Hassan v Republic (Criminal Appeal E061 of 2024)
[2025] KEHC 10806 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10806 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E061 OF 2024

JN ONYIEGO, J

JULY 24, 2025

BETWEEN

ABDIFATAH IFTIN HASSAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in Sexual Offence Case No. E018 of 2024 at Dadaab Law Courts delivered on 18.12.2024 by Hon. R. Lemayan (RM))

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. Particulars of the charge were that on diverse dates between the month of March and September, 2024 within Fafi sub-county in Garissa County, he intentionally and unlawfully caused his penis to penetrate the vagina of DNM, a child aged 17 years.
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*. Particulars being that on diverse dates between the month of March and September, 2024 within Fafi sub-county in Garissa County, he intentionally and unlawfully touched the vagina and breasts of DNM, a child aged 17 years with his penis.
3. He pleaded not guilty and a full hearing was conducted with the prosecution calling five (5) witnesses in support of its case.
4. At the close of the prosecution's case, the trial court ruled that a prima facie case had been established against the appellant thereby placing him on his defence.
5. He was consequently convicted and sentenced to 15 years' imprisonment.
6. Being aggrieved by the determination of the trial court, the appellant filed an undated petition of appeal citing 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 the evidence of the defence thus reaching a wrong determination.

iii. That the learned magistrate erred in law and fact by relying on prosecution's evidence which was not only inconsistent but also contradictory.

7. The court directed that the appeal be canvassed by way of written submissions.

The appellant's submissions

8. The appellant via undated submissions urged this court that the prosecution did not prove its case beyond any reasonable doubt. That the prosecution's case was marred with contradictions and inconsistencies that did not warrant the trial court to convict him. It was his contention that prosecution did not prove that he committed the offence considering the fact that its witnesses were equally unreliable.

9. He argued that the age of the complainant was not resolved as she did not undergo an age assessment to clearly determine her age. Additionally, it was urged that, DNA having not been carried out to establish paternity of the complainant's baby, it could not be authoritatively stated that he was responsible for the act that led to the complainant getting pregnant.

10. On contradictory evidence by the prosecution, the appellant urged that PW1 stated that they started dating in August 2024 while PW4 testified that the duo had known each other for a period of 4-5 months while the doctor stated that the complainant had been defiled for a period of one month. According to him, PW2 testified that the matter was reported vide OB No. 10B/34/09/2024 while PW4 testified that he was directed to investigate the matter in relation to OB/20/25/9/2024. That in view of those contradictions, the investigating officer could have presented wrong facts before the court as a result of wrong investigations, which facts the trial magistrate relied on to convict him.

11. It was urged that the complainant having declined to be examined, the medical doctor's report could not be relied on as the same was not established. According to him, the medical report was a pure fabrication thus the trial court ought not to have relied on the same. In the same breadth, he submitted wondering why the trial court was quick to convict him and yet he was a child aged 17 years just like the complainant. In relation to the foregoing, he decried the fact that the prosecution shifted the burden of proof upon him thus failing to prove its case as is required.

12. He pleaded his innocence by urging that the fact that the complainant might have been defiled, the evidence before court did not prove that he was responsible taking into account that this matter also took such a long time before being reported. In the end, he urged this court to allow his appeal as prayed.

The respondent's submissions

13. Mr. Owuor for the respondent filed submissions dated 16.05.2025 urging that the prosecution was expected to prove three things namely: proof of penetration, age of the complainant and that the accused was indeed properly identified. That the trial court properly convicted the appellant on the main charge of defilement and sentenced him to serve fifteen years' imprisonment.

14. In urging this court to uphold the finding of the trial court, the respondent placed reliance on the case of Mwalango Chichoro vs Republic [2016] eKLR where the court emphasised the importance of

proof of age which in this case, was proved having in mind the PRC Form which showed that PW1 was 17 years old.

15. In regards to penetration, it was urged that the same was proved by the evidence of the complainant and further corroborated by the evidence of the doctor who examined her. On identification, counsel urged that the complainant testified that she was in a love relationship with the appellant and further, that the relation had existed for quite some time hence identity of the appellant could not be in error.

16. On sentence, it was urged that the same was founded on law as the said offence attracts a 15 - year sentence. This court was urged to uphold the finding of the trial court by dismissing the appeal herein.

Analysis and determination.

17. 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 position was succinctly set out by the Court of Appeal in Kiilu & Another vs Republic (2005)1 KLR 174.

18. Brief facts of the case are that, PW1, D.N.M., testified that on diverse dates between the month of March and September, 2024, she had a relationship with the appellant. That the appellant started talking to her in the year 2022 about having a relationship and that their communications was normally done over the phone.

19. According to her, they started dating in August 2024 but were not involved romantically. She went further to state that at some point, the appellant invited her to his house in block K – 9 a request she acceded to. That during that time, they had sex and consequently the appellant promised to talk to her parents with a view to marrying her. Similarly, on 22.09.2024, the appellant called her to Ifo where again they spent the day together having sex.

20. That upon returning home, she found that her family was looking for her and at that juncture, she was taken to Hagadera Police station and consequently to IRC hospital for medical examination. That she later recorded her statement stating that the appellant was responsible for her pregnancy which was medically confirmed on 25.09.2024.

21. PW2, KAN, PW1's mother testified that she was a businesswoman who used to leave for work at 6.00 a.m. and returns at 6.00 p.m. She stated that she has seven children including the complainant and most of the time, she was in the habit of taking care of her siblings when she was away. She stated that on 22.09.2024, she did not go for work early as she had gone to fetch water while the complainant was to prepare tea. That upon returning, she did not find her and on asking neighbours, she was told that the complainant was at Ifo.

22. She stated that she reported the matter to the police via a OB No.: OB/34/23/09/2024. It was her case that she got information from the appellant's relative who informed her that the complainant and the appellant had been seen aboard a motor vehicle from Ifo to Hagadera. That based on that information, the police proceeded to arrest the complainant together with the appellant.

23. It was her testimony that the appellant was taken into custody while the complainant was taken to IRC hospital for examination and treatment. It was her further evidence that PW1 informed her that she had gone to the appellant's house. She stated that upon medical examination, it was found that the complainant was pregnant and the complainant confirmed that the appellant was responsible for her pregnancy.

24. PW3, SMA testified that on 23.09.2024, PW2 called and informed him that PW1 was missing and so, they started looking for her. That he was later told that PW1 had been found at Ifo thus prompting

them to report to Hagadera Police station leading to the arrest of the appellant. According to him, the appellant and PW1 were taken to the police station. On cross examination, he stated that the appellant's family had desired to have the matter settled out of court and further, that the complainant's family did not ask for any money.

25. Pw4, No. 10xxx, PC Caleb Mokaya testified that on 25.09.2024 while at the gender desk, he was directed by the OCS to investigate a matter that had earlier been reported vide OB No.: OB/20/25/9/2024. That the complainant was a minor aged 17 years who allegedly had been defiled by a person known to her. He went further to state that the minor had been accompanied by her mother and uncle and so, he referred her to the IRC hospital. That he contacted PW1, PW2 and the uncle who upon interrogation recorded their statements. According to him, the minor informed him that she had known the appellant for a period of 4 – 5 months while they were at a wedding party.

26. That the duo later on engaged in sex between the month of March and September 2024 as the appellant promised the complainant that he would marry her. It was his evidence that the girl went missing and was traced at the appellant's home. It was further his evidence that upon completing investigations, he made the decision to charge the appellant with the offence before court.

27. PW5, Dr. Chirchir testified that while at the hospital, they received a patient who reportedly had been defiled by her boyfriend for a period of one month and further, that they had been dating for a period of 3 years. That a day before reporting to the facility, the minor had undertaken a pregnancy test and was found to be pregnant. He thus examined her body, arms, abdomen and limbs but did not perform vaginal examination as the minor declined to be examined. Ultra sound was performed and it was found that the minor was 7 weeks pregnant. He produced the P3 Form, Hepatitis results, Syphilis results, HIV results, ultra sound report, pregnancy test results, and PRC Form as Pex 1 to Pex 7 as evidence.

28. On cross examination, he stated that the age of the complainant was determined from the manifest as age assessment was not carried out. That the complainant averred that she had been dating the appellant for about a month and that DNA was not conducted to determine paternity of the complainant's baby.

29. At that point, the prosecution made an application to have a DNA test done to determine the paternity of the complainant's child. At the same time, he sought leave to have the complainant undergo an age assessment. The court in declining the application stated that the age assessment ought to have been conducted as early as possible when the appellant was charged but noting that the prosecution did not see the need to put its house in order prior to charging the appellant, the application was thus dismissed.

30. DW1, AIH testified that he was a casual worker who lived in Hagadera. He stated that he knew the complainant as they had promised one another that they would get married but at no point did they have sex. He conceded that they had eloped but noting that PW1's parents did not approve of their marriage; the charges herein were initiated. He denied committing the offence claiming that when he realized that he was being sought for, he readily availed himself and that he did not run away.

31. On cross examination, he stated that he had known the complainant for a period of 3 years and further, they used to communicate via phone. That he lived at Dagahley while the complainant lived in Hagadera and further, that they had met physically in as much as he did not know that the complainant was under 18 years.

32. upon conviction, the appellant sought for forgiveness and further urged that he was a student in school.

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

i. Whether the prosecution proved its case beyond reasonable doubt establishing that; the complainant was a child; there was penetration; and the identity of the assailant;

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

34. 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 vs Republic [2016] eKLR.

35. Equally, in the case of Daniel Kamau v R (2019) e KLR the court of appeal cited with approval the case of Fappyton Mutuku Ngui v R (20140e KLR where the court held that conclusive proof of age in cases of sexual assault does not necessarily mean production of birth certificate save borderline cases.

36. In the instant case, the age of the complainant according to the doctor (pw5) was ascertained from the manifest. Although the appellant stated that he mistook the complainant to be over 18 years, there is documentary proof that pw1 was 17 years. Further, during the preliminary examination of pw1, she stated that she was 17 years. The court in its judgment stated that from its observation pw1 was old enough to know her age. From the evidence on record, am convinced that the complainant was 17 years.

37. 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 the girl's organ nor releasing sperms therein.

38. According to the doctor (pw5), the complainant refused to be examined hence no physical vaginal examination was done to ascertain penetration. From this angle, there was no proof of penetration. However, prosecution relied on the evidence of pw1 and the fact that she was pregnant to infer penetration. The appellant admitted having been engaged in a relationship with the appellant for over 3 years.

39. He however denied having engaged in a sexual relationship with pw1 and that no paternity test by way of DNA was done to ascertain his involvement. He did not deny that the complainant was found in his house having disappeared from her home. Equally, he did not challenge the testimony of pw1 and pw2 on cross examination save for the remarks that he still loved the complainant.

40. The trial court found the complainant to be truthful. These are the words of the trial court at page 7 para.2 of its judgment;

> " The court cannot find any reason why the complainant, who is currently expectant, could fabricate a complaint against the accused person. The court is satisfied that the accused herein sexually defiled pw1"

41. It is clear from the evidence on record that the court relied on the testimony of pw1 to convict. Under section 124 of the *evidence Act*, a court can convict on sexual offence related cases based on the evidence of the victim a lone without mandatorily demanding for corroborative evidence. See Arthur Mushila Manga (2016)e KLR where the court of appeal held that;

> " From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was

> nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. 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.

42. In the instant case, the court gave a reason for trusting her as follows; pw1 had no grudge hence had no reason to fabricate this case; the appellant did not challenge her testimony implying that she had given the true story.

43. There is no doubt that the appellant and the complainant were friends who had good plans to get married. There was no medical proof of penetration save for the pregnancy which the accused has disowned. The question is, is it possible to be in a relationship with a girl for a long without having sex? The answer is yes.

44. Is it possible for a man to be in an official marriage relationship with a wife and yet the wife engages in adulterous activities or infidelity resulting to an illegitimate baby being born without the husband's knowledge yet he is made to believe that he is the father until the secret comes out? Yes, there are so many men in society today bringing up children in the mistaken believe that they are the biological fathers without knowing that a neighbor was the real biological father.

45. Although DNA testing to ascertain paternity is not mandatory, it is also not useless. Where circumstances are such that the only evidence to determine a disputed issue like paternity to unearth the truth on penetration, DNA testing must be done. We are in a modern society where technology defines our life. We cannot ignore forensic evidence. Although section 124 of the *evidence Act* can be a savior on weak sexual offences, there must be strict compliance. The trial court did not caution itself of the consequences of relying on the evidence of a single witness to convict.

46. Further, in the absence of any medical evidence or otherwise to prove penetration, DNA testing of the child would have sufficed considering that the appellant had denied paternity nor engaging in any sexual activity with the complainant. The court should have allowed the prosecution's application to have a DNA test on the pregnancy done. It is possible that the complainant would have gotten the pregnancy from another source/man. Even married women lie over the source of a pregnancy.

47. For the above reasons stated, the evidence of pw1 and the existence of pregnancy which was not ascertained alone was not sufficient proof of penetration. See the case of John Mutua Munyoki v Republic [2017] KECA 376 (KLR) where the court had this to say;

> " As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant"

48. On the question of the appellant's age and being a school going student, the same did not come up in his defence. He actually stated that he was a casual labourer. For those reasons, I do not find that ground tenable.

49. As to the defence of mistaken age, the appellant stated that he mistook the complainant to be over 18 years. The court did not consider this defence. Considering the fact that the complainant was 17 years old, the same is almost on borderline. Secondly, considering the conduct and behavior that she was considering getting married to the appellant and could freely engage in a relationship for three years and quite often she was the one visiting the appellant at his home even without her parents' knowledge, is a conduct consistent with a mature person who would reasonably be mistaken to be over 18 years hence the need for consent which was readily available in the circumstances.

50. In the case of David Jairo & another v Republic (2012)e KLR the court had this to say on defence of mistaken age;

> " The complainant did not conduct herself like a person who had been defiled. If she was locked up in the 1st Appellant's room against her will, it is surprising that she did not raise an alarm at least to alert the neighbours that she was in distress. She is alleged to have been in that room until the next day. Again, she did not complain even to the 2nd Appellant. When her mother found her the following day at the door of the 2nd Appellant's room, she did not complain immediately. It was not until some officers came from the chief's camp that she spoke about her whereabouts the previous day. This is not compatible with the conduct of a child who had been defiled. Her silence throughout the afternoon of the incident and the night raises more questions than answers. This leads one to pose the question - what is the truth about this incident?
>
> A person cannot be convicted of a criminal offence on the basis of speculation. Hard evidence is required in order to sustain a conviction. On the basis of the evidence before the court, it is the word of the complainant (PW2) against that of the 1st Appellant. Whereas the latter conceded that PW2 slept the night in his room, he denied having defiled her. Such an incident calls for corroboration".

51. This being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt including the possibility of mistaken age. The Court of Appeal for Eastern Africa, in the celebrated case of Okale vs REP 1965 EA 555 held thus:

> " In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches;
>
> ...the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as a whole."

52. Having held that there was no proof of penetration and even if it was proved which was not, the mistaken age of maturity of the complainant would still have sufficed as sufficient evidence to acquit the appellant. Accordingly, am satisfied that the appeal is merited and the same is allowed. The conviction thereof is quashed and the sentence set aside. The appellant be set free forthwith unless otherwise lawfully held.

ROA within 14 days

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF JULY 2025

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J. N. ONYIEGO

JUDGE