Orakuni v Republic (Criminal Appeal E043 of 2024)
[2025] KEHC 10588 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E043 OF 2024

WM MUSYOKA, J

JULY 18, 2025

BETWEEN

KEVIN ORAKUNI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence, in Malaba MCSOAC No. E008 of 2024, by Hon. AZ Ogange, Resident Magistrate, RM, on 26th September 2024 and 14th October 2024, respectively)

JUDGMENT

1. The appellant had been convicted by the trial court of the offence of defilement of a minor of 15. He had denied the charges, and a full trial was conducted. 5 witnesses testified.

2. PW1 was the complainant. She was lured by the appellant, who operated a barber kiosk at the local trading centre, to his house, where he defiled her. She got pregnant. PW2 was her mother. When it was established that PW1 was pregnant, PW1 disclosed to PW2 that the appellant had defiled her, where upon PW2 reported the matter to the police. The initial report was made to PW3, of community policing, who took the appellant to the police. PW4 investigated the matter. PW5 was the clinician, who attended to PW1, 3 months after the alleged incident.

3. Upon being put on his defence, the appellant opted to remain silent. He was convicted and sentenced to serve 20 years imprisonment.

4. The appellant was aggrieved, hence the instant appeal. His petition of appeal is dated 23rd October 2024. He complains that his fair trial rights were violated, the evidence was insufficient to support a charge of defilement, and the medical evidence did not support the case.

5. The principal elements for the offence of defilement are the age of the victim, penetration and identification of the perpetrator.

6. The offence was allegedly committed on 7th November 2023. PW1 was said to be 15 years of age at the time. PW1 and PW2 testified on 11th July 2024. None of them mentioned the date of birth of PW1. They mentioned that she was aged 16, as at 11th July 2024, and did not speak of her age as at 7th November 2023. PW4 produced a certificate of birth, dated 5th February 2022. It indicated her date of birth to be 5th May 2008. That made her 15 years 6 months and 1 day old, as at 7th November 2023. She would have been 16 years 2 months and 5 days old, when she testified on 11th July 2024. The age of PW1 was adequately established.

7. On penetration, PW1 testified that the appellant took his penis, and inserted it into her vagina. It happened to her. She was the victim. She had reached an age where she could clearly articulate herself. She had just completed Standard 8, in primary school, and was waiting to join high school. Her testimony was direct primary evidence, which required no corroboration. When her mother discovered that she was pregnant, PW1 told her, PW2, that the appellant was responsible. That was some corroboration. The medical examination of PW1, by PW3, could not yield much, given that it was done 3 months after the event. It only confirmed that there was a pregnancy. It is trite that a court, trying a sexual offence, may convict without corroboration, by relying solely on the testimony of the victim, so long as the trial court believes it to be truthful. That was the case here. The trial court believed the testimony given by PW1.

8. On whether it was the appellant who perpetrated the act, PW1 identified him as the culprit. As discussed above, there was adequate material. demonstrating that PW1 was a teenager of 15, going to 16. She had just completed her primary school studies and was to proceed to high school. She was mature enough to be aware of her immediate environment, inclusive of knowing or identifying the persons around her.

9. She identified the appellant as a neighbour, and a person who had been cutting her hair at his barber shop. She said she had known him for 2 months. She had met him the previous day, 6th November 2023, when he asked her to meet him on 7th November 2023, which she did, and he defiled her. He was not a stranger to her. She properly identified him. On 7th November 2023, she went to his barber shop at 5.00 PM, at daytime. He closed the back door of his kiosk, and pushed her into his house, where he defiled her. Sexual intimacy brings individuals very close to each other, creating an ideal environment, for identification and recognition, particularly where the encounter is consensual, as the instant one appears to have been.

10. I agree with the trial court, all the elements for the offence of defilement were established. It is not lost on me that the appellant had initially pleaded guilty, and that, after he was placed on his defence, he chose silence.

11. The appellant raises 3 issues: fair trial rights, evidence being in insufficient, especially the medical evidence.

12. Regarding the evidence, I have analysed the trial record above and concluded that, with the material that was placed before the trial court, on age, penetration and identity of the perpetrator, there was enough evidence, upon which the trial court could convict, as it eventually did.

13. I should, perhaps, only comment on the medical evidence. I could start by reiterating what I have stated above, about corroboration, with respect to sexual offences. It is no longer mandatory. The trial court can still convict, so long as it believes the testimony of the complainant to be true. A conviction for defilement is not dependent only on medical evidence or forensics. The evidence adduced by the victim suffices, so long as the same is believable.

14. Flowing from the above, it should be taken that the testimony of the victim is the primary evidence, anything else is secondary. The secondary evidence is merely corroborative. Whether the corroborative evidence should be given any weight will depend on the quality of the testimony by the victim. Where the trial court finds the narrative by the victim wholly believable and truthful, there would be no need to look for corroborative evidence, including that of a medical nature, whether collected from the victim or the accused person, or both.

15. On fair trial rights being violated, I note that the appellant has not identified the rights he has in mind. I note, though, that the trial was conducted in Kiswahili, and the appellant cross-examined prosecution witnesses extensively. That suggests that Kiswahili was a language he was familiar with, although the court did not note so, as it should have. The fact of that extensive cross-examination of the prosecution witnesses would also suggest that he was not prejudiced by not having legal representation. I have also noted that he was provided with prosecution evidence before the trial commenced in earnest.

16. On the sentence, I note that the appellant was sentenced to serve 20 years imprisonment. The charge was founded on section 8(3) of the *Sexual Offences Act*. Section 8(3) covers victims aged between 12 and 15 years. The victim here was in the age of 15. Section 8(3) prescribes a minimum of 20 years imprisonment, upon conviction, for defilement of a minor falling within that age bracket. The appellant was given the minimum available, which was within the law. Where there is a minimum sentence prescribed, the discretion of the court is taken away, so, it may not give a sentence other than what is prescribed.

17. Perhaps, the appellant has *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) in mind. *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) inspired *Wachira & 12 others* [2022] KEHC 12795 (KLR)(Mativo, J) and *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J), where the High Court ruled minimum and mandatory sentences to be unconstitutional, and held that trial courts ought to have discretion to decide on the appropriate sentences, without being hamstrung. These two decisions appear to be what has influenced the appellant. He seeks review of sentence, on grounds that the hands of the trial court were not tied and it should have exercised discretion.

18. Unfortunately, there has been a paradigm shift in the jurisprudence around minimum and mandatory sentences. *Wachira & 12 others* [2022] KEHC 12795 (KLR)(Mativo, J) and *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) have been held, in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (Koome, CJ&P, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), to be bad law. It was declared that the minimum sentences, prescribed by the *Sexual Offences Act*, are constitutional and lawful, meaning that the hands of the trial court would be tied and there would be no discretion. Based on that the trial court, herein, was on the right track.

19. Overall, I find no merit in the appeal herein. I shall, accordingly, affirm the conviction, and confirm the sentence. The appeal is dismissed. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 18TH DAY OF JULY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Kevin Orakuni, the appellant, in person.

Advocates

Mr. Antony Onanda, instructed by the Director of Public Prosecutions, for the respondent.