Daudi v Republic (Criminal Appeal E043 of 2024)
[2025] KEHC 9612 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E043 OF 2024

JN ONYIEGO, J

JULY 3, 2025

BETWEEN

ABDULLAHI ABDI DAUDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence arising in PM's Court at Dadaab in MSCO No. 1 of 2022 and delivered on 13.12.2022 by Hon. J.J. Masiga (P.M)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 03rd and 13th day of 2022 in Fafi sub County within Garissa County, he intentionally and unlawfully caused his penis to penetrate the vagina of MOM, a child aged 14 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 03rd and 13th day of 2022 in Fafi sub County within Garissa County he intentionally touched the buttocks and vagina of MOM, a child aged 14 years with his penis.

3. The appellant was convicted of the main charge and sentenced to 20 years imprisonment.

4. Being dissatisfied with the said judgment, the appellant lodged the present appeal relying on grounds that have been expressed in his written submissions dated 02.04.2025.

5. The appellant submitted that the prosecution' case was full of irregularities. That the complainant was not informed of his right to legal representation as provided for under article 50 of the *Constitution*. That the court neither explained to the appellant nor appointed him an advocate despite the fact that

he was facing a charge with a severe sentence if convicted. Reliance to support the foregoing was placed on the case of *David Macharia Njoroge v R*, (2011) eKLR, where the court held that:

> State funded legal representation is a right in certain instances...that we are of the considered view that in addition to situations where substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.
>
> We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new constitution would automatically be entitled to a retrial where no such legal representation was provided.

6. Similarly, it was urged that the appellant did not understand the charge he was facing as this was demonstrated from his defence. It was contended that the appellant only understood that the charges were related to a running down case. It was urged that the same was buttressed by the fact that it was not shown the language in which the proceedings were carried out.

7. Regarding penetration, it was submitted that the medical doctor's examination could not authoritatively be relied on as the Court of appeal has in some instances proclaimed itself on the issue. That in the case of *PKW v Republic* [2012] eKLR, the court held that a missing hymen is not an automatic proof of penetration in a sexual offence case. Equally, that the appellant's defence was not considered as he did not understand the repercussions of tendering an unsworn testimony. It was urged that the foregoing was as a result of the fact that the appellant was not provided an advocate to guide him appropriately through the hearing process thus the same led to a miscarriage of justice.

8. On sentence, the trial magistrate was faulted for having meted out a harsh sentence against the appellant in the given circumstances. The appellant thus prayed that his appeal be allowed, his conviction be quashed and sentence set aside.

9. The respondent in their submissions dated 24.03.2025 urged that the prosecution proved its case to the required standard. That the prosecution was duty bound to prove the following elements: age, penetration and the identity of the perpetrator.

10. As regards to age, the respondent relied on the case of *Mwalango Chichoro Mwanjembe v Republic* [2016] eKLR where the Court of Appeal held that age could be proved by documentary evidence such as; 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. That in the case herein, the minor testified that she was 14 years and the same was corroborated by the evidence of PW4 who produced a manifest showing that she was born on 08.11.2009, hence aged 14 years.

11. On penetration, this court was urged that PW1 testified that the appellant had unlawful carnal knowledge with her. That he caressed her breasts and on a different occasion, had sexual intercourse with her. Additionally, that PW3 also corroborated the testimony of PW1 on penetration. On identification, it was submitted that the same was free from error noting the period of time the complainant spent with the appellant. Further, that the appellant was someone known to the complainant and therefore, the finding of the trial court was free from error.

12. On sentence, counsel urged that the same was appropriate noting that the appellant did not demonstrate that the trial court acted in excess of its powers or acted on evidence that is perverted.

13. I have considered the grounds of appeal and submissions by the parties. I have also read the record of the trial court together with the judgment. As a first appellate court, this court is obligated to revisit

and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* (1972) EA32.

14. PW1, MOM testified that during the material time, she was 14-years-old living with her aunt at [Particulars Withheld] Block Hx. That on 3rd to 13th of January, 2022, the appellant visited them at their home. That the appellant informed her father that he desired her as spouse which offer her father declined. She stated that on the first night, the appellant caressed her breasts while they were watching a movie within their compound. She stated that there was a day when the appellant took her to his daughter's house where he defiled her. It was her testimony that the appellant had sex with her in two occasions and when her father enquired from the appellant on her whereabouts, the appellant claimed that he had no idea. That the appellant took her to his relatives in Hagadera where they stayed for 14 days until the time when her father went for her. She stated that she was later taken to the hospital where she was examined and then treated.

15. PW2, OMM, PW1's father testified that he met the appellant at a miraa joint. That he invited the appellant who is also a herbalist to his home noting that he was sick and in need of help. That on a different occasion, the appellant informed him that there was need to have treatment carried out at night and therefore, he invited the appellant to his home. On the very night, he noted that the appellant gave his daughter a phone and when she started shaking, the appellant informed him that he was treating him instead.

16. He recalled that he realized that the same was a lie as his daughter fainted and in the morning, the appellant disappeared with her PW1). It was his evidence that he was informed that the appellant had disappeared with PW1 to Hagadera. He stated that upon reaching out to the appellant, the appellant told him that he had his daughter but he could not do anything over the same. That relatives took him to Block L where the appellant was found with PW1 and thus prompting his arrest while PW1 was taken to IRS hospital.

17. PW3, Dr. Ngao testified on behalf of Dr. Silas Chirchir that the minor upon being presented at the hospital, was examined. That upon examination, some redness in the vaginal canal was noted. That there were bruises in the vaginal canal, hymen was absent and a whitish discharge from the vagina noted. In the same breadth, it was noted that penetration was repeatedly done and that the bruising was at 6 O'clock. He therefore opined that PW1 was defiled.

18. PW4, 90xxx, Sgt. Flora Maina testified that PW2 reported that his daughter, PW1 had gone missing from 03.01.2022 to 13.01.2022. According to her investigations, previously, PW2 fell sick and noting that the appellant who also was a herbalist, visited PW2 to examine and offer treatment. While there, the appellant who also goes by the name of Gargashin sought the hand of PW1 for marriage, which move PW2 declined. That upon the appellant completing treating PW2, he left and that is the time PW2 noted that his daughter was missing hence suspecting that the appellant had run away with her.

19. She further stated that PW1 on the other hand informed her that she had eloped with the appellant as they were to start marriage life. That on the first night, the appellant defiled her twice and on the following day, they traveled to Hagadera where they spent at the appellant's relatives. According to her, PW1 told her that she was introduced as the wife of the appellant and that the elders were to be sent to inform PW2 of the same as was the tradition.

20. That PW2 set off from Dagahaley in search of PW1 when he met the appellant who upon being questioned said that he would deliver PW1 on the following day. On the said day, the appellant instead sent his brother but PW2 declined to meet him insisting that he be taken to where the appellant and PW1 were. That upon being taken to the place where the appellant was, he also found PW1 there. The

appellant was arrested while PW1 was taken to the hospital for examination and treatment. It was her evidence that PW1 identified the appellant at the time of effecting arrest and further, that the manifest which she produced before the court confirmed that PW1 was born on 08.11.2008 hence showing that her age at the time in question was 14 years.

21. DW1, Abdullahi Abdi Daud in an unsworn statement testified that he is also known as Gergashin. That he knew and further understood the charges against him. It was his evidence that the said charges were read to him and further, he heard the witnesses testify against him and that the charges according to him were false. Additionally, he proceeded to state that he was falsely accused. In a twist, he stated that he knocked one Jaylani Murithi with a boda boda but took him to the hospital. That he only learnt about the defilement case upon being arraigned in court. He denied committing the offence herein.

22. DW2, Ali Hussein Mohamed in his sworn testimony testified that he knew the appellant as they are from the same tribe. That the appellant was arraigned before the court for having knocked down one Murithi hence not the charges of defilement.

23. I have considered the appeal herein, proceedings before the lower court and submissions before this court. The issues that arise for determination in this appeal are;

    i. Whether the prosecution proved its case to the desired threshold;

    ii. Whether the sentence meted upon the appellant was lawful.

24. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* which provides:8(1)- a person who commits an act which causes penetration with a child is guilty of an offence termed defilement8(3) "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

25. The ingredients that ought to be established in an offence of defilement are: the age of the complainant, proof of penetration and the positive identification of the assailant. See *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013.

26. In a charge of defilement, the age of the victim is important for two reasons:

    i) defilement is a sexual offence against a child; and

    ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

27. In this case, PW1 testified that she was 14 years and the same was corroborated by PW3 who produced a manifest showing that indeed the complainant was 14 years hence a minor. Additionally, the appellant did not raise any concerns towards the same hence it is my finding that the complainant was 14 years old. [See the case of *Edwin Nyambogo Onsongo v Republic* (2016) eKLR].

28. Regarding penetration, Section 2(1) of the *Sexual Offences Act* defines the same as: "The partial or complete insertion of the genital organs of a person into the genital organ of another person." See *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No. 35 of 1995].

29. PW1 testified how the appellant took her away from her home and had sex for several days. The testimony of PW1 was also corroborated with the evidence of PW3 who testified that upon the complainant being examined, it was found that the vaginal walls were red, the hymen was absent and further, there was a bruising at 6 O'clock. The medical doctor confirmed that the complainant was penetrated repeatedly. As such, it is my finding that the complainant was indeed penetrated.

30. On identification, the same was discussed in the case of *Wamunga v Republic*[1989] KLR 424 at 426 where the court held that; where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.

31. In the instant case, the identity of the appellant could not be faulted for the reason that prior to the appellant eloping with PW1, he had stayed in their house while supposedly treating PW2. Additionally, the appellant and the complainant stayed together for a period of 14 days or thereabouts as they had allegedly eloped together. Clearly, the time spent together was so long as to lead to positive identification.

32. Although there was no corroboration of the victim's direct evidence, section 124 of the *Evidence Act* is clear on that aspect. Indeed, that provision does not make mandatory for corroboration of the victim's evidence in a sexual offence as long as the trial court is satisfied of the truthfulness of the victim. As such, I have no doubt that the appellant was positively identified as the perpetrator of the offence.

33. On the question of language in which the proceedings were conducted, during the time of plea taking, the interpretation was done in English to Somali. During the hearing, he fully participated in cross examination implying that he understood and clearly followed proceedings. Although the law requires the trial court to indicate language used during every hearing, the omission herein was not fatal.

34. On the question of legal representation, Article 50(2)(h) of the Constitution recognizes provision of legal representation by the state at state expense if an injustice is likely to be suffered. In the case of *Chacha v Republic* (Criminal Appeal E027 of 2022(2022) KEHC16370(KLR)(15December 2022) (Judgment) the court held that the right under Article 2(h) is qualified by the requirement that one has to demonstrate the likelihood of suffering substantial injustice if legal representation is not accorded to the particular person. The court held that that right is not automatic.

35. I wish to take similar approach as above in that the provision in question is not mandatory and it depends on the circumstances of each case save for murder where it is mandatory considering that the maximum penalty is death. In the circumstances of this case, the court was at liberty to direct provision of legal representation or even the appellant should have requested. That omission was not fatal in the circumstances.

36. The court of appeal had occasion to consider similar position in the case of *Severin v Republic* (Criminal Appeal 180 of 2018)(2023)KECA 355(KLR)(31 March)(Judgment) where it was held that;

> " we reiterate the above position and hold and find that from the circumstances of this case the appellant was not entitled to legal representation as he never raised this issue before the trial court to enable the trial court consider the same"

37. The court of appeal went further to state that;

> " para.32- it must be remembered the right to legal representation by the state is not automatic..."

38. Guided by the senior court as above, it is my finding that the appellant did not suffer any prejudice as he was able to ask questions on cross examination and properly defended himself and even call a witness. In my view that ground has no basis. In a nut shell, the conviction herein was properly arrived at and the appeal on conviction is dismissed.

39. On sentence, it is trite that the appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The same provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

40. The trial court in sentencing the appellant considered the mitigation advanced and sentenced him to 20 years imprisonment. This court is conscious of the fact that it should not interfere with the decision of the trial court unless he/she acted on wrong principles. Just because this court could have arrived at a different decision does not mean that it should review the sentence.

41. In *S v RO and Another* 2000(2) SACR 248 (SCA) the court in a nut shell pronounced itself on how a court should strike a balance in any given circumstances to arrive at a fair and proportionate sentence. Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offence committed, the interest of society with different nuance, prevention, retribution and deterrence. Invariably there are overlaps that render the process unscientific to an extent that even a proper exercise of the judicial function, allows reasonable people to arrive at different conclusions.

42. Similarly, the Supreme Court in the case of *Republic v Joshua Gichuki Mwangi* Petition No. E018 of 2023 held that where a sentence is set in statute, the legislature has already determined the course unless the same is declared unconstitutional.

43. For those reasons, and considering the principles enunciated in the above case law, I find no reason to exercise discretion to review the trial court decision on sentence. It is therefore affirmed and the appeal on both conviction and sentence is dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 3RD DAY OF JULY 2025

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J. N. ONYIEGO

JUDGE