JMN v Republic (Criminal Appeal E008 of 2025)
[2025] KEHC 10090 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 10090 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E008 OF 2025

JN NJAGI, J

MAY 14, 2025

BETWEEN

JMN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. B. Kabanga, SRM, in Hola SPM`s Court Sexual Offence Case No. E001 of 2022 delivered on 11/7/2024)

JUDGMENT

1. The Appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve life imprisonment. The particulars of the offence were that on the 13th January 2022 at xxxxx Village of xxxxx location within Lamu West Sub County within Lamu County, he intentionally caused his penis to penetrate the vagina of TM (herein referred to as the complainant), a girl aged 10 ½ years.
2. The appellant was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:
    a. The learned trial magistrate erred in law and fact in convicting the Appellant by failing to appreciate and make a finding that there was no evidence linking the Appellant to the commission of the alleged offence.
    b. The learned trial magistrate erred in law and fact in convicting the appellant by relying on the evidence of complainant PW1 who was under pressure to nail the appellant when the evidence of Pw2, Pw3 PW4 and PW5 was a classical example of well-choreographed ploy to have the appellant suffer from tramped us charges.

c. The learned trial Magistrate erred in law and fact in convicting the appellant after making a finding that there was no evidence of proof of the alleged communication through telephone calls and messaging tendered by the prosecution that linked the appellant with the commission of the offence.

d. The learned trial Magistrate erred in law by pronouncing a sentence which was excessive, punitive, unreasonable and discretionary in nature and misdirected himself in failing to find that the appellant was equally innocent.

Case for prosecution

3. The case for the prosecution was that the appellant was an uncle to the complainant. That on the material day at 6pm the appellant went to the home of the appellant and asked the complainant mother PW4 to allow him to go with the complainant to help him fetch water. He went with the appellant and her brother to his home. They fetched water. That the appellant locked the appellant's brother in his house. He took the complainant his farm and defiled her.

4. Meanwhile, when the children delayed in going back home their mother sent their brother PW5 to get them. PW5 headed to the shamba of the appellant. He found the appellant defiling the complainant in a farm. He went and called a friend PW2 to go and assist him. They went and found the appellant continuing to defile the complainant. He threatened them. The appellant headed towards his home. They followed him there. Other people went to the home of the appellant. A report of the defilement was received at Kibaoni police station. PC Nzuki PW8 and other police officers headed to the home of the appellant. They found a mob at the home of the appellant which was crying for his blood. They arrested the appellant and picked the complainant. They took them to the police station.

5. The complainant was taken to Mpeketoni sub-county hospital. She was examined and found with a vaginal orifice that appeared inflamed, an open vaginal path with a broken hymen and a tear at the 1, 2 o`clock position. A clinical officer PW7 filled a Post Rape Care form to that end. PC Nzuki investigated the case and charged the appellant with the offence. During the hearing in court, the clinical officer PW7 produced the treatment notes and the Post Rape Care form as exhibits, P.Exh.1 and 3 respectively. PC Nzuki produced the complainant`s birth certificate as exhibit, P.Exh.2. It indicated that she was aged 10 years.

Defence Case

6. In his defence the appellant stated in a sworn statement that his brother and his family had ran away from their home due to Al-shabaab attacks and settled at a farm not far from his farm. That he assisted his brother to settle down and bought him provisions worth Ksh. 850. He gave him pocket money of Ksh. 200. That on 13/1/2022 he went and fetched water near the farm where his brother and his family had settled. He took the jerrican of water to the home of his brother. He went to some other place. Later he went and picked the jerricans of water. The complainant and her brother assisted him to carry them to his home. He served them with food. Then he told the complainant to return to her home and leave her brother behind to spend the night at his home. The complainant went away. He remained behind with her brother. That later on he was getting ready to sleep when there was a knock on the door. A mob was telling him to open the door. They were saying that he had defiled. He armed himself. At 9:30 pm two elders went to his home. Later policemen arrived at his home at 1:30 am. He was taken to Kibaoni police station. He was interrogated on defiling the complainant. He denied having done so. He was charged. He was later released on bond. He went home and found his brother having harvested his green grams and cashew nuts. He then realized that his brother had set him up so that he would get hold of his property.

Submissions

7. The appeal was canvassed by way of written submissions. The appellant submitted that the evidence on record proved that the complainant was aged 11 years and 3 months and not 10 years as stated by the prosecution witnesses. That nonetheless, the certificate produced in the case proved that the complainant was a minor.

8. The appellant submitted that the doctor who examined the complainant did not elaborate on the issue of penetration nor did his report show any nexus between the appellant and the act of penetration as no presence of spermatozoa was found. He argued that the medical examination was conducted a day after the alleged incident which raised doubt on its credibility. He submitted that medical evidence produced in the case was inconclusive.

9. It was submitted that the trial court overlooked the issue that the complainant could have been making wild allegations that she was defiled by the appellant. That the court should not have placed reliance on the unsworn evidence of the complainant.

10. The appellant submitted that the complainant did not attempt to describe how penetration took place. That her evidence of having sex did not necessarily prove that penetration took place.

12. On sentence meted out on the appellant, it was submitted that the complainant was aged 11years and 3 months. Therefore, that the charge sheet was defective by stating that the complainant was aged 10 years. The appellant urged the court to allow the appeal.

13. It was further submitted that the sentence meted on the appellant was not proportionate to the offence committed. Reliance in this respect was placed in the case of Manyeso Vs Republic (Criminal Appeal 12of 2021) (2023) where the Court of Appeal opined that an indeterminate life sentence is inhuman treatment and violates the right to dignity under Article 28 of *the constitution*. The appellant submitted that the sentence imposed on him was excessively high and urged the court to revise it.

14. The respondent on the other hand submitted that the charge against the appellant was proved beyond reasonable doubt. That the age of the complainant was proved by production of a birth certificate. That the evidence of the complainant that the appellant defiled her was corroborated by the evidence of the clinical officer PW7 who found her with tears on the vaginal walls and a broken hymen. That the appellant was an uncle to the complainant and he was sufficiently identified by the complainant, her brother PW5 and a neighbor PW2 who accompanied PW5 to the scene. That PW5 and PW2 used spotlights to identify the appellant. It was submitted that there was no mistake on the identification of the appellant.

15. The respondent submitted that the appellant's defence was a mere denial that did not cast doubt on the prosecution case.

16. On sentence, it was submitted that the appellant was sentenced to the mandatory sentence as provided by the law. That the complainant was traumatized by the ruthlessness of the defilement. That the appellant defiled her twice and he threatened the complainant's brother PW2 when he went to her rescue. That a stiff sentence was appropriate so as to protect young children from such predators as the appellant.

Analysis and determination

17. This being a first appeal, the court is clothed with the jurisdiction to re-evaluate and re-analyze the evidence of the trial court and arrive at its own independent conclusion as was stated by the Court of Appeal in the case of David Njuguna Wairimu V – Republic (2010) eKLR that:-

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

18. In addition, it was held in the case of Okeno v R (1972) EA 32 that the court should take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard to that.

19. The elements of the offence of defilement that the prosecution is required to proof beyond reasonable doubt are proof of the age of the victim, proof of penetration and proof of the identity of the of the perpetrator, see the Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.

20. The trial court found the three elements of the offence to have been proved beyond reasonable doubt. I have on my part considered the grounds of appeal, the record of the trial court and the submissions tendered by the appellant and the respondent.

21. Starting with the element of the age of the complainant, the law is that the age of a person can be proved in various ways. In the case of Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held 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 a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

22. The complainant in this case told the trial court that she was at the material time aged 10 years. Her mother PW4 identified her birth certificate, P.Exh.2 and said that she was born on 30/10/2011. The investigating officer PW8 produced the said birth certificate as exhibit which indicated that she was born on the stated date which placed her age at the material time at 10 years. There was thereby credible evidence proving that the complainant was aged 10 years at the material time. A birth certificate is a credible mode of proving the age of a person. The age of the complainant was therefore proved at 10 years.

23. Moving on to the element of penetration, the same is defined in Section 2 of the *Sexual Offences Act* as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

24. Penetration may be proved by way of medical evidence or by oral or circumstantial evidence. In the case of Kassim Ali v Republic (2021) eKLR the Court of appeal stated that;

> " ....the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"

25. The clinical officer who examined the complainant PW7 found her with an open vaginal path with a broken hymen and a tear at the 1 and 2 o`clock position of her vagina.

26. The appellant submitted that the evidence of PW7 was inconclusive on whether the complainant was defiled. I however do not agree with that position. The finding of the clinical officer that the complainant had injuries in her vagina was not challenged by the defence by way of producing another medical examination. That being the case, I find that there was sufficient evidence proving that the complainant was penetrated through her vagina.

27. The evidence of the complainant that the appellant picked her and her brother from her parent`s home with the request for them to go and assist him fetch water was corroborated by the complaint`s mother PW4 and her brother PW5. The appellant admitted in his defence to have picked the two children from their home and went with them to his home.

28. The complainant testified that the appellant locked her brother in his house, took her away to a farm and defile her. Her evidence that the appellant defiled her was corroborated by her brother PW5 and a friend to her brother PW2. The two found the appellant in the act of defiling her. It was the evidence of PW5 that the appellant threatened him when he found him defiling the complainant and he went away and went back to the scene with PW2. He said that they found the appellant defiling the complainant about 35 steps away from the first scene. That on both occasions he flashed a torch at the appellant and identified him. That he even called him by his name Mwangi upon identifying him. That they followed him to his home where he armed himself with an axe and a spear and started to threaten them.

29. John Maina Kagai PW2 supported the evidence of PW5 that PW5 called him and asked him to accompany him to go and assist his sister who had been defiled by Mzee Mwangi. That they went and found the appellant and the complainant in the bush. He flashed a spotlight on him. They went with him to his house.

30. Upon keenly going through the evidence of the complainant`s brother PW5 and that of PW2, I have no doubt that they were telling the truth that they found the appellant defiling the complainant. They had no reason to lie against the appellant. In fact, PW2 was not well acquainted with the appellant and only used to see him. I find the evidence of the two witnesses to have been credible.

31. The appellant was an uncle to the complainant and PW5. The complainant was in the company of the appellant in his house when he took her away to a farm and defiled her. The complainant could thereby not mistake the appellant for anybody else. Both PW2 and PW5 flashed torches on the appellant when they found him defiling the complainant. They accompanied him to his home from the scene of defilement. There was no possibility of them mistaking him for somebody else. The appellant was therefore positively identified by the complainant, PW2 and PW5.

32. I find no truth in the appellant`s denials that he did not defile the complainant. There was no truth that the case was fabricated by the father to the complainant to have him jailed so as to snatch his property from him. The evidence adduced against the appellant was overwhelming. If the case was fabricated for reasons given by the appellant, there was no reason for PW2 to lie against the appellant that they found him defiling the complainant. I find the trial court to have rightly dismissed the appellant`s defence. The conviction is thereby upheld.

33. The appellant was sentenced to the minimum sentence provided by the law. In the case of Republic v Joshua Gichuki Mwangi, Petition No. E018 of 2023, the Supreme Court stated that the minimum sentences prescribed under the *Sexual Offences Act* remain lawful until such time that they are declared unconstitutional. This court is bound by the decisions of the Supreme Court. The appellant`s argument that the sentence was excessive holds no substance. A mandatory sentence cannot be said to be excessive. Consequently, the sentence imposed on the appellant is lawful.

34. Upon considering the evidence adduced before the trial court in its entirety, I find no merit in the appeal and the appeal is consequently dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 14TH DAY OF MAY 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant- present in person at G. K. Prison Malindi

Court Assistant – Ndonye