



**Salim v Republic (Criminal Appeal E024 of 2023)
[2025] KEHC 6881 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E024 OF 2023**

JN NJAGI, J

MAY 16, 2025

BETWEEN

OMAR ADE SALIM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence by Hon. B. Kabanga, SRM, in Hola Senior Principal Magistrate's Court Sexual offence Case No. E009 of 2020 delivered on 9/8/203)

JUDGMENT

1. The Appellant was convicted of 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 months of July 2020 and September 2020 at Malindi ya [Particulars withheld] village in Tana Delta Sub County in Tana River County, he intentionally caused his penis to penetrate the vagina of D. M. (herein referred to as the complainant), a child aged 14 years.
2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal.
3. The grounds of appeal are in summary that the trial court erred in law and fact in failing to hold that the prosecution had not proved the charge against the appellant beyond reasonable doubt and that the court failed to consider the appellant's defence.

Case for the prosecution

4. The complainant who was PW1 in the case testified that the appellant was her boyfriend for a period of three months. That sometimes in the month of August 2020, the appellant picked her from her home on a motor cycle and took her to his house. They proceeded to have sex after which he took her home. That on another day he picked her from home at 11 am and took her to his house where they



had sex again. She later went home. That on another day in the month of September 2020, he picked her from her home at 11 pm and took her to a house of his friend. She stayed with him up to 3 am and he took her home on his motor cycle. They did engage in sex on that day. That on getting home her mother answered her knock and sent her sister to open the door for her. In the morning her parents questioned her on where she had been on the previous night. She told them that she had been having a love affair with the appellant and that they had been engaging in sex. She was taken to the police station and then to hospital for examination.

5. The complainant's mother PW2 testified that the complainant was at the material time aged 14 years. That on the 18/8/2020 the complainant disappeared from home at 6pm and returned at 10 pm. She asked her where she had been and she informed her that she had been with a guy called Omar from Malindi ya [Particulars withheld] village. She reported to her husband about it. From that day the complainant started missing from home at night. That on 7/9/2020 she disappeared from home at 6pm and returned at 4 am. They interrogated her in the morning and she said that had been with the appellant. She disclosed to her that she had been having sex with the appellant. They reported to the police and took her to hospital for examination. It was her evidence that she did not know the appellant before the that time.
6. The complainant's father PW3 told the trial court that he is the chief of Chewani location That on the 8/9/2020 he returned to his home in the morning and his wife PW2 told him that the complainant had returned home that morning at 4am. That he interrogated the complainant and she told him that she had been away with Omar, the appellant. That she had been having sex with the appellant. They took her to the police station and reported the matter. They took her to hospital for examination.
7. The doctor who attended to the complainant PW4 testified that he examined the complainant on the 23/9/2020 and found her with a broken hymen but which was not freshly broken. She had vaginal discharge connoting infection. He filled a P3 form to that effect. During the hearing he produced the P3 form as exhibit, P.Exh.2.
8. The investigating officer, PC Victor Mutunga, PW5 testified that the report was made at Hola police station on 8/9/2020 by the complainant and her father. He interrogated the complainant who revealed that she had been defiled by the appellant on several occasions in one of the houses at Chewani village. The appellant was arrested and charged with the offence. During the hearing in court, he produced the complainant's birth certificate as exhibit, P.Exh.1.

Defence Case

9. When placed to his defence, the appellant stated in a sworn statement that he came to know the complainant in July 2020. He learnt that she was a daughter to the area chief. He thereafter met her on the road on several occasions. At another time he met her at her friend's place at [Particulars withheld] village. He did not meet her again until his arrest.
10. It was further evidence of the appellant that the complainant is his cousin and is related to his wife. That his father is an elected official in charge of land matters at [Particulars withheld] village. That his father has serious differences with the complainant's father over land grabbing at [Particulars withheld] village. That the charges were fabricated by the complainant's father so as to settle scores between him and his (appellant's) father. He denied that he defiled the complainant.
11. The appellant called 6 witnesses in the case. His father DW2 testified that he represents Muslims land interests at [Particulars withheld] village. That the complainant's father sold a parcel of land allocated to Muslims which he, DW2, was opposed to. That the complainant's father has been fighting him



- over that. That in 2020 he was partially paralysed and the complainant's father picked on his son, the appellant, so as to settle their scores.
12. Ammon Petro Buya DW7 told the court that the appellant's father is a committee member representing Muslim community interests at Malindi ya [Particulars withheld] village. That the chief teamed up with other people to grab land at the village and he differed with the appellant's father over it.
 13. The wife to the appellant DW3 testified that she was married to the appellant in 2019. That since he married her he returns home after work by 7pm and has never slept out.
 14. Mohamed Komora Ali testified that he is a neighbor to the appellant. That the appellant is married and he has never seen girls entering into his house. That in the year 2020 he was working with the appellant in the business of sand harvesting. That they were returning to their homes by 7 pm.
 15. Halako Kofa DW5 told the trial court that in April 2021 she went to live with her uncle after his wife gave birth. That she did not have a place to sleep at his uncle's house and her uncle's wife approached the mother to the complainant to offer her, DW5, a place to sleep. She started to sleep with the complainant in her room. That she realized that the complainant was keeping a secret mobile phone. That at night she was calling a boyfriend that she was addressing as "uncle". That she on several times accompanied the complainant to the house of the said boyfriend. It was her evidence that the complainant had several boyfriends and she would sneak out at night to see them.
 16. The appeal was canvassed by way of written submissions of the appellant and those of the respondent.

Submissions

17. The appellant submitted that the complainant left her parent's home and went to the house of the appellant for the purpose of having sex with the appellant. That the complainant was enjoying sex with the appellant. That this was the behavior of an adult and does not amount to defilement. That the appellant should not be punished for the voluntary acts of the complainant. That the parents of the complainant were aware of her behaviour. That it is unfair for the appellant to be sent to prison for a period of 20 years yet the complainant was enjoying the relationship.
18. It was submitted that the doctor who examined the complainant PW4 found the complainant with a broken hymen which however was not recently broken. That this meant that the complainant was sexually active.
19. The respondent on the other hand submitted that the case against the appellant was proved beyond reasonable doubt. That the age of the complainant was proved by the complainant herself and her mother both of whom said that the complainant was at the material time aged 14 years which evidence was supported by the complainant's copy of birth certificate, P.Exh. 1.
20. It was submitted that penetration was proved by the complainant who testified that the appellant was her boyfriend and that she had had sex with him on three different occasions at his house. That the penetration was supported by the evidence of the doctor PW4 who examined the complainant and found that her hymen had been broken though she had no fresh scar. That the broken hymen proved penetration beyond reasonable doubt.
21. It was submitted that the appellant was a person well known to the complainant as he was her boyfriend for a period of three months. Therefore, that the appellant was positively identified as the perpetrator of the offence. That the appellant's defence did not cast doubt on the prosecution case.



22. The respondent submitted that the sentence of 20 years imposed on the appellant was in accordance with section 8(3) of the [Sexual Offences Act](#) when taking into account that the complainant was aged 14 years. That the sentence was fair and just.

Analysis and determination

23. This being a first appeal, this court is required to re-evaluate the evidence tendered in the trial court and come up with its own independent conclusion as to whether or not to uphold the conviction and sentence. This duty was stated by the Court of Appeal in the case of *Okeno Vs. Republic* (1977) eKLR 32 that it is the duty of a first appellate court to revisit the evidence tendered before the trial Court afresh, evaluate it, analyze and come to its own independent conclusion on the matter. This task must have regard to the fact that the appellate court never saw or heard the witnesses testify thus the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence.
24. The ingredients of an offence of defilement are: proof of the age of the victim, proof of penetration and proof of the perpetrator of the offence, see *Dominic Kibet Mwareng v Republic* (2013) eKLR. The prosecution was required to prove these elements beyond reasonable doubt.
25. The appellant and the complainant were well known to each other. The issue of identity of the appellant therefore does not arise. The issues for determination are on proof of the age of the complainant and penetration.
26. The trial court found that the age of the complainant was proved by production of the complainant's birth certificate.
27. The complainant and her mother gave evidence that the complainant was at the material time aged 14 years. This evidence was corroborated by the birth certificate of the complainant which indicated that she was born on the 1st March 2006. This placed her age at 14 years in the year 2020. The age of the complainant was thereby proved beyond reasonable doubt.
28. On penetration the trial court held that the evidence of the doctor proved that the complainant had been defiled.
29. The evidence of the doctor was that the complainant had a broken hymen which though was not freshly broken as it had an old scar. The doctor as such could not have known when the complainant was defiled and whether the same had taken place in the period the appellant was said to have defiled the complainant. However, the fact that there was an old scar showing that the hymen had been broken was proof that the complainant had been defiled. The question is whether the appellant had defiled the appellant in the period in question.
30. The trial court considered the evidence adduced before it and came to the conclusion that the prosecution witnesses were credible. The court was convinced that the complainant was telling the truth that the appellant had defiled her.
31. I have on my part reviewed the evidence adduced before the trial court. The complainant testified that the appellant was her boyfriend and that she had engaged in sex with him in his house on two different occasions between the months of July and September 2020. She gave a narrative of how the sexual activities took place.
32. Section 124 of the [Evidence Act](#) allows a court in a sexual offence charge involving children to convict on the evidence of a child victim where the court finds reason to believe that the child is telling the truth.



33. I have no reason to fault the finding of the trial court that the complainant was telling the truth. Her credibility is reinforced by her evidence that when she went missing from her home on the night of 7/9/2020, she was in the company of the appellant but they did not engage in sex on that night. The fact of the complainant missing from home on that night and that she returned at 3 - 4 am was corroborated by her mother PW2. The complainant said that it is the appellant who brought her back home on his motor cycle. If it was a question of the complainant fabricating the evidence she would as well have said that they had engaged in sex on that night. There was no reason to disbelieve her evidence on her sexual escapades with the appellant.
34. The trial court considered the appellant's defence against the prosecution evidence and found that the defence evidence had irreconcilable contradictions one of which was that the appellant's father DW2 said that he differed with the chief in 2021 when the chief started selling some plots at the village. The court wondered how a dispute that started a year later after charges were brought against the appellant could have given birth to the case. The court was of the view that the defence witnesses were out to exonerate the appellant from his crime.
35. I have considered the appellant's defence vis a vis the prosecution evidence. The appellant never questioned the complainant in cross-examination that the charges were fabricated by her father due to differences between their respective fathers. He never questioned her how he managed to take her to his house if his wife was present in his house. He never questioned her whether she had a boyfriend she used to address as "uncle" as testified by Halako Kofa, DW5. The complainant's father, PW3, in his evidence said in cross-examination that he had no ill-will against the appellant. The appellant never asked him whether he was in fact the one who had fabricated the evidence against him as a result of differences between him (PW3) and his (appellant's) father. Neither were these issues brought to the attention of the investigating officer during investigations. The failure to question the prosecution witnesses on these issues can only mean that the appellant's defence was an afterthought. The prosecution witnesses were credible witness. The defence evidence did not cast any doubt on the prosecution evidence. I am in agreement with the trial court that the defence witnesses were only interested in having the appellant released from the hook. There was sufficient evidence that the appellant defiled the complainant on two occasions between the months of July and September 2020. I find the trial magistrate to have rightly dismissed the appellant's defence. The conviction is thereby upheld.
36. Section 8(3) of the *Sexual Offences Act* provides for a sentence of not less than 20 years for a person found guilty of defiling a child between the ages of 12 and 15 years. The appellant was given the minimum sentence. I find the sentence to be proper and lawful.
37. The upshot is that I do not find any merit in the appeal. Consequently, the appeal is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 16TH DAY OF MAY 2025.

J.N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant appearing in person - G.K. Prison Malindi

Court Assistant - Ndongye

