EOO v Republic (Criminal Appeal 8 of 2016)
[2025] KEHC 10383 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10383 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL 8 OF 2016

WA OKWANY, J

JULY 3, 2025

BETWEEN

EOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and Sentence at the Senior Resident Magistrate's Court in Keroka in SRMCCR Case No. 981 of 2014, delivered on 5th February 2015 by Hon. N. Kahara, Resident Magistrate)

JUDGMENT

1. The instant Appeal was triggered by a judgment delivered by the Court of Appeal, sitting in Kisumu on 19th December 2023, wherein the said Court found that the judgment delivered in this appeal by Hon. C.B. Nagillah J. (Rtd) on 29th April 2017 was a nullity as it did not satisfy the obligation imposed on a first appellate court. The Court of Appeal remitted the matter back to this Court for an accelerated hearing and disposal.

2. 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*. The particulars of the charge were that on 25th September 2014 at Kegogi Sub-Location in Masaba North District, within Nyamira County, intentionally caused his penis to penetrate the vagina of JKO (particulars withheld) a child aged 15 years.

3. The Appellant faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge are similar to the particulars in the main charge.

4. The Appellant pleaded not guilty to both charges and the matter proceeded to a full trial in which the prosecution called a total of five (5) witnesses.

5. The victim (PW1) testified that she was on the morning of 25th September 2014, on her way to school when the Appellant accosted her, grabbed her by the neck and dragged her to a bush on the roadside where he defiled her. She proceeded to school where she informed her teacher one Esther Bosire (PW2) of the ordeal. PW2 in turn informed the victim's mother PMM (PW3) (particulars withheld) of the incident. The victim was escorted to the police station where the defilement report was made and later to the hospital for examination and treatment.

6. PW4 No. 96xxx P.C. Sarah Lumbasi, received the defilement report and recorded the witnesses' statements. She testified that the victim informed her that she did not know the name of her assailant but that she could identify him physically. She stated that the Appellant was arrested by members of the public on the same day and that the victim identified him. She further stated that the Appellant denied the allegation that he had defiled the victim and that the knife that the assailant allegedly used to threaten the victim was never recovered.

7. PW5, Joel Ongaro, a Clinical Officer at Ekerenyo Sub-District hospital produced the medical report, Treatment Notes (P.Exh 1) and P3 Form (P.Exh 2) and stated that the Appellant was also examined and found to be HIV positive. He produced the Appellant's Treatment Notes (P.Exh 3) and the victim's age assessment Report (P.Exh4).

8. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer. When placed on his defence, the Appellant opted to tender sworn evidence and did not call any witnesses.

9. The Appellant (DW1) testified that he was on the material day on his way home when some young men informed him that the area Chief was looking for him. He proceeded to the Chief's office where the Chief informed him that someone who resembles him had defiled a girl near his home. He stated that he was then taken to the police station where he denied the defilement allegation and added that the victim's mother kept asking for his brother's number so that she could ask him for money. He stated that he was examined at the hospital and that the victim's mother had all along been asking for a reconciliation only for him to be charged with the offence of defilement while the victim had run away from home and was married.

10. At the conclusion of the case, the trial court found the Appellant guilty of the offence of defilement and sentenced him to serve 30 years' imprisonment.

The Appeal.

11. Aggrieved by the trial court's decision, the Appellant filed the instant Appeal challenging both the conviction and sentence on the following grounds: -

    1. The Learned Trial Magistrate erred in law and in fact in relying on evidence of recognition which was not free from error.

    2. The Learned Trial Magistrate failed to note that there were material contradictions in the Prosecution witnesses' testimonies.

    3. The Learned Trial Magistrate erred in law and in fact in rejecting the Appellant's defence.

    4. The Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant.

    5. The sentence was manifestly excessive in the circumstances.

12. The Appeal was re-admitted for hearing on 21st January 2025 when parties were directed to canvass it by way of written submissions which I have considered.

13. The duty of a first appellate court was aptly stated in the case of Kariuki Karanja vs. R (1986) KLR 190 thus: -

> " On a first appeal from a conviction by a judge or a magistrate, the appellant is entitled to have the Appellate Court's own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit."

14. From the grounds of appeal, the rival submissions and the evidence adduced before the trial court, I discern the main issues for determination to be: -

    i. Whether the Prosecution proved the charge to the required standard.

    ii. Whether the sentence was just and appropriate.

Analysis and Determination

Whether the Prosecution proved the charge to the required standard

15. Section 8 of the *Sexual Offences Act* (the Act) stipulates as follows: -

    8. Defilement

    (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.

    (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.....

16. In proving the charge of defilement, the Prosecution must establish three main ingredients namely: age of the victim, proof of penetration and positive identification of the perpetrator of the offence. (see Dominic Kibet vs. R [2013] eKLR).

17. In the case of Francis Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, it was held that the age of a minor in sexual offences could be proved in several ways. The court stated thus: -

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

18. In the present case, the victim testified that she was born in 1999 and was therefore 15 years old at the time of the offence. PW5 the Clinical Officer produced the victim's Age Assessment Report (P.Exh4) which indicates that she was 15 years old at the time that she was defiled. It is also noteworthy that the Appellant did not raise any issue with the victim's age and I am therefore satisfied that the victim's minority age was proved beyond reasonable doubt.

19. The Act defines penetration under Section 2 as follows: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

20. The victim testified as follows on the circumstances under which she was defiled: -

> " .....Then he grabbed my neck from behind using his left hand. He dragged me to some trees that were on the right side of the road as you face Keroka direction..... He asked me "kwani nakuita na unaniringia" in Ekegusii (I am calling you and you choose not to respond to me) He then removed my panty. He laid me on the ground next to the trees. I lay on my back. I lost consciousness as he was holding my neck with a lot of force. I regained consciousness after a few minutes and I tried to struggle with him. He held my neck again and told me that if I scream he would kill me. He showed me a knife. He removed a knife from his pocket and told me that if I screamed he could stab me with the knife. It was not so dark.....At this time he was laying on top of me. He was having sex with me. He had removed his trousers up to slightly above the knees. (witness starts crying). I felt his penis inside my vagina (witness points at her vagina). I did not scream but remained silent. He finished having sex with me, stood up but did not look at him (sic). He wore trouser again and left....I stood up from the ground, wore my panty again as he had removed only one of the legs (left leg)....

21. From the victim's testimony, it is clear that the person who accosted her also sexually penetrated her. I find that her evidence was clear, credible and consistent. I also note that the trial court recorded her reaction as she narrated her ordeal which leads me to conclude that she was a credible witness owing to the emotions that she exhibited when giving her account of the ordeal. I find that the victim's testimony points to the fact that the ingredient of penetration was proved beyond reasonable doubt.

22. I anchor the above conclusions on the provision of Section 124 of the *Evidence Act* which provides that courts can convict an accused person based on the victim's sole testimony as follows: -

> 124. 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.

23. The Prosecution also presented the evidence of PW5 the Clinical Officer who stated that the victim had a whitish discharge in the vagina, her hymen was broken and a High Vaginal Swab (HVS) test revealed that there were spermatozoa and puss cells in the victim's vagina. I have also perused the victim's P3 Form (P.Exh 2) together with her Treatment Notes (P.Exh1) which indicate that the victim had a normal external vagina with whitish discharge which was actively draining and a broken hymen. I find that the medical evidence corroborated the victim's testimony that she was sexually penetrated on the material date. I therefore find that the ingredient of penetration was proved beyond reasonable doubt.

24. Turning to the third ingredient of identification of the Appellant as the perpetrator of the offence, it was the Prosecution's evidence that the victim positively identified her assailant by recognizing him

as her neighbour whom she had known for three years. The Prosecution Counsel, Mr. Chirchir, submitted that the Appellant was positively identified and placed at the crime scene on the material day. He noted that the Appellant also confirmed that he knew the victim and had shared the same road with her on the material day.

25. The Appellant, on the other hand, submitted that it was not possible for the victim to allege that she did not know his name yet she alleged that they were neighbours whose homes were barely 30-35 metres apart. The Appellant cited the decision in James Omondi Onyango vs. R (2014) eKLR where the Court of Appeal held that the witnesses ought to have identified their assailant by name if they indeed recognized him at the crime scene when they reported the matter to the police.

26. The Appellant further took issue with the evidence on identification and argued that the trial court did not probe the circumstances of the identification, in particular, the type of lighting at the time of the sexual assault and its intensity. Reference was made to the case of Patrick Muriuki Kinyua and Another vs. Republic (2015) eKLR where the court cautioned against overlooking the possibility of mistaken identity where the evidence of identification was one of recognition. The Appellant noted that from the sequence of events, as stated by the prosecution witnesses, it was not clear how and at what point the victim informed her mother about the clothes that her assailant wore at the time of the assault when she was already at the hospital when her parents were called to the police station.

27. I note that the victim claimed that she knew the Appellant, by appearance and not by name, since he was her neighbour. She also stated that the Appellant first called her while she was on her way to school but she ignored him only for him to follow her and grab her by the neck. She stated that she recognized his voice as that of the person who had called her earlier when she ignored him.

28. I have considered the victim's claim that she knew the Appellant by appearance and not by name. The question that baffles this court is how the Appellant was identified as the victim's assailant at the time of his arrest when the victim was not present to identify him and was categorical that she did not know his name. This court is of the view that this is a case where the police should have conducted an identification parade so as to enable the victim to pick or single out her assailant from among a group of suspects matching his description. The identification parade would have assisted the court to rule out any possibility that the Appellant was a victim of mistaken identity.

29. It did not also escape the attention of this court that the person(s) who arrested the Appellant were not called as witnesses to confirm how they singled him out as the person who had defiled the victim. The Investigating Officer merely stated that the Appellant was arrested and brought to the station by members of the public.

30. Still, on identification, it is instructive to note that the victim stated that it was not so dark at the time of her assault which then begs the question of the intensity of the lighting at the time and if it could have enabled the victim to properly identify her attacker. The Prosecution did not lead any evidence to show how the victim was able to identify the Appellant in the wee hours of the morning. I find that the trial court did not properly analyse the evidence on identification and warn himself of the difficulty that could have arisen in proper identification. I find guidance in the decision in R vs. Turnbull [1976] 3 All ER 549 where it was held thus: -

> "……..the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way …..?

> Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ....Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

31. In the circumstances of this case, I find that the evidence of recognition, though more reliable than mere identification, was not full-proof or cogent enough to sustain a conviction. I find that this is a case where the prosecution and the investigative apparatus of the government should have gone a notch higher and subjected the body fluids or sperms/semen that was allegedly seen in the victim's vagina to DNA analysis so as to confirm if they were indeed from the Appellant.

32. This court is appalled at the lacklustre manner in which the investigations were conducted. It is clear that the police not only failed to carry out an identification parade that could have assisted their case on the issue of identification but did not also carry out DNA analysis of the body fluids so as to confirm their nexus to the Appellant. This court has to wonder why the police did not find it necessary to do the DNA analysis yet they were able to examine the Appellant for HIV. I am of the view that such wishy washy investigations, by the police, have led to the acquittal of suspects, even in serious crimes such as this one, when they could have as well been culpable for the offences as charged.

33. For the reasons I have stated hereinabove and owing to the glaring gaps on the issue of identification, I find that the Appellant's conviction was not safe. Consequently, I find that the instant appeal is merited and I therefore allow it by quashing the conviction and setting aside the sentence imposed by the trial court. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

34. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 3RD DAY OF JULY 2025.

W. A. OKWANY

JUDGE