JND v Republic (Criminal Appeal E135 of 2022)
[2025] KEHC 9446 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 9446 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E135 OF 2022

TM MATHEKA, J

MAY 14, 2025

BETWEEN

JND ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

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 offence were that on diverse dates between the month of January 2021 and May 2022 at [Particulars Withheld], Kaasuvi Sub-Location, Kiboko Location in Makindu Sub-County within Makueni County, the Appellant intentionally and unlawfully caused his penis to penetrate the Vagina of M.M.N, a child aged 12 years.

2. In the alternative, he was charged with the offence of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that during the same time and at the same place, the Appellant intentionally and unlawfully committed an indecent act by touching the vagina of M.M.N, a child aged 12 years with his penis.

3. The appellant pleaded not guilty and after a full trial, he was convicted on the main charge and sentenced to 20 years imprisonment.

4. Aggrieved by that decision, the appellant filed this appeal on the following grounds;

5. That he is in dispute with the sentence that was imposed by the law court magistrate.

6. That he was convicted and sentenced when he had not pleaded guilty to the offence.

7. The law points and facts used in the court were all framed up and not true.

8. That he prays to this court to come up with its own findings and decisions.

9. The Appellant later filed submissions containing the following grounds;

10. That the learned trial magistrate erred in law and fact by failing to find that the key ingredients of the offence were not established against the accused person.

11. That the learned trial magistrate erred in law and fact by holding that PW1 was a credible witness whereas the evidence therein was greatly uncorroborated and was full of inconsistencies and contradictions that impugned on the overall burden of proof.

12. That the learned trial magistrate erred in law and fact by shifting the burden of proof on the accused person thereby prejudicing him greatly.

13. That the learned trial magistrate erred in law and fact rejecting the cogent defence which reasonably exonerated him from any wrong doing.

14. The prosecution's case was that on 15/05/2022, members of the public went to the Assistant Chief and told him about their suspicion i.e that the Appellant was sleeping with his daughter. The Assistant-Chief reported to the police and he was later called to record a statement as the victim had confirmed the defilement. It was also the prosecution's case that the victim's mother and grandmother were aware but had decided not to report. Consequently, the Appellant was arrested and prosecuted.

15. The prosecution called 6 witnesses to wit; the Clinical Officer (PW1), the Assistant Chief (PW2), the complainant (PW3), the complainant's teacher (PW4) the complainant's mother (PW5) and the Investigating Officer (PW6). The exhibits produced were; P3 Form (P.Ex 1), PRC Form (P. Ex 2), Lab Results (P.Ex 3 a-h), victim's Out Patient Card (P. Ex 4a-b), birth certificate (P.Ex 5) and Age assessment report (P.Ex 6).

16. The Appellant was found to have a case to answer and was put on his defence. He elected to give sworn evidence and not to call any witness. He testified that he lived in Kiboko and was 62 years old. That on 16/05/2022, he was from getting vegetables with his wife when he was arrested. He was accused of raping the girl which, he said, was not true. That he was doing casual jobs to educate his children and he learnt that they had dropped out of school after his arrest. That he was framed for the offence.

17. On cross examination, he confirmed that the complainant is his daughter. That the complainant's mother was working in Voi and while she was away, he was the one staying with the children. That the children would sleep in the sitting room but since they were many, others would sleep outside. He denied calling the complainant but conceded that she would sleep in the house. That he loved his child and she also loved him. That they could have conspired with the mother to frame him. That in 2021, the complainant's mother was not staying with him as she had run away but she eventually returned. That she moved back when the issue of defilement arose. That they were all taken to the hospital for examination and he was found with ulcers. That the doctor did not find any disease on the child. That he did not see the point of cross-examining the officer as he (officer) simply relied on statements.

18. The parties elected to canvass the appeal through written submissions

19. The Appellant submitted that according to the prosecution case, the exact dates of the offence cannot be accounted for. That according to case law, where incidences of such nature are reported after a long time, considerable doubts are inferred on the person that committed them. He relied on *Chrispine Waweru Njeru -vs- R; Cr. Appeal No. 6 of 2015* where it was held that;

> " the medical examination has to be done at the earliest possible time where there is no eye witnesses and where there is a delay in doing the examination, questions would arise as to

the person responsible for breaking the hymen and the standard of proof in defilement cases is beyond reasonable doubt."

20. He also relied on Joseph Ndeto Kimunyu -vs- Republic [2018] eKLR where the court stated that;

> " This court is aware that it can convict an accused on the basis of uncorroborated testimony of a victim of sexual violence if it is convinced that the victim is telling the truth.

21. In the present appeal, the complainants were children of young and tender age. They are impressionable. They are susceptible to influence by adults who have authority over them. The close reading of the testimonies of the complainants reveal uncanny semblance in the manner in which the two complainants narrated the events that are alleged to have taken place. Such uncanny likeness in the complainants' evidence leads this court to the conclusion that the complainants may have been couched to give their testimony before court in the manner that they did. This court is not persuaded that the complainants were telling the truth to entitle this court convict the Appellant on the basis of uncorroborated evidence of the complainants. Further, the Appellant's assertion that he had differences with the originator (Dobi) of the information that eventually led to his arrest and arraignment before court, is something that should have been investigated by the police. The fact that the said Dobi was not called upon to record a statement or to testify on behalf of the prosecution, raises doubt in this court's mind that the information that he gave to PW5 was based on the truth.

22. He submitted that it is possible to coach witnesses especially where the ultimate aim is to get rid of a person. That sexual offence charges have been turned into a tool to achieve a particular course at the expense of innocent parties.

23. The Appellant submitted that the Clinical Officer did not conclude that there was evidence of penetration in this case and he only relied on the fact of a broken hymen. He contended that a broken hymen is not proof of defilement and that the trial court erred by forming a firm conclusion of defilement from the lone fact of broken hymen. He relied PKW-vs- Republic (2012) eKLR where the judges stated;

> " [15]. In their analysis of the evidence on record, the two courts below...appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?
>
> [16]. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences 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 hymen. Those who are, there are times when 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, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."

24. He submitted that if the trial court had not attached undue and undeserved weight to the state of the hymen, it would have been less confident about the weight of the prosecution case.

25. The Appellant submitted that it is debatable whether minimum mandatory sentences which only prescribe imprisonment as the mode of sentencing are in tandem with the International Covenant on Civil & Political Rights of 1966 which was ratified by Kenya in 1972. That whereas the sentences prescribed may not be necessarily unconstitutional, the courts must ensure that whatever sentence is imposed upholds the dignity of the individual.

26. That since the *Sexual Offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must now be construed with adaptations, qualifications and exceptions so as to take into account the dignity of the individual. That the circumstances of the offence must be considered and having done so, nothing bars the court from imposing such sentences as are appropriate. He relied on Dismas Wafula Kilwake -vs- R [2019] eKLR where the Court of Appeal held;

> " In appropriate cases therefore, the court freely exercising its discretion in sentencing should be able to impose any of the sentences prescribed if the circumstances of the case so demand."

27. He submitted that if this court disallows the appeal, it should consider Section 333 of the *Criminal Procedure Code* and compute his sentence from the date of his arrest on 16/05/22.

28. The Appellant submitted that the onus was on the prosecution to adduce evidence and counter his defence. He relied on Adedeji -vs- The State (1971) I ALL N.L.R 75 where it was held that;

> " Failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of a tribunal and lead to the quashing of a conviction imposed."

29. He submitted that the misdirection by the trial magistrate clouded the courts eyes such that it could not find that the duty to prove the case lay on the prosecutor's door and that the prosecution failed to prove the case beyond reasonable doubt.

30. The State, through Prosecution Counsel Vera Omollo, submitted that all the evidence on record excluding the birth certificate indicated that the victim was born in 2010 and was therefore aged 12 years at the time of the offence. She relied on Hilary Nyongesa -vs- R [2010] eKLR where the court stated; "age is such a crucial aspect in sexual offences that it has to be conclusively proved and this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

31. She submitted that the complainant's evidence and the medical evidence established that the complainant was defiled. That the complainant testified of how she was sleeping in the sitting room when the Appellant took her to his bedroom and defiled her.

32. She submitted that the Appellant acknowledged that he knew the complainant as his daughter but merely denied defiling her. That the trial court was right in dismissing the defence as it was just a mere denial. She relied on Yasmin -vs- Mohammed [1973] EA 370 where the court stated;

> " The High Court is especially endowed with the jurisdiction to safeguard the interests of infants as the court is the parent of all infants. The welfare of the infants is paramount and is clear to the heard of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe and sect fall within the purview of the Guardianship of infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."

33. She submitted that the sentence meted on the Appellant was the most appropriate as section 8(1) of the *Sexual Offences Act* provides for a sentence of not less than 15 years.

34. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions always alive to the limitation that unlike the trial Court, it did not see or hear the witnesses (Okeno –vs- R [1972] EA 32).

35. I have carefully considered the grounds of appeal, the rival submissions and the entire record, and the only issue for determination is whether the case was proved beyond reasonable doubt.

36. In answering this question we must ask whether the ingredients of the offence were established, whether the case for the prosecution was cogent vis a vis the defence by the appellant, whether the sentence is legal.

Analysis and determination

Whether the case was proved beyond reasonable doubt

37. The ingredients of the offence od defilement are; age of the complainant, proof of penetration and positive identification of the assailant. The court must also look at the circumstances of the offence.

38. The prosecution produced a certificate of birth showing that the complainant was born on 6th June 2014. The proceeded to present her for age assessment and the report shows that the complainant's age was assessed at 12 years. The complainant's mother testified that the date on the birth certificate was erroneous and that the child was born on 06/06/2010 and that the certificate of birth was in error. I also noted that in the P3 the age was given as 12 years, the PRC says she was born in 2010.

39. The state also submitted that the victim was 12 years.

40. The age of the complainant could therefore not be in doubt. In any event PW5 is the complainant's mother was best placed to know when the complainant was born. In the Ugandan case of Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000; it was held that: -

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

41. In our jurisdiction, there is Richard Wahome Chege –vs- Republic [2014] eKLR, where the Court of Appeal stated that;

> " 12. On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."

42. The complainant's age was established to be 12 years.

43. On the identity of the appellant, it is not in doubt that they are known to each other as the appellant is the father of the victim. In the PRC form, he is described as the step father.

44. Was penetration established?

45. The case for the prosecution is that certain members of the public suspected that the appellant was sleeping with his daughter. They reported to the Assistant Chief, PW2 and he took the necessary action to report to the police. There was no explanation why these members of the public were not called to testify yet they were the initiators of the whole case. What had They seen or heard with their own eyes and ears to warrant the suspicion? Their absence as prosecution witnesses is suspect yet they were not protected witnesses. They allegedly reported to the assistant chief on 15th May 2022 yet it was alleged the defilement had started more than a year earlier. Why would they not testify? When had they realized this? How had they known this? If they were acting in the best interests of the child why would they not testify? Why remain unknown rendering their alleged report doubtful?

46. In her evidence, the complainant, PW3, narrated that in January 2021, she was living with her mother in Mtito Andei when her father, the Appellant, said that she should go home to Ngulyu. The Complainant travelled to Ngulyu alone and joined the Appellant and her siblings who were living with the Appellant. She narrated that her father told her to sleep in the sitting room where she slept with her 9 year old brother. That at night he took her to his bedroom and defiled her. She told the court that her brother did not hear anything. There is no way of knowing how she knew this yet there is no evidence that anyone interrogated the boy. Her testimony that her brother heard nothing is untenable, because the prosecution ought to have called him to testify.

47. There was no investigation of this case at all.

48. According to the prosecution the appellant was staying with the complainant and other children. The police officers did not talk to the other children or any of the persons who were suspecting this heinous offence. Going by the sleeping arrangements in the home she was not sleeping alone in the sitting room. There were other siblings who could hear or saw something suspicious, and it ought to have gone through the minds of the officer to warrant their interviews and recording of their statements.

49. If the incidents were several as alleged by the prosecution, there was no evidence to avail the evidence of those other alleged incidents. There was no evidence of how did the other incidents happened, where they happened? . The prosecution did not lead any evidence on this alleged other incidents. If indeed the prosecution has evidence of several incidents over that period of time then having charged the appellant of the same they had a duty to set out those other incidents.

50. There was also no evidence of any incident in May, the month the appellant was arrested.

51. Regarding the specific incident, the complainant's testimony was that she was defiled on the day that she arrived at her father's house from Mtito which means that it was sometimes in January 2021.Further, she testified that it was not the first time for him to defile her meaning that it had happened prior to January 2021. On the other hand, the I.O, PW6, testified that; "she told us that the incidence began in January 2021." The complainant's mother, PW5, testified that according to information from the complainant, the second incident of defilement was when the Appellant took her from the sitting room. Evidently, the complainant gave two different versions to two different people. It also does not add up for PW5 to testify that the complainant confided in her about the defilement yet the complainant's evidence was that; "I would use the money to buy always and sweets but I did not tell my mother."

52. The complainant also testified that on the night she arrived from Mtito and was defiled, she bled from her private parts and she informed Mr. Mutua about it. It is alleged that the said Mr. Mutua called the Appellant to ask him about the report and the Appellant admitted that it was true. The police did

not see it fit to speak to this Mr. Mutua. Neither was he mentioned by the chief as one of the persons who reported to him.

53. The same applies to the complainant's grandmother. It was stated that she was informed but she told her (complainant) to forgive the Appellant. This statement came from the prosecution. Why was this person was not investigated as she ought to have been charged with the offence of making the complainant to be a child in need of care and protection? But the police did not investigate that claim.

54. Otherwise it would be safe to conclude that they did and found them not to be true and hence unable to call the two as witnesses.

55. That said the complainant testified that the Appellant stopped defiling her after the Mutua and her grandmother were informed. Yet arrest was in May 2022 more than one year later, Did the defilement continue or not? This query also arises from the testimony of PW4. It was also the case for the prosecution that after defiling her, the Appellant would give her money which she would use to buy always and sweets. PW4, testified that upon interrogating the complainant, (in May 2022) the complainant said that she would buy bread with the money which she received from the Appellant after being defiled. PW4 said that she checked the complainant's desk and found some bread.

56. PW4's testimony was in reference to May 2022. Did the prosecution mean that the defilement was still happening contrary to the complainant's testimony? This contradiction was not explained by the prosecution.

57. Further the case for the prosecution was that it was teacher Nancy who interrogated her yet, PW4's name was Maria Mueni Range. PW6, the Police Officer was PC Mary Wangeci Mwaura so there can be no confusion. There was no explanation for this discrepancy. Is the person who interrogated the complainant and the same one who testified in court?

58. It was also PW4's evidence that; "I and the two officers and the learner went to my office and the officers started interrogating the learner. At first she denied being defiled." Evidently the Police and the teacher put the questions to the complainant as to whether she had been defiled. It is not the complainant who told them she had been defiled.

59. In addition, she was interrogated in the absence of her parent or guardian. The officer did not mention that the complainant t had at first denied being defiled. She simply stated that she told them that her father was defiling her, the manner in which the complainant was interrogated raises questions as to the credibility of her testimony. If she denied being defiled at first, one wonders what happened in order for her to change the story and what influenced or caused the change.

60. The Appellant testified that the complainant's mother had ran away in 2021 but she moved back when the defilement issue arose. This evidence of domestic strife cannot be ignored as a possible motive in using the criminal justice system to settle scores. It is also suspicious that the complainant is the one who was living away with her mother and is the one to whom the offence relates yet the evidence shows that the Appellant was living with other minors in the absence of their mother.

61. The complainant's mother also testified that she confided in a family friend called Kamute and allegedly, the Appellant admitted before Kamute. Further, the members of public who reported to PW2 should also have been called as witnesses. Failure to call these witnesses, in my view, means that either they were non-existent or their evidence would have been adverse to the prosecution case. In Paul Kanja Gitari –vs- R (2016) eKLR the court stated that;

> " The state of the evidence tendered with all its inconsistencies means that the appellant's complaint that some vital witnesses were not called is also not idle. It is of course trite that

there is no number of witnesses required for proof of a fact. See section 143 of the *Evidence Act*. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the Court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case."

62. The mother of the complainant did not come across as a reliable witness. She testified that the defilement happened in May 2022, and that her child told her about it upon learning about the alleged defilement she waited for three weeks before taking action. And the action was, she called her husband to talk about it. She claimed to have recorded his confession on phone and threatened to open it in court. Clearly with such evidence why had she not surrendered it even to the authorities? Why would she learn that her daughter had been defiled, leave the same daughter with the defiler, and go to her place of business to call the defiler on phone? She said she was afraid of the accused but she was not living in the home, was doing business away from home and could have taken action from that distance. She never said the appellant was violent with her or the children or had threatened her and the children or anything.

63. These questions needed to be answered by the prosecution either through the testimony of the mother or any other witness. This is because the issues of threats not to report are not strange, but the court cannot just make that assumption

64. Looking at the judgment, it is evident that the trial magistrate put undue weight on the fact of the broken hymen and appears to have shifted the burden of proof to the Appellant by stating; "PW1 upon examining the minor confirms that the hymen was broken and which indicates and confirms an incidence of penetration. Important to note is that the evidence of the said medical expert went on record as unchallenged as the accused did not have any issues to cross examine the said doctor on."

65. The accused person did not have to ask the clinical officer anything. The law is clear that an accused person can keep quiet throughout the trial and the onus will still be on the prosecution to prove every element of an offence beyond reasonable doubt.

66. It was upon the trial court to examine the evidence and determine whether it established penetration.

67. The clinical officer stated that the hymen scar was over a year old. There are numerous authorities that a broken hymen alone cannot be proof of defilement. Hymens break for many varied reasons that are not necessarily penetration. The surrounding circumstances ought to have been considered to see whether they supported the alleged defilement. The medical evidence did not establish penetration.

68. The upshot, in my view, is that the prosecution case is doubtful and it is not safe to sustain the conviction.

69. The appeal is allowed. The conviction is quashed. The sentence is set aside.

70. The appellant be set at liberty unless otherwise legally held.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 14TH MAY 2025

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MUMBUA T MATHEKA JUDGE

Kazungu for state

Appellant present virtually from Makueni Main Prison CA Chrispol

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA