



REPUBLIC OF KENYA



**Bashir v Republic (Criminal Appeal E058 of 2024)
[2025] KEHC 6406 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E058 OF 2024**

JN ONYIEGO, J

MAY 16, 2025

BETWEEN

ISSE AHMED BASHIR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence in Dadaab SPM Criminal
Case No. E015 of 2024 delivered on 18.12.2024 by Hon. R. Lemayan (RM))*

JUDGMENT

1. The appellant was charged with the offence 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 charge were that on 22.09.2024 within Fafi Sub – County in Garissa County, he intentionally caused his penis to penetrate the vagina and anus of AAN, a child aged 14 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 of the charge were that on 22.09.2024 within Fafi Sub – County in Garissa County, he intentionally and unlawfully touched the vagina and breast of AAN, a child aged 14 years with his penis.
3. He pleaded not guilty to the charge and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case while the appellant presented two witnesses in support of his 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. The trial court delivered its judgment convicting the appellant and consequently sentencing him to 20 years in prison.



6. Aggrieved by the determination of the trial court, the appellant, through his Advocates Ongegu & Associates filed a petition of appeal dated 23.12.2024 citing the following grounds:
 - i. That the learned magistrate erred in law and facts by convicting him notwithstanding the fact that the prosecution did not prove its case.
 - ii. That the learned magistrate erred in law and facts by convicting the appellant notwithstanding that the prosecution's case was marred with inconsistencies.
 - iii. That the learned magistrate erred in law and facts by shifting the burden of proof to the appellant.
 - iv. That the learned magistrate erred in law and facts by convicting the appellant notwithstanding that the charges herein were defective.
7. The court directed that the appeal be canvassed by way of written submissions.
8. The appellant via submissions dated 10.03.2025 urged that the evidence by the prosecution did not prove the elements of the offence herein and therefore, the burden of proof was not shifted. It was urged that the age of the complainant was not proved notwithstanding that the same is crucial in proving the offence charged. Additionally, learned counsel opined that documentary evidence was not produced to confirm the complainant's age. It was argued that in as much as the respondent relied on the oral testimony of the complainant, the same was not sufficient as the legal standard requires documentary evidence to establish the victim's age.
9. That the foregoing notwithstanding, it was revealed that the minor had plans to elope with the appellant to Somalia upon him completing his KCSE exams. Equally, that it was clear that there existed a bad relationship between the complainant and the appellant. This court was further urged to take note of the fact that failure to investigate the alleged feud that existed between the complainant and the appellant's family called into question the credibility of the entire prosecution's case.
10. It was contended that the prosecution's case was marred with contradictions as the complainant testified that the appellant took her to a place near the borehole where he defiled her. That contrary to PW1's testimony, PW2 testified that the complainant was defiled in the bushes near the dumpsite. In the same breadth, counsel opined that PW2 did not see blood on the minor's clothes when she arrived at home at 8.00 p.m. It was further pointed out that the complainant testified that she consented to the sexual activity in as much as she later retracted the same and alleged that it was non-consensual. That the issue on whether there was consent or not brings doubt into the credibility of the complainant's evidence vis a vis the defence of the appellant.
11. Learned counsel argued that the court shifted the burden of proof to the appellant while analyzing the evidence before him. That the evidence by the appellant was not only truthful but remained unshaken even during cross examination and therefore, it was not proper for the court to convict the appellant. In conclusion, the appellant urged this court to quash the conviction and set aside the sentence and set him free.
12. The respondent filed submissions dated 11.03.2025 thus urging this court to find that prosecution did not establish salient elements of the offence of defilement inter alia: age of the victim, penetration and the identity of the perpetrator. That in this case, the complainant was 14 years old at the time when the offence herein was committed. To that end, the learned prosecutor relied on the case of Daniel Kamau vs Republic (2019) eKLR citing the Court of Appeal decision in Fappyton Mutuku Ngui vs Republic [2012] e KLR where it was held that proof of age is not only cast on a birth certificate but any other formal document which may be used to prove age.



13. On penetration, counsel contended that the complainant reiterated how the appellant had unlawful carnal knowledge with her on the day in question. That the appellant penetrated her both vaginally and anally. In the same breadth, PW3 testified that upon examining the complainant, he found that indeed, the complainant had been defiled. To that end, counsel made reference to the case of Mark Ouiruri vs Republic (2013) eKLR where the Court of Appeal held that penetration of a minor does not necessarily end in release of sperms into the victim.
14. Lastly, on identification, counsel urged that it was not denied that the appellant and the complainant were people who were known to each other. This court was therefore urged to dismiss the appeal and uphold the finding of the trial court as the ingredients constituting the commission of the offence herein were satisfactorily proved.
15. This being the first appellate court, it has a duty to re-evaluate the evidence on record afresh and come to its own conclusions bearing in mind that it did not have the benefit of assessing the general demeanour of the witnesses when testifying. This position was set out by the Court of Appeal in Kiilu & Another vs Republic (2005)1 KLR 174.
16. Briefly, PW1, AAN, testified that on 22.09.2024, she was at her home washing clothes when the appellant asked her to accompany him to a borehole some distance away from her home. Upon reaching the said borehole, the appellant asked her to remove her clothes and thereby proceeded to defile her. She narrated that the appellant penetrated her vagina and anus and thereafter took her home. According to her, the appellant took her home at 8.00 p.m. That she bled and her clothes were soiled with blood.
17. It was her testimony that when she met her mother and siblings she did not disclose what had happened. She told the court that her mother took her to Hagadera Police station where they were given a P3 Form and then directed to go to IRC hospital. That the doctor examined her and then prescribed some medicines.
18. PW2, SAH testified that on the material day, the appellant took her daughter, PW1 to some bushes nearby where he defiled her. That the complainant returned home at about 8.00 p.m. looking confused and not speaking well. She thus took her to the police station where she divulged that the appellant had defiled her both in the anus and the vagina. She stated that she was present at the hospital when the complainant was examined and noticed the alleged injuries on PW1's vagina and anus.
19. PW3, Dr. Chirchir testified that the complainant was presented at the IRC hospital with a history of being defiled. According to him, upon examining the minor, he found lacerations at the vaginal and anal glands. He thus formed the opinion that the complainant had been defiled. He produced PRC form, P3 Form and Treatment notes as Pex 1,2,3 respectively. On cross examination, he stated that there were no tears nor stains noted at the time of examination.
20. PW4, No. 10XX43, PC Caleb Mokaya, the investigating officer stated that on the material day, at around 2300hrs, he was on duty when he received the complainant in company of her mother. It was his testimony that the complainant claimed that the appellant had picked her from her home, took her to a place next to a dumpsite behind Block S where he defiled her. On 23.09.2024, he summoned the complainant with her mother, interrogated them and consequently recorded their statements. It was his evidence that the complainant informed him that together with the appellant, they had plans to elope to Somalia upon the appellant completing his KCSE exams. He issued them a P3 Form and directed them to go to IRC hospital where the minor was examined and found that she had been defiled. He later arrested the appellant and charged him with the offence herein.



21. DW1, Isse Ahmed Bashir in his sworn testimony denied committing the offence and urged that he was simply framed. It was his testimony that his family and that of the complainant had a dispute relating to a water point. According to him, PW2 had promised to make him suffer and therefore, the charges herein were mere fabrication. On cross examination, he stated that the complainant was known to him as they were neighbours.
22. DW2, Hassan Mohamed, a businessman at Hagadera testified that he is a neighbour to both the appellant and the complainant and that there existed a conflict in relation to a water point between the parties. He stated that he was amongst the elders who tried to solve the alleged dispute in as much as PW2 was not satisfied with their finding. That PW2 swore to make the appellant's life difficult and therefore, he was not surprised with the charges herein. He alleged that the same were mere fabrication in that even at the time when the appellant was arrested, he visited him at the police station and the appellant told him that at the time in question, he was at home preparing for his exams.
23. DW3, Abshir Hussein Mohamed, a taxi driver testified that the appellant and the complainant are neighbours and that there has been an existing feud between them. It was his case that the parties had clashed over a water point and that the elders intervened and solved the same. It was his further evidence that the elders involved in solving the conflict were mostly relatives from the complainant. It was his case that the charge herein was a fabrication for the reason that the complainant is seeking sympathy to have her relocated abroad. On cross examination, he stated that on 22.09.2024, he was at his home in Hagadera.
24. I have considered the grounds of appeal, the trial court's proceedings and written submissions by both parties. Grounds that fall due for determination are:
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the appellant's defence placed doubt on the prosecution's case.
 - iii. Whether there were inconsistencies in the prosecution's evidence
 - iv. Whether the sentence preferred against the appellant was just and fair.
25. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
26. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act 2022 as "...any human being under the age of eighteen years."
27. The importance of ascertaining the age of the complainant was dealt with in the case of *Kaingu Kasomo vs Republic*, Criminal Appeal No. 504 of 2010, where the Court of Appeal stated as follows:

"Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."
28. In this case, the complainant testified that she was 14 years old in as much as no documentary evidence was produced. In the case of *Edwin Nyambaso Onsongo vs Republic* (2002) eKLR, the court cited the case of *Mwolong Chichoro Mwanembe vs Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) where the Court of Appeal held thus: "...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 a



birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof...”

29. In this case, the trial magistrate who saw the complainant and further conducted a *voire dire* examination, was of the view that the complainant was not only intelligent but also understood the importance of telling the truth. He thus believed her to be a 14-year-old child. In the same breadth, PW3 who examined the complainant was of the view as exhibited in the P3 and PRC Forms that the complainant was a minor aged 14 years. To that end, it is my view that the complainant was a minor aged about 14 years at the time when the offence was committed. Therefore, Mr. Bosire’s argument that no documentary evidence was produced to corroborate the age of the complainant who is not tenable.
30. On penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of *Bassita Hussein vs Uganda*, Supreme Court Criminal Appeal No 35 of 1995, the court held that;

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”
31. From the above quoted case law, it is clear that penetration can be proved through the evidence of the victim or through any circumstantial evidence.
32. In the instant case, the complainant narrated to the court how the appellant defiled her both vaginally and in the anus. PW2 also testified that she was present when the complainant was examined by PW3 and that she confirmed that the complainant had injuries on her vagina and anus. PW3 further stated that the vaginal laceration was noted at 6 O’clock, the hymen was absent and further, there were anal lacerations circumferentially noted.
33. However, counsel for the appellant raised quite pertinent questions regarding the issue of penetration. According to the complainant, she was asked by the appellant to accompany him. That they went to the borehole where he asked her to remove her clothes a request she complied with without any resistance. That the appellant removed his clothes and they had sex. After that, the appellant escorted her up to near her home and then left her there. It was her testimony that after the act, she bled and her clothes were soiled with blood. She further stated that she did not disclose to her mother nor her siblings what had happened.
34. On the other hand, the mother claimed that when the complainant went home, she appeared confused thus prompting her to take her to the police station. The questions to be answered are; what made pw2 take her daughter to the police station yet no complaint had been made to her? Does mere confusion of a person make somebody to report to the police station? How come the mother did not observe any blood stains on the clothes of the complainant nor bleeding yet the girl claimed her clothes were soiled with blood?
35. If pw2 took her daughter to the police immediately while wearing the alleged blood stained clothes, how come the investigating or the Doctor did not notice. If there was bleeding, how come the doctor did not notice any tear on her genitalia?
36. From the above observation, it is clear that some story does not add up. The mere fact that there was some laceration on the victim’s genitals does not automatically mean there was penetration. There has to be a link with the alleged act of penetration. Superior courts have time and again held that there are times when hymen may be broken or laceration occasioned by other factors other than sexual intercourse. See *P.K.W vs Republic* (2012) e KLR.



37. In the instant case, the doctor did not state whether the laceration was fresh bearing in mind that the victim was taken to the hospital the same day. With this inconsistencies, one is left wondering as to who is telling the truth. The only direct evidence available is that of the victim. It is surprising that the mother on her own motion decided to take her daughter to the police to report an incident that her daughter had not even reported. This conduct is a manifestation of a pre-conceived idea by pw2 to achieve an unknown objective.
38. There was no direct evidence by any independent witness besides pw1. I am fully aware that a court can convict based on the evidence of the victim alone in a sexual related offence pursuant to section 124 of the *Evidence Act* as long as the trial court warns itself of the truthfulness of the witness. In the case of *John Mutua Munyoki v Republic* [2017] KECA 376 (KLR) the court had this to say regarding the applicability of Section 124 of the *Evidence Act*:
- “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”.
39. It is trite law that evidence of a single witness can be relied on to convict as long as the court warns itself of the dangers of relying on such evidence. See *The Court of Appeal of Uganda in Okwang Peter vs Uganda Criminal Appeal 104 of 1999* where it was held as follows: -
- “Subject to certain well-known exceptions, it is trite law that a fact may be proved by the 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 in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error”
40. In the instant case, the evidence of pw2 and pw1 is not consistent hence uncredit-worthy witnesses. The trial court did not caution itself or satisfy itself as to the truthful nature of pw1’s testimony. In the circumstances, there was need for corroboration by an independent witness which is not the case here. A sexual offence is such a serious offence and its investigation must be taken seriously. In the absence of any corroboration and given the discrepancies on the face of the record, I am inclined to find that penetration was not established.
41. On identification, there is no doubt that the victim and the appellant are neighbours. The only issue begging for an answer is whether he was at the scene of crime and therefore committed the offence. Again, in as much as pw1 and pw2 said that pw1 left her home with the appellant, there was no corroborating evidence that they had sexual intercourse.
42. From the above holding, it is apparent that the evidence of the prosecution fell short of the required standard of proof beyond reasonable doubt. Accordingly, the appeal is allowed and the conviction herein quashed and the sentence set aside. The appellant shall be set free unless otherwise lawfully held.

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



J. N. ONYIEGO
JUDGE

