TL v Republic (Criminal Appeal E013 of 2024)
[2025] KEHC 6972 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6972 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

CRIMINAL APPEAL E013 OF 2024

AK NDUNG'U, J

MAY 16, 2025

BETWEEN

TL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Maralal SPM's Criminal Case No.S.O. E007 of 2022 – Hon. J.L. TAMAR – (SPM)

JUDGMENT

1. The Appellant was charged with the Defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No.3 of 2006. The Particulars were that on 13th day of August, 2022 at Sirata of Samburu Central Sub-County within Samburu County, intentionally caused his penis to penetrate the vagina of G.L. a child aged 8 years.

2. He faced an Alternative Charge of Indecent Act with a child Contrary to Section 11 (1) of the *Sexual Offences Act* No.3 of 2006. The Particulars were that on 13th day of August, 2022 at Sirata of Samburu Central Sub-County within Samburu County, intentionally touched the vagina of GL a child aged 8 years with his penis.

3. He was tried and in a judgment dated 21st June, 2023 he was found guilty, convicted of the main Count and sentenced to serve 20 years imprisonment.

4. Aggrieved by the conviction and sentence, he lodged this appeal and set out the following grounds;

    a. That the learned trial magistrate erred in law and in fact by conducting a trial which was prejudicial to the appellant which was not in accordance to Article 50 of *the constitution* and section 146 of the criminal procedure code.

b. That the learned trial magistrate erred in law and fact by failing to note that the charge of defilement was not proved against the appellant to the required standards (proof beyond reasonable doubt).

5. The appeal was canvassed by way of written submissions.

6. On his part, the Appellant submitted that the trial was prejudicial to him and was not in accordance to Article 50 of *the Constitution* and Section 146 of the C.P.C.

That the trial was not fairly conducted. He stated that he was arrested and taken to Mararal police station and he wondered why investigations were done at Kisima.

7. He urges the court to know that he was unrepresented which fact called upon the trial magistrate to be particularly solicitous of the accused welfare. That the officer presiding the matter is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating Judicial process. He placed reliance on the case of Ndegwa Vs Republic (1985) KLR the court observed that:

> " ..... no rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense Is to be sacrificed, violated or abandoned when It comes to protecting the liberty of the subject. He is the most sacrosanct Individuals In the system of our legal administration."

8. He adds that *the Constitution* has provisions which protect an individual. That Article 19(30 (a) of *the constitution* provides:

3) the rights and fundamental freedoms in the Bill of Rights;

(a) belong to each and every individual and are not granted by the state.

Article 20 (1) and (2) of *the constitution* provides right to a fair trial and cannot be limited. Secondly, Article 50 of *the constitution* of Kenya provides for the rights of an accused person to a fair trial, relevant to this matter is Sub Article (2) b and K which provides that;

(2) Every accused person has the right to a fair trial, which includes the right

(b) to be informed of the charge, with sufficient details to answer it

(c) to adduce and challenge evidence.

Thirdly, that Section 146 of the criminal procedure code, provides the following:

> "If the court is satisfied by evidence on oath that the person will not attend until compelled to do so, it may at once issue a warrant for the arrest and production of the witness before the court at a time and place to be therein specified".

9. He argues that he was arrested at Sirata and most of those who arrested him were not called to testify. He gives the example of PW2 who testified that she called some elders who pursued the appellant and arrested him. He questioned why the area Chief was not called as a witness.

10. The Appellant asserted that it was necessary for him to undergo a medical examination for the prosecution to prove the allegations. It is urged that the ingredients of the charge of defilement were not proved beyond reasonable doubts.

11. For the Respondent, counsel submitted that the *Sexual Offences Act* No.3 of 2006 defines "penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another personand reliance is placed on the case of FOD =vs= Republic (2014) eKLR.

12. It is urged that the testimony of PW5 was beyond a shadow of a doubt that the appellant defiled the Complainant. The witness testified that he examined the victim and noted that she had bruises of external labia and bruises in the clitoris. The hymen was broken. The child had a lot of pain when high vaginal swap was taken. He prescribed antibiotics and medicine to prevent exposure to HIV.

13. Furthermore, he noted that the victim had pains in the neck. There was wild tenderness on the left hip. He assessed the degree of harm as grievous and produced the P3 form.

14. Thus, the medical evidence availed by the P3 form (P EXH 1), truly indicates that the victim was defiled beyond reasonable doubt. The main ingredient for defilement, penetration was proved appropriately by the Prosecution.

15. On the age of the minor, Counsel submitted that this was proved by way of a birth certificate which indicated that the victim was born on 23rd April, 2014 and was therefore 8 years old.

16. It is urged that the purported grudge is watered down by the testimony of PWI which was well corroborated by PW2, PW3, PW4, PW5 & PW6. The appellant was well identified by the victim. The direct evidence adduced by prosecution was not subject to a grudge.

17. On alleged contradictions, counsel submits that there were no contradictions or inconsistencies in the evidence adduced and the testimony of PW1 was corroborated by the testimony of PW2, PW3, PW4, PW5, PW6, PW8. Reliance is placed on the case of Richard Munene –vs- Republic 2018 eKLR.

18. On identification, it is the Respondent's case that the Appellant was properly identified by the victim as the perpetrator of the ill-fated ordeal. PW2 properly identified the appellant since she saw him on top of the victim.

19. Counsel concludes that the conviction was proper but he faults the sentence of 20 years imprisonment on ground that Section 8 (2) provides that a person who commits an offence of defilement with a child between the age of eleven or less shall upon conviction be sentenced to imprisonment for life.

20. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. 9 See Okeno v Republic [1972] EA 32.)

21. That duty is further explained in Kiilu & Another v Republic [2005]1 KLR 174, where the Court of Appeal held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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.

22. A recap of the evidence at the trial court was as follows. PW1 recalled on August, 2022 she was in [Particulars Withheld] looking after the sheep belonging to her aunt. She was with N who was younger to her. The Appellant came as if he was looking after the sheep and came towards her. He held PW1 on the head and did "tabia" on her. He removed both her skirt. She also had a panty. He removed both her skirt and panty and did bad manners. He had a shuka. He removed his thing(she drew a sketch of male organ) and inserted into her thing" PW1 cried and he held her on the neck and covered the mouth.

23. While defiling her mama N came from fetching water. She saw the act and ran to tell some wazees what she had seen. The Appellant ran and while running he met the elders. PW1 was taken home by Mama N. She was later taken to hospital for treatment.

24. In cross-examination PW1 stated that the appellant did not talk with mama N. She confirmed she was defiled.

25. PW2 stated that on 13/4/2022 in the morning around 10;00 she left PW1 and a small girl looking after the goats and went to fetch water. On the way back home. She did not find PW1 and her daughter. She heard the child cry and ran towards the crying child at the scenes. She found the Appellant on top of PW1. The Appellant had held the child's neck and covered her mouth. The appellant had a shuka. She went close and saw that he had covered the child skirt and panty. When he saw PW2 he pulled out of the child. She picked her child and ran to a neighbor, a relative and three elders found appellant and asked what he had done.

26. PW2 knew the appellant as he is a relative. Appellant is a member to the family that PW2 got married into.

27. In cross-examination PW2 stated that its not true that she had agreed to sleep with Appellant. Appellant was arrested later in the day.

28. PW3 stated that she is the mother to PW1, she stated PW1 stays with her husband's sister. On 13/8/2022, she received a call from pw7 and told her that her daughter had been raped/defiled by the Appellant. PW3 proceeded with her husband to PW7's house and found her child in the house sleeping in the bed. She checked her private parts and saw some blood. She told her husband to look for a vehicle and PW1 was taken to hospital. The child told PW3 that Appellant defiled her. The Appellant had been arrested by elders.

29. PW3 took the child and the Appellant to Maralal Police station and later to hospital where the child was treated. PW3 knew the Appellant very well. Appellant brother married her husband's sister. In Cross-examination PW3 stated that the child was examined and it was determined that she was defiled.

30. PW4 stated PW1 is his daughter who stays with his sister. On 13/8/2022 PW3 received a call from her sister and he was informed that her daughter had been defiled by Appellant who is a brother to the person who married her sister. He got to know him when her sister was married to his brother.

31. PW4 rushed with his brother to where the child was. His wife later came. They asked where the Appellant was and they were told he had gone. They found him watching TV at a neighbour's place and handed him over to the police. They took the girl to hospital for treatment and recorded statement.

32. In Cross-examination PW4 stated that they found Appellant watching TV and he told them that he defiled the child because he was drunk.

33. PW5 stated that he is the Clinical Officer in Samburu county Referral Hospital. On 14/8/2022, he received a P3 form from the Police station dated 13/8/2022 of PW1 who was alleged to have been defiled by someone known to her.

34. On examination, there were bruises on external labia majora and bruises in the clitoris. The hymen was broken. The child had a lot of pain on a high vaginal swab. There was pain on the neck and tenderness on the left hip. The injuries were classified as grievous and the weapon that may have been used is blunt.

35. In cross-examination PW5 stated that he did not examine Appellant because he was not available.

36. PW6 stated that he participated in the arrest of the Appellant. They found him in a certain Manyatta in Sirata. They arrested him and took him to Maralal police station. In cross-examination PW6 stated that he was informed that appellant is the one defiled the child and that he was found red handed.

37. PW7 stated that she recalls on 13/8/2022, she had a child who was staying with her. She was her niece. On that day, the child went to look for goats in the morning. PW7 remained at home. PW2 then come together with the victim and told PW7 that she had been defiled by the Appellant who is her husband's brother.

38. They went to place where the child was defiled and found the appellant. When the appellant saw them he ran away. PW7 called the minor's father and informed him what had happened. He immediately came to their home. Together with another he was able to arrest the appellant who was in another manyatta. They took the child to the hospital and the appellant was taken to the police station.

39. In cross-examination PW7 stated that she did not see the Appellant defile the minor.

40. PW8 was the investigating officer. He was on duty when he received information that a suspect had been arrested on allegation of defilement. PW8 stated that the child was defiled on 13/8/2022 at around 7;00am while looking after the goats in Sirata. The appellant was found in the act by one family member and matter was reported to some elders.

41. The suspect was later arrested. The child was taken to police station and to hospital for treatment. P3 was issued and filled. He subsequently charged the accused for the offence before the court. PW8 produced a birth certificate showing that the child was born on 23/4/14. In cross-examination PW8 stated appellant was arrested by members of public and brought to the police station and he was not beaten.

42. Appellant gave unsworn testimony stating that he did not commit the offence. He was at N's home watching TV. He stated that the father of the child and four others came and arrested him. He asked them what he had done and he was told he would know later. He was taken to Maralal police station on allegation of defilement. He was placed on cell and the child was taken to hospital. Appellant stated that he could not do that to a small child. He had a grudge with M who he had wanted to marry when he came back only to find her with a child of another person.

43. I have had occasion to consider the evidence as adduced at the trial court. In doing so, am alive to the fact that, unlike the trial court, I did not have the advantage of seeing or hearing the witnesses testify and I have given due allowance for that fact. I have had due regard to the 2 grounds of appeal raised herein, the submissions made and case law cited as well as the applicable constitutional and statutory provisions.

44. Of determination is whether there was any constitutional violations of the Appellants rights, whether the case was proved to the required legal threshold and if in the affirmative whether the sentence imposed was legal and appropriate in the circumstances.

45. I have carefully perused the record all the way from the plea taking to the sentencing stage. I note the Appellant was accorded all the rights of an accused person. The charge was read to him. He understood it and denied it. The trial commenced and at every turn of each of the witnesses, he was granted his legal right to cross -examine the witnesses. On being place on his defence, he was accorded the opportunity to testify.

46. The Appellant has pleaded violation of his constitutional rights in a general and vague manner without specifics of the breaches complained of. My evaluation of the entire legal process is that the rights of the Appellant were protected at every point in the trial and the claim of breach of his constitutional rights is unfounded.

47. Turning to the proof of the charges, Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* establishes the offence of defilement as follows:

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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> 8(2) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for life.
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> The specific elements of the offence defilement arising from Section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
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> a. Age of the complainant;
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> b. Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*;
>
> c. Positive identification of the perpetrator.

48. As regards the age of the victim in this appeal, the matter is laid to rest by the production of an official document certifying the victim's age being a birth certificate. Indeed, the age has not been disputed at the trial and even now on appeal. Am satisfied the minor was 8 years at the time of the incident.

49. On whether there was penetration PW1's evidence is materially corroborated by the medical evidence tendered which showed that the victim had injuries on her genetalia, on the neck and on the thigh. The victim gave a graphic detail of how the assailant inserted his genital organ in her and the record shows she even drew a sketch plan of the organ that was inserted in her genetalia. The evidence of PW2 who found the assailant on top of PW1 buttresses this fact. There is no doubt whatsoever that the victim was penetrated.

50. The final ingredient that required proof was the identity of the perpetrator. Evidence on record is that PW1 knew the Appellant as he lived nearby. She identified him as the person who defiled her. PW2 properly identified the Appellant since she saw him on top of the victim. The Appellant was a family member and a person familiar to her. The Appellant confirms that the 2 knew each other as he states that he had wanted to marry her only for him to find her with a child from another person when he returned.

51. The Appellant's rejoinder to the evidence of identification was that he was just arrested and told he would learn later why. That PW2 harboured a grudge since he had wanted to marry her only to return and find her with a child from another man. While I fail to appreciate what kind of grudge PW2 would harbor in those circumstances (the person who was offended here, if at all, being the Appellant), I have

carefully weighed the evidence on both divides. In light of the prosecution watertight evidence the Appellant's assertion cannot possibly be true.

52. The identification of the Appellant was by evidence of recognition. It meets the threshold established by our courts. In Peter Musau Mwanzi .vs. Republic [2008] eKLR, the Court of the court of Appeal expressed itself as follows:-

> "We do agree that the evidence of recognition to be relied upon the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must slow for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time offence, can recall very well having seen him earlier on incident. It is not clear whether that is what that is what Mr. Mutuku refers to as basis for recognition.
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> In Wamunga –vs- Republic (1989) eKLR 424 at 426 had this to say:-
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> > " Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examined such evidence carefully and to be satisfied that the circumstances of identification were favourable and free possibility of error before it can safely make it the basis of conviction."

53. In my considered evaluation of the evidence, the recognition of the Appellant was free from any error. It was, in the words of the court in Anjonini and Others vs Republic (1989]eKLR, more satisfactory, more assuring and more reliable than identification of a stranger.

54. Evidence is overwhelming that the victim was penetrated resulting in serious injuries on her genetalia, the neck and thigh. The victim gave a graphic description of what happened on the material day including drawing a sketch of the object that the assailant inserted in her genetalia. The penetration is corroborated by medical evidence. She identified the Appellant as the assailant a fact corroborated by PW2 who found the Appellant in the Act. The age of the victim was proved. The prosecution proved its case to the required degree and the conviction was founded on solid evidence.

55. Turning on the sentence, Section 8(2) provides;

> 8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

56. The Appellant was sentenced to 20 years imprisonment. This was a sentence below the mandatory minimum sentence prescribed in law. The state in its submissions seeks enhancement of the sentence. The Appellant did not raise any grounds against the sentence.

57. It was upon the Appellant to demonstrate that the sentence was manifestly excessive, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. The court in Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No. 253 of 2003 laid a clear basis upon which an Appellate court can interfere with the sentence passed by a trial court. The Appellant has not demonstrated any of those factors. The trial court while sentencing him considered his mitigation and did not consider extraneous matter nor did it fail to consider relevant matters.

58. The Supreme has affirmed the legality of the mandatory sentences in the Sexual offences in its recent decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024). The court stated;

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.....
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> 68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

59. A look at the sentencing proceedings and the sentence itself in the matter clearly shows that the trial court was in error to fault the minimum sentence set in law. This is a clear invite to the court to interfere with the sentence by way of enhancement of the sentence and as indicated earlier the state seeks this measure. The Appellant must consider himself lucky that he got away with a light sentence as opposed to that prescribed in law. I note however that no notice of enhancement was served on the Appellant. While this court has the jurisdiction to order enhancement of the sentence, and in view of the foregoing sentiments, I will let the matter lie.

60. With the result that the appeal lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MAY 2025.

A.K. NDUNG'U

JUDGE