Kadenge v Republic (Criminal Appeal E179 of 2023)
[2025] KEHC 4541 (KLR) (Crim) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4541 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CRIMINAL

CRIMINAL APPEAL E179 OF 2023

CJ KENDAGOR, J

APRIL 8, 2025

BETWEEN

PHILADEPHIA KADENGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to Section 8 (1), read together with Section 8 (2) of the *Sexual Offences Act*. He had an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the said Act. He was found guilty of defilement and was convicted. He was sentenced to 2 years of placement, with one year being non-custodial, but to be placed in a custodial facility in the year 2024.

2. He was dissatisfied with the conviction and the sentence and appealed to this Court through a Petition of Appeal dated 13th June, 2023. He listed the following Grounds of Appeal;

    1. That the Honourable Magistrate erred in law and fact in failing to appreciate that no case had been demonstrated by the Prosecution to warrant a finding of guilt on the Appellant.

    2. That the Honourable Magistrate erred in making sweeping findings devoid of any analysis of the material evidence, issues and facts presented before her.

    3. That the Honourable Magistrate erred in law and fact in failing to consider and analyze the testimony by the Appellant, his witness and the submissions made by the Appellant.

    4. That the Honourable Magistrate erred in law and fact in rendering a judgment that only contained an introduction and a finding and completely lacking of a reason(s) for the findings.

5. That the Honourable Magistrate erred in law and fact in dealing with the trial before her in a very casual manner devoid of elaborate reasoning as required in judicial decisions.

6. That the Honourable Magistrate erred in law and in fact in concluding that the offense of defilement was proved without considering and analyzing the evidence of the Clinical Officer.

7. That the Honourable Magistrate erred in law and fact in overlying on an unsworn testimony by PW1 which was also not corroborated.

8. That the Honourable Magistrate erred in law and fact in assuming that the presence of a broken hymen was complete evidence and proof of defilement.

9. That the Honourable Magistrate erred in law and fact in failing to appreciate that the casual approach she adopted in failing to deliver the judgment for almost eight (8) months since the close of Defence case was a violation of Article 50 and 53 (2) of the *Constitution* and the principle of the Best Interests of the Child.

10. That the Honourable Magistrate erred in law and fact in unnecessary detaining the Appellant from the 28th April 2023 to the 29th May 2023 awaiting for a Placement Ruling which approach was a violation of Article 50 of the *Constitution*.

11. That the Learned trial Magistrate erred in law and fact in dealing with the matters before her arbitrarily, casually and on whims rather than on analysis of evidence as by law required.

12. That the Honourable Magistrate erred in law in her insistence of detaining the minor after he sits of National Exams and her total disregard of the social inquiry report prepared by the Probation Office.

13. That the finding of guilt in the present circumstances is dangerous and against the weight of the evidence.

3. He requested this Court to set aside the conviction and sentence of the subordinate court and acquit him. The Appeal was canvassed by way of written submissions. The Respondent did not file submissions despite being given the opportunity to.

Appellant's Written Submissions

4. The Appellant submitted that the lower Court was wrong to convict him. He argued that the prosecution did not prove two ingredients of defilement-Proof of penetration of victim's genitalia and Identification of the perpetrator because it did not adduce evidence to corroborate the complainant's testimony. He submitted that the court was wrong to conclude that the evidence of a torn hymen was proof of penetration. He argued that the breakage of the hymen in the present case is not evidence of the penetration. Lastly, he claimed that he was not properly identified. He argued that only the unsworn evidence of the minor herein pointed at him, but that evidence was not corroborated.

Issues for Determination

5. Upon consideration of the facts of this case, the Grounds of Appeal and the submissions made by the Appellant, I find that there are two issues for determination;

   a. Whether the offence of defilement was proved to the required standard;

   b. Whether the Appellant was identified as the perpetrator;

   c. Whether the sentence imposed was appropriate.

6. The role of this Court as the first appellate Court is well settled. In Okeno vs. Republic (1972) EA 32, the East Africa Court of Appeal gave an authoritative observation on the duty of the first Appellate court. It stated as follows;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

7. The above authority has since been adopted and affirmed more recently by the Court of Appeal in Peter Kifue Kiilu & another v Republic [2005] eKLR, where the Court held that the role of the first Appellate Court is not merely to scrutinize the evidence to see whether there was some evidence in support of the trial Court's decision.

8. Based on these authorities, this Court shall undertake a wholesome review of the evidence with a view to reaching its own conclusion. As I undertake this cause, I appreciate that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. I have reviewed the testimonies of all the witnesses and I have summarized them as follows;

10. The Complainant gave unsworn evidence, the trial Court opined from the viva voce evidence that she did not understand the solemnity of being in Court and the significance of swearing. She stated that the Appellant took her to the bathroom, closed the bathroom and removed her clothes. She stated that the Appellant then inserted his dudu to hers. She stated that she did not cry/shout because the Appellant told her to shut up. She stated that the Appellant's mother found them in the bathroom and beat them both. On cross-examination she stated that the Appellant did tabia mbaya to her.

11. The second witness was the Complainant's mother. She stated that she took the Complainant to the hospital the same day. She mentioned that the child had not bathed when she got home and that they went to the hospital in that condition. She indicated that the child was examined at Nairobi Women's Hospital. She produced the P3 form from Muthangari Police Station and filled out a PRC form at Nairobi Women's Hospital. She also provided the Complainant's birth notification. PW2 denied asking for money from the Complainant's family in exchange for settling the matter.

12. The Prosecution also called a Clinician from Nairobi Women's Hospital. The clinician came to produce the medical report on behalf of her colleague, who had left the facility. He stated that she had worked with her former colleague for more than 2 years and that she was familiar with her colleague's handwriting. He stated that the Complainant was examined on 16th November, 2021 at 1.20 am, and that the alleged defilement was reported to have happened on 15th November 2021 at 11pm. He stated that, according to the examination, the Complainant's hymen was torn and had a laceration at 10 O'clock and that they had formed the opinion that there was penal-vaginal penetration with injury. In cross-examination, he stated that the hymen had injuries and that the injury from the tissue hymen was noticeable.

13. The Appellant gave unsworn evidence in his defence. He admitted playing hide and seek with the Complainant and other kids but denied defiling the Complainant. He stated that they were not found in the bathroom, which he mentioned is far away and used by many people. He also stated that he thinks the Complainant was coached. According to the Appellant, they were beaten by their mother (DW2) for playing outside at night.

14. The defence also called the Appellant's mother. She stated that she did not find the Appellant and the complainant in the bathroom as alleged. She said that she did not know what happened and that she did not find the children naked. She told the Court that she did not know whether the Complainant was defiled. She said she beat the Appellant and the Complainant because they were playing at night, chasing each other in hide and seek. DW2 stated that the Complainant's mother came to her house, quarrelling and demanding to know why DW2 had assaulted the Complainant. According to DW2, she explained that the children were playing hide and seek at night, and the mother (PW2) began to accuse the appellant of defiling the complainant.

15. Section 8 of the *Sexual Offences Act* defines defilement as;

    8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.

    Penetration is defined as;

    > " means the partial or complete insertion of the genital organs of a person into the genital organs of another person.'

16. In C.W.K v Republic [2015] eKLR, the Court highlighted the ingredients forming the offence of defilement;

    > " The critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant."

17. The burden of proof rests with the prosecution to prove its case against the Appellant beyond reasonable doubt. In Stephen Nguli Mulili vs Republic [2014] eKLR, it was held that: -

    > " It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V Woolmington, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa vs. R, [2013] eKLR."

18. Age - I am satisfied that the Complainant's minority age was proven to the required standard.

19. Recognition – The Complainant and the Appellant know each other well as neighbours. On the material night, they were playing hide-and-seek, and there is evidence of an incident that occurred that night involving both of them and their parents, which led to the subsequent interventions and the case now before the Court.

Whether Penetration was proved to the required standard

20. The Appellant submitted that the lower Court was wrong to rely solely on the laceration of the hymen as proof of penetration. He urged this Court to relook at the evidence and ascertain whether the breakage of the hymen proved penetration in the circumstances of this case.

21. I have relooked at the evidence placed before the lower Court to prove penetration. Key of them is the Medical Examination Report-P3 Form dated 17/11/2021. The medical examination revealed that there was 'Torn hymen with laceration at 10 O'clock.' The report shows that everything else was normal. There was no discharge or blood, the external genitalia was normal, and the labia majora/ minora was normal. The clothes of the Complainant did not have blood stains, and the Complainant did go for a short or long call between the time of the alleged defilement and the medical examination. Based on these facts, the medical officer concluded that there was 'penile-vaginal penetration with physical injury.'

22. The question that arises before this Court is whether the evidence of 'torn hymen with laceration at 10 O'clock' alone was sufficient proof of penetration in these circumstances. This is because Courts have already established that hymen can be broken by other factors or things other than the penis.

23. This was the observation of the Court of Appeal in P.K.W v Republic [2012] eKLR, where the Court held as follows:

> " In most cases of sexual offence 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 a hymen. Those who are, there are times when the 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, injury, and medical examinations, which 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."

24. The High Court in Ringo *v Republic (Criminal Appeal 88 of 2023*) [2024] KEHC 2783 (KLR) faced a similar question where the Complainant's hymen had an old tear, and the issue was whether this proved penetration. In that case, the Court looked at other factors to ascertain whether the findings of the medical report collaborated the complainant's testimony. The Court observed as follows:

> "The answer therefore is that the fact that there are no fresh tears on the hymen does not mean there was no penetration, other findings ought to be considered. From the medical evidence, and as indicated in the PRC form, PW1 had minimal bleeding from her vagina. Even though PW4 could not ascertain whether the said blood was from PW1's menses, I have noted that this finding was consistent with PW1's testimony that after the said act of penetration, she bled, which bleeding was also visible on the trousers she had on the material night. I am therefore of the view that the findings of medical evidence were consistent with the testimony of PW1."

25. In the current case, the medical report did not indicate whether the tears on the hymen were fresh or old. Nonetheless, the fact that the hymen was broken does not, based on the above authorities, conclusively mean that there was penile penetration. I take the view that other factors ought to be considered to see whether the findings of the medical evidence were consistent with the testimony of the complainant and other witnesses.

26. The Complainant and the appellant were both minors.

27. The Complainant gave unsworn evidence because she did not seem to appreciate the solemnity of being in Court and the importance of swearing. She used euphemisms, which are acceptable, but they must also be viewed through the lens of the child's age and the description of events.

28. The admissibility of unsworn evidence is well settled. Courts have held that it must be considered with circumspection. A Court wishing to rely on unsworn evidence is mandated to ensure it is adequately corroborated.

29. This position was restated by the Court of Appeal in Jamaar Omari Hussein v Republic [2019] e-KLR, where considered the issue of the unsworn evidence of a child of tender years and said that:

> " This is nonetheless not to say that unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter."

30. I noted several inconsistencies in her testimony. In her examination-in-chief, she stated that the Appellant had defiled her twice before. She said: "The [Appellant] used to do the same to me at his home, he has done twice in another bathroom but my brother saw it." In her re-examination, she gave a different version. She said: "This was the only time [the Appellant] did so."

31. The Complainant said that at the time it happened, she was playing with the Appellant and her brother hide and seek. She testified that while at the game her brother left, leaving her in the company of the Appellant.

32. Although the Court can convict under Section 124 of the *Evidence Act*, this Section should be applied with great caution and only when the victim's testimony is completely clear and unequivocal.

33. While the children played hide and seek, considering what both parties state; I believe the prosecution should have called the Complainant's brother to testify and confirm whether he left his sister, the Complainant, in the company of the Appellant.

34. The Complainant's testimony that the Appellant's mother found them in the bathroom has also not been collaborated. The Complainant told the Court, ' it is my sister who told the Kadenge's mum.' From this part of the testimony, the Complainant is saying that her sister went to report them to the Appellant's mother. According to the Complainant, her sister told the Appellant's mother that the two were in the bathroom. This implies that the Complainant's sister must have seen the two enter the bathroom or must have had reasons to believe they were in there. The Court notes that this particular sister was older than the complainant.

35. In my view, the prosecution ought to have called the Complainant's sister to testify and confirm whether she had seen the two enter the bathroom. She would also have confirmed whether she was the one who informed the Appellant's mother about the presence of the two in the bathroom. In my opinion, the testimony of the two siblings of the Complainant would have formed enough circumstantial evidence to corroborate the Complainant's testimony and the findings of the medical examination.

36. I have reevaluated the evidence and analyzed it myself, and I have concluded that the prosecution did not prove the case against the Appellant beyond reasonable doubt.

37. Consequently, the appeal is allowed, conviction quashed and sentence set aside. The Appellant is hereby set at liberty unless otherwise lawfully held.

38. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 8TH DAY OF APRIL, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant - Beryl

Ms. Njoki, ODPP for Respondent