Kamau v Republic (Criminal Appeal E009 of 2024) [2025] KEHC 9750 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9750 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E009 OF 2024

LN MUTENDE, J

JULY 3, 2025

BETWEEN

HARUN RUHI KAMAU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. Harun Ruhi Kamau, 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*. Particulars of the offence were that on the 19th day of August, 2020, at Nyahururu Township in Laikipia West Sub-County within Laikipia County he intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of L.N.G. a child aged 13 years.
2. In the alternative, he faced a charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars being that on the 19th day of August, 2020, within Nyahururu Township in Laikipia West Sub-County within Laikipia County he intentionally and unlawfully touched the vagina of L.N.G. a child aged 13 years with his penis.
3. The Appellant denied charges presented by the prosecution hence he was subjected to full trial. To prove the case the prosecution called four (4) witnesses. PW1 L.N. testified to have encountered the assailant on 18th August, 2020 while on her way to buy bananas. The individual promised to get her a job in Nyahururu. The promise prompted her to gather her personal items, but when the individual turned up he said they would travel in the evening and advised that she waits at a hotel.
4. Later in the evening a motor vehicle went to pick her up. Although she was hesitant to enter the P.S.V. vehicle, the individual communicated with the conductor so she boarded it and alighted at Nyahururu where she met him. Instead of taking her home, he took her to a hotel room where there was only a

bed. On inquiring how she would stay at the place the person told her that she would sleep there on the material night.

5. That the individual undressed her and they had sex. She could hear noise outside hence she hardly slept on the fateful night. His alarm went off at 5.00am when he attempted to have sex with her again but she declined and he said he would get her a vehicle to travel back to Rumuruti. So, he took her to town and left her waiting for a motor vehicle to take her back to Rumuruti.

6. That a certain person went and interrogated her saying that she seemed to have a problem. On explaining what happened to her he gave her Ksh.200/- which she added on the Kshs.100/- that the assailant had given her and she decided to travel to Nakuru where she met her father and on telling him what befell her he took her to the police station where the matter was reported and she was taken to the hospital for examination.

7. PW2 Amos Gikonyo the father of the victim testified to have received a call from his mother who said the complaint had not gone home on 20th August, 2020. Later he received a call from stranger telling him that his daughter was in Nakuru. She did explain to him what happened to her and he took her to the police station where the matter was reported then to hospital. He said the Complainant was born in 2007.

8. PW3 Dr. Hildah Nyanjui adduced in evidence a P3 form filled by Dr. Nthenya who examined the Complainant on 26th August, 2020. She was found to have an old torn hymen. There were no visible injuries and no spermatozoa were seen.

9. PW4 No. 118977 PC Sauda Hassan of Rumuruti Police Station recorded statements of the witnesses, arrested the Appellant who was identified by the Complainant and caused him to be charged.

10. Upon being placed on his defence the Appellant denied having committed the offence. He denied knowing the Complainant. He stated that he was arrested following allegations of having defiled the Complainant a person he saw for the first time in court.

11. The trial court considered evidence adduced and concluded that all ingredients of defilement were proved hence the conviction. Consequently, the Appellant was sentenced to serve twenty (20) years imprisonment.

12. Aggrieved, the Appellant appeals on grounds thus;

    1. That the learned trial Magistrate erred in law and in fact in believing the Complainant whose evidence was uncorroborated.

    2. That the learned trial Magistrate erred in law and in fact in failing to find that no eye witness confirmed seeing the Appellant with the Complainant on the 19th August, 2020, and the staff at the hotel where the offence is alleged to have been committed did not record a statement or called as prosecution witness.

    3. That the learned trial Magistrate erred in law and in fact in failing to find that failure by the investigating officer to record statements from the staff of the hotel where the offence is alleged to have been committed and to call them as witnesses was fatal to the prosecution.

    4. That the learned trial Magistrate erred in law and in fact in finding that the medical evidence confirmed penetration.

    5. That the learned trial Magistrate erred in law and fact in failing to note glaring contradictions and inconsistences in the prosecution evidence where the Complainant alleged that she met

the Appellant on the 18th August, 2020, was defiled on the 20th August, 2020, the matter was reported to the Complainant's father on the same day 20th August, 2020, to the police on the 24th August, 2020 and the Complainant was seen by a doctor on 26th August, 2020. The delay was not explained.

6. That the learned trial Magistrate erred in law and in fact in finding that lack of a grudge between the Appellant and the Complainant and the fact that no other man was mentioned by the Complainant was enough proof that it is the Appellant who committed the offence if at all one was committed.

7. That the learned trial Magistrate erred in law and in fact in convicting the Appellant on evidence which did not meet the required standards.

8. That the learned trial Magistrate erred in law and in fact in meting out an excessive sentence in the circumstances.

13. Following directions given the appeal was disposed through written submissions. It is urged by the Appellant through learned counsel, Mr. Waichungo that the prosecution did not discharge the burden of proof to the required standard. That elements of the offence of defilement namely including lack of penetration were not established and the defence of alibi was not considered.

14. The Respondent through learned prosecution counsel Ms. Mumbe submitted that the age of the victim was proved; medical evidence established presence of a torn hymen which suggested penetration by a blunt object clearing any doubt of how the hymen was broken hence proof of penetration; and that the Appellant's own witness testified to the victim having boarded a motor vehicle and having been picked by someone on a date that she could not recall.

15. I have considered the rival submissions and authorities cited by the Appellant and the Respondent. The Appellant having challenged the decision of the trial court; this being a first appellate court has a duty to reappraise evidence presented at trial and reach an independent finding based on the facts and law. And in doing so it must consider all relevant aspects of the case bearing in mind the fact of having not seen nor heard witnesses who testified. This role and responsibility was clearly set out in Okeno v Republic [1972] EA 32 where the Eastern Court of Appeal delivered itself thus;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174."

16. The legal basis of the offence of defilement is provided by Section 8(1) of the *Sexual Offences Act* states that;

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

17. Therefore, the elements of defilement are;

i. Age of the Complainant (victim)

ii. The act of penetration

iii. Positive identification of the perpetrator

18. The Court of Appeal did pronounce itself on the issue of proof of age in defilement cases. In one of the authorities, Elias Kaingu Kasomo v Republic Criminal Appeal No. 504 of 2010 it was stated that;

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

19. The prosecution which bears the burden of proof did discharge its responsibility by adducing evidence of a birth certificate issued to L.N. She was born on 28th August, 2007. The preferred documentary proof of age is a birth certificate because being an official document it reduces chances of errors and manipulation. But the testimony of a parent or guardian as to the child's date of birth is credible evidence. (See Omuroni *v Uganda, Criminal Appeal No. 2 of 2000*)

20. In the instant case PW2 confirmed that the Complainant was born in 2007 hence at the time of the Act she was 13 years old.

21. In the context of defilement, penetration is defined by Section 2 of the *Sexual Offences Act* as;

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

22. The learned trial Magistrate is faulted for not considering evidence of the doctor who testified that there were no visible injuries and there was no spermatozoa seen. Though the only conclusion was that the hymen was broken which was an old tear. Relying on the case of PWK v Republic [2012] eKLR it is urged that the tear may be as a result of any other factor.

23. In the cited case of PWK (Supra) it was held that;

> " In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by the intercourse? Hymen, also known as vaginal membrane, is a thin mucus membrane found at the orifice of the female vagina (sic) with which most female instants are born with. In most cases of sexual offences we have dealt with, courts tends to assume that absence of hymen in the vagina of the a girl alleged to have been defiled is proof of the charge. That is however an erroneous assumption. Scientific and medical evidence has proved that some girls are broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation, injury and medical examination can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen V Manuel Vincent Quintanilla (1999) ABQB 769."

24. However, it has been held now and then that penetration may be proved by medical evidence, victim's testimony or circumstantial evidence. As to the argument that there were no spermatozoa seen; Spermatozoa are not always necessary to prove that penetration occurred. Such that if they are absent

that does not necessarily mean penetration did not occur. In Mark Oiruri v Republic [2013] eKLR the Court of Appeal stated as follows;

> " …Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.…"

25. Proof of presence of spermatozoa is not a requirement in defilement cases since penetration can be partial or minimal. The victim's testimony is given some weight as long as it is consistent, detailed and credible. Section 124 of the *Evidence Act* provides thus;

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 offence, 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.

26. The Complainant testified to have been taken to the hotel by the Appellant a person that she knew who duped her to travel to Nyahururu following an understanding that he would secure a job for her as a house help. She testified that they had sex. This meant that they had penetrative sex an act that involved penetration.

27. The trial court believed the Complainant to have been truthful. The learned Magistrate proceeded to give reasons for the belief. The victim vividly narrated what happened and subsequently led to his arrest without mentioning somebody else.

28. The trial court is faulted for failure to find that failure by the investigating officer to record statements from the staff at the hotel where the offence was alleged to have been committed and call them as witnesses was fatal. Section 143 of the *Evidence Act* provides thus;

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

According to the law, the quality of evidence adduced outweighs quantity of witness testimony. The role played by the alleged staff has not been pointed out. This having been a case of defilement evidence of the victim that was reliable and credible was sufficient to prove the fact of defilement.

29. On the question of discrepancy in dates pointed out as the 18th August, when the Complainant was alleged to have met the Appellant and defiled her on 20th August, 2020 when the matter was reported to her father. According to the charge sheet, the act of defilement was committed on 19th August, 2020, while the 18th August, 2020, was the date she met the Appellant while going to check on the bananas. Then the 20th August, 2020 was the date she reported to her father. The prejudice caused has not been pointed out hence the alleged discrepancy which did not create a reasonable doubt was not fatal to the prosecution's case.

30. On the issue of defence. In his defence the Appellant did not allege that he could not have committed the offence because he was elsewhere. The question of the alibi defence was not a ground of appeal. The Appellant called a witness, Susan Wangui DW2, who alleged that she saw the Complainant meet another individual who was not the Appellant but she could not recollect the date. Her evidence was not helpful.

31. The sentence meted out is stated to be excessive. It is desirable for a sentence to be proportionate to the offence committed. In Shadrack Kipkoech Kogo v Republic, Eldoret Criminal Appeal No. 253 of 2023 the Court of Appeal stated that;

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

32. Section 8(3) of the *Sexual Offences Act* provides;

> A person who commits an offence of defilement with a child ages of 12 and 15 year is liable upon conviction to imprisonment for a term of not less than 20 years.

33. The sentence provided being a minimum mandatory one, the trial court did not misdirect itself.

34. The upshot of the above is that the appeal is devoid of merit. Accordingly, it is dismissed in its entirety.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF JULY, 2025.

L.N. MUTENDE

JUDGE