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Luvisia v Republic (Criminal Appeal E021 of 2025)
[2025] KEHC 9928 (KLR) (8 July 2025) (Interim Judgment)

Neutral citation: [2025] KEHC 9928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E021 OF 2025

S MBUNGI, J

JULY 8, 2025

BETWEEN

ALVIN WERE LUVISIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.V. O Amboko, Senior Principal Magistrate, in Kakamega CM`s Court Sexual Offence Case No. E099 of 2023 delivered on 10/01/2025)

INTERIM JUDGMENT

Introduction

1. 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* of 2006. The particulars were that on 27th of August,2023 at [Particulars Withheld] in Navakholo sub county within Kakamega county intentionally and unlawfully caused his penis to penetrate the vagina of AWL a child aged 15 years.
2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on 27th of August,2023 at [Particulars Withheld] in Navakholo sub county within Kakamega county intentionally and unlawfully caused his penis to penetrate the vagina of AWL a child aged 15 years.
3. The Appellant pleaded not guilty to the charge in the trial court on 10th January 2025, he was convicted of the offence of defilement, and sentenced to 20 years' imprisonment.
4. The Appellant being aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal dated 24th February,2025 are as follows:

a. That the Honorable Magistrate erred in law and fact when she convicted the Appellant for an offence of defilement whose basic elements of

   (i) identification and

   (ii) penetration were not proven to the required standard of proof to the prejudice of the Appellant.

b. That the Honorable Magistrate committed reversible error by failing to apply the law and reaching a conclusion that was illegal and not supported in law. The Magistrate had a predetermined conclusion unsupported by the evidence.

c. That the Honorable Magistrate erred in law when she shifted the burden of proof of innocence to the Appellant, knowing the prosecution had failed to meet its burden of proof.

5. During the trial, the prosecution called five witnesses who testified in support of their case. The appellant was placed on his defence, and he opted to remain silent.

6. The trial magistrate, after considering the evidence adduced, found the appellant guilty and sentenced him to 20 years' imprisonment.

7. The appeal proceeded by way of written submissions.

Appellant's submissions

8. In his submission dated 24th June 2025, the appellant focused on 4 grounds of appeal. On the first ground of whether the offence of defilement was proven beyond a reasonable doubt, they quoted the case of *Stephen Nguli Mulili v the Republic* (2014).

9. On the element of identification, they held that the case had to be proved without any doubt and that identification ought to be watertight, especially at night, and quoted the case of *Nzaro v Republic* (1991) KAR 212 and *Kiarie v Republic* (1984) KLR 739.

10. According to the appellant, the incident occurred at 4 p.m., and there was a claim that the complainant was not clear whether it was the accused who defiled her, since there were two accused. He quoted the cases of *Mwaura v Republic* (1987) KLR 645 and *Maitanyi v Republic* (1986) KLR 196, which constitute favorable conditions for identification.

11. On the claim for penetration, they held that it had to be proved by way of medical evidence; however, they claimed that the trial court relied on the evidence of the minor as she was the only eyewitness, and quoted section 124 of the *Evidence Act*. They cited the case of Julius Kiunga M'birithia v R, where the trial court was required to be satisfied that the child is telling the truth. He avers that the minor was 15 years old and knew the consequences of engaging in consensual sex and hence was not a minor.

12. They quoted the case of *Abdulsalim v Republic* (Criminal Appeal 005 of 2023) KEHC 25863 (KLR) (30 November 2023)

13. They questioned the complainant's evidence, claiming that it was full of contradictions and inconsistencies since she stated that it was Lillian who brought her to the compound and that the said Lillian was not called as a witness.

14. On the element of penetration, it was the complainant's claim that she had sex with the appellant in June 2022 and later realized she was pregnant, and from the clinical officer's evidence, she gave birth on 27/03/2023.

15. He questioned the production of the DNA report that was never produced in court as an exhibit. They further stated that the clinical officer, after examining the complainant, did not find any evidence of penetration and found that she was pregnant, and hence no evidence to corroborate his evidence that she was defiled on 27/6/22.

16. He avers that the only evidence that the court relied on was the testimony of the complainant that she and the appellant engaged in sex.

17. He avers that the defilement was never reported until she was pregnant and gave birth in March 2023and further that the DNA report was not produced in court to corroborate her evidence.

18. He avers that no evidence was produced to corroborate the claim that the was penetration as the element was not proven beyond a reasonable doubt.

19. On the medical evidence, he relied on the testimony of the clinical officer who stated that the hymen was broken and an old scar, and that no sperm or seminal fluid was found during the medical examination. He avers that the epithelial cells were linked to the pregnancy, not the defilement, and that the medical evidence did not corroborate the evidence of the minor.

20. The other issue they raised was the inconsistencies in the statement. They cited the case of *Bernard Gathiaka Mbugua & 4 others v Republic* (2016) eKLR and held that despite the testimony that the complainant stated that she had been defiled and beaten, there were no injuries to support the claims.

21. He further claims that the timeframe of when the incident happened was never explained, since, according to the complainant, she did not know when the incident happened or when the incident occurred.

22. He asserts that the accused was not adequately represented or informed of his rights and questioned why the accused remained silent when he had a case to answer, and hence that he had not been given a right to fair hearing.

23. Finally, on the sentencing, he cited the case of *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR and further that the trial court imposed the mandatory minimum sentence and questioned the legality of the sentence and opines that the mandatory sentence was too high and prays that the same be substituted to a term of ten years from the date of sentence.

Facts at Trial

24. PW1 SN, testified that on 27/8/2023, a girl Lillian took her to the 2nd accused home and that the 1st accused came with a panga and threatened to beat her if she disturbed him. she claimed that the appellant who was the 1st accused locked the door and forced her to sleep with him. she alleged that he removed his clothes and asked her to remove her clothes and defiled her. She claimed that the 2nd accused called out the 1st accused, and she tried to escape, and he slapped her. She asked to go out to urinate, and the 2nd accused followed her and she managed to run away while screaming to the next house.

25. She recalled that she ran to the village elder, who called her brother, who took her to Namacha police station and later took her to the hospital, and she discovered that she was pregnant with her boyfriend, although she admitted that she had not consented to having sex with the accused person. She produced her birth certificate as PMF1, indicating that she was born on 26/12/2005.

26. During cross-examination, she claimed that she knew the accused persons and had no relationship with either of them. She claimed that the 1st accused forced her to have sex with him while the 2nd accused stood at the door and only managed to escape after he tricked the 2nd accused that she wanted to urinate.

27. PW2 testified that the complainant was his sister. He recalled that on 28/8/2023, he received a call from the village elder asking him to come to his house. He found his sister sleeping on a chair with a bra and a skirt. she was crying and claimed that she had been defiled.

28. He testified that he took her to Nambacha police post, where he recorded a statement, and later to Navakholo sub-county Hospital, where she was treated. He produced the treatment notes as PMF1 2 and the PRC form as PMF1 3, and the P3 form as PMF1 4.

29. During cross-examination, he testified that it was the complainant who informed him that the 1st accused had defiled her and the 2nd accused who slapped her. He never interacted with the two accused persons before they had been arrested.

30. PW3 was the village elder Peter Koya, who recalled that on 27/08/2023 at around 11 pm to 12 a.m., the complainant came to knock on his door and she informed him that she was in trouble and she gave him her brother's number, who came to pick the complainant.

31. He testified that he did not know what happened to the complainant, and he never followed up on the case.

32. PW4, the clinical officer from Navakholo hospital, recalled that on 28/8/2023, the complainant came for treatment claiming that she had been defiled. From his assessment, the minor had a foul-smelling discharge. That the hymen was broken and had an old scar and spotted lacerations on the vaginal walls.

33. The cervix was reddish and tender to touch and the high vaginal swab, pregnancy, HIV, VDRL was all negative whilst the pregnancy test was positive and the epithelial cells was present.

34. He confirmed that she had a fungal infection, although no spermatozoa were present, and from the pregnancy test, the pregnancy was 5 weeks old. He produced the PRC form as Exhibit 3, the P3 form as Exhibit 4, ultra-ultrasound notes as Exhibit 5, 9 (a)(b) notes, and treatment notes as Exhibit 2.

35. During cross examination, he confirmed that the hymen was broken but old since it was not related to the incident although there was a fresh lacerations of the vagina and there was presence of epithelial cells.

36. PW5 was the investigating officer. She recalled that on 28/8/2023, she received a report from the complainant that she had been defiled in [Particulars Withheld] after her friend Lillian left her in a house. She recalled that the appellant came and locked the door and forced her to the bed and threatened to cut her with a panga.

37. According to the complainant, when the 2nd accused came back, she asked for water and later asked to go to urinate, and that when she got a chance to escape and ran to the village elder, who called her brother, who escorted her to the police station.

38. She confirmed that they took the complaint to the hospital, and it was confirmed that she was 5 weeks pregnant, and it was discovered that she had initially slept with her boyfriend. They later went to the accused's house and found the complaint and the accused's shoes in the house, and the accused was later arrested.

39. During cross-examination, she claimed that they never found Lillian, and no identification parade was conducted. She confirmed that the sandals at the house belonged to the complainant.

40. The prosecution closed its case, and the trial court ruled that it had proved its case beyond a reasonable doubt.

41. The appellant chose to remain silent during his defence, and the court proceeded to judgment after considering the pre-sentence report and the mitigation sentenced the accused to 20 years' imprisonment after taking into account the period the accused had been in remand, which prompted the current appeal.

Analysis and Determination

42. The role of this court as the first appellate court is well settled. It was held in the case of *Okeno v Republic* (1972) EA 32 and in *Mark Oiruri Mose v R* (2013) eKLR that a first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its own independent conclusion but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

43. I have perused and considered the record of appeal together with submissions filed by parties herein and find that the following as issues for consideration: -

    i. Whether ingredients for offence of defilement were proved beyond reasonable doubt.

    ii. Whether the prosecution's case had inconsistencies and contradictions

    iii. Whether the sentence imposed was harsh and excessive.

44. On the first issue of whether the offence of defilement was proven beyond a reasonable doubt,under section 8(1) and (3) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of the offence, which are as follows:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration occurred; and

    c. The perpetrator was positively identified.

45. It was the testimony of PW1 that at the time of the incident, she was 15 years old. According to the birth certificate produced as Exhibit 1, which indicated the complainant was born on 26/12/2008, the age of the complainant was 15, and the same was not contested by the appellant.

46. In the case of in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR, the Court of Appeal held that:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, 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." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

47. On whether there was penetration, it was the evidence of PW1 that she was locked in a room with the appellant while his friend stood guard. It was her evidence that the appellant threatened her with a panga, then proceeded to force himself on her. According to the clinical officer Pw3, when the complainant came to seek medical treatment, her hymen had been torn with an old scar.

48. It was in doubt that PW1 was 5 weeks pregnant at the time of the alleged incident. The appellant is of the opinion, that the medical evidence did not prove that there was defilement and that although there was a DNA conducted, the document was not produced, although it was in the court record.

49. It should be noted that PW1 was clear that she had been pregnant at the time of the defilement, and she did not link the pregnancy to the appellant, or did she claim he was responsible for the said pregnancy and so the DNA, whether produced or not, did not prove or disprove the alleged defilement.

50. The Court of Appeal in *AML v Republic* (2012) eKLR, authoritatively stated that: "The fact of rape or defilement is not proved by D.N.A. test but by way of evidence."

51. In *Evans Wanjala Wanyonyi v Republic* [2019] eKLR, the court held that, "An essential ingredient in the offence of defilement is penetration and not impregnation."

52. This court is required to review the evidence before it and establish if there was defilement. The medical evidence by PW3 stated that the hymen had already been broken, and there was an old scar, there was no spermatozoa, but the presence of epithelial cells.

53. The trial court relied on the testimony of PW1, the complainant, and her narration of how the appellant removed her clothes and had sex with her despite her protest.PW4, the clinical officer testified that although the hymen was broken, PW1 had a foul smelling discharge from her vagina and the vaginal walls had lacerations and the cervix was reddish and tender to touch and confirmed that PW1 was defiled despite her being 5 weeks pregnant.

54. In this case, there was only one witness to the alleged offence, namely Pw1 herself. This brought the operation of section 124 of the *Evidence Act* into operation.

55. Corroboration required in criminal cases

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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.

56. The Court of Appeal interpreted the above section in the following manner in the authority of *Geoffrey Kioji v Republic*, NYR Crim. App. No. 270 of 2010 (UR):

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We, however, hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond a reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

57. In *Kassim Ali v Republic* Cr. App. No. 84 of 2005 (Mombasa) thus;

> " the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

58. It is not in doubt that the medical evidence stated that there was no hymen however, the other observation such as the vaginal laceration and the tender and red cervix , the clinical officer observed that there was penetration. This corroborated the evidence of PW1 that she had been defiled.

59. From the evidence of the victim and the clinical officer, it is clear that the appellant had penetrated the vagina of the victim. The medical report and testimony of the doctor and the victim also corroborated the same. It is therefore a safe conclusion, based on evidence presented that the ingredient of penetration was proved.

60. On the issue of identification, the court trial relied on the testimony of the complainant, PW1 who avers that on the day of the incident 27/8/2023, at 4.00 p.m., one Lillian came to pick her from their home and took her to the 2nd accused's house, which was in their compound. That the appellant, who was the 1st accused, came and he had a panga, and that he forced him to sleep with him and threatened her with a panga. She stated that the 2nd accused stood watch and that there was no light inside the house, but outside it was still light and she was able to identify her capturers and the person who had defiled him.

61. The Court of Appeal in the case of *Peter Musau Mwanzia v the Republic* 2008 eKLR expressed itself as follows: -

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend, or somebody within the same vicinity as himself, and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such a time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

62. PW1 testified that she left her home at 4.p.m and in the company on one Lillian. When she went to their compound, they entered the house of the 2nd accused and later the 1st accused joined them. At that time, it was still light outside and she was able to positively identify the accused persons.

63. She recalls that the 1st accused threatened her with a panga and that the 2nd accused stood guard outside. It was clear that she was able to identify the appellant despite their being no light inside the room where the alleged incident happened. This court is therefore convinced that the element of identification was proven.

64. The appellant claimed that PW1 had contradictions in her testimony as to who had defiled her . she kept claiming that the person who defiled her was Alvin however, she heard the 2nd accused refer to the name Ray. They claim that there was contradictions and inconsistencies in the prosecution's witnesses' evidence.

65. The issue of contradiction was addressed in the Court of Appeal case of *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the Ugandan case of *Twahangane Alfred v Uganda* CR. Appeal No. 139 of 2002 (2003) UGCA,6, where it was held that:

> "with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

66. On my examination of the evidence PW1 was very consistent of what happened from the time she left their home to when she went to the 2nd accused house and what transpired after that. She was able to identify the appellant and the other co accused, the names used may be different but that did not contradict her narration of the alleged defilement. The said contradictions stated by the appellant did not affect the substance of the prosecution case.

67. On the sentencing, it was the appellant asserted that it was too harsh and prayed for a lesser sentence.

68. The Appellant was charged under provisions of section 8(1) and 8(3) of the *sexual Offences Act* No 3 of 20026 of defiling PW1. As of 2023, the minor was already 15 years old, and therefore the Appellant was sentenced under provisions Section 8(3) of the *Sexual Offences Act* No 3 of 2006, which provides for a minimum sentence of twenty years.

69. This Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR, where it was stated as follows:

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, a sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

70. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in their entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi v Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira v The state of Maharastra* at paragraphs 70 – 71, where the court held;

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is the imposition of appropriate, adequate, and proportionate sentences commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; the twin objectives of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstances of each case, and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence, and all the attendant circumstances. The principle of proportionality by sentencing for a crime is well entrenched in criminal

jurisprudence. As a matter of law, the proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects, including social interest and consciousness of the society, for award of an appropriate sentence.

71. In the particular circumstance of this case, the trial magistrate correctly exercised her discretion while sentencing the appellant. But there was a need for the trial court to further consider the judiciary sentencing policy guidelines especially section 23.7 thereof to note that there were no aggravating circumstances and therefore it would have further considered a more rehabilitative sentence and punishment which is proportional to circumstances of the crime.

72. I have carefully considered the circumstances of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, and the scar the incidence left in the life of the victim. I have also considered the purpose of sentencing and the principles of sentencing under the common law.

73. In *Maingi & 5 others v Director of Public Prosecution & Another* (Petition No. E117 of 2021) (2022) KEHC 13118 (KLR) as well as the dicta in *Francis Muruatetu case* and the judiciary sentencing policy I do hereby set aside the sentence of 20 years imposed on the appellant and substitute it with a sentence of ten (15) years imprisonment to run from the date of the trial court judgment to wit 10th January 2025.

74. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF JULY, 2025

MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Agong'a

Ms Chala for DPP.

Ms Mburu for the Applicant present.