Ahmed alias Jehow v Republic (Criminal Appeal E039 of 2024)
[2025] KEHC 6471 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6471 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E039 OF 2024

JN ONYIEGO, J

MAY 16, 2025

BETWEEN

YUSSUF MOHAMED AHMED ALIAS JEHOW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Wajir PMCC No. E013 of 2024 delivered on 14.10.2024 by Hon. Baraka X. (RM))

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. Particulars of the charge were that on diverse dates between November 2023 and June 2024 at Kutulo location, Kutulo sub county, within Wajir County, he intentionally caused his penis to penetrate the vagina of H.H.H., a child aged 17 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars were that, on diverse dates between November 2023 and June 2024 at Kutulo location, Kutulo sub county, within Wajir County, he intentionally touched the vagina of H.H.H., a child aged 17 years with his penis.

3. He pleaded not guilty and a full hearing was conducted whereby the prosecution called four (4) witnesses in support of its case.

4. At the close of the prosecution's case, the trial court ruled that a prima facie case had been established against the appellant thereby placing him on his defence.

5. Consequently, the trial court delivered its judgment on 26.09.2024 thus convicting the appellant and sentenced him to 15 years' imprisonment.

6. Aggrieved by the determination of the trial court, the appellant, through his Advocates M/S Kivuva Omuga & Co Advocates filed a petition of appeal dated 18.10.2024 citing grounds as follows:

   i. That the learned magistrate erred in law and fact by failing to recognize that the appellant was a minor at the time of the trial and therefore ought to have been accorded an advocate.

   ii. That the learned magistrate erred in law and fact by convicting him notwithstanding the fact that the prosecution did not prove its case.

   iii. That the learned magistrate erred in law and fact by adopting a hearing procedure unknown in Criminal Litigation.

   iv. That the learned trial magistrate erred in law in admitting evidence into the Court record in blatant disregard of the provisions of the *Evidence Act*.

   v. That the learned magistrate erred in law and fact by failing to consider the evidence of the defence thus reaching a wrong determination.

   vi. That the sentence meted was harsh and excessive having regard to the circumstances of the case.

7. The court directed that the appeal be canvassed by way of written submissions.

8. The appellant via submissions dated 16.12.2024 urged that the trial court failed to make a preliminary enquiry on the age of the appellant despite the fact that the court was informed that the appellant was in Form 2 at the material time. It was contended that in an attempt to rectify the same, the court allowed the prosecution to adduce more evidence despite the fact that the appellant had already testified. That such action was a fundamental breach on the rights of the appellant and therefore, the court ought to take judicial notice of the same.

9. That during the hearing, the trial court allowed the prosecution to produce the ID card for one Halima Muhumed Ahmed, the appellant's sister yet the said Halima was not a witness in this case. Additionally, no evidence was adduced to support the allegations that the said ID indeed belonged to the sister of the appellant. It was contended that the trial court was at fault when it noted the alleged disparity in the KCPE certificate, school leaving certificate and the ID. That these documents were not produced formally nor marked for identification during the hearing process in as much as they emerged in the judgment.

10. The trial court was faulted for its desire to convict the appellant at all costs noting that it casually handled the issue on the appellant's age. Reliance to support the same was placed on the case of P.O.O. (minor) vs Director of Public Prosecutions & another [2017] eKLR where the court held that: what transpired in the matter did no live upto the ideals espoused in the ODPP Act. That the mere assertion by the petitioner that he was a child ought to be investigated at the first instance...". That the parties herein were minors and the law was clearly used to discriminate the appellant.

11. It was also urged that despite the fact that the appellant was a minor, the trial court failed to appoint a counsel for him. That this was contra the provisions of section 43 of the *Legal Aid Act* which operationalized article 50(2)(g)(h) of the *constitution*. The appellant relied on the case of P.O.O. (minor) vs Director of Public Prosecutions & another (ibid) where the court was of the view that criminal justice ought to take account of a defendant's age, level of maturity and emotional capacity. That it was only by doing so that the system could redress the imbalance which was the inevitable result where a child or young person was confronted by the power of the criminal justice.

12. It was further submitted that the prosecution failed to provide the appellant the documents that it relied on during the hearing and not to mention that the offence herein was not proven to the required standard. It was further contended that the charge sheet did not disclose the date when the alleged offence was committed. Counsel further averred that due consideration was not given to the defence availed by the appellant. To that end, this court was urged to allow the appeal as prayed and set free the appellant.

13. Mr. Okemwa for the respondent conceded to the appeal urging that the hearing was encumbered with irregularities.

14. This being the first appellate court, it has a duty to re-evaluate the evidence on record afresh and come to its own conclusion bearing in mind that it did not have the benefit of seeing or listening to the witnesses so as to be able to assess their demeanour. This position was set out by the Court of Appeal in Kiilu & Another vs Republic (2005)1 KLR 174.

15. From the record herein, PW1, (H.H.H) testified that she was aged 17 years and a student at [particulars withheld] Secondary School. That in November 2023, she was undertaking tuition at her neighbour's house where the appellant had formed a habit of visiting regularly. She stated that on the material day, the teacher arrived late and noting that the appellant was around, they ended up having sex. That despite the fact that she told the appellant of the pain that she was undergoing, the appellant just kept on. It was her evidence that the act stopped when they heard the tuition teacher's arrival thus prompting the appellant to leave the house as she continued with her tuition classes.

16. According to her, it was her first time having sex and that after some period of time, she met with the appellant whom she informed that she had missed her periods hence the possibility of being pregnant. That when she reported to school for the second term, she was tested and was found pregnant. The school thus summoned her brother who took her to the hospital where it was officially confirmed that she was pregnant.

17. The matter was reported to the police and consequently the appellant was arrested and then charged with the offence herein.

18. PW2, AAM, mother to the complainant testified that the appellant was in the habit of following the complainant since she was in class seven. That previously, he confronted the father of the accused over the same but the behaviour persisted. She testified that the alleged defilement occurred when the complainant went for tuition. That she had sought for maslaha from the parents of the appellant in vain. She further stated that the appellant had threatened the complainant that should she tell anyone, he was going to kill her. At that point, the court recalled the complainant so that it could hear the allegations on threats and so, the complainant reiterated the evidence of her mother.

19. PW3, Julius Kipsang, a medical officer testified that on 13.06.2024 at around 1.10 p.m., the complainant was presented to his medical facility on allegations that she had been defiled by a person known to her. That the complainant had missed her menstrual period for a period of seven months. That the abdomen was distended at 32 weeks of pregnancy.

20. He further carried out other investigations including VDRL, syphilis, H.I.V test which were found to be negative. An ultra sound was carried out and the results were that there was a single life intrauterine pregnancy with regular cardiac activity and the amniotic fluid was found to be adequate. On cross examination, he stated that the complainant visited the hospital on 13.06.2024 and that she was 8 months pregnant. That the month of November was just an approximation period as the complainant could not tell when exactly she had sex.

21. PW4, Cornelius Muyonga, the investigating officer reiterated the evidence of other prosecution witnesses and further stated that the appellant was responsible for defiling the complainant. He stated that the complainant was examined and treated; he further produced a P3 Form and PRC Forms which were filled in the hospital. According to him, after carrying out investigations, he arrested the appellant and charged him with the offence herein. On cross examination, he stated that the complainant and the appellant had had sex on several occasions.

22. At that point, the court suo moto asked the appellant to cross examine the investigating officer over issues regarding his name. In response, the witness stated that the name on the charge sheet was given to him by PW1 and PW2. On re-examination, he stated that the complainant told him that the appellant was known as Yussuf Mohamed Abdi but when at school, he referred to the appellant as Yussuf Mohamed Ahmed. In the same breadth, the appellant informed him that he had a nickname known as Jewoh. He thus urged that there was no confusion at all in reference to the name of the appellant.

23. The appellant in his sworn testimony denied perpetrating the offence. To the contrary, he averred that at the material time when he was charged, he was a child. He wondered why the complainant would keep quiet of the same issue for such a long time if indeed he was the one responsible for her pregnancy. That it was not possible to have sex on the first engagement. It was his averment that the complainant had other relationship with other men and further, that the complainant was not a credible witness. That the complainant stated that she previously had sex once while the investigating officer stated that the complainant and him had had sex severally.

24. He alleged that he was framed as there existed a grudge between his family and that of the complainant. Additionally, that one Katiba was responsible for the complainant's pregnancy. He urged the court to dismiss the case and set him free.

25. The prosecution in an attempt to confirm the age of the appellant made an application to recall PW4 who testified that he discovered that the appellant was aged 18 years at the time of the alleged commission of the offence. He presented a copy of the National ID of one Halima Muhumed, the appellant's younger sister and attempted to convince the court that noting that Halima was young, it definitely meant that the appellant was an adult at the time he allegedly committed the offence.

26. AAO, the complainant's cousin testified that the complainant's mother and the appellant's mother have the same grandparents. He urged that the appellant was an adult at the time when he allegedly committed the offence. Further, that in the year 2012, the appellant used to live in Kutulo and at that time, he was aged 13 years.

27. Muhumed Ahmed Abdi testified that indeed Halima was younger than the appellant as the appellant was older by one year. He reiterated that the appellant was an adult at the time when he allegedly defiled the complainant.

28. I have gone through and considered the trial court's proceedings, the petition of appeal and the submissions by the parties. In my view the following issues fall due for determination:

    i. Whether the trial was a mistrial?

    ii. Whether the prosecution proved its case beyond reasonable doubt.

    iii. Whether the appellant's defence placed doubt on the prosecution's case.

    iv. Whether the sentence preferred against the appellant was manifestly harsh and severe.

29. The appellant raised the issue of the proceedings being conducted in an irregular manner owing to the fact that the court stepped into the arena of litigation thereby assisting the prosecution in proving its case. A case in point was where after the complainant(pwa1) and her mother had testified, the court suo moto directed that the complainant be recalled to corroborate what the mother said regarding the alleged threats made against pw1 after the alleged defilement not to disclose to anybody about the incident. Obviously, after giving evidence in-chief and having been cross examined, the court had no business directing for recalling of pw1 to fill in the gaps in her testimony. Although under Section 150 of the CPC a court can order for any person it deems necessary to testify as a witness, in this case the court had no justification.

30. The second factor which made the appellant refer to the trial as a mistrial, was the calling of some witnesses by the prosecution after the close of the defence case. I have perused the proceedings after the defence case. According to the trial court, the rebuttal proceedings were conducted pursuant to section 212 of the CPC. The whole idea behind rebuttal proceedings was to ascertain the age of the appellant whom the prosecution had acknowledged during the prosecution case that he was a minor because of his birth certificate but the court insisted that he was an adult.

31. Prosecution acknowledged that the trial was irregular hence conceded to the appeal. The question begging for an answer is whether the procedure adopted by the trial court amounts to a mistrial.

32. The Black's Law Dictionary, 10th Edition defines a mistrial as:-

> " A trial that the Judge brings to an end without determination on the merits because of a procedural error or serious misconduct occurring during the proceedings".

33. In the case of Republic vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 in which the case of Bhagwan Singh vs State of M. P. (2002)4 SCC 85 was cited as follows: -

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or no

34. It is trite that the principles upon which a mistrial may be declared are well settled in our jurisprudence. Black's Law Dictionary 9th Edition defines mistrial as "a trial that the Judge brings to an end, without determination on merit, because of procedural error or serious misconduct occurring during proceeding."

35. From the record, the prosecution while in the middle of the hearing, informed the court that after looking at the birth certificate of the appellant, it realized that the appellant was a minor at the time when the offence was allegedly committed. The prosecution thus sought for directions from the court but instead, the court directed that the hearing continues as the appellant was an adult. In view of the foregoing, it was not necessary to ignore that evidence as the law still makes provision for circumstances as the one that was before the trial court under Section 8(1) and (7) of the *Sexual Offences Act* which provides:

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

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children' s Act.

36. After determining that the accused person was a minor, ordinarily, it would be expected in reference to article 50(2)(h) of the *constitution*, that he be provided with an advocate at the expense of the state. In the case of P.O.O. (A Minor) v Director of Public Prosecutions & another [Supra], the court recognized that the criminal justice system ought to take account of a defendant's age, level of maturity, and emotional capacity. It was only by doing so that the system could redress the imbalance which was the inevitable result where a child or young person was confronted by the power of the criminal justice.

37. In this case, such did not happen as the trial court dismissed the issue of age as raised by the prosecution by proceeding to hear the matter with a presumption that indeed the appellant was an adult. In my humble view, there was a basis for presuming that the appellant was a minor and that he ought to have been provided an advocate to represent him unless proved that the birth certificate was forged. The foregoing notwithstanding, it was not difficult for the prosecution to seek for an age assessment of the appellant to determine if indeed he was a child. The same would have appropriately guided the trial court on the way forward.

38. It was also contended that the trial process adopted by the trial court was one which is unknown in the criminal litigation. Guided by the decision by the Supreme Court of India in the case of Natasha Singh vs CBI cited in Joseph Ndungu Kagiri vs Republic [2016] eKLR, it was held that: 'Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized."

39. From the record, it was clear that the prosecution prosecuted its case and closed. Thereafter, the appellant gave his testimony and closed his defence. However, the court suo moto urged the prosecution that the age of the appellant being crucial, and noting that the appellant intended to challenge the contents of his sister's ID, it was important that the prosecution appraise itself of the provisions of section 212 of the *Criminal Procedure Code*.

40. At that point, the prosecution made an application for leave to present Halima's ID as the same was introduced by the appellant after the prosecution had closed its case. That Halima's ID was crucial as the same would help in determining the age of the appellant. The main reason as to why the foregoing was necessary, the court reasoned that the appellant's birth certificate did not correspond with Halima's ID.

41. As a consequence of the above, the trial magistrate proceeded to make a ruling under section 212 *Criminal Procedure Code* that the prosecution to recall the investigating officer to produce the ID of the appellant's sister. Of importance to note is the fact that two more witnesses ended up testifying without having supplied the said statements to the appellant thereby occasioning upon the appellant an ambush trial. In my considered view, this was contra the provision of section 212 of the *Criminal Procedure Code* as previously alluded to by the trial court. The said section 212 *Criminal Procedure Code* provides as follows: If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

42. It is clear from the proceedings that the court took lead in guiding the prosecution on how to prosecute and prove its case. Whereas a court can legally allow new evidence in rebuttal of the defence case, in this case, prosecution had already established that the appellant was a minor. To rely on the Id card of the appellant's sister who was not call as a witness to determine the age of the appellant was irregular.

43. It is not controverted that a court should always ensure substantive justice is done but the same should not be at the detriment of the accused person. In seeking guidance in the Supreme Court decision Petition No. E007 of 2023, Abidha Nicholus vs The Hon. Attorney General & 8 Others, the court held that; "...it is outright that a court on its part, must not descend to the arena of litigation but instead determine all contested matters judicially..." Clearly, the descends went beyond the expectation of ordinary criminal litigation. Indeed, the trial cannot be said to have been conducted properly and fairly.

44. Given the foregoing, the question for this court to determine is whether, as a consequence of the omissions and/ or commissions during the hearing, the court should acquit the appellant or remit the case back to the trial court for rehearing. Given the cited omissions, a retrial will not be ideal to order.

45. However, assuming the trial was properly conducted which is not, the prosecution was obligated to prove its case to the required standard. The offence of defilement is defined under Section 8(1)(4) of the *sexual offences Act* as "a person who commits an act which causes penetration with a child is guilty of an offence known as defilement". If the child is aged between 16 and 18 years, the penalty is not than 15 years imprisonment.

46. In a defilement case, the prosecution is duty bound to prove age; penetration and the perpetrator of the act. See the case of George Opondo Olunga v Republic (2016)e KLR.

47. In this case, the victim stated that her age was 17 years. A birth certificate was produced to that effect(exh.7). Nobody disputed this fact. To that extent, the complainant was a minor at the time of the alleged incident.

48. As to penetration, the complainant stated that she had consensual sex with the appellant while her friend Sahara waited outside the house. Sahara did not testify as a witness. Besides, when pw1's teacher arrived in the tuition room where she was attending tuition classes, the complainant did not report to him what the appellant had done to her.

49. Further, when the complainant went home, she did not report to her mother or anybody about what had happened. From November 2023 when the alleged incident took place up to June 2024 when it was discovered that she was pregnant and then confessed to her mother is such a long period. Why didn't she report immediately. The medical report was not of any help as it merely confirmed the existence of a pregnancy meaning there was sexual intercourse hence penetration. However, there was nothing to connect the allegation that the alleged pregnancy was occasioned by the appellant or somebody else.

50. This is a case that is out rightly lacking in corroboration. Although Section 124 recognizes that a court can convict on a sexual offence without asking for corroboration as long as it is satisfied that the witness is truthful, in this case, the victim did not exhibit credibility. What threats would have persisted for all that period not to disclose. In a nut shell, the prosecution evidence was not sufficient to proof the element of penetration.

51. Concerning identification, there is no doubt that the appellant was well known by the victim. Actually they knew each other before. However, there was no evidence to corroborate that of the victim that the appellant was at the scene on the material day and that he committed the offence as alleged. Again,

the court did not caution itself of the consequences of relying on the evidence of the victim alone to convict pursuant to Section 124 of the *evidence Act*. In the case of John Mutua Munyoki v Republic [2017] KECA 376 (KLR) the court had this to say;

> " As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant".

52. Taking into account the above findings, and considering that the appeal was not opposed, it is my holding that the appeal is merited and the same is allowed. I do not find the option of a retrial viable in the circumstances. Consequently, the conviction herein is quashed and the sentence thereof set a side. The appellant to be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MAY 2025

J. N. ONYIEGO

JUDGE