**BNK v Republic (Criminal Appeal E109 of 2023)**
**[2025] KEHC 8555 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8555 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MURANG'A**

**CRIMINAL APPEAL E109 OF 2023**

**TW OUYA, J**

**JUNE 19, 2025**

**BETWEEN**

**BNK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Murang'a Sexual Offence Case No. E024 of 2024 delivered by Hon. A. Okullo R.M on 31st August 2022 in the CM's court in Murang'a)***

## JUDGMENT

1. The Appellant, BNK, was charged with the offence of Defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between January 2020 to 26th September 2022 at unknown time at he intentionally caused his penis to penetrate the vagina of MN a child aged 10 years old.

2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between January 2020 and 26th September 2022 at unknown time at [Particulars Withheld], Nyakihai location within Murang'a county he intentionally touched the buttocks and vagina of MN a child aged 10 years with his penis.

3. The prosecution called six witnesses while the appellant testified as a sole witness by giving sworn evidence. At the end of the trial, the appellant was convicted of the charge of defilement contrary to Section 8(1)(2) and sentenced to life imprisonment.

4. Aggrieved with both the conviction and sentence of the trial court, the appellant filed the instant appeal urging the following amended grounds:

a. The trial court erred in law for convicting and sentencing the appellant to life imprisonment on the evidence of a single witness without observing corroboration by material medical evidence thereby contravening Section 36 of the Sexual Offence Act

b. The trial magistrate erred in law for sentencing the appellant to life without observing that it was a degrading punishment contravening the principles of Article 25 (a), 28 and 29(f) of *the constitution* thus declared unconstitutional.

c. The trial court erred in law for failing to observe that the appellant was denied the benefits on the role of mitigation thereby contravening section 216 and 329 of the *Criminal Procedure Code*.

5. The appeal was canvassed by way of written submissions. In a nutshell, the appellant's submission is that the offence of defilement was not proved to the standard required by the law. He faulted the trial court for relying on the uncorroborated evidence of a child. The appellant joins issue with the fact that no DNA evidence was conducted, therefore there is no scientific evidence that is linking him with the offence. Furthermore, the Appellant contends that the failure by the prosecution to call one Peter Mwangi as a prosecution witness should be visited upon the prosecution.

6. The appellant further submits that the sentence meted against him is degrading punishment and falls afoul of Articles 25 (a), 28 and 29 (f) of *the Constitution*. The appellant thus contends that the sentence is excessive and neither serves the interest of justice nor of the society. He further contends that the minimum mandatory sentence stifles the discretion of the trial court hence infringing the doctrine of separation of powers. Lastly, the appellant submits that he was denied his right to mitigation in violation of Section216 and 329 of the *Criminal Procedure Code* as he was sentenced to a mandatory sentence.

7. The Respondent's case is summed up in their submissions dated 24th May 2024. It is the Respondent's submission that the ingredients of the offence of defilement were sufficiently proved beyond reasonable doubt.

8. Regarding the Age of the victim, the Respondent contends that the same was proved by production of the victim's birth certificate which showed that she was born on 13th March 2012. Therefore, she was aged 10 at the time of the commission of the offence.

9. On the issue of penetration, the Respondent submits that PW1 gave clear details on the manner in which she was defiled by the Appellant. Her testimony is also corroborated by PW5 who examined the minor and made an opinion that the minor had indeed been defiled.

10. The Respondent has submitted that PW1 knew the appellant by name and identified him as the one who had defiled her on 26th September 2022 and on previous occasions. The testimony of PW2 is equally crucial in this regard as she testified that he heard a child cry and on moving near, he saw the appellant coming from the direction of the cry with the child.

11. Lastly, the Respondent submits that the sentence meted upon the appellant was legal and lawful. The same was made upon careful consideration by the trial court in exercise of his discretion.

12. I have had occasion to consider the grounds of appeal, the evidence adduced at the trial court and the submissions filed by the rival parties. The issues that commend themselves for determination are:

a. Whether the prosecution proved the offence of defilement beyond reasonable doubt

b. Whether the sentence meted against the appellant was legal and lawful

13. This being a first appellate court, I am obliged to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses testify. See Okeno vs. Republic [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

14. Section 8 of the *Sexual Offences Act* provides as follows:

8.

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(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.

15. It is trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013, where it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

16. In the case of Kaingu Elias Kasomo vs. Republic Malindi, the Court of Appeal in Criminal Appeal No. 504 of 2010 stated as follows:

> " Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

17. The importance of proving the age of the complainant in sexual offences was emphasized in Alfayo Gombe Okello vs. Republic (2010) eKLR where the Court stated that:

> " In its wisdom, Parliament chose to categorise 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)...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved

failing which the offence will not have been proved beyond reasonable doubt in material particulars."

18. Although the age of the victim is not in dispute in the instant appeal. I find that the same was sufficiently proved at the trial court. Suffice to say, the age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR that:

> " ... 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 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

19. In the instant case, the victim's birth certificate was produced in court as exhibit in support of her age. According to the birth certificate she was born on 13th March 2012. Hence, she was 10 years old at the time of the offence. It suffices to note that proof of the victim's age in maters defilement goes beyond ascertaining that he/or she was a child but is also crucial in determining the extent of the sentence in accordance with Section 8(1) of the *Sexual Offences Act*.

20. On the perpetrator's identity, I note that PW1, PW2, PW3 and PW4 testified that the appellant is a brother to PW1's father. However, whether he perpetrated the defilement would depend on whether the evidence adduced by the prosecution meets the required threshold. PW1 alleged that the appellant defiled her twice, the first time was at the river and the second time was at night.

21. The third element is penetration which is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

22. The same section defines "genital organs" to include;

> " the whole or part of male or female genital organs and for purposes of this Act includes the anus."

23. Section 124 of the *Evidence Act*, Cap 80 provides that:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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."

24. The medical evidence on record was presented by PW5, a doctor who gave his evidence and stated that the minor visited Murang'a Level 5 Hospital on 28th September 2022. The minor reported that her father's brother had been defiling her for a period of two years and telling her not to tell anyone.

The matter was however known when he was found trying to remove her clothes near the river where she had gone to fetch water while the accused alleged that he was looking for cows. On medical examination, according to the evidence of PW5, the clinical officer, she was found to be normal, no injuries were noted on her vagina. However, her hymen was torn and lab findings revealed bacterial and fungal cells which was evidence of sexual activity. That the complainant gave a history of her defilement over a period of 2 years. And she stated that her uncle, the accused was the culprit.

25. The minor in her sworn evidence in chief stated that on 26th September 2022 she was at the river where she had gone to fetch water at around 6 pm when the appellant inquired from her where the cows were, she showed the appellant where the cows were. The appellant then held her hands tightly and pulled her, he then removed her clothes beginning with the stockings to the inner wear and her school clothes. She shouted as the appellant inserted his penis in her anus. She felt pain. Her screams for help were heard by one Peter Mwangi (PW2) who intervened and slapped the appellant warning him never to repeat such conduct. She testified that the appellant had defiled her on two occasions. One at the river and another time at night. She was later taken to the hospital.

26. PW2 testified that on 26th September 2022 he was at home in the process of letting out his goats when he heard a child cry. Standing near the well, he saw the appellant coming from the direction of the child's cry. Shortly thereafter, she saw the child who informed her on inquiry, that appellant wanted to remove her clothes. He also testified that the cows that the appellant was allegedly looking for had already arrived home.

27. PW3, NMK, an aunt to PW1 stated that on 26th September 2022 at around 06.45 pm she met PW1 screaming. On inquiry, PW1 informed her that the appellant had tried to pull her to the river but she refused. Therefore, the appellant made her bend in the seasonal river, PW1 warned the appellant that if he defiled her, she would report to PW3. PW1 informed her that she was rescued by her father, PW2.

28. PW4, Sarah Wanjiru Maina, also testified that on 26th September 2022 she met PW1 crying, on inquiry, PW1 informed her that the appellant removed her trouser but when he tried to remove her innerwear, she screamed, and PW2 came to her rescue.

29. PW6, CPl Purity Marete, the investigating officer, testified that on 27th September 2022 she was at the Station when a minor was brought to the station with a history of having been defiled by the uncle. The minor told her that on 26th September 2022 at around 5.30pm she had gone to fetch water from a river next to their home when the appellant found her there and demanded to sleep with her. When she refused, the appellant grabbed her and took her to the bush. The appellant removed her trouser, skin tight and pant causing her to scream. PW2 heard her scream and came to her rescue.

30. The material on the alleged defilement is very sketchy and vague. PW2, PW3, PW4 and PW6 are all clear that PW1 informed them that the appellant had wanted to have sex with her but she refused. As a result, the appellant grabbed her to the nearby bush and removed her trouser. However, when the appellant was removing PW1's pant, she screamed and was rescued by PW2.

31. Although it is alleged that the defilement happened on diverse dates between January 2020 and 26th September 2022, at the river and on a particular night. The evidence on record suggests that the incident referred to as the river is the one that PW2, PW3,PW4 and PW6 testified that they were allegedly informed that the appellant merely attempted to defile PW1.

32. Moreover, the medical evidence did not quite corroborate the defilement claims. PW5 testified that the minor's genitalia were normal save for the presence of bacterial cells and fungal cells that demonstrated high sexual activity. Such evidence of sexual activity, in the instant case, is not analogous to evidence

of penetration by the appellant herein. There was no proof that loss of the hymen had anything to do with the appellant.

33. Arguably, the testimony by the prosecution is incredibly vague, inconsistent and largely composed of hearsay. The testimony of PW1 herself is not sufficiently consistent to paint a clear picture of whatever transpired on the diverse dates between January 2020 and 26th September 2022. I find that the trial magistrate did not give sufficient reasons for believing the evidence of the complainant that the appellant defiled her on the dates in question. In view of the foregoing, I find that there was no sufficient evidence for convicting the appellant for the offence of defilement. In view of the foregoing, I find that there was no sufficient evidence for convicting the appellant for the offence of defilement.

34. Having found that the conviction of the appellant on defilement was unsafe, I will now turn on the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. It is alleged that the appellant touched the buttocks and vagina of MNa, a child aged 10 years with his penis.

35. Section 11 (1) of the *Sexual Offences Act* provides that:

> Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

36. Section 2 of the *Sexual Offences Act* defines an indecent act as :

> " indecent act" means an unlawful, intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will."

37. The testimony of PW2, PW3, PW4 and PW5 regarding what happened to PW1 on 26th September 2022 amount to hearsay as their knowledge on what happened is based on what PW1 allegedly told them. PW1 testified that the appellant held her hands tightly, pulled her towards the bush, removed her clothes and inserted his penis in her anus thus causing her to scream for help in pain. PW2 indeed confirms that he heard the cry of a child and shortly thereafter saw the appellant coming from the direction of the child's cry. PW2, upon being informed that the appellant had attempted to defile PW1, confronted the appellant and slapped him while warning him never to repeat such conduct. The medical evidence on record is silent on any anal examination of PW1. Therefore, there is no medical evidence to corroborate the allegation that the appellant inserted his penis in the anus of PW1. Accordingly, the only evidence regarding that incident is that of PW1.

38. Courts are empowered by dint of section 124 of the *Evidence Act* to convict an Accused person solely on the evidence of the victim, but only on the condition that the trial court believes their testimony. Therefore, the trial court should always record its reasons for believing the victim before convicting an Accused person on the victim's sole testimony. Section 124 of the *Evidence Act* provides:

> ''Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be

liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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."

39. The Court in Korir v Republic (Criminal Appeal E003 of 2022) [2024] KEHC 9585 (KLR) stated thus....

> I must reiterate the importance of recording the trial court's observations of the victim, their demeanor and their testimony, which should be recorded as nearly as possible in the words used by the child probably with an interpretation of the court's understanding of the words used.

40. Upon going through the proceedings of the trial court as well as the judgement dated 31st August 2022, I note that the trial court did not record its reasons for believing the testimony of PW1. I have also reconsidered the evidence of PW1 and I have noted that at no point did she say that the Appellant touched her buttocks, she only mentioned that the appellant inserted his penis in her anus thus causing her pain. There is no medical evidence regarding the allegation that the appellant inserted his penis in PW1's anus, the absence of which is not fatal as the court is still empowered to convict on the sole testimony of a victim as espoused in Section 124 of the *Evidence Act*. The Court of Appeal sitting in Nyeri in the case of George Kioji vs Republic, Criminal App No 270 of 2012 held as follows:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

41. In the instant case, all that was alleged was penetration and no any other contacts were alleged and proved. It is therefore difficult for this Honourable court to infer that there was indeed any actual sexual contact between PW1 and the appellant, without the trial court having made such a record or observation in writing.

42. Although it is possible that the appellant might have touched PW1's buttocks while he was trying to remove her underpants, the alternative charge is based on the fact that the appellant touched PW1's buttocks with his penis and not his hands. The sketchy nature of the prosecution's case coupled by the failure of the trial court to record any reasons for believing the testimony of the victim leaves lots of room for speculation and suspicion. Suspicion however cannot lead to a conviction. The Court of Appeal in Sawe v Republic [2003] KLR 364 stated thus: -

> " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

43. It is my finding that the alterative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* has also not been proven. In the final analysis, the Prosecution failed

to prove its case beyond reasonable doubt and the evidence they presented was insufficient to warrant a conviction.

44. The appeal herein succeeds. The conviction of the appellant is thereby quashed and the sentence imposed on him set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED VIRTUALLY AND PHYSICALLY THIS 19TH DAY OF JUNE 2025.**

**HON. T. W. OUYA**

**JUDGE**

For Appellant...BNK (Present at Kamiti Maximum )

For Respondent.....P. Mwangi

Court Assistant.....Brian