**Mnangat v Republic (Criminal Appeal E020 of 2024)**
**[2025] KEHC 5928 (KLR) (12 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5928 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAPENGURIA**

**CRIMINAL APPEAL E020 OF 2024**

**RPV WENDOH, J**

**MAY 12, 2025**

**BETWEEN**

**ABRAHAM MNANGAT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. Abraham Tamata Mnangat faced a charge of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act*.

2. The particulars of the charge are that on 4/7/2024, at Batei Location, Kipkomo Sub County, intentionally caused his Penis to penetrate the vagina of SC a child aged eleven (11) years.

3. In the alternative, he faced a charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* in that the appellant touched SC's vagina, a girl aged eleven (11) years.

4. After a full trial, the appellant was convicted on the main charge and sentenced to serve life imprisonment. The appellant is aggrieved by both the conviction and sentence which provoked this appeal. The grounds of appeal are found in the petition of appeal and amended grounds of appeal. The grounds are as follows;-

    1. That the identification of the perpetrator was not full proof;

    2. That the charge is defective in that the word 'unlawful' was not included in the particulars of the charge;

    3. That the appellant's defence was not considered;

    4. That the sentence is harsh and excessive;

    5. That the applicant's mitigation was not considered.

5. The appellant prays that the conviction be quashed, sentence set aside and he be set at liberty.

6. This is a first appeal and this court is under a duty to re-examine all the evidence that was tendered in the trial court, analyze it and arrive at its own findings but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for that fact. This court is guided by the decision in Okeno -V- Rep. (1972) EA 32.

**Prosecution's case**

7. After a voire dire examination, the court allowed PW1, SC, to testify on oath. She recalled that on the night of 4th and 5th July, 2024 she was asleep with her siblings MC, SP, MC and BC who were all younger than her. She was woken up by somebody lying on her and she switched on a Solar lamp and saw it was Abraham whom she knew physically and by name; that he did 'tabia mbaya' to her; that she raised alarm by screaming and the appellant got up and ran out. PW1's mother came and she was taken to Hospital. PW1 said that they had not locked the door because one Mama Osman was supposed to pick vegetables from there and her mother had gone for a celebration.

8. PW2 SC, the mother to PW1 recalled the 4/7/2024 about 7.45 p.m., she was asleep when she heard screams from her sister's homestead. She ran there and found Mama L screaming and she appeared drunk. When going back home she found her daughter screaming and said that the appellant had defiled her. PW2 called her sister PW3 and, they observed PW1 and she had semen outside her vagina. She took PW1 to hospital next day and on the way, PW1 saw Accused who PW1 said had worn a red shirt and he was arrested. PW2 identified the appellant as a neighbour and he used to fetch water for her homestead.

9. PW3 EC, an aunt to PW1 and sister to PW2 recalled that on 4/7/2024 she went to a party in her neighbourhood, and the appellant was there but he left after quarrelling with some people; that PW2 was at the same party but left about 12.00a.m., that PW2 later called to inform her of what had happened to PW1; that PW1 was present and named the appellant as having done "tabia mbaya" to her. PW2 and 3 observed her and saw dry semen in her private parts. They took PW1 to hospital next day and on the way to hospital PW1 saw the appellant and they arrested him.

10. PW4 Nicholas Selemi, a Clinical Officer at Chepareria Sub county hospital recalled the 4/7/2024 when the complainant was taken there with a history of defilement. He examined PW1 and found a watery discharge (semen) in her vagina bruises at 12 o'clock and 9 o'clock at the cervix and the vulva was perforated.

11. PW5 PC Charles Mukhoma of Ortum police station, was the Investigating Officer in this case. He recalled that the case was reported to the station by Esther Cheptoo who was accompanied by PW1. She reported that somebody defiled PW1 on the night of 3-4/7/2024. He arrested the appellant at Ortum hospital when in company of PW2; that her age was assessed at eleven (11) years.

**Defence Case.**

12. When called upon to defend himself, the appellant gave unsworn evidence; that on 3/7/2024 he went to work on the farm at Majorwa where he slept; that on 4/7/2024 people came to tell him that there was work at home and he went with them but was arrested while at the centre; that he was charged for an offence he knew nothing about.

**Submissions:**

13. The appellant submitted that he incident allegedly occurred at night and PW1 did not tell the court in detail, how she managed to see the perpetrator, whether the light had been on, how far it was from her. He relied on the decision of Joseph Wambua Nzoro -V- Republic (1991) eKLR and that the court erred by basing the conviction on a single identifying witness without corroboration. The appellant further urged that the first report to police should have been placed before the court to confirm if the complainant named the appellant as the assailant.

14. The appellant also submitted that the charge sheet is defective for omitting the word 'unlawful' in the particulars of the charge. He relied the decision of David Odhiambo -V- Republic CRA 5/205 (MSA).

15. As regards sentence, the appellant urged that the court failed to consider that he is a young man and the court was not guided by the principles of sentencing e.g., character of appellant, school integration and reform.

16. The appeal was opposed by the Prosecution Counsel who also filed submissions. On identification, Counsel submitted that the complainant saw the accused using Solar light which she lit; that the appellant was well known to her both physically and by name, Abraham; that she screamed for help and when PW2 and 3 came to the scene, she named the appellant as the assailant; that PW1 pointed out the appellant the next day following which he was apprehended hence the identity is not in doubt.

17. On the charge being defective, the Respondent submitted that the charge clearly reads the sections under which the appellant was charged which clearly speaks of the offence of defilement and the sentence; that failure to insert the word 'unlawful' is not fatal to the charge.

18. On Sentence, the Counsel submitted that the court's hands were tied by the law and that the court pronounced the sentence after considering the sentencing guidelines and authorities' on.

19. I have duly considered the grounds of appeal, the lower court record and the submissions filed by either side.

**Whether the charge was defective:**

20. The appellant complained that since the word 'unlawful' was missing from the charge, it renders the whole charge defective and fatal to the case.

21. In Kaaka Masara Mangeti -V- Republic (2020) eKLR the Court of Appeal stated thus; "similarly, we reject the ground that the charge sheet was defective because the words "intentionally" or "unlawful" were not included. The act of defilement in itself is unlawful. The words do not constitute any of the elements of the offence of defilement as was explained in the case of Josphat Wanjala Olbai -V- Republic (Eld) CRA.92/2015 which stated:

    25. The offence of defilement is unlawful and the absence of the words 'intentional' and 'unlawful' in the particulars of the charge do not render the charge defective".

        > " The words 'intentional' and 'unlawful' are not ingredients of the Offence of defilement under section 8(1) of the *Sexual Offences Act*. Defilement itself is unlawful. Those words are only elements of the charge of rape under section 3(1) and section 4 of the *Sexual Offences Act* respectively".

22. The same view was accepted by the Court of Appeal in CRA 27/2015 Marindany -V- Republic (2023) KECA 450. As held in the above considered decisions, the charge is not defective for lack of the word 'unlawful'.

23. The appellant faced a charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. To prove a charge of defilement, the prosecution has the duty to prove the following ingredients beyond reasonable doubt;

    1. That the complainant is a child;

    2. Proof of penetration;

    3. Proof of identity of the perpetrator.

**Proof of age of complainant**

24. In the case of Joseph Kiet Seet -V- Republic (2014) eKLR, the court held that "it is trite law that the age of a victim can be determined by Medical evidence and other cogent evidence.

25. In the case of Francis Omuroni -V- Uganda Court of Appeal CRA 2/2000, it was held thus, "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 Medial evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

26. The Court of Appeal reached similar decisions in Mwalongo Chichoro Mwajembe -V- Republic CRA 24/2015 (MSA) and Edwin Masara Onsongo -V- Republic (2016) eKLR where the court said

> ..... 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 birth certificate, baptism card or by oral evidence of the child, if the is insufficiently intelligent or the evidence of the parents or guardian is medical evidence, among other credible forms of proof.
>
> ".....we think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victims age, it has to be credible and reliable".

27. In the instant case, the complainant testified that she is eleven (11) years and in grade 5. PW2, the complainants mother confirmed that the complainant was born on 1/4/2013 hence she was eleven (11) years in 2024. The Doctor who examined her also estimated her age to be eleven (11) years. The complainant's age was satisfactorily proved to be eleven (11) years.

**Proof of penetration.**

28. Section 2 of the *Sexual Offences Act* defines penetration to mean: "the partial or complete insertion of the genital organs of a person into the genital organs of another person";

29. PW1 told the court that she woke up only to find the appellant on top of her and that he did 'tabia mbaya' to her, pointing at her vagina.

30. PW1 was examined by PW4 on 4/7/2024, a day after the incident. He found watery discharge or semen in her vagina. She had 12 o'clock and 9 o'clock bruises in the cervix and the vulva was perforated. PW4 was of the view that PW1 was defiled.

31. In the case of Mark Oiruri Mose -V- Republic (2013) eKLR, the Court of Appeal stated as follows:

> ..... So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ".

32. In this case, the bruises found in the vagina and the perforated vulva is evidence of forceful penetration of the complainant, and the presence of semen corroborated that fact.

**Proof of the perpetrator's identity;**

33. The appellant's submission is that since it was night the evidence of identification by a single witness is not full proof. When the court entirely relies upon evidence of a single witness under unfavourable conditions, the court has to warn itself of the danger of relying on such evidence.

34. Section 143 of the *Evidence Act* provides that a fact may be proved by a single witness provided that the law does not require otherwise.

35. In Abdullah Bin Wendo -V- Rex 20 EACA 166, the Eastern Court of Appeal stated thus

> .... Subject to certain well known exceptions, it is trite law that a fact may be proved by a 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 the 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 probability of error"

36. In this case, the magistrate was guided by the provision 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".

37. Under the above provision no corroboration is required.

38. The complainant said that when she noticed somebody lying on her, she lit a solar lamp. It means that the lamp was within her reach and since the perpetrator was right there on top of her, the court believed that PW1 was able to see the assailant. PW1 described the assailant to PW2 and 3 immediately after the incident; that it was Abraham who used to fetch water at their home and he wore a red shirt. PW3 had seen the accused in the same red shirt on the same evening when they were at a celebration in the neighbourhood, PW3 said she was at the event with PW2, I believe the appellant took advantage of PW2 being at the celebration and sneaked back to her home to attack PW1. The next day, it is the same PW1 who pointed out the appellant and he was arrested. By then a report had not yet been made to the police and it was not necessary for PW1 to describe the suspect to the police when she had led to his arrest. The trial Magistrate found the testimony of PW1, 2 and 3 to be credible and truthful and believed her. In the circumstances, this court is satisfied that the appellant was properly identified by PW1.

39. In Petition E018/2023 John Gichuki Mwangi and others, the Supreme Court has expressed itself that the *Sexual Offences Act* has not yet been amended hence the sentences must be meted in accordance with the Act.

40. Section 8(2) of the *Sexual Offences Act* provides that one found guilty of the offence of defilement of a child aged eleven (11) years or less is liable to life imprisonment. In view the of John Gichuki's decision, the sentence is lawful and this court upholds it.

41. Having considered the grounds of appeal, the evidence tendered before the trial court, and the rival submissions, I find that the conviction is sound and I affirm it. The sentence is lawful and this court will not interfere. I find that the appeal lacks merit and is hereby dismissed in its entirety.

**DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 12TH DAY OF MAY, 2025.**

**HON. R. WENDOH.**

**JUDGE**

In the presence of

Mr. Majale for State /Prosecution

Appellant - present

Court Assistants – Juma /Hellen