



**Losengura v Republic (Criminal Appeal E017 of 2024)
[2025] KEHC 4468 (KLR) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E017 OF 2024
RPV WENDOH, J
APRIL 7, 2025**

BETWEEN

DANIEL LOSENGURA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein is Daniel Losengura who was convicted for the Offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offence Act by the SRM Kapenguria. The particulars of the charge are that on 7/7/2024 at [Particulars Withheld] village in Alale Sub location, Alale location, In Pokot North Sub county, intentionally caused his penis to penetrate the vagina of S.C.Y.A., a child aged nine (9) years.
2. In the alternative, the appellant faced a charge of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offence Act. He is alleged to have intentionally and unlawfully touched the buttocks, and vagina of S.C.Y.A, a child aged nine (9) years.
3. The appellant denied the offence and the case proceeded to full trial with the prosecution calling seven (7) witnesses, while the Appellant gave unsworn evidence. He did not call any other witness.
4. After the conviction the appellant was sentenced to serve life imprisonment.
5. The appellant is aggrieved by the conviction and sentence and filed this appeal based on the following summarised grounds:
 1. That the court failed to consider the appellant’s defence;
 2. That the trial court shifted the onus of proof on the appellant;
 3. That the conviction was based on insufficient evidence;



4. That the court relied on the evidence of a single witness.
6. He therefore prays that the conviction be quashed, the sentence set aside and the appellant to be set at liberty forthwith.
7. This being a first appeal, it behoves this court to exhaustively re-examine all the evidence tendered in the trial court, evaluate it and arrive at its own conclusions. The court should however bear in mind that it neither saw nor heard the witnesses testify, in order to weigh their demeanor. The court is guided by the decision of *Okeno -V- Republic* (1972) EA 32.
8. The appellant also filed submissions in support and the Respondents also filed prosecution theirs in opposition to the appeal.

Prosecution Case:

9. PW1 S.C., a minor, after a voire dire examination, was found not to understand the meaning of the oath and gave unsworn evidence. She recalled the 7/7/2024, she was at her home with her siblings when Losike, the appellant went there and told her that she needed to go and get some sugar for her younger siblings and asked her to go with him. She left her younger siblings crying; that the appellant took her to the bushes, removed her pant. He removed his sheet (shuka) and dropped the shorts to remove his penis and put in her private parts and did bad manners to her. Her father called out and the appellant told her not to respond and covered her mouth, and covered her with the sheet; that she saw his bangles and he threatened to kill her and bury her. PW1's father came and that the appellant grabbed his shorts and sheet and ran away. Neighbours came and took her to Hospital and they were referred to Alale Police Station; that a rider was sent to buy medicine at the Centre and came back and said he had seen the appellant and people went and arrested the appellant at Amakuriat Centre in Alale. PW1 said that that was the first time she saw the appellant.
10. PW2 NY, a resident of [Particulars Withheld] village recalled the 7/7/2024; He came back home about 4.00p.m. after he heard his children crying. On inquiring why they were crying, they told him that someone had taken PW1 to go and get sugar. He rushed towards the direction he was told they went as he called out PW1's name; that PW1 responded and he rushed towards where the voice emanated and found accused, who ran off. He found PW1 was bleeding from her private parts. He screamed and neighbours responded and the women took PW1 to Hospital. PW2 said that the appellant outran him because he is younger and that he saw the appellant from about ten (10) – fifteen (15) metres away; that the ground where he found them was disturbed which was evidence of a struggle; that PW1's pant was torn and skirt blood stained. PW2 did not know accused before but saw him well and saw him later at the Police Station.
11. PW3 CA, recalled that she was going home from Hospital when she heard screams from her homestead. On rushing home, she found PW1 with members of public and PW1 who was bleeding from her private parts. She took the child to Hospital then were referred to Police Station. They did not get medicine and they sent a rider to the pharmacy. The rider returned and claimed to have found the suspect at the pharmacy. PW1 confirmed she could recall the assailant and they all boarded a motorcycle to the Pharmacy; that the appellant dashed out but they screamed and the appellant was arrested, PW2 stated that PW1 told them that she had hit the assailant with a stone on the forehead and they noticed that the appellant's forehead was swollen.
12. PW4 MC recalled 7/7/2024 about 4.00p.m., she was at her shop when two children went there to her kiosk, P and M informed her that somebody had taken PW1. They wanted her to close the shop to help look for PW1. PW4 went to the home found people gathered and the complainant was being carried;



- that PW1's clothes were blood stained and they took her to Hospital, then reported to the police; that PW1 told them she could identify the assailant and that she had hit him with a stone on the forehead; that she sent a rider for medicine and he returned and claimed to have seen the assailant; that they went to Petero where the appellant dashed out but was arrested by members of public.
13. PW5 PM of [Particulars Withheld] sells in a shop; that on 7/7/2024 about 7.00p.m. he got information from PW3 that a person had defiled a child and was dressed in a green sheet and had an injury on the forehead; that at 7.00p.m. a customer fitting the description went to the shop and was picking up clothes and shoes. PW5 asked the person what had happened to the forehead and he claimed to have fallen from a motor cycle; that he left and was chased and arrested on a farm; that PW1 came and identified the person as the assailant.
 14. PW6 PC Foster Omondi Otieno of Alale Police station recalled 7/7/2024 while at the police Station about 7.00.p.m. when the complainant (PW1) was brought there with an allegation of being defiled. He recorded witness statements and after the report, the appellant was taken to the Police station as the suspect.
 15. PW7 Kenneth Koskei, a Clinical Officer at Alale Health Centre examined the complainant on 8/7/2024. He noticed that her skirt was stained with blood, she had scratches on the head/neck, thighs had bruises and were tender. He also found that she had a second-degree tear on her left lateral side of the vagina which he repaired; tear on vaginal wall which was oozing blood. He found spermatozoa in the urine and he came to the conclusion that the child was defiled.

The Defence:

16. The appellant made an unsworn statement in his defence. He said he is a herds boy in Alale and was found watering cows in the river and was framed for this offence.
17. In his submissions, the appellant contends that penetration was not fully proved; that despite the findings of the Clinical Officer who examined the complainant, it was not proved that it was linked to him; that the clinical officer failed to tell the court whether or not the hymen was broken and whether there was a fresh tear or not.
18. In the submissions, the appellant also alleged that the charge was defective because it did not include the word "unlawful; that section 43(1) of the Sexual Offence Act describes the terms 'intentional' and 'unlawful act'; that though the act may have been intentional, it was not unlawful; that the defect should be resolved in favour of the appellant. He relied on the case of David Odhiambo CR.A 5/2005(MSA) where the charge sheet did not include the word 'unlawful' and the appellant was acquitted; that failure to draft the charges properly has prejudiced the appellant. He also relied on the case of Sigilai B. -V- Republic 2004 eKLR 480 and Suleiman Juma alias Tum -V- Republic CR.A. 18/2000.
18. The appellant also submitted that he is a very young man; that the courts have moved away from mandatory sentences and the court should consider reducing his sentence.
19. The state opposed the appeal. It was submitted that the offence was committed in the day time about 4.00p.m. and the complainant was able to see the appellant well together with PW2 who saw him from about 10-15 metres away; that PW2 later identified the appellant at Police Station after their arrest; that the complainant was nine (9) years old; PW3, her mother saw the child bleeding from her private parts and clothes soiled with blood; that PW4 corroborated PW3's testimony; PW7 who attended the complainant made findings consistent with Sexual assault. PW7's findings were corroborated by the findings of the Clinical Officer, the complainant and filled the P3 form and confirmed finding injuries



to the complainants' private parts. The Counsel submitted that there is sufficient evidence to prove that it the appellant who defiled the complainant.

20. I have considered all the evidence tendered before the trial court, the grounds of appeal, the rival submissions.
21. The appellant faced the charge of defilement contrary to section 8(1) and (2) of the Sexual Offence Act. The prosecution bears the duty to prove its case beyond reasonable doubt. The ingredients that have to be proved are as follows;
 1. That the complainant was a minor;
 2. Proof of penetration;
 3. Proof of the perpetrator's identity.

Proof of Age;

22. The Court of Appeal in the case of Edwin Nyambogo Onsongo -V- Republic (2016) eKLR stated as follows:

"..... 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 documents, evidence such as birth certificate, baptism card, or by oral evidence of the parents or the guardian or medical evidence among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of the evidence preferred in the proof the victims age, it has to be credible and reliable".
23. In the Ugandan case of Francis Omuroni -V- Uganda, the Ugandan Court of Appeal No. 2/2000, the Court held that "in defilement cases, medical evidence is paramount in determining the age of the victim in the absence of any other evidence. Apart from medical evidence, age may be proved by birth certificate, the victims' parents or guardian and by observation and common sense"
24. Proof of age of a victim is important in defilement cases because it determines what sentences to be meted so that under Section 8(2)-(4) SOA, the younger the victim, the harsher the sentence.
25. In the instant case, PW3, the complainant's mother did not know the complainant's age. PW7 assessed the complainants age as ten but in court said she was (10) years. I have seen the age assessment report from Kapenguria County Referral Hospital which shows that the complaint's age was nine (9) years. In addition, the court observed that the complainant was a minor and did not understand the meaning of the oath and that is why she gave unsworn evidence. From the above evidence this court is satisfied that the complainant was a minor aged about nine (9) years.
26. Proof of penetration 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;
27. PW1 testified that the assailant removed her pant and inserted his penis in her private parts. The Clinical Officer who examined the compliant on 8/7/2024 found that she had scratch marks on the head and neck, lower limbs and thighs had bruises and were tender; that there was a tear to the labia marjora/minora, on vaginal wall and was oozing blood. He repaired the tear. There was presence of Pus cells and Spermatozoa in the vagina and PW1's skirt was soiled with blood. The findings by PW7 corroborated PW1's testimony. PW2,3 and 4 also saw blood on the complainant's skirt.



28. The appellant in his submissions argued that the Clinical Officer did not state whether the hymen was broken. In *Mark Oiruri Mose -V- Republic (2013) e KLR*, the Court of Appeal had this to say,

"..... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredients of the offence is demonstrated, and penetration need not be deep inside the girl's organ....."

Later on, in *Erick Onyango Ondeng -V- Republic (2014) eKLR*, the court of Appeal said, "in Sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured"

29. As held above, the rupture of the hymen or otherwise is not proof of penetration. In this case, there is ample evidence of penetration from the testimonies of PW1,2,3 and PW4 and the Clinical Officer (PW7). PW2,3 & 4 confirmed that PW1 was bleeding from her private parts. PW7 found tears to the vaginal walls, PW1 was bleeding and there was spermatozoa present in her urine. All the above is evidence of perpetrator. PW1 also told court that the assailant strangled her and that is corroborated by the testimony of PW7 who found bruises on the neck. The presence of the bruises on the neck and bleeding of PW1 are evidence of force used on the complainant. This court finds that there is overwhelming evidence that the complainant was defiled.

Proof of identity of the perpetrator

30. Under section 143 of the *Evidence Act*, a fact may be proved by the testimony of a single witness. In the case of *Abdullah Bin Wendo -V- Rex 20 EACA 166*, the court said "Subject to certain well known exceptions, it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. PW1 was alone when the defilement started but PW2 arrived at the scene hence identification was not by a single witness."

31. PW1 was defiled during the day about 4.00p.m. she talked with the assailant as he asked for direction and later told her to go get sugar. When defiling her, the assailant was in close contact with PW1. PW2 found the complainant being defiled and he said he was only about 10-15 metres when the assailant bolted and ran. PW2 could not keep up with the speed. Although he did not describe how the assailant was dressed, he identified him as the culprit next day at Police Station.

32. PW1 described the assailant as wearing a sheet and shorts. Both PW3 and 4 told the court that PW1 told them that she hit the assailant with a stone on the forehead. PW5 who caused the arrest of the appellant first noticed the injury to the forehead and the green sheet (cloth) which PW4 had described to him. I find that the appellant was caught red handed defiling PW1 and was arrested a few hours later and was satisfactorily identified by PW1 and 2 as the culprit, as the incident was fresh in their minds. The appellant's defence was a bare denial and not believable.



Whether the charge sheet was defective:

33. It was the appellant's contention that the charge sheet was fatally defective for omitting the word "unlawful" in the particulars of the charge. The Court of Appeal in *Josphat Wanjala Olbai -V- Republic* (2019) eKLR considered the same objection and said as follows at paragraph 25 thereof,

"The offence of defilement is unlawful and the absence of the words 'intentional and unlawful' in the particulars of the charge do not render the charge defective. The words 'intentional' and 'unlawful' are not ingredients of the offence of defilement under Section 8(1) of the Sexual Offence Act. Defilement itself is unlawful. Those words are only elements of a charge of rape and attempted rape under Section 3(1) and Section 4 of the Sexual Offence Act respectively"

34. The Court of Appeal also considered a similar objection to the charge as in this case and the court held that the omission of the word 'intentional' or 'unlawful' from the charge was not defective. See *CR.A 136/2018 Christopher Lemaishe -V- Republic* CR.A 136/2018.

Was the sentence excessive

35. The appellant was sentenced under Section 8(2) of the Sexual Offence Act which provides that upon conviction for defilement of a child aged under ten (10) years, one is liable to life imprisonment. The minor was traumatized and seriously injured as a result of the appellant's heinous act. A deterrent and retributive sentence is called for in the circumstances; In exercise of this court's discretion, I hereby set aside the Sentence of life imprisonment and substitute it with thirty-five (35) years imprisonment.

DATED, SIGNED AND DELIVERED ON THIS 7TH DAY OF APRIL, 2025

HON. R. WENDOH

JUDGE.

Judgement read in open court in the presence of

Mr. Majale for State /Prosecution Counsel

Appellant- present virtually

Juma/Hellen-Court Assistants

