Hamu v Republic (Criminal Appeal E015 of 2024)
[2025] KEHC 9832 (KLR) (8 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E015 OF 2024

JN ONYIEGO, J

JULY 8, 2025

BETWEEN

ABDULLAHI WARSAME HAMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. R. Lemayian (R.M.) delivered on 19.03.2024)

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*, 2006.The particulars of the main charge were that, the appellant on 21.07.2023 in Dadaab Sub – County within Garissa County intentionally and unlawfully caused his penis to penetrate the vagina of K.H.M., a child aged 14 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*, 2006. Particulars were that on 21.07.2023 in Dadaab Sub – County within Garissa County he intentionally touched the vagina of K.H.M., a child aged 14 years, with his penis.

3. At the conclusion of the trial, the trial magistrate convicted the appellant on the main charge and sentenced him to serve twenty (20) years imprisonment to be calculated from when he was arrested.

4. The appellant filed an undated petition of appeal setting out the following grounds:

    i. The learned magistrate erred in law and fact by convicting the appellant on the basis of the prosecution evidence which was marred with contradictions and inconsistencies.

    ii. The learned magistrate erred in law and fact by convicting the appellant and thereafter meting out a harsh sentence not commensurate to the circumstances herein.

iii. The learned magistrate erred in law and fact by convicting the appellant without giving due regard to his defence.

iv. The learned magistrate erred in law and fact by convicting the appellant yet the prosecution had not discharged its duty of proving the case beyond any reasonable doubt.

5. The court directed that the appeal be canvassed by way of written submissions which order the parties complied with.

The appellant's submissions

6. The appellant submitted that the case was not proved beyond any reasonable doubt by the prosecution. It was argued that at no time did he get linked to the offence herein as the evidence that was used by the trial court was purely contradictory. It was contended that the sentence meted out was not only harsh but also not commensurate with the offence herein. That the court did not take into consideration his mitigation thereby handing him a harsh sentence. In the end, the appellant urged this court to quash his conviction and set aside the sentence as meted out by the trial court.

The respondent's submissions

7. The prosecution counsel, Mr. Owuor while relying on his written submissions dated 19.03.2025 submitted that upon evaluation of the five witnesses, the trial court rightly convicted and sentenced him to serve twenty years' imprisonment. It was further submitted that prosecution properly proved the offence of defilement by establishing key elements intera lia: age of the victim, penetration and identity of the perpetrator and therefore, the appeal as lodged was destitute of any merit.

8. Reliance was placed on the cases of Mwalango Chichoro vs Republic [2016] eKLR where the court emphasized the importance of proof of age. That the same was proved having in mind the birth certificate of the minor and the medical documents which corroborated the complainant's evidence.

9. In regards to penetration, it was urged that the same was proved by the evidence of the complainant and further corroborated by the testimony of the clinical officer. Counsel made reference to the case of Mark Oiruri Mose v Republic (2013)e KLR where the court of appeal held that penetration does not necessarily end in the release of sperms into the victim's organ.

10. On identification, counsel urged that the incident happened in the morning at around 1000hrs and therefore, the complainant was able to clearly see the appellant hence the idea of mistaken identity could not apply. It was urged that indeed the prosecution proved its case flawlessly beyond any reasonable doubt and therefore the alleged grudges as averred by the appellant remained unfounded. On sentence, it was urged that the same was founded on law as the said offence attracts a 20-year sentence. This court was urged to uphold the finding of the trial court by dismissing the appeal herein.

11. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated that;

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered

the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

12. Briefly, PW1, K.H.M., the complainant herein testified that on 21.07.2023, she was grazing goats in the morning hours when the appellant with two other men approached her. That the other two men went on their way while the appellant remained behind. That suddenly, the appellant jumped and grabbed her from behind. As a consequence, he held her neck, covered her mouth and then defiled her. It was her evidence that she screamed in vain as no one showed up to help her. She testified that when the appellant finally stopped, she went home crying.

13. That upon arriving home, she found her father and neighbours whom she narrated the incident to. That on her way home, she met her uncle by the name of Hassan to whom she also narrated her ordeal. She recalled that her dad together with her uncle set out to look for the aggressor and while on the way, the appellant saw them but ran away as it was in the evening hours. On cross examination, she stated that the appellant did not penetrate her but only his sperms were smeared on her vagina. She further stated that she did not bleed from her vagina because the appellant did not penetrate her vagina. That she was consequently taken to the hospital for medical checkup and treatment.

14. PW2, MA, father to PW1 stated that on the material day, the complainant was out in the field grazing goats when she was defiled. That she arrived home crying. That upon PW1 informing him of the incident, he set out with some gentlemen that he met along the way who gave them directions on where to find the appellant.

15. That they found the appellant's cart and donkey tied to a tree and therefore, they took the donkey home. He further stated that his nephew had found the appellant in the field on the said day. He stated that the appellant was arrested as he was erecting a fence at Ifo. It was his testimony that the appellant was a stranger to him and he only learnt of his name from the boys who were in the search team.

16. PW3, Lauren Katana, a medical officer who examined the complainant stated that on systemic examination, the head, thorax, lower limbs and neck were normal. That the age of the injury was approximately 10hours and therefore, she administered pain killers and further classified the injury as harm. She further stated the complainant's perineum was bruised with minimal bleeding; there was whitish discharge from her genetalia and further, that the hymen was broken.

17. It was her evidence that a swap was done but unfortunately, no spermatozoa was seen in as much as numerous epithelial cells were found. She produced PRC Form, P3 Form, Lab results, treatment notes. Of importance to note is the fact that the witness stated that in as much as the complainant's hymen was broken, she could not determine whether it was freshly broken.

18. PW4, Abdiaziz Jama testified that on 31.07.2023, he found the appellant at block H-1 where he was fencing some compound. He called the investigating officer, Mr. Warsame from Ifo who effected arrest upon the appellant. According to him, he was aware that the appellant had defiled a girl and further, PW2 had equally given him the same information. He reiterated that previously, while together with Osman, he saw the appellant fetching firewood at the forest in as much as he did not see the complainant at the bush.

19. On cross examination, he stated that he knew that the appellant had defiled the complainant for he had escaped from home. That previously, he did not know the appellant and he only got to know him at the time when he was fetching firewood. He went further to state that he did not see the appellant run away only that he had found his cart abandoned. In the same breadth, it was his testimony that the appellant while at the police station reportedly admitted that he had defiled the complainant. That he

got to know more about the appellant after asking around and that is the point he was informed of the appellant's name together with that of his parents.

20. PW5, No. 75xxx Cpl. Leonard Busum, the investigating officer testified that on 21.07.2023, he was at the station when a report of defilement was made by a girl named K.H.M. That she reported that on the material day at around 10 a.m., she was looking after her father's goats at Maleley area when she was accosted by the appellant. It was his evidence that the appellant grabbed her by the neck, covered her mouth and then wrestled her to the ground thus defiling her. That he escorted the complainant to Ifo hospital for examination and treatment. He stated that from the P3 form filled, it was clear that the complainant's hymen was broken and lacerations and bruises at her perineum area noticed.

21. He thus proceeded to record statements of the witnesses and thereafter pressed the charges herein against the appellant. It was his case that the appellant was not a person known to the complainant prior to the occurrence of the incident and further, from the birth certificate presented before the court, the same denoted that the complainant was 14 years old thus a child. He stated that the complainant identified the appellant before arrest and further, one Abdia Aziz was with the appellant in the forest while they were fetching firewood. It was his case that Abdul Aziz assisted the police in arresting the appellant.

22. DW1, Abdullahi Warsame in his sworn testimony denied committing the offence herein. He stated that on the material day, he was at Dagahley doing construction work while on 31.07.2023, he was still at his place of work when he was arrested. He stated that there existed a grudge between his family and Abdia Aziz as he had previously raped his sister. It was his case that the matter was reported to the police and the said Abdia Aziz arrested but later set free. According to him, he was simply framed. On cross examination, he stated that he has never been to Maleyley and neither does he fetch firewood or know the name of the complainant. He reiterated that on the material day, he was at a construction site at block E-B from 7 a.m. to 6 p.m.

23. DW2, Mohamed Muse stated that he lived at Maleyley and eked a living as construction fundi. That on 21.07.2023, he was with the appellant doing construction work. On cross examination, he stated that the appellant does not own a donkey and that there exists a grudge between the appellant and Abdia Aziz.

Analysis and determination.

24. I have considered the appellant's grounds of appeal, his submissions and those by the prosecution. The only issue for determination is whether the prosecution proved the elements of the offence of defilement to the required standards. It is trite law that in any criminal case, the burden of proof always lies with the prosecution and that the prosecution is duty bound to prove its case beyond reasonable doubt. See Stephen Nguli mulili v Republic (2014)e KLR.

25. To prove the offence of defilement, salient elements of the offence arising from Section 8 (1) of the *Sexual Offences Act* must be proved beyond reasonable doubt. The critical ingredients constituting the offence of defilement therefore are; age of the complainant, proof of penetration and positive identification of the assailant." [See Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013].

26. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's *Act No. 8 of 2001* which defines a "Child" as "...any human being under the age of eighteen years."

27. In the case of Martin Okello Alogo vs Republic [2018] eKLR the court stated that: -

> " On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See Alfayo Gombe Okello v Republic Cr. Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated: -
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> > "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8 (1)..."

28. In regards to the age of the complainant, in her testimony, she stated that she was aged 14 years. This fact was corroborated by production of her birth certificate which showed that she was born on 01.01.2009 and the offence herein allegedly perpetrated on 21.07.2023. It follows therefore, that the complainant was aged 14 years at the time when she was allegedly defiled. I am therefore convinced that the age of the complainant was determined appropriately.

29. I will now proceed to determine whether penetration was proved. It is trite that penetration, as defined in the *Sexual Offences Act* entails;

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

30. The Court of Appeal, in the case of Sahali Omar vs Republic [2017] eKLR, noted that:

> " ...penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*."

31. In the instant case, PW1 in her testimony testified that she was defiled by the appellant and at the same time during cross examination, she stated that the appellant did not penetrate her but only his sperms were smeared on her vagina. Further, that she did not bleed from her vagina because the appellant did not penetrate her vagina.

32. On the other hand, PW3 testified that upon examining the complainant, she noted that the age of injury was approximately 10 hours, the complainant's perineum was bruised with minimal bleeding and at the same time, her hymen was broken which could not be confirmed whether freshly broken or not. That in as much as swap vaginal swap was done, no spermatozoa were found.

33. At this point, it is important to note that the medical doctor's evidence is in contradiction with that of the complainant and not to mention that the process leading to the identification of the appellant was not clear. This is clear from the complainant's evidence in which she stated that the appellant did not penetrate her save for the fact that he smeared his sperms on her. On the other hand, she claimed that she had been defiled but did not bleed. This is also contrary to pw3's evidence that the complainant bled.

34. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. Needless

to say that the degree/standard of prove in a criminal case is always that of "beyond any reasonable doubts" [See was Miller vs Minister of Pensions [1947] 2 ALL ER 372 – 373].

35. The Court of Appeal in the case of Richard Munene vs Republic [2018] eKLR had this to say on apparent contradiction or inconsistency in the evidence of the prosecution witness:

> " Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

36. From the above, it is my considered view that the case herein was clouded with lots of contradictions which in my view go to the root of the case. It therefore follows that penetration was not proved to the required standard.

37. On identification, the complainant points to the fact that she saw the appellant who was with other two men while in the forest. That the appellant instead jumped on her from behind and proceeded to defile her as the other two men comfortably proceeded with their journey. On the other hand, Abdi Aziz (pw4) claimed that in as much as he was in the forest with Osman on the material day and time, he saw the appellant collecting firewood but interestingly, did not see the complainant.

38. He further stated that the appellant was a stranger to him and that it was PW2 who informed him that the appellant had defiled pw1. According to him, the appellant was a person whom he had seen at the bush collecting firewood.

39. The appellant on the other hand testified that PW4, Abdia Aziz was a person known to him and that there existed a grudge between them. He explained that previously, the said Abdia Aziz had been arrested for having raped her sister but later released. PW5, the investigating officer testified that PW4, Abdia Aziz was responsible for assisting in the arrest of the appellant.

40. A review of the foregoing shows that the person who identified the appellant to the complainant's family and the police was Abdia Aziz whose testimony also pointed to the fact that the appellant was a person not known to him prior to the incident. The evidence of Abdia Aziz is contradictory and yet, the investigating officer majorly relied upon him in identifying the aggressor.

41. Pw1 said she did not know the assailant before. That after the ordeal, she went home and informed her father who proceeded to the bush where they found the appellant cooking but ran away upon seeing them. That when he was arrested she was not there. It was her testimony that she later saw him in court. From this testimony and that of the investigating officer, there was no identification parade done for the complainant to pick on the appellant

42. The importance of an id parade need not be overemphasized. It is one way of ascertaining the accuracy of somebody's cognitive ability to remember somebody (stranger) accused of perpetrating an offence

against somebody not known to him before. See Ajode vs. Republic [2004] eKLR the Court of Appeal stated:

> "It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade".

43. Unless there are exceptional circumstances to warrant dock identification, an ID parade is critical and in this case no explanation was given for not conducting the parade. Although the investigating officer tried to say that pw1 assisted in the arrest of the appellant, pw1 stated the opposite as she was not there. Besides, the trial court did not invoke the application of Section 124 of the *evidence Act* to justify reliance of the evidence of a single witness. Without cautioning itself on the truthfulness of the victim of a sexual offence, the need for corroboration will creep in. In this case the same is lacking.

44. In a nutshell, the evidence of pw1 is uncorroborated for there is a possibility of mistaken identity. Taking into account that penetration was not established beyond reasonable doubt and that identification was doubtful, the appellant is prone to benefit from reasonable doubt created in the prosecution evidence.

45. Consequently, I find merit in the appeal herein and as such, I set aside the finding of the trial magistrate by quashing the appellant's conviction and further set aside the sentence meted out upon the appellant. The appellant is hereby set free unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED VIRTUALLY THIS 8TH DAY OF JULY 2025

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J. N. ONYIEGO

JUDGE