted that there was variance of evidence – sufficient to warrant the setting aside of the conviction. That though the charge speaks about events of 17/2/2022, PW2 spoke about 21/2/2022 as the day she was called to the school on account of the defilement of the minor and when she asked the grandmother about the defilement she said she did not know.
19. The State’s submissions analysed the evidence and pointed out:
In *Ali Mohamed Ibrahim v Republic*, the court was called to determine similar issues and the court held as follows:
“... The appellant has indeed in this case picked out sentences and considered them in isolation in attempt to prove inconsistencies. There is otherwise no inconsistencies or discrepancies in the prosecution’s evidence. The prosecution’s evidence was clear and consistent.”
20. In *Erick Onyango Ondeng’ v Republic* [2014] e KLR the court pronounced itself on the need to establish significant inconsistencies in the evidence of witnesses for the court to reject such evidence. The court citing *Twehangane Alfred v Uganda*, Criminal Appeal No. 139 of 2001, [2003] UGCA a Ugandan case held that:
“... With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case ...”



21. The state also relied on Section 124 of the *Evidence Act*, submitting that no corroboration is necessary in criminal cases involving a sexual offence. Reliance was placed on *Joseph Mwangi v Republic* [2015] e KLR where the court faced with a similar question held:

“ ... The medical evidence by PW1 merely corroborated the fact that PW2 was defiled, and even if it was to be excluded under section 50 of the *Evidence Act* on account that there was no proof that PW1 was acquainted with the handwriting on the notes, the proviso to section 124 of the *Evidence Act* provides that no corroboration is required in cases where the court believes that the complainant is telling the truth ...”
22. The state also relied on *GOA v Republic* [2018] e KLR where it was held that the court a court of law can convict solely on the evidence of the victim stating:

“ .. Section 124 of the *Evidence Act* comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. In fact, a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth.”
23. From the evidence on record – the offence was committed on 17/2/2022 which was a Thursday. The child told her teacher about it on 18/2/2022 and she was told to come with her parent to school. The parent would have shown up on Monday 21/2/2022 and when the parent did not show up the teacher PW6 sent for the said mother PW4 on 21/2/2022 and she immediately went to the child’s home – she did not find the child and left a message for the child to go to her home – the child did. The child told her she had been defiled by the accused person. She and the child went back to the child’s home. When PW4 asked the grandmother about the defilement, she did not know –
24. The child told her she was defiled by Kyalo.
25. From the foregoing one can see that there is no inconsistency – the facts and dates flow and the events follow one after the other. The child did not tell the grandmother, she told her teacher about the defilement – the day after it happened. And it is clear why there was a delay in reporting the matter, and taking the necessary action. The most important thing is that the child reported the defilement the day after it happened and it is that report that triggered the events that followed. his argument is also untenable.
26. The appellant argues that the police officer lied that the matter was reported to police on 25/2/2022 yet it is evident from the charge sheet that it was reported vide OB13/14/03/2022; and that the Investigating Officer did not explain why the appellant was not arrested in good time as the charge sheet shows he was arrested on 14/3/2022 and brought to court on 15/3/2022.
27. This argument is ingenious. The report was made at Kalawa police station vide OBXXXX/2022 this is evident from the P3 – that referred the complainant to hospital. P3 was filled on 28/2/2022. The OB 13/14/3/2022 is clearly about the appellant’s arrest, which he himself concedes. Hence I find no contradictions here.
28. I found nothing in the evidence on record by in the appellant’s defence to confirm his contention that this case was part of what he describes as “a Cartel of people being organized to victimize him”. There is no evidence of any grudge between him and the family of complainant or the social worker, or the police or the complainant’s teacher.



29. The appellant argues there was no corroboration of the complainant's evidence and proceeds to cite Benjamin Mugo Mwangi and Another v Republic [1984] e KLR, Bernard Kekiba v R [2000] e KLR Chila v R (1967) EA 722 and 723 – and other numerous authorities on the requirement for corroboration in sexual offence cases.
30. On this issue of corroboration, the State submits that Section 124 of the *Evidence Act*, no corroboration is necessary in criminal cases involving a sexual offence. The state relies on Joseph Mwangi v Republic [2015] e KLR where the court held:
- “... The medical evidence by PW1 merely corroborated the fact that PW2 was defiled, and even if it was to be excluded under section 50 of the *Evidence Act* on account that there was no proof that PW1 was acquainted with the handwriting on the notes, the proviso to section 124 of the *Evidence Act* provides that no corroboration is required in cases where the court believes that the complainant is telling the truth ...”
31. Also on GOA v Republic [2018] e KLR the court was of the view that in fact a court of law can convict solely on the evidence of the victim. The court held as follows:
- “.. section 124 of the *Evidence Act* comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. In fact, a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth ...”
31. It is submitted that the requirement for corroboration in *Sexual Offences Act* matters was taken away by the proviso to section 124 of the *Evidence Act* clearly because of the nature of sexual offence – they are more often than not committed in secrecy, away from person who may be eye witness, in circumstances where sometimes the only available evidence is that of the victim.
31. It is evident from the appellant's submissions that he was aware this position. He submits that the Court of Appeal sitting in Mombasa in Sahali Omar v Republic [2017] e KLR held: - on the first issue, the appellant took issue with lack of corroboration of the complainant's evidence, which he said foul of section 124 of the *evidence act*”, The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated. See Patrick Kathurima v Republic [1983] KLR 445 and also John Otieno Oloo v Republic [2009] e KLR which show that in addition, the provision to section 124 of the evidence affords an exception to this general rule in case of sexual offences where the child in question is not only the sole witness but also the alleged victim.
31. This ground fails.
32. The Appellant argues that the learned trial court did not make reference to section 124 of the *Evidence Act* and did not demonstrate why she believed the complainant. However, it is evident that the court having heard the complainant believed her evidence and explained the reason for the belief. The court stated PW5 the clinical officer who examined the complainant told the court that she found evidence of penetration, though the hymen was broken, it was not freshly so. I note that the examination was done on 26th February, 2022, 9 days after the alleged defilement making it impossible to ascertain whether the incident of 17th February 2022 was the cause of the hymen breakage or not. PW1, the complainant herein, has also told this court that the incident of 17th February, 2022 was not the first time the accused person had defiled her. The two factors, in my opinion, explains the indication of the hymen being broken but not freshly so. I am therefore convinced by the evidence of the complainant, which was corroborated by the evidence of the medical officer that indeed there was penetration.



33. It is my view that the learned trial magistrate was well guided
34. With regard to penetration the court relied on section 2(1) of the Sexual Offences Act: 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.”
35. In *Alex Sayalel Kantai v Republic* [2021] e KLR the court opined that:
- The key evidence relied by the courts in rape cases and defilement in order to prove penetration is the complainant own testimony which is usually corroborated by the medical report presented by the medical officer. In this case since the complainant was a minor, the evidence of the Clinical Officer is key so as to corroborate such testimonies.
36. This ground fails.
37. I note that the appellant had indicated that the appeal was also against the sentence but he appears to have abandoned that.
38. The State did submit on it – and affirmed the sentence – to the effect that the trial court exercised its discretion and gave its sentence.
39. In the end – the issue was only – whether or not the charge against the appellant was established – the appellant did not dispute the age of the complainant – the appellant’s arguments that penetration was not proved have failed – the last one – is whether the appellant was identified as the perpetrator.
40. The appellant and the complainant are known to one another. They were neighbours. The appellant argues that there is a Kelvin, and there is a Peter – and he is Peter not Kelvin. It is evident from the record that the appellant was known as Kelvin Kioko by the complainant. She identified him as the person who committed the offence – which was committed during the day – and the appellant was not a stranger to the child. I find that he was properly identified.
41. In the circumstances I find that the appeal has no merit and dismiss it accordingly.
42. Right of Appeal 30 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH MARCH 2025 MUMBUA T MATHEKA.

JUDGE

Appellant present

Ms. Nelima Court Assistant

Mr. Kazungu for state

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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The Judiciary of Kenya

