Kasingihi v Republic (Criminal Appeal E033 of 2023)
[2025] KEHC 6130 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6130 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E033 OF 2023

M THANDE, J

MAY 16, 2025

BETWEEN

MATESO KAZUNGU KASINGIHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein, was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* in Kilifi Sexual Offences Case No. 102 od 2019. He was sentenced to 15 years imprisonment. The particulars of the offence are that on 29.8.19 at around 1300 hours at Ganze sub-county within Kilifi county, caused his penis to penetrate the vagina of KM, a child aged 17 years.

2. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. The grounds of appeal are reproduced below:

    1. That the trial magistrate faulted in points of law and facts by clearly misdirecting himself when he failed to invoke section 8(5) of the *Sexual Offences Act* and making provisions providing under section 8(1)(4) of *Sexual Offences Act* in the circumstances in particular case cannot be defilement.

    2. The trial magistrate erred in law and facts where she failed to hold that the prosecution did not discharge its burden of proof to the legal standards required threshold (sic) this is unconstitutional and contrary section 107 (1) and 109 of the *evidence act*.

    3. That the honourable trial magistrate faulted in points of law and facts by failing to consider my strong defence.

4. The Respondent opposed the appeal in submissions dated 21.1.25.

5. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See Okeno v. Republic [1972] EA 32.

6. On the ground that the trial Magistrate erred in failing to invoke Section 8(5) of the SOA, the Appellant submitted that the Complainant told the trial court that she was 18 years old. Further that PW2 testified that her daughter had the behavior of an adult of enjoying sex with men.

7. Section 8(5) of the SOA provides:

   (5) It is a defence to a charge under this section if—

      a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

      b. the accused reasonably believed that the child was over the age of eighteen years.

   (6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

8. For this defence to be available to an accused person, it must be raised at trial to enable the prosecution respond thereto, and the trial court pronounce itself on the same.

9. I have looked at the sworn statement the Appellant made in the trial court. He did not raise the defence in Section 8(5) of the SOA. All he did was deny committing the offence. This ground therefore fails.

10. I now turn to the ground that the prosecution did not prove its case to the required standard.

11. To sustain a conviction for the offense of defilement, 3 ingredients must be established by the prosecution. This was set out in Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where the Court stated:

> The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.

12. This Court is required to determine whether in the court below, it was demonstrated that the Complainant was below 18 years of age. Second, whether there was penetration of the Complainant's genitalia. Lastly, that the evidence identified the Appellant as the perpetrator.

13. The record contains the birth notification of the Complainant produced by PW4 No. 8XXXX9, PC Charles Onderi which indicates that she was born on 18.10.01. On 29.8.19, when the offence is alleged to have been committed, the Complainant was 17 years old. This was not challenged by the Appellant. The test of age was thus established.

14. As regards penetration, the Complainant testified that on 25.8.19 at 1.30pm, she met the Appellant and they had sex in the bush. She said "tulifanya tabia mbaya". When they parted, she went to her sister's home at Kwa Demu. She returned home after 2 days as her parents were looking for her. HeR mother threatened to take her to the police and she disclosed to her. He parents did not believe her and they took her to Bamba Police Station and she told them what she had told her parents. She was then taken to hospital. PW4 a clinician at the Kilifi County Referral Hospital who produced the P3 and PRC forms filled by Dr. Yeri and Dr. Kaingu respectively, testified that the Complainant was examined on 4.9.19. The examination revealed a broken hymen and whitish discharge from the vagina. The P3

form indicated that the hymen was broken but that that the labias, cervix and vagina were normal. HIV, syphilis and pregnancy tests were negative. PW4 did not state that the conclusion deduced from the findings was penetration.

15. A broken hymen alone cannot be used as proof of penetration. In P.K.W v Republic [2012] eKLR, the Court of Appeal addressed its mind to this issue and stated:

> 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 the 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 natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.

16. The doctors who examined the Complainant did not find any injuries on the child's genitalia. The only evidence of the alleged penetration was that of the Complainant. Indeed, in her judgment, the trial Magistrate noted that the Complainant's evidence was not corroborated. However, she cited the proviso to Section 124 of the *Evidence Act* which provides as follows:

> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

17. The law requires that in situations where the only evidence is that of a victim of a sexual offence, that evidence even if not corroborated shall be received and the accused person may be convicted. The trial court must however record the reasons for believing such a victim. In the present instance, the trial Magistrate stated that she found the evidence of the Complainant believable. She did not however comply with the proviso cited, by giving the reason as to why she believed the Complainant.

18. Even assuming that penetration had been established, was any evidence placed before the trial court to connect the Appellant? I think not. This is because, the offence as per the charge sheet is said to have been committed on 29.8.19. The Complainant stated that she had sex in the bush with the Appellant on 25.8.19. Further PW2, the Complainant's mother stated that she knew that the Complainant had sex with men and that she did not tell her who she slept with. Accordingly, I find that if indeed defilement took place, when and by whom cannot be ascertained from the evidence on record. Doubt is therefore raised in the mind of the Court and the Appellant is entitled to benefit therefrom. The ingredient of identification thus fails.

19. In light of the foregoing, I find that the prosecution did not discharge its burden of proof against the Appellant, beyond reasonable doubt. The conviction was not safe. In the premises, I quash the conviction and set aside the sentence. The Appellant is hereby set at liberty unless otherwise lawfully held.

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

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M. THANDE

JUDGE