



**AMM v Republic (Criminal Appeal E052 of 2024)
[2025] KEHC 10049 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 10049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E052 OF 2024**

**JN NJAGI, J
JUNE 12, 2025**

BETWEEN

AMM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence by Hon. M. M. Wachira, PM, in Lamu Principal Magistrate’s Court Sexual Offence Case No.E006 of 2024 delivered on 22/7/2024)

JUDGMENT

1. The Appellant was charged in count I with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on diverse dates and times between January 2021 and December 2023 at [Particulars withheld] area of Langoni location in Lamu central sub-county within Lamu County, he intentionally and unlawfully caused his penis to penetrate the anus of MEA (herein referred to as the complainant), a girl aged 16 years.
2. In Count 11, he was charged with Incest contrary to Section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of this offence being that on diverse dates and time between January 2021 and December 2023 at [Particulars withheld] area of Langoni location in Lamu Central Sub County within Lamu County, he intentionally and unlawfully caused his penis to penetrate the anus of MEA (the complainant), a child aged 16 years who was to his knowledge his daughter.
3. The Appellant denied the charges. After a full trial he was found guilty and convicted on the two counts. He was sentenced to serve fifteen years’ imprisonment in respect to count 1 and ten years’ imprisonment in respect to count 2. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:



1. That the Learned Trial Magistrate erred both in law and fact by failing to consider that the elements of the offense of defilement were not proved beyond doubt.
2. That the Learned Trial Magistrate erred in law and fact when he failed to observe that the prosecution did not provide enough evidence to prove the offence alleged to have been committed.
3. That the Learned Trial Magistrate erred both in law and fact by failing to consider that the evidence tendered by the prosecution was marred with contradictions and discrepancies.
4. That the Learned Trial Magistrate did not consider his defence and mitigation.
4. The prosecution called 5 witnesses in the case at the close of which the trial court found the appellant to have a case to answer and placed him to his defence. The appellant defended himself and called one witness.
5. The appeal was canvassed by way of written submissions of the appellant and the respondent.

Appellant's submissions on appeal

6. The appellant submitted that the prosecution failed to discharge the burden of proof against the appellant as provided for under Section 107 and 109 of the *Evidence Act*. He faulted the trial court for basing the conviction on the findings of the doctor that the complainant upon being examined was found with bruises and cuts on the anal canal yet the examination took place two months after the appellant was said to have defiled the complainant in December 2023. The appellant submitted that the presence of such injuries in the anus are not proof of penetration through a sexual act as they can be caused by other causes such as straining during bowel movement or diarrhoea.
7. The appellant further submitted that the doctor who produced the medical documents in court, the Post Rape Care Form and the P3 form, was not the maker of the documents. That there was no basis laid out under section 33 of the *Evidence Act* as to why the makers of the two documents were not called to produce the documents while they were reported to be on duty. It was submitted that the documents were un procedurally produced in court and failure to call the two doctors who completed them denied the appellant the right to cross-examine them on the contents of the documents and denied him the right to fair trial and hearing as provided under Article 50 (2) (k) of the *Constitution* of Kenya 2010. That this rendered the trial a mistrial and the conviction a nullity.
8. The appellant submitted that the complainant was couched by her mother into lying against him due to differences he had with the complainant's mother after he married a second wife.
9. It was also the submission of the appellant that the trial court dismissed his defence without giving due weight to it and considering whether it should stand or not. More so that the police and the prosecution had an opportunity to investigate his defence and determine its veracity but failed to do so. That the mere fact that the prosecution's case was believable does not amount to a rejection of the alibi defence. It was submitted that the appellant's defence raised a reasonable amount of doubt in the prosecution case. That this court ought to make a finding that the case was not proved beyond reasonable doubt and acquit the appellant.

Respondent's submissions

10. The respondent on the other hand submitted that the elements of defilement being proof of the age of the victim, proof of penetration and proof of identification of the offender were sufficiently proved by the prosecution to the required standard of beyond reasonable doubt. That the age of the complainant



was proved by production of a birth certificate. That penetration was proved by the evidence of the complainant that the appellant inserted his penis into her anus which evidence was corroborated by the findings of the doctor that the complainant had bruises on her anus. It was submitted that the defence tendered by the appellant was a mere sham that did not cast any doubt on the prosecution case.

11. The respondent submitted that the complainant's birth certificate indicated that the appellant was her father. That the appellant confirmed that he was indeed the biological father to the complainant. Therefore, that the prosecution had proved that incest was committed.
12. On sentence, it was submitted that the appellant was sentence to the minimum sentence provided by the law in the two counts. It was submitted that the appeal lacks merit and ought to be dismissed.

Analysis and determination

13. This being a first appeal, this court is mandated to analyze and re-evaluate afresh the evidence adduced before the trial court in line with the holding in the case of *Odhiambo v Republic* Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

14. I have considered the grounds of appeal, the record of the trial court and the submissions filed herein. The standard of proof in Criminal cases is that of beyond reasonable doubt. The issue for determination is whether the prosecution proved the charges levelled against the appellant beyond reasonable doubt.
15. The offence of defilement is rooted on three main ingredients being proof of the age of the victim, proof of penetration and proof of the identification of the perpetrator see *George Opondo Olunga v Republic* [2016] eKLR.
16. The complainant who was PW1 in the case testified that she was at the material time living with her father, the appellant, after her mother went to work in Saudi Arabia. She told the court that the appellant started defiling her through the anus in 2021 that continued to December, 2023. That he used to send his siblings away then commit the act either in his room or in her room. That in January 2024 her mother called her from Saudi Arabia and she told her what had been happening. The matter was reported to the chief and later to the police.
17. An aunt to the complainant PW2 told the court that the mother to the complainant travelled to Saudi Arabia in 2021 and the appellant was left with their children. That on 20/1/2024 she received a phone call from the complainant's mother informing her that the appellant was having sex with the complainant. She requested her to look into the matter. That she went to the complainant who told her that the appellant had been defiling her and he was threatening her. They reported the matter to the police who took them to King Fahad Hospital.
18. PW3 Zeinab Ahmed who works with a human rights organization in Lamu stated that she was on the 22/1/2024 at the chief's office when the chief informed her that there was a case that had been reported of a girl who was being defiled by her father. She assisted the girl to report the matter to the police.
19. The investigating officer, PC Mercy Salama Katama PW4 of Lamu police station testified that on 22/1/2024 the complainant reported at the station that she was being defiled by her father after her mother left the country to work in Saudi Arabia. That she and a colleague escorted the girl to King



- Fahd Hospital for examination. She then obtained her birth certificate that indicated that she was born on 11/9/2007.
20. Dr. Mohamed Arif Ramadhan PW5 testified that the complainant was examined at King Fahad Hospital and she complained that she was bleeding from the anus and had pain while passing long call. On examination the hymen was found to be intact and there were no bruises on the vagina. That upon conducting an anal examination, the anus was found to have had reduced closure with bruises and cuts in the anal canal (anus splutter was loose). A P3 form and post rape care form were filled.
 21. The appellant when placed to his defence stated in a sworn statement that he was arrested by Coast Guards in 2018 after which his wife disappeared from home with the children. That she returned after 8 months and wanted a divorce. The imam refused to grant her the divorce since she is the one who had left and he had not chased her. She said that he was sodomising her.
 22. That in 2018 he married another wife from his village. He took back the 1st wife. That in 2020 the 2nd wife ran away after being threatened by the 1st wife. That the 1st wife took him to the chief and to the children's office. That in 2021 he got sick and the 1st wife went to Saudi Arabia. He asked the 2nd wife to come back.
 23. That in 2023 he went to Malindi. He was called and told that her grandmother had come to talk to the children. In 2023 he took the family to Garsen after schools closed. His wife did not want them to go to Garsen. That on 21st February 2021 he was arrested. The complainant said that she was instructed by her mother to lie against him.
 24. A son to the appellant, DW2, told the court that her mother told the victim to go and report their father to the police. That his sister brought police officers to their home. That his mother gave a lady officer Kshs. 20,000/- and Kshs. 10,000/- to his sister to frame his father. That his mother sent Kshs. 20,000/- to their aunt to take to the doctor. That his aunt told him that his mother wanted his father jailed.
 25. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), proof of penetration and proof of the identification of the perpetrator – see *George Opondo Olunga v Republic* [2016] eKLR.
 26. Proof of age in a sexual offence case is crucial as it determines the sentence to be imposed on the offender upon conviction, see Criminal Appeal No.102 of 2010 - *Eliud Waweru Wambui v Republic* (2019) eKLR. In the case of *Alfayo Gombe Okello v Republic*, Cr App no 203 of 2009. (2010) eKLR the Court of Appeal stated as follows: -

“....In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).”
 27. The complainant herein testified that she was born on 11/9/2007. Her aunt PW2 confirmed this. The birth certificate produced by PW4 indicated that she was born on the said date. The offence was said to have occurred on diverse dates between January, 2021 and December 2023. The complainant was therefore aged 16 years at the time of the offence which most recently occurred in the month of December in 2023. The age of the complainant was therefore sufficiently proved.
 28. Penetration is defined under section 2 of the *Sexual Offences Act* as the “partial or complete insertion of the genital organs of a person into the genital organs of another person.”



29. The complainant in her testimony told the trial court that the appellant penetrated her into her anus on various dates between 2021 and December, 2023. That the last encounter had taken place at her grandmother's home at Garsen in December 2023. That she reported to her mother in January 2024.
30. The trial court in making a finding that the appellant defiled the complainant said that her evidence that the appellant did so was corroborated by medical evidence that showed that she had bruises and cuts in the anal canal. That there was nothing to suggest that the complainant was lying against the appellant or that she had framed him. That the complainant was consistent in her evidence. The trial court believed that she a truthful witness.
31. The appellant argued that the doctor who testified in court was not the maker of the medical documents relied on by the prosecution. That no basis was laid for him to produce the medical documents in court.
32. Section 33 of the *Evidence Act* allows a person who is not the maker of the documents to produce the documents in court where the maker cannot be found or where the maker cannot be procured in court without come considerable expense. The law in such a scenario requires the person producing the documents in the absence of the maker to be in the same profession with the maker and to be conversant with the handwriting of the maker. The doctor who produced the medical documents in this case, Dr. Arif PW5, said that he was working at the same hospital with the doctors who completed the P3 form and the Post Rape Care Form. He said that he was conversant with the handwriting of Dr. Saddam who completed the P3 form.
33. I have considered that PW5 is a doctor colleague to Dr. Saddam who completed the P3 form and that they were working in the same hospital. He was conversant with Dr. Saddam's handwriting. The appellant did not put any question to PW5 that he was unable to answer or which could only have been answered by Dr Saddam. He did not request for the maker to be availed to produce the documents. I thereby find that there was no prejudice occasioned to the appellant by the production of the P3 form by Dr. Arif, PW5. It was proved that the complainant had bruises on the anus that supported the complainant's evidence that the appellant had penetrated her through the anal canal.
34. That notwithstanding, it is trite that a charge of defilement need not be corroborated by medical evidence and the court can convict on the basis of oral evidence if it is convinced of the truthfulness of the witnesses called by the prosecution. In *Kassim Ali v Republic* [2006] eKLR the court noted that:
- “....absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”
35. Additionally, under the proviso to section 124 of the *Evidence Act* allows the court may convict on the sole evidence of a child victim of defilement if the court is satisfied that the child victim is telling the truth. The trial magistrate in this case was satisfied that the complainant was telling the truth.
36. I have on my part re-evaluated the evidence of the complainant. I have no reason to differ with the finding of the trial magistrate that the complainant was telling the truth. Though the appellant stated in his defence that the complainant was couched by her mother to lie against him, no such a question was put to her during cross-examination. The complainant admitted in cross-examination that the appellant had differences with her mother but no question was put to her that she had fabricated the evidence due to the appellant's differences with her mother. Her explanation that she had not told her mother about the ordeal for a period of two years was because she had decided to hide the shame was convincing. The defence of the appellant that the charges were a fabrication was not true. The evidence



of his son that his mother bribed the prosecution witnesses to fix the appellant had no basis. I find the trial court to have rightly dismissed the defence of the appellant.

37. The appellant was convicted in both counts of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* as well as on the charge of incest contrary to section 20(1) of the said Act. In my view this was a duplication of the charges as the two offences have the same ingredients. Incest is defilement on a close family member. Once the court had convicted the appellant for the offence of defilement, it should have acquitted him of the charge of incest as charged in count 2. The conviction and sentence in count 2 is thereby set aside.
38. The Appellant was sentenced in respect to count 1 to the minimum sentence provided under the *Sexual Offences Act*. I have no basis of interfering with the sentence.
39. The upshot is that the conviction and sentence for defilement as charged in count 1 is upheld while the conviction and sentence in count 2 is set aside,

Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 12TH DAY OF JUNE 2025

J. N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Respondent

Appellant – present

Court Assistant – Kambi

