



REPUBLIC OF KENYA



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**TCA v Republic (Criminal Appeal E006 of 2023)
[2025] KEHC 6737 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E006 OF 2023
RPV WENDOH, J
MAY 23, 2025**

BETWEEN

TCA APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence by Hon. A. N. Karimi – Senior Resident Magistrate in
Kehancha Senior Principal Magistrate’s Court S.O. No. E048 of 2022 delivered on 8/02/2023)*

JUDGMENT

1. TCA has filed this appeal against the judgment of the Senior Resident Magistrate in Kehancha, in which he was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. In the alternative, the appellant faced a charge of committing an incident Act with a child contrary Section 11 (1) of the *Sexual Offences Act*.
2. The particulars of the charge are that on the 31st day of May, 2022 in Kuria West Sub County within Migori County, wilfully and unlawfully caused his penis to penetrate the vagina of RRS a child aged 12 years old or that in the alternative committed an indecent act by touching the vagina of RRS a child. No finding was made on the alternative charge.
3. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of five witnesses in support of their case namely PW1 Edwin Omahe a clinical officer at Isebania Sub-County Hospital; PW2 the complainant child RRS; PW3 SKM, the Complainant’s aunt, PW4 SW, the complainant’s mother and lastly PW5, PC Roseline Anyango the investigating officer attached to Isebania Police Station.
4. When placed on his defence, the appellant gave a sworn statement and called 1 witness in support of his case.



5. Upon conviction, the appellant was sentenced to serve twenty (20) years imprisonment. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The Amended grounds of appeal filed in court on 11/03/2024 are as follows: -
1. That the learned magistrate erred in law and in fact by failure to observe that the prosecution had failed to prove their case to the required standard of cogent proof beyond reasonable doubt.
 2. That the trial magistrate erred in both law and in fact by imposing on me a mandatory minimum sentence (MMS) of twenty years imprisonment notwithstanding that he had powers to make her discretion to grant a less severe sentence or grant an appropriate sentence under Article 50(2) (p) of *the Constitution* of Kenya 2010 and under section 26(2) of the *Penal Code* hence prejudiced.
 3. That the pundit magistrate made an error of law and/or made a blatant disregard of the law by failure to observe that there was lack of medical proof on the type of injury and the type of weapon used hence penetration not proved leading to a miscarriage of justice
 4. That the trial magistrate misdirected herself by mismanaging the case for the prosecution filing gaps occasioning an injustice.
 5. That the trial magistrate erred in law and in fact by failure to evaluate the evidence adduced that was inadequate, insufficient and inconsistent and had material contradiction and material discrepancies hence misguided.
 6. That there was no evidence of co-operation as the evidence was based on speculations and conjecture made up through a grudge between PW3 and the Appellant over land dispute.
 7. That the trial court erred in law by failure to observe that there was no nexus connection to the alleged commission of the offence, there is no exhibited clothes DNA tests carried out, appellant not examined the investigation was too shoddy, paradoxical and a hotchpotch of prevarication of a made-up case.
 8. That the trial magistrate erred in both law and in fact by shifting the burden of proof on the appellant yet the prosecution had failed to comply with section 212 of the CPC.
6. The appellant therefore prays that the Appeal be allowed, conviction quashed, sentence set aside and he be set at liberty.
7. The Appeal was canvassed by way of written submissions; the appellant filed written submissions in support of the appeal dated 18/08/2023 while the Respondent's counsel Ms. Tanui opposed the appeal through their submissions dated 14/11/2023.
8. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it, and arrive to its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal said: -

“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 v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 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 findings and conclusions; 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.”

9. PW1, testified on behalf of his colleagues Everlyne Awuor and Joshua Sorum who examined the complainant filled the P3 Form and the treatment notes. He stated that at the time of the examination the complainant was in fair general condition, she had not started seeing her menses and an impression of defilement was made. She was tested for HIV, VDRL and pregnancy which all tested negative. On urinalysis, epithelial cells were seen, no spermatozoa was seen on high vaginal swab, genitalia examination showed normal external genitalia with a whitish discharge on the outside. There were lacerations on the lower part of the vagina orifice, no bruises were seen on both labias. He produced the treatment notes as Pexh. 1 and the P3 Form as Pexh. 2.
10. PW2, having been taken through the *voire dire*, proceeded to give her testimony on oath. She told the court that she is 13years born on 25.12.2009, a student at [Particulars withheld] Primary School. She confirmed that she knew the appellant who she stated was her uncle; that on 31/5/2022 she was at her aunt S's house when the Appellant went and asked her to go and get him a matchbox from the shop. He then told her to accompany him to his house to collect money; while at his house the appellant removed her clothes and “akanifanyia tabia mbaya”, when he finished, she took the money and went to get him matchbox, she did not return to him but went back to her aunt's place and told her cousin Idah Monica Chacha what the appellant had done to her and later told her aunt; she clarified that by “tabia mbaya” she meant that the appellant had raped her. She was later taken to hospital, examined and later reported the matter at Isebania Police Station. She identified the appellant as the one who had defiled her. That she was taken to the hospital on 31/5/2022 and was examined on the same day; that she has lived with her aunt in Nyabohanse for 2 years since grade 4.
11. PW3, the complainant's aunt told the court that the appellant is her brother in-law; that she has stayed with the complainant for 3 years; that the complainant went home crying and told her that her uncle asked her to go with him to his house, that he wanted to feel what others were feeling, gave her Kshs. 10/- and told her to keep quiet. They later escorted the complainant to the police station and hospital.
12. PW3 said that they both her and appellant live on a land parcel belonging to their father in-law and she does not have the title deed. That her late husband built their house while the appellant stays on the other portion. She denied that there is no land dispute in court between her and the appellant.
13. PW4 the victim's mother stated that in the month of August, 2022, her sister S who lives her daughter, the victim, went to her place of work accompanied by her daughter and told her what had happened to PW2. They reported the matter to the police station and they were later referred to the hospital, the victim was examined, treatment notes and P3 Form was filled and they returned to the police station, the appellant was later arrested, she was with the victim during examination, the victim told her that the appellant is the one who had defiled her.
14. The investigating officer (PW5) stated that on 31.5.2022, the complainant in the company of her aunt S and mother S reported to the police station that she had been defile; PW5 interrogated the complainant who told her what had transpired. Witnesses statements were recorded, the appellant was traced and arrested. The appellant denied the allegations made against him and stated that he had a land dispute with his sister in-law S (PW1). She also produced the victim's Birth Certificate as Pexh. 3 which confirmed that she was born on 12/4/2010.



15. On cross-examination, she conceded that she did not dig deeper on the land dispute allegation but only concentrated on the defilement issue even though and established from neighbour that the re indeed existed a land dispute and that the appellant's portion of land had been sold by PW3 S. She however did not establish that the instant case was filed after the land dispute arose. She confirmed that the appellant and S have been in constant conflict over the land parcel.
16. The appellant denied committing the offence, it was his defence that he was attending the burial arrangements of one of his clan members who had died on the 30/5/2022 and remained there until 6.00pm on 31/5/2022 after the burial. He also stated that he did not know the complainant. Further asserted that his sister-in-law admitted that there was a land dispute between them.
17. DW2, VK, the appellant's sister stated that she travelled from Kisumu on 30.5.2022 and went to the appellant's home, she found him at home and after having dinner, the appellant left for the burial arrangement meeting, on 31/5/2022. They also left and went to the burial and no one visited the home on the said date until after the burial since she had the keys of the house, that the accused remained at the grave site the entire date as per the Kuria customs and could not have committed the offence. On cross-examination she however conceded that she was not with the appellant on 31/5/2022 between 6.00am until 6.00pm in the evening and could not tell what he did the entire day.
18. In support of the appeal, the appellant submitted that he was convicted and sentenced to mandatory sentence of 20 years imprisonment which has been declared unconstitutional and relied on the decisions in Petition No. E017 of 2021 and Petition No. E097 of 2021 in support of his case. It was also his submission that the results of the medical examination in the P3 Form were not reliable and could not be corroborated and hence made the conviction unsafe.
19. He further stated that the trial magistrate was biased and stage managed the case for the prosecution by filling in the gaps left by the prosecution case, that the trial magistrate had a predetermined mind which saw him as guilty as charged. He relied on the decision of the court in *Burunyi & Others vs Uganda* (1968) EALA 123.
20. On the age of the complainant, it was his submission that there was material discrepancy with regards to the same. That PW2 in her testimony at page 9 line 3-4 stated that she was 13 years old, born on 25/09/2009 while the Birth Certificate produced as Pexh. 3 showed that she was born on 12/04/2010. He relied on the cases of *Arthur Mshila Manga vs R Criminal Appeal No. 24 of 2014* and *Hudson Ali Mwachungo vs R Criminal Appeal No. 65 of 2015* on the consequence of the failure to prove the victim's age. He urged the court to resolve the benefit of doubt in his favor.
21. It was his contention that the evidence was inadequate, insufficient, inconsistent, distorted and weak, the same fell short of the required standard of cogent proof beyond reasonable doubt. That the trial magistrate failed to evaluate the whole evidence and which occasioned a miscarriage of justice; she failed to evaluate thoroughly the existing grudge between PW3 and the appellant. He averred that PW3 wanted him in jail so that she could deal with the land without hindrance and that is why she used the accused; that there was no evidence adduced to prove the offence, there were no clothes adduced as exhibits. That the investigating officer (PW5) went to the crime scene but nothing was found that could link him to the said crime, he was never taken for examination in any public facility or a doctor to prove the prosecution case.
22. Further, that his defence of alibi was disregarded even though the same was not challenged by the prosecution side nor called for rebuttal evidence. That as a result, he was fundamentally prejudiced.
23. In her submissions, Ms. Tanui prosecution counsel submitted on the ingredients of the offence of defilement and whether the same had been proved to the required standard of proof by the



prosecution. On the age of the victim, it was her submission that PW2 in her testimony stated that she was 13 years old, however from Pexh. 3, the same showed that she was born on 12.4.2010 and which therefore meant that she was 12 years at the time of the incident. Further, that PW1 in his testimony stated that the clinical officer who examined the minor indicated that she was 12 years old, that the treatment notes and the P3 Form (Pexh. 1 and 2) estimated the age of the victim as 10 years old. Even though the mother of the victim testified (PW4), she did not refer to the minor's age. She relied on the provisions of sections of 124 and 143 of the *Evidence Act* on this regard and maintained that the victim was 12 years old at the time of the incident, which fell within the delimitation of the age set under subsection 2 of the SOA. That the birth certificate produced as Pexh. 3 should take precedence over the oral evidence of the minor and the estimates done by the clinical officer.

24. On whether or not there was penetration, it was her submission that it was the testimony of the victim that the appellant took her to his house, stated that he wanted to feel what others felt, removed her clothes “akanifanyia tabia mbaya” (page 9 line 21) which she later clarified that by “tabia mbaya” she meant that the appellant “raped” her (page 10 line 6). Further, that PW1 noted an impression of defilement, noting that there were lacerations on the vaginal orifice, she had a whitish discharge and there was presence of epithelial cells. She urged the court to find that penetration was proved as envisaged under the *Sexual Offences Act*.
25. Lastly, on the identification of the appellant; she submitted that the appellant was well known to the victim. He was her uncle. On the issue of the 20 years mandatory minimum sentence, she relied on the Supreme Court decision in the Muruatetu case as well as the Court of Appeal decision in Onesmus Safari Ngao vs Republic Criminal Appeal No. 5 of 2020. She thus maintained that the sentence as meted is not excessive but is legal, that the trial court exercised her discretion judiciously. That there has not been any demonstration by the appellant that the sentence was harsh or manifestly excessive in the circumstances to warrant the court to interfere with the same. In conclusion, it was her submission that prosecution discharged its burden, the evidence tendered was not discredited by the defence, the conviction and sentence were sound in law.
26. I have carefully read and understood the amended grounds of appeal, record of appeal and the rival submissions. This being an offence of defilement, the prosecution had the duty to prove beyond any reasonable doubt the following: -
 1. Proof that the complainant was a minor;
 2. Proof of penetration;
 3. Proof of identification of the perpetrator.

See the case of Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013

27. From the amended grounds of appeal and the rival submissions; it is the appellant's contention that the said ingredients were not proved beyond any reasonable doubt, the appellant attacked the age of the victim and maintained that there was material discrepancy in proving the age of the victim. He further maintained that there was no sufficient evidence pointing to his guilt as the perpetrator of the offence especially since he raised the defence of alibi, which he avers was disregarded by the trial court. The appellant further took issue with the 20 years mandatory minimum sentence meted out on him and stated that the same had been declared unconstitutional in a number of cases.
28. The Respondent on the other hand maintained that the prosecution proved all the ingredients of the offence of defilement to the required standard of beyond reasonable doubt. That the trial court exercised her discretion judiciously in sentencing the appellant to 20 years and the same cannot be said to be unconstitutional.



Proof that the Complainant is a minor.

- 29 Age is a critical aspect in Sexual Offences which has to be conclusively proved. I have carefully looked at the Record of Appeal, particularly the testimony of PW1, PW2 and PW5 contained in pages 6, 9 and 16 of the Record of Appeal; I note that PW1 stated that the victim was 12 years old, he also produced copies of the treatment notes and the P3 Form as Pexh. 1 and 2 respectively and which showed that the victim was 12 years old. PW2, the victim, in her testimony stated that she was 13 years old. PW5 produced a copy of the Birth Certificate as Pexh. 3 which showed that the victim was born on 12.4.2010, this document was not challenged by the defence. I agree with the trial court's findings that at the time of the incident on 31.05.2022, the victim was 12 years old and thus within the statutory age limitations as provided under the Sexual Offences Act. There is no material discrepancy as alleged by the appellant.
30. Rule 4 of the Sexual Offences Rules, 2014 provides that:-
- "When determining the age of a person, the court may take into account evidence of the age of the at person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."
31. Further the Court of Appeal in eth case of Mwalango Chichoro Mwanjembe vs. Republic, Mombasa Criminal Appeal No. 24 of 205 (2016) eKLR held as follows: -
- "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 documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense..."
32. In view of the foregoing, I find that the birth certificate produced as PEXH. 3 is a prima facie proof of the age of the victim. It is therefore my finding that age of the victim was sufficiently proved to the required standard. She was 12 years old at the time of the incident and hence a minor.

Proof of penetration.

33. It is the appellant's contention that the evidence tendered by the prosecution was inadequate, insufficient, inconsistent and fell short of the required standard of proof to warrant his conviction. It was his claim that from the trial court judgment, the trial magistrate noted that there was no indication of the state of the hymen neither was there an indication of the approximate age of the injury. This the appellant construed to mean that the result in the P3 Form was not reliable and the same was not corroborated. It was also his submission that the investigating officer did not establish any nexus between him and the commission of the offence; that nothing was found on the crime scene to link him to the offence, that he was not taken for any examination, that the clothes of the victim were not adduced into evidence. His defence of alibi was disregarded despite the fact that he called 1 witness who corroborated his defence that on the day of the incident he was at attending a burial and remained there the entire day.
34. The Respondent on its part maintained that penetration was adequately proved and relied on the testimony of PW1 and 2, treatment notes and the P3 Form produced as Pexh.1 and 2 respectively.



35. Penetration has been defined under Section 2 of the *Sexual Offences Act* as:-
- "Partial or complete insertion of the genital organs of a person into the genital organ of another person."
36. PW2 in her testimony stated that the appellant removed her clothes 'akanifanya tabia mbaya'. She later clarified that by "tabia mbaya" she meant 'raped' her; it means to defile "kubaka mtu". Is this a proper description of the occurrence of the offence to prove without reasonable doubt that there was penetration?
37. What amounts to penetration, is a question that may be asked. The Court of Appeal in the case of *Mark Ouiruri v Republic (2013) eKLR*, expressed itself on the issue of penetration as follows: -
- "..... In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl's organ...."
38. From the above caselaw, it is clear that penetration does not necessarily end in the release of sperms into the victim and thus the evidence of spermatozoa or absence thereof cannot rule out the fact that there was penetration. However, this court must establish whether or not there was penetration from the testimony of PW2 and PW1. Was the use of "alifinya tabia mbaya" in describing what the appellant had done sufficient proof of penetration?
39. It was the evidence of PW2, the victim that the appellant defiled her. PW1 in his testimony stated that when urinalysis was done, epithelial cells were seen, external genitalia with a whitish discharge on the outside, there were lacerations on the lower part of the vagina orifice and blood stains on the vaginal fourchette and consequently made an impression that there was defilement. Is this sufficient proof of penetration?
40. The presence of epithelial cells alone without a DNA report done against the appellant is not an absolute proof that there was penetration within the definition outlined in Section 2 of the *Sexual Offences Act*. It was the evidence of PW1 that lacerations were also noted on her lower part of the vagina orifice and bloodstains seen on the vagina fourchette. There was no further explanation by PW1 on the correlation between the epithelial cells seen in the urine and the lacerations but he only stated that an impression was made that there was penetration. These lacerations and blood stains on the vagina fourchette may have reasonably been caused by use of force of either the penis or even fingers. It is therefore impossible to state without a shadow of doubt that there was penetration within the meaning of Section 2. Further, as pointed out by the trial court in its judgment. PW1 did not comment on the status of the hymen; whether or not it was freshly broken or the age of the injuries sustained by the victim.
41. While this court acknowledges the use of the phrase 'alifinya tabia mbaya' as a general parlance particularly used by children who are victims of sexual abuse as description of acts of defilement. It is my considered view that in the instant case, the said description as a stand alone cannot be used as sufficient proof of penetration. As pointed out in the above paragraph; neither the testimony of PW1 nor PEXH. 1 and 2 can conclusively corroborate the evidence of PW1 to sufficiently prove penetration.



42. Having found above that the prosecution did not prove beyond reasonable doubt that there was penetration, which is an important ingredient for the offence of defilement, the remaining issues and grounds fall by the way.

43. In view of the foregoing, I find that the appeal merited. The conviction and sentence are hereby set aside and I hereby order that the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 23RD DAY OF MAY, 2024.

R. WENDOH

JUDGE

In presence of; -

Mr. Oimbo for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistants

