JOA v Republic (Criminal Appeal E053 of 2024) [2025] KEHC 10034 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10034 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E053 OF 2024

A MABEYA, J

JULY 11, 2025

BETWEEN

JOA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment & conviction of Hon. J. Kimetto PM delivered on the 27/6/2024 and sentence passed on the 11/7/2024 in Maseno SPMC in SO Case No. 68 of 2019, R. vs Julius Odhiambo Arego)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that, on the 27/9/2019 at about 1600hrs at Marera Sub-Location, Kisumu West sub-county within Kisumu County the appellant intentionally caused his penis to penetrate the vagina of DA a child aged 13 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* No. 3 of 2006. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of four (4) witnesses. The defence evidence was based on the appellant's sworn testimony.
3. In in its judgment dated 27/6/2024, the trial court found the appellant guilty of the main charge, convicted and sentenced him to serve 20 years imprisonment.
4. Dissatisfied by the trial court's conviction and sentence, the appellant filed his petition of appeal dated 17/7/2024 raising nine (9) grounds that can be summarized as follows: -
    a. That the trial court erred in both law and in fact by failing to consider that it seriously violated the appellant's right to fair trial guaranteed under Article 50 (2) (p) of the *constitution*.

b. That the trial erred in both law and fact by convicting the appellant whilst failing to interrogate prosecution evidence that was full of contradictions and shifting the burden of proof to the appellant whilst misevaluating his plausible defence of alibi.

c. That the trial court erred in law in not evaluating the appellant's mitigation pursuant to section 216 and 329 of the CPC and infringing on his right to the least severe sentence pursuant to section 26 (2) of the *Penal Code*.

5. The appellant had not filed submissions in support of his appeal as at the time of writing this judgment. The state submitted that all the ingredients of the offence of defilement were proved and that the appellant's defence was an afterthought. That it consisted of mere denials in that, the issues of a grudge was never raised during cross-examination thus did not distort the evidence of the prosecution. That the sentence meted out was commensurate with the offence and ought not to be interfered with.

6. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion and findings but at all times bearing in mind that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

7. Before the trial court, the prosecution's case was supported by the evidence of four (4) witnesses. PW1, the complainant, testified that on the material day, the appellant placed her on the bed, removed her clothes and inserted his penis in her vagina after which he told her to go to the toilet.

8. PW2 Elizabeth Awino Meso, the area Assistant Chief testified that on 1/10/2019, she received a call from the appellant's step-mother who told her that the appellant had defiled the complainant and later that evening, they took the complainant to hospital for examination. That the complainant was threatened by the appellant's relatives to keep silent or be chased away from the home.

9. PW3 Christine Omiya, a Clinical Officer at Chulaimbo County Hospital produced a report prepared by her colleague who had examined the complainant. She testified that the examination revealed that the complainant's vagina wall was hyperemic reddish, that her hymen was broken and that there was a foul-smelling vaginal discharge. It was concluded that the complainant was defiled. She testified that the appellant was also examined.

10. PW4 No. xxx PC Nancy Kerubo Ongwae testified that, on 3/10/2019 she took the appellant and complainant to Chulaimbo Hospital for examination then proceeded to the scene of crime where the complainant retold her the story of the defilement. She produced a birth certificate that showed that the complainant was born on the 26/7/2008.

11. When placed on his defence, the appellant denied defiling the complainant stating that the complainant slept outside the house on the particular night of the alleged offence. He gave a detailed account of how his wife, the complainant's sister left home on 24/9/2019, how he pleaded with her to return but she refused. That when she returned, she is the one who came with the complainant who had been missing.

12. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him.

13. Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* establishes the offence of defilement as follows:

> " 8 (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8 (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."

14. The specific elements of the offence defilement arising from section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are: -

    a. Age of the complainant;

    b. Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*;

    c. Positive identification of the perpetrator.

15. The age of the victim of defilement is essential element because defilement is a sexual offence committed against a child who under the Children's Act is a person below the age of 18 years. In addition, the age of the child is an aggravating factor for purposes of determining the sentence to be imposed as per the penalty clauses in the *Sexual Offences Act*. The younger the child the more severe the sentence.

16. In this case, there was contradicting evidence on the complainant's age. The charge sheet indicated that she was 13 years. The doctor who examined her indicated, at section A of the P3 Form that her age was 13 years. In section c of the same P3 Form, she was estimated to be 10 years old. The PRC form indicated that she was born on the 15/6/2006 and was therefore approximately 13 years old. PW4, the Investigations Officer testified that the complainant's age ought to have been indicated as 11 years based on the birth certificate which showed that she was born on the 26/7/2008.

17. On the age, the trial court observed that: -

> "The birth certificate was issued on 5/10/2020 whereas the registration was done on 31/12/2019 about three months after the incident. Given the contradictions above, the victim's age is not certain whether she was 11 years or 13 years old at the time of the incident on 27/9/2019. It may not be safe or fair to rely solely on the birth certificate ...
>
> Upon analysis of the evidence tendered, I find the victim was 13 years old on the day of the incident. Hence, the relevant section of the Act applicable is Section 8 (1) and (3) of the *Sexual Offences Act* as earlier on charged before the amendment."

18. The importance of proving the age of the complainant in sexual offences was emphasized in Alfayo Gombe Okello v Republic (2010) eKLR where the Court stated that: -

> "In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a 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) ... proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

19. On 24/10/2019, the trial court ordered that an age assessment be carried out on the complainant. However, there is no evidence on record that the same was undertaken. The question is thus whether the complainant was 11 years old or 13 years old as at the time of the incident on the 27/9/2019.

20. In Mwalango Chichoro Mwanjembe v Republic (2016) eKLR the court said as follows: -

> " The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a 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."

21. Further, in Fappyton Mutuku Ngui v Republic (2012) eKLR, the Court of Appeal said as follows: -

> " ... that 'conclusive' proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other."

22. In the present case, when the complainant testified on 26/8/2021, she told the court that she was 15 years old. That would mean that she must have been 13years at the time of the offence. Her testimony was corroborated by the medical evidence in the PRC form as well as the charge sheet. Accordingly, I find that the proven age of the complainant was 13 years old at the time of the offence.

23. On the issue of penetration, section 2 of the Act defines penetration as follows:

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

24. The complainant testified that on the material day, she came home from school for lunch. That the appellant came home drunk. He gave food to his children who slept. That the appellant then grabbed her and placed her on the bed, removed her clothes and inserted his penis into her vagina. She screamed but because of rain, no one could hear.

25. The findings of the clinical officer who testified as PW3 told the court that the complainant had been penetrated. That upon examining the complainant, it was found that her vagina wall was hyperemic reddish, her hymen was broken and there was a foul-smelling discharge from her vagina. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

26. The other question is whether the appellant was positively identified as the perpetrator. The appellant was well known to the complainant being her brother in law with whom they lived together. From the foregoing, it is clear that the Appellant was not a stranger to the victim having lived with the appellant for a long time.

27. In his defence, the appellant denied the charge. He raised an alibi defence that the complainant was not at home on the night the alleged offence is alleged to have occurred. That he was arrested and charged as a result of dispute between himself, PW2 and his wife.

28. The law is that when an accused puts forward an alibi defence, he does not bear any burden to prove its falsity or truth. The burden always remains with the prosecution. In Victor Mwendwa Mulinge v Republic (2014) eKLR the court said: -

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution ..."

29. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See Nyakundi J in Charles Kasena Chogo v Republic [2019] e KLR.

30. In the present case, the appellant was not accorded any opportunity to tender his alibi earlier than at the time of his testimony. He was denied the opportunity to cross-examine the complainant who was stood down mid-way her testimony for age assessment. Twice the court gave the prosecution an opportunity to recall her but it failed. This was 22/9/2023 and 6/11/2023, respectively.

31. On 27/11/2023 when the matter was listed for the recall of the complainant, the prosecution just stated that it had not traced the complainant and closed its case. That meant that the prosecution case was closed before the appellant was accorded an opportunity to face his accuser. That was neither the mistake of the court nor the appellant. It was the making of the prosecution.

32. The record shows that the appellant gave a sworn testimony. He gave a detailed account of what happened during the period in question. His testimony remained unshaken. He was unshaken that the complainant never came back home on the days following the day he is alleged to have committed the offence. He was heavily cross-examined but remained firm in his testimony.

33. The trial court made a finding that the appellant did not challenge the testimony of PW1, PW2 and PW3. That was a misdirection. He could not have challenged the evidence of PW1 as he was not accorded an opportunity to cross-examine her.

34. As regards Pw2, her testimony was hearsay. She told the court that on 1/10/2019, she received a call from one Beatrice Owuor, the step mother of the appellant who told her that they were suspecting that the complainant had been defiled on 27/9/2019.

35. The said Beatrice Owuor was not called to testify. Any information from her could not be relied on as it was hearsay. Secondly, there was no explanation as to why the matter was never reported between 27/9/2019 and 1/10/2019 when the alleged Beatrice Owuor made the call to Pw2. In cross-examination, the appellant ably challenged the testimony of Pw2.

36. AS regards the testimony of Pw3, the Clinical Officer who produced the P3 form prepared by his colleague who examined the complainant, his testimony cannot be said to have been water tight. He testified that the form was filled on 1/10/2019 at page 23 of the proceedings. However, at page 24, he stated that the complainant was seen on 3/10/2019. The testimony of Pw2 was that they took the complainant to Chulaimbo Hospital on 1/10/2019. The question is, when was the complainant examined and the information entered in the P3 Form made? What was happening to the complainant between 27/9/2019 and 3/10/2019? It must be recalled that the appellant had testified to the unbecoming conduct of the complainant which testimony was never challenged nor denied.

37. From the foregoing, it is clear that the evidence presented was not consistent nor clear to have proved the charge beyond reasonable doubt. The Court is agreeable to the appellant's contention that the case against him was not proved beyond reasonable doubt as the evidence presented was full of contradictions and inconsistencies.

38. Accordingly, the appeal is found to be meritorious. It is allowed. The appellant's conviction was unsafe. The same is hereby quashed and the sentence set aside. He is to be set at liberty forthwith unless otherwise lawfully held.

    It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE