Ali v Republic (Criminal Appeal E033 of 2024)
[2025] KEHC 10116 (KLR) (9 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10116 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E033 OF 2024

JN NJAGI, J

JULY 9, 2025

BETWEEN

BWANAHERI FAMAU ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. T. A. Sitati, SPM, in Lamu Senior Principal Magistrate's Court Sexual Offence Case No. EOO2 of 2023 delivered on 4/9/2023)

JUDGMENT

1. The Appellant was charged in count 1 with the offence of defilement contrary to Section 8[1] [3] of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 26th day of January, 2023 at around 1000 hours at Lamu East Sub County within Lamu County, he intentionally and unlawfully caused his penis to penetrate the vagina of M.A [herein referred to as the complainant], a child aged 12 years.

2. In Count 11 he was charged with the offence of defilement contrary to Section 8 [1] [3] of the *Sexual Offences Act* No. 3of 2006, the particulars being that on the same date, time and place as in count 1, he intentionally and unlawfully caused his penis to penetrate the anus of the complainant in count 1, a child aged 12 years.

3. The Appellant pleaded not guilty to the charges and he was tried. He was found guilty on the 2 counts as charged and was sentenced to serve twenty years imprisonment on each count. He was aggrieved by conviction and the sentence of the trial court and lodged an appeal on the following amended grounds of appeal:

1. That the learned trial magistrate erred in law and in fact in relying on a narrative riddled with material contradictions and the same failed the test of the truthfulness of the testimonies of PW1, PW2 and PW3;

2. That the learned trial magistrate erred in law and in fact by failing to consider that the prosecution failed to discharge the burden of proof to the required threshold.

3. That the learned trial magistrate erred in law and in fact by imposing upon the appellant a sentence that was harsh and excessive.

4. That the learned trial magistrate erred in law and fact by failing to consider his defence.

Case for prosecution

4. The evidence adduced against the appellant at the trial court was that the complainant was at the material time a 13 year-old girl. She had at that time joined her mother, PW2, at [particulars withheld] village and was waiting to be enrolled for school. The appellant was their neighbour.

5. That on the material day at about 11 am she was at home when she went out of her house to fetch water in a well within their compound. As she passed outside the house of the appellant, he grabbed her hand and pulled her into his house. He locked the door and undressed her. He removed his trousers and inserted his penis into her vagina. He then turned her over and inserted his penis into her anus. He then ordered her to go away. She went out of the house. She went to the place where her mother was working but she did not tell her what had happened. In the evening she opened up to her mother and told her what the appellant had done to her. On the following day they reported the matter at Kizingitini Police Station. IP Paul Ongesa PW4 took their report and escorted the complainant to Faza Sub County Hospital where she was examined by Dr. Mohamed Hussein, PW3. The doctor found her with fresh laceration on the labia and fresh bleeding and lacerations in the anal area. He found her with an old scar on the labia and a missing hymen. That the victim revealed that in the past her uncle had vaginally defiled her which explained the old scar. The doctor filled a P3 form and her PRC form.

6. IP Ongesa then in the company of the complainant proceeded to the house of the appellant where the complainant pointed out the appellant and he arrested him. He charged him with the offences. During the hearing in court the doctor PW4 produced the treatment notes, the P3 form and the Post Rape Care form as exhibits, P.Exh. 1, 2 and 3 respectively. The mother to the complainant identified the complainant`s birth certificate in court which IP Ongesa produced as P.Exh. 1. It indicated that the complainant was born on 28/10/2010 which placed her age at 12 years and 3 months.

Defence Case

7. When placed to his defence, the appellant told the court that he is a fisherman. That he goes fishing every day except on fridays. That on 26/1/2023 he went to Kiwayuu island to fish and he did not know what happened in relation to this case. He was later arrested on 29/1/2023. He maintained that he was nowhere near home on the material day.

8. The appellant called 3 witnesses. NAM DW2 testified that she is a neighbour to the appellant. That on 26/1/2023 she was indoors throughout the day and she did not hear of any event or incident. She did not know anything about the charges preferred against the appellant.

9. The wife to the appellant, DW3, told the court that on the alleged date the appellant was out fishing at sea. That the police visited her home twice during the day looking for him but they did not find him. He came back home in the evening and he was arrested.

10. DW4 told the court that on 26/01/2023 he went out fishing at sea with the appellant at 6am. They fished the whole day and therefore that the appellant had no opportunity to commit the offence that he was charged with.

11. The appeal proceeded by way of written submissions.

Appellant's submissions

12. The appellant set out three issues in his appeal: contradictory evidence on the prosecution's case; a flawed investigation and that the prosecution failed to discharge its burden of proof to the required threshold.

13. He submitted that the evidence of the prosecution witnesses was marred with inconsistencies. That the medical evidence did not support the allegation of defilement.

14. He further submitted that the trial court failed to consider the crucial facts which raised doubt in the testimony of the complainant.

Respondent's submissions

15. Counsel for the respondent submitted that the prosecution had proved its case beyond reasonable doubt. She submitted that the age of the victim was proved as the investigating officer produced a copy of her birth certificate which confirmed that the complainant was 12 years at the time of the alleged defilement. On penetration, it was submitted that the doctor PW3 confirmed that the complainant had fresh lacerations on both her vagina and anus.

16. On identification, it was submitted that the appellant was well known to the victim. That the trial court had the advantage of observing PW2's demeanor and took note that she appeared as a truthful witness. It was submitted that the alibi defence raised by the appellant was an afterthought and that his defence did not cast any doubt on the prosecution's case.

Analysis and determination

17. The role of this court as the first appellate court is well settled. It was held in the case of Okeno v Republic [1972] EA 32 and in Mark Oiruri Mose v R [2013] eKLR that a first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its own independent conclusion but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

18. The appeal was based on grounds of contradictory evidence on the prosecution case; that the prosecution failed to prove the charges against him beyond reasonable doubt; that the trial court failed to consider his defence and that the court imposed a harsh sentence on him.

19. I have considered the grounds of appeal, the record of the trial court and the submissions filed by the respective parties.

20. The ingredients of the offence of defilement are: proof of the age of the victim, penetration and proper identification of the perpetrator – see George Opondo Olunga v Republic [2016] eKLR.

21. On the issue of age, it has been held that the age of the victim in sexual offences can be proved by the direct evidence of parents or guardian or by observation by the court. In Thomas Mwambu Wenyi v

Republic [2017] e KLR cited with approval Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000 which held that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

22. In the instant case, the mother to the complainant PW1 stated that the complainant was born on 28th October, 2010 and therefor that she was ages 12 years. She identified the complainant`s birth certificate in court. The same was produced by the investigating officer PW4 as an exhibit in the case, PExh.1. It indicated that the complainant was born on the aforesaid date which placed the age of the complainant at the material time at 12 years and 3 months. The age of the complainant was therefore proved.

23. On the element of penetration, the same is defined in section 2 of the *Sexual Offences Act* defines penetration as:

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

24. The prosecution has a duty to establish that the complainant was partially or fully sexually penetrated by the Appellant.

25. The doctor who examined the complainant, PW3, noted that she had fresh lacerations on her labia minora and on her anal orifice. The evidence of the doctor was not challenged. The medical evidence corroborated the evidence of the complainant that she was penetrated on the vagina and anus. The question was whether the appellant was the perpetrator.

26. The complainant testified that on the fateful day she was walking towards the gate to their plot when the appellant pulled her by her left hand and dragged her into his house. He locked her inside his house. He laid on top of her and inserted his penis into her vagina and then into her anus. After he finished he ordered her to leave. She later reported to her mother what the appellant had done to her.

27. The mother to the complainant PW1 narrated that the complainant recounted to her that the appellant had defiled her. She took her to hospital where she was examined and found to have been defiled.

28. It would appear that there was credible evidence from the complainant that she was penetrated by the appellant both into her vagina and anus. This evidence was corroborated by the medical evidence of the clinical officer PW4.

29. There is however one aspect of the case that I should consider though it was not raised in the appeal. This is because the issue touchers on a point of law and therefore this court cannot ignore it.

30. The complainant herein testified in court on 6/3/2023 during which time she was aged 12 years and 5 months. She was thus a child of tender years. She gave unsworn evidence in court.

31. I have noted from the record of the trial court that the court did not conduct a voir dire examination on the complainant before she testified so as to satisfy itself that the minor was intelligent enough and that she understood the duty of speaking the truth. This is as required by Section 19 [1] of the Oaths and Statutory Declaration Act which provides that:

> " Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the

opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

32. A child of tender years for the purposes of Section 19 of the above stated Act was defined in the case of Kibageny Arap Kolil v Republic [1959] EA 92 to mean a child of any age, or apparent age of under fourteen years.

33. In Maripett Loonkomok v Republic [2015] eKLR, the Court of Appeal had his to say in respect of voir dire examination:

> " Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R [1959] EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No 137 of 2014 and in Samuel Warui Karimiv R Criminal Appeal No 16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honored 14 years remains the correct threshold for voire dire examination.....
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> It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;
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> "In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction".

34. From the foregoing the evidence of the complainant in this case that was given without voir dire examination being conducted could not be used to convict the appellant. A conviction could only lie if there was some other sufficient independent evidence proving that the appellant defiled the complainant. The medical evidence of the clinical officer PW4 only proves that the complainant was penetrated but it did not prove who did so. That was therefore not independent evidence to prove the charge of defilement against the appellant. There was thus no independent evidence to prove the charge.

35. I am alive to the proviso to section 124 of the *Evidence Act* which allows the court in sexual offence cases involving children to convict an accused person on the sole evidence of the child victim if the court is satisfied that the child is telling the truth. The provisions of the section cannot apply in this case since the child testified in court before establishing in a voir dire examination whether she was possessed of

sufficient intelligence to justify the reception of her evidence. I find that the trial was vitiated by failure by the trial court to do so and there was therefore a mis-trial. Having come to that conclusion, the question is whether I should order a re-trial.

36. It is trite that a retrial can only be ordered where the same will not occasion injustice or prejudice to the appellant. The same cannot be ordered so as to give the prosecution an opportunity to fill in the gaps noted during the trial. The court has also to consider whether a conviction may result if a re-trial is ordered. In the case of Edward Marwa Maisori & 2 others v Republic [2014] eKLR the Court of Appeal stated as follows:

> " In Sumar v R, [1964] EA 481, the East African Court of Appeal emphasised that whether or not an order for a retrial should be made depends on the particular facts and circumstances of each case, but it should only be made where the interest of justice require it and it is not likely to cause an injustice to an accused person. In Mwangi – v- R, [1983] EA 522, it was held that an order for a retrial should not be made unless the appellate court is of the view that on a proper consideration of the admissible evidence, a conviction may result. In the case of Fatehali Manji v R, [1966] EA 343, the Court of Appeal for Eastern Africa held that a retrial can only be ordered when the original trial was illegal or defective. The court stated:
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> "In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial should be ordered each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

37. The appellant was arraigned in court on 1st February 2023 and was sentenced on 4th September 2023. He has thus served less than two years of the sentence imposed on him. The fault in this case lay on the trial court which failed to conduct a voir dire examination on a child of tender years before it allowed her to testify in the case. The prosecution had a strong case against the appellant. I do not see any prejudice that may be occasioned on the appellant if he is re-tried of the offence. The justice of the case demands that I order a re-trial.

38. The upshot is that the trial was vitiated by failure by the trial court to conduct a voir dire examination on a child of tender years. Consequently, the trial is hereby quashed and the sentence set aside. I order that the appellant be re-tried of the offence on a priority basis by another magistrate of competent jurisdiction other than Hon. T. A. Sitati.

39. Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 9TH DAY OF JULY 2025.

J. N. NJAGI

JUDGE

In the presence of:

Ms Mkongo for Republic

Appellant - present in person at G.K. Prison Malindi

Court Assistant - Ndonye