



REPUBLIC OF KENYA



KENYA LAW
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**LSA v Republic (Criminal Appeal E035 of 2024)
[2025] KEHC 6356 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E035 OF 2024**

JN NJAGI, J

MAY 14, 2025

BETWEEN

LSA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from original conviction and sentence by Hon. F.M.
Mulama, Resident Magistrate, in Lamu Principal Magistrate's
Court Sexual offence Case No. E003 of 20203 delivered on 14/3/2024)*

JUDGMENT

1. The Appellant was convicted for 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 the 31st March 2023 at [Particulars withheld] village within Lamu Central Sub County in Lamu County, he intentionally and unlawfully caused his penis to penetrate the vagina of H.G (herein referred to as the complainant), a child aged 12years.
2. The appellant was sentenced to serve 25 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal, grounds of which are that:
 1. That the trial court erred in convicting the appellant despite unreliable identification evidence.
 2. That the trial magistrate failed to address contradictions in the complainant's testimony.
 3. The medical evidence did not support the prosecution's case.
 4. The trial court failed to consider the complainant's past attempt to falsely frame the appellant.
 5. The prosecution's case was based on weak and uncorroborated testimony.



6. The investigating officers failed to conduct a proper investigation.
7. The sentence imposed was excessive and not based on conclusive proof of guilt.

Case for prosecution

3. The evidence for the complainant who was PW1 in the case is that she was at the material time a grade 6 pupil at [Particulars withheld] primary school. She was living with her mother at [Particulars withheld] village together with her step-father, the appellant. That they were living in the same house but in different rooms. The complainant was sleeping in her room with her siblings. That on the material day she was asleep in her room when she woke up and found the appellant sitting on her bed. She got shocked and the appellant left. She slept and after some time she woke up again and saw him by the bed side. He left. She slept. She later woke up and found the appellant on top of her and was having sex with her. She did not have her clothes on. The appellant did not have his clothes on and was only wearing a boxer. She pushed him away and he left. She screamed and her mother went into her room to find out what was happening. She explained to her what had happened. On the following morning they reported the matter at Hindi police station. She was taken to hospital.
4. A clinical officer who attended to the complainant at Hindi dispensary, Madi Sheyumbe, PW2, testified that he examined the complainant and found her with normal external genitalia and a hymen that was not intact but not freshly broken. That she had whitish discharge that suggested fungal infection. He gave her medication for fungal infection. Other tests were done that came out negative. He completed her P3 form and Post Rape Care form. During the hearing in court, he produced the treatment notes, the P3 form and Post Rape Care form as exhibits, P. Exh. 1-3 respectively. He also produced age assessment report from King Fahd Hospital as exhibit, P. Exh.4. The same indicated that the complainant was at the time aged 12 years.
5. A police officer from Hindi Police station, John Kaingu PW3 told the court that the complainant and her mother went to the police station and made a complaint to the OCS who called him to record their complaint in the Occurrence Book. He booked the report in the OB. He filled a P3 form and escorted them to hospital for the filling of the same. He thereafter handed over the documents to the investigating officer, Cpl Mbithe. That on the 2/4/2023 he received a phone call from a member of public from [Particulars withheld] village that the appellant had been arrested by members of the public. He called the investigating officer. They went and rearrested the appellant and took him to the police station.
6. It was further evidence of PW4 that the complainant told him that she identified the appellant by aid of moonlight that was pilfering into the house through the large windows of the house.
7. The investigating officer, Cpl Lilian Ngige PW4, testified that he took over this matter on 1/4/2023 when she was handed over relevant documents in regard to the case. The OCS requested her to take the complainant to King Fahd Hospital for further treatment. She did so. She visited the appellant's home at [Particulars withheld]. That on 2/4/2023 she was told by a colleague that the appellant had been arrested by members of the public at [Particulars withheld] village. They went to the place and found the appellant at the home of a village elder. They re-arrested him and took him to Hindi police station. She charged him with the offence.

Defence Case

8. When placed to his defence the appellant stated in a sworn statement that he was on the 24/4/2023 heading to [Particulars withheld] town when he met with 3 boys who told him that the village elder



was looking for him. They took him to the village elder. On reaching there he was tied on the legs with a rope. He was not told the reason. Policemen then went there and arrested him. He was taken to the police station. He was charged. He denied the charges.

9. It was further evidence of the appellant that in the year 2017 the complainant had made him to be charged with a similar offence. She later admitted to have framed up the case and he was acquitted by the High court. He said that he had divorced with the complainant's mother at the time that the charges were brought up against him.

Submissions

10. The appeal was canvassed by way of written submissions of the appellant and those of the Senior Prosecution Counsel, Miss Agatha Mkongo.
11. The appellant submitted that the medical evidence adduced before the trial court did not support the charge of defilement. The appellant relied on the case of *J.W.A v Republic (2021) eKLR* where it was held that where medical evidence does not support allegations of defilement, then the prosecution's case is weakened.
12. The appellant submitted that the complainant's mother attempted to prevent the complainant from testifying which act raises doubt on the credibility of the prosecution's witnesses. The appellant cited the case of *David Ochieng v Republic (2015) eKLR* where it was held that a court should be cautious in convicting based on the sole evidence of a complainant, especially where other evidence is inconsistent.
13. It was submitted that the sisters of the complainant who were in the same room with the complainant at the alleged time of defilement did not hear or witness anything. That there was no sufficient evidence of positive identification by the complainant. That his identification was unsafe and unreliable. The appellant cited the case of *Roria v Republic (1967) EA 583* where the court emphasized that evidence of visual identification under difficult circumstances should be approached with caution.
14. It was submitted that the trial court imposed a sentence of 25 years without it exercising judicial discretion in sentencing as stated by the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic (2017) eKLR*.
15. The respondent on the other hand submitted that the ingredients of the offence of defilement was proved beyond reasonable doubt. That the clinical officer PW2 produced the age assessment report that confirmed the evidence of the complainant that she was aged 12 years. That the complainant proved that the appellant penetrated her which evidence was corroborated by the evidence of the Clinical officer PW2 who found the complainant with a broken hymen and whitish discharge from her vagina.
16. It was submitted that the appellant was a person well known to the complainant as a step father and she saw him by aid of moonlight. Therefore, that the appellant was positively identified by the complainant.
17. The respondent submitted that the appellant's defence consisted of mere denials which did not cast any doubt on the case for the prosecution.
18. It was submitted that the complainant was traumatized by the act of defilement committed by the respondent. Therefore, that the sentence of 25 years was fair and just. The respondent urged the court to dismiss the appeal.



Analysis and determination

19. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In the case of *Okeno vs Republic* [1972] EA 32 the Court of Appeal set out the duty of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] E.A 424.”
20. I have perused the grounds of appeal, the record of the trial court, the judgment and the written submissions filed by both parties. The issue arising for determination is whether the prosecution had proved the case against the appellant beyond reasonable doubt.
21. The ingredients of the offence of defilement are proof of the age of the victim, proof of penetration and proof of the identity of the perpetrator – see *Dominic Kibet Mwareng v Republic* (2013) eKLR.
22. The complainant in her evidence in court did not tell the court how old she was. She was not asked about it. However, the prosecution produced her age assessment report that indicated that her age was assessed at 12 years. Part c of the P3 form indicated her estimated age as 13 years. I therefore find that the complainant was a child under the age 18 years for the purposes of the *Sexual Offences Act*.
23. On penetration, the complainant gave evidence that the appellant went to her bedroom while she was asleep and penetrated her vagina. The respondent submitted that the evidence of penetration was corroborated by the evidence of the clinical officer PW2 who on examining the complainant found her with broken hymen and vaginal discharge.
24. The trial magistrate in his judgment stated that penetration was proved by the evidence of the complainant as supported by medical evidence. I do not agree with the finding of the trial magistrate that medical evidence adduced before the trial court supported the evidence of the complainant that she had been defiled. The clinical officer PW2 in the first place noted that the hymen was not freshly broken. It is trite that a broken hymen does not necessarily connote defilement – see *PKW v Republic* [2012] eKLR. Therefore, absence of hymen did not prove penetration on the complainant. There was thus no medical evidence to support the evidence of the complainant that the appellant defiled her on the material day.
25. However, lack of medical evidence is not fatal to a charge of rape as the offence can be proved in other ways such as by way of oral evidence of the victim or by circumstantial evidence. This position was fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi vs Republic* Criminal



Appeal No. 661 of 2010 (Eldoret), citing *Kassim Ali v Republic* Criminal Appeal No. 84 of 2005 (Mombasa), where the court stated that:

The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.

26. In the absence of medical evidence to support the charge of defilement, the question is whether there was oral or circumstantial evidence to prove the same.
27. The complainant gave evidence that the appellant entered her room three times. She said in cross-examination that she identified the appellant by aid of moonlight that was pilfering into the room through the window. The question then is whether the complainant identified the appellant as the person who entered her room three times and defiled her.
28. The law on identification especially where it takes place in difficult circumstances is that it should be treated with a lot of care so as to avoid convicting the accused person on evidence of mistaken identity. In *Francis Karuiki and 7 others vs. Republic* Cr. Appeal No 6 of 2001 [200] eKLR it was held that;

“The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if satisfied that the identification is positive and free from possibility of error.”
29. In *Wamunga v Republic* [1989] KLR 424 at 426 the Court of Appeal had this to say on the subject:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from the possibility of error before it can safely make it the basis of a conviction.”
30. In *Kimea v Republic (Criminal Appeal 010 of 2020)* [2022] KEHC 104 (KLR) (18 February 2022) (Judgment) the court enumerated the factors to be considered in identification to include such factors as the lighting conditions under which the witness made his/her observation; the distance between the witness; the period of time the witness actually observed the perpetrator and whether the witness had an unobstructed view of the perpetrator.
31. The complainant in her evidence-in-chief never stated how she identified the appellant. It is only in cross-examination that she mentioned that she identified him by aid of moonlight that was pilfering into the room through the window. However, there was no evidence on how bright the moonlight was. There was no evidence on the side the appellant was facing in relation to the moonlight and whether the complainant had clear view of him. There was no evidence on the position of the moonlight. The investigating officer did not inspect the window and ascertain whether the witness could actually identify the appellant though moonlight pilfering in through the window. It was a grave mistake on the part of the prosecutor to fail to bring out clear evidence on identification. Moreso, the trial magistrate was in error in failing to address himself to the principles applicable in identification where the offence is committed at night. In view of this, I cannot say that the identification was free from the possibility of error.



32. The complainant was the sole identifying witness in the case. It is trite law that a court before convicting on the evidence of a single identifying witness should warn itself of the danger of basing a conviction on such evidence. In *Roria vs Republic* (1967) EA 583 the Court of Appeal stated at page 584 that:

“A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

33. In *Kiilu & Another v Republic* [2005] eKLR, the Court of Appeal held that;

“Subject to 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 of identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error.”

34. In *Abdalla bin Wendo and another v Republic* (1953) 20 EACA 166 it was held that:

“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 respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be 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 the possibility of error”.

35. The complainant in this case saw her assailant at night. The trial court did not test her evidence with care so as to ensure that there was no mistaken identity. It was therefore, in my view, not safe to base the conviction on the untested evidence of the complainant that she identified the complainant by aid of moonlight. In the absence of clear evidence on identification, I am of the view that the appellant was entitled to the benefit of doubt.

36. The upshot is that the prosecution had not proved beyond reasonable doubt the charge of defilement against the appellant. Consequently, the conviction entered against him is quashed and sentence imposed on him set aside. I order the appellant be set at liberty forthwith unless lawfully held.

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

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for the Respondent

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

Court Assistant - Ndonye

