Abdille v Republic (Criminal Appeal E054 of 2024)
[2025] KEHC 10761 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10761 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E054 OF 2024

JN ONYIEGO, J

JULY 24, 2025

BETWEEN

DAUD ABDOW ABDILLE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in Sexual Offence Case No. E003 of 2023 at CM's Garissa Law Courts delivered on 29.11.2024 by Hon. J. Omwange P.M)

JUDGMENT

1. The appellant was charged 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 charge were that on 10.01.2023 at around 1530hrs at [particulars withheld] area in Garissa Township within Garissa County, he caused his genital organ namely penis to penetrate the genital organ namely vagina of A.A.S., a girl child aged 16 years old.

2. The appellant 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 being that on 10.01.2023 at around 1530hrs at [particulars withheld] area in Garissa Township within Garissa County, he willfully and intentionally touched the genital organ namely vagina of A.A.S., a girl child aged 16 years old with his genital organ namely penis.

3. He pleaded not guilty and the prosecution presented a total of 4 witnesses in support of its case. He was consequently convicted and sentenced to 15 years' imprisonment.

4. Being aggrieved by the determination of the trial court, the appellant filed an undated petition of appeal on grounds as follows:

i. That the learned magistrate erred in law and fact by convicting him notwithstanding the fact that the prosecution did not prove its case.

ii. The learned magistrate erred in law and fact by failing to consider his mitigation and defence.

iii. That the learned magistrate failed to invoke section 333[2] of the *Criminal Procedure Code* to factor in the 8 months that he had spent in remand.

iv. That the learned magistrate erred in law and fact by meting out a harsh sentence.

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

6. The appellant in his submissions argued all the grounds of appeal collectively urging that the prosecution did not prove its case beyond any reasonable doubt. That the prosecution's case was marred with contradictions and inconsistencies besides the fact that the prosecution witnesses were not reliable.

7. He pointed out some contradictions to wit; the time when the complainant was defiled as the evidence of PW1 and PW3 was not at par. Similarly, it was pointed out that PW1 stated that after the appellant defiled her, he left her in the forest while PW3 stated that the appellant defiled the complainant and upon reaching the following day, he left her at Lamirep.

8. It was his contention that the trial court did not consider his defence and yet the same was strong to rebut the prosecution's case. That he has never been a taxi driver and that the prosecution did not explain how he was identified at the time of arrest. He thus urged this court to allow his appeal as prayed.

9. The learned prosecutor, Mr. Owuor filed submissions dated 14.05.2025 urging from the outset that the prosecution was opposed to the appeal in totality noting that the trial court reached a fair determination. That as was held in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013, the prosecution was expected to prove three things namely: there was penetration; that the complainant was a child and; that the accused was indeed properly identified.

10. That the court properly convicted the appellant after satisfying itself that the complainant was a child and reliable. It was submitted that the prosecution established the elements of the offence charged to the required standard and therefore, the appeal as lodged was destitute of any merit.

11. On sentence, counsel relied on the case of Francis Karioko Muruatetu and Anor v Republic [2021] eKLR where the Supreme Court gave guidelines to the effect that the said case could not be used as an authority to infer that all laws prescribing mandatory or minimum sentences are inconsistent with *the constitution*. This court was thus urged not to interfere with the finding of the trial court.

12. This being the first appellate court, this court has a duty to re-evaluate the evidence on record afresh and come to its own conclusions. This was set out by the Court of Appeal in Kiilu & Another v Republic [2005]1 KLR 174.

13. PW1, AAS., testified that on 10.01.2023 at 1530hrs at Modika, she was aboard a taxi probox from Liboi while the appellant was the driver. That there were other passengers aboard the said vehicle who along the way alighted thereby leaving her as the last passenger. Noting that she remained with the driver, the appellant herein, they continued with the journey until darkness creeped. It was then that the appellant allegedly pulled the car towards some shrubs. It was her evidence that in her attempt to jump out of the car, the appellant pulled her and started removing her trouser in attempt to have sex with her.

14. she stated that the appellant returned to the car and brought along a Somali knife which he used to threaten her with. The appellant thus defiled her at least four times between 8.00 p.m. and 6.00 a.m. and that every time he desired to defile her, he would use the knife to threaten her. Upon reaching morning, the appellant left her in the forest and that she was rescued by a man whom she saw along the way.

15. That it was the said man also who looked for her relatives who later came and had the matter reported at the police station and consequently she was taken to Garissa General Hospital. On cross examination, she stated that she had no reason to frame the appellant and further, she had not changed her clothes by the time she was taken to the hospital.

16. PW2, No. 89383 Cpl. rahma Aden Ibrahim, the investigating officer testified that on 11.01.2023 at 5.30 hrs, she was at the office when the complainant arrived in company of a relative who reported that the complainant had allegedly been defiled. She stated that she escorted the victim to Garissa Hospital where she was treated and a P3 form filled. She later on took her for an assessment of age which was found to be 16 years old. She proceeded to record the statement of the complainant together with other witnesses and thereafter started searching for the appellant who was later arrested and charged.

17. PW3, Adan Bulle Osman, an imam testified that on 10.01.2023 at 9.00 a.m., he was at Sankuri when he received a call from a neighbour informing him that their female relative had been defiled and left at Lamirep. That he took a vehicle and rushed to the place where he found the said relative. It was his evidence that the victim's head was swollen and that she generally felt a lot of pain and so he took her to Garissa. That the complainant informed him that she was related to Adey Umar whom he contacted and thereafter left the girl in the hands of the elders. They reported the matter to the police station and upon being asked, the complainant stated that she could identify her aggressor. In cross examination, he stated that the appellant was a stranger to him.

18. Pw4, shaffie Omar, a clinician at Garissa county Hospital testified that he examined the complainant on 16.01.2023 and generally, observed that the clothes had blood stains but no tear. There were no injuries on the physical body while in the genitalia, there was a fresh tear and bruises in the labia minora. He proceeded that there was a foul smelly discharge and a slight bleeding from the vagina.

19. His opinion was that there was a vaginal penetration. On cross examination, he stated that the hymen was freshly raptured and that the complainant was 16 years old. He further stated that the complainant was brought to the hospital in the morning of the following date of the commission of the offence.

20. DW1, DAA, a livestock broker from [particulars withheld] stated that on the date of arrest, he was at [particulars withheld] in company of his witnesses. He denied committing the offence. On cross examination, he stated that he did not know the complainant prior to the occurrence of the incident in as much as there existed a grudge between him and the family of the complainant. He also stated that there existed a grudge between him and PW3 in as much as he did not mention the said grudge.

21. DW2, Mohamed Dahal in his sworn evidence testified that he was also a livestock broker and that he knew the appellant as they were neighbours. That it was not possible for the appellant to commit the offence herein.

22. DW3, Ebla Budint Garane testified that he knew the appellant as they were neighbours. According to him, it was not possible for the appellant to commit the offence alleged herein. That the appellant had no motor vehicle. On cross examination, he stated that he only witnessed the appellant being arrested but he did not see him on the date when the offence was allegedly committed.

23. I have gone through and considered the trial court's proceedings, the petition of appeal, the submissions by the parties. Issues that fall due for determination are:

    i. Whether the prosecution proved its case beyond reasonable doubt by establishing the age of the complainant; penetration and identity of the complainant.

    ii. Whether the sentence preferred against the appellant was manifestly harsh and severe.

24. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved. [See the case of George Opondo Olunga v Republic [2016] eKLR].

25. This being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt. [See section 107 of the *Evidence Act*; the case of Woolmington v DPP [1935] A.C 462].

26. On the question of age, courts have time and again held that proof of age does not necessarily mean production of birth certificate alone. This position was held in the case of Fappyton Mutuku Ngui v R [2014] e KLR. In the instant case, the complinant stated that she was 16 years old. Her age was also assessed by the doctor to be 16 years old. From this bit of evidence, I have no doubt the complainant was 16 years at the material time.

27. As to penetration, Section 2 of the *Sexual Offences Act* defines "penetration" as partial or complete insertion of the genital organs of a person into the genital organs of another person. It therefore follows that penetration does not necessarily entail physical release of sperms in the victim's genital organ. See Mark Oiruri Mose v Republic [2013]e KLR where the court held that penetration does not necessarily mean getting deep inside a girl's organ or releasing sperms therein.

28. In the instant case, pw1 explained how she was dragged into the bush by a man she didn't know and got defiled the whole night. Upon examination, Dw4 found that her clothes were blood stained; the hymen was firstly raptured; in the genitalia there was afresh tear; there was bleeding from the vagina and bruises in the labia minora hence concluded there was penetration. I have no doubt from these evidence that there was penetration.

29. Who defiled the complainant? The complainant pointed at the appellant whom she stated was a driver of the motor vehicle she had boarded from Liboi. The appellant urged that he had been framed for the reason that it was not demonstrated how he was identified prior to him being arrested.

30. There is no doubt that the appellant and the complainant were strangers to one another. There was no eye witness when the offence was committed. This therefore leaves the court with the evidence of the victim alone against that of the appellant. when the complaint made the report, she did not give any physical description of the assailant and whether if she saw him she would identify him.

31. This court notes that the appellant herein was convicted through the evidence of identification by the complainant which should be treated with caution. I say so for the reason that the investigating officer did not state how the appellant was arrested, who arrested him and further, his description that enabled the arresting officer to effect the arrest.

32. In the case of Maitanyi v Republic [1986] KLR 198, the Court of Appeal had this to say in respect of evidence of identification, especially in regard to the evidence of identification by a single witness: -

> " In this case there is no other evidence, circumstantial or direct. The decision must turn on the need for testing with the greatest care the evidence of this single witness. Is that what the courts below really did? It must be emphasized that what is being tested is primarily

> the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to greater brightness, so the chances of a true impression being received improves. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel.
>
> In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness? There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect unless explained. It is for the magistrate to inquire into these matters."

33. In the instant case, it was not enough for PW2 to state that after recording the statement of the complainant, she started searching for the appellant. where did she search for him? Which features was she using to identify the assailant who was a stranger? Where did she find him and by what aid? Who arrested him? Who pointed at the appellant now that the complainant was not there? It is trite that a court ought not to convict an accused person based only on the evidence of identification unless the court is sure that the identification of the appellant as the person who committed the offence is proved beyond any reasonable doubt.

34. In the instant case, no identification parade was conducted in as much as identification parades are meant to test the correctness of a witness's identification of a suspect. The court in the case of Njihia v Republic [1986] KLR 422 held that:

> "...If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

35. The trial magistrate merely relied on Section 124 of *Evidence Act* to convict. He did not state reasons why he believed in the complainants' testimony as truthful. Section 124 is not a general blanket for

condemnation of accused persons in sexual related offences. See. Arthur Mushila Manga v Republic [2016]e KLR.

> " ... It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. [See Mohamed v Republic [2008] KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic [supra]. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

36. There is always the need to be careful on the aspect of identification of a stranger even if the offence is committed at day time. That is the reason why description must be made to test the accuracy of such identification during the parade. Dock identification was not sufficient in the circumstances. There was no explanation given why no identification parade was conducted. This was poor investigation.

37. The defendant raised an alibi defence which the trial magistrate dismissed as unproven. It is trite law that it is not the duty of an accused person to prove his alibi. See the case of Victor Mwendwa Mulinge v R, [2014] eKLR where the Court of Appeal rendered itself thus on the issue of alibi:

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

38. Guided by the above case law, the appellant had no obligation to prove his alibi.

39. In a nut shell, it is my finding that prosecution did not prove its case to the required standard hence the appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set free unless otherwise lawfully held.

ROA 14 days

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF JULY 2025.

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J. N. ONYIEGO

JUDGE