**Samuel v Republic (Criminal Appeal E037 of 2023)**
**[2025] KEHC 10461 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10461 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYAMIRA**

**CRIMINAL APPEAL E037 OF 2023**

**WA OKWANY, J**

**JULY 10, 2025**

**BETWEEN**

**EVANS BOSIRE SAMUEL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the Judgment and Sentence in the Senior Principal Magistrate's Court in Keroka MCSO E009 of 2023 delivered on 18th August 2023 by Hon. B.M. Kimtai, Senior Principal Magistrate)***

## JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the charge were that on 28th January 2023 [Particulars Withheld] area of Masaba North Sub-County within Nyamira County intentionally and unlawfully caused his penis to penetrate the vagina of JKA (particulars withheld), a child aged 4 years old.

2. The Appellant was also charged with the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the charge were that on 28th January 2023 [Particulars Withheld] area of Masaba North Sub-County within Nyamira County intentionally and unlawfully touched the vagina of JKA (particulars withheld), a child aged 4 years old with his hands.

3. The Appellant pleaded not guilty to both charges and a trial was thereafter conducted in which the Prosecution called a total of four (4) witnesses.

**The Prosecution's case**

4. At the commencement of the trial, the Prosecution's application under Section 31 of the *Sexual Offences Act*, to have the minor declared a vulnerable witness so as to enable her tender her evidence through an intermediary, was allowed. The minor subsequently refused to testify as she is reported to have feared the Appellant and the court. The Prosecution Counsel therefore dispensed with her testimony.

5. PW1, DN (particulars withheld) the victim's mother, testified that she was at home on 28th January 2023 while the victim was outside playing with other children when she saw the victim emerging from a deserted house. She also saw the Appellant getting dressed inside said house. PW1 screamed when she noted that her child (the victim) had sperms on her clothes. The Appellant was arrested. PW1 escorted the victim to the hospital for examination and treatment.

6. RN (particulars withheld) (PW2), the victim's father, also saw Appellant dressing up in the deserted house. He apprehended the Appellant and escorted him to the police station where photographs of the clothes were taken.

7. Ruth Nyanchama (PW3) the Clinical Officer at Keroka Sub-County hospital produced the minor's P3 Form. She stated that the victim's clothes had sperms and that her inner pants were blood-stained. She examined the victim and noted that her external genitalia was normal with no lacerations, she had no discharge or blood, and that her hymen was intact. The lab results revealed red blood cells, Spermatozoa and pus cells. She concluded that there was defilement and produced the minor's treatment notes (P.Exh2), Laboratory results (P.Exh4), the P3 Form (P.Exh 6) and PRC Form (P.Exh7).

8. PW3 further testified that she examined the Appellant on 28th January 2023 and noted that the he had bruises and swollen lips, blood-stained innerwear. Penile examination did not reveal any bruises. Laboratory results indicated presence of puss cells. PW3 produced the Appellant's treatment notes (P.Exh3) and laboratory results (P.Exh5).

9. PW4. No. xxx P.C. Daniel Obiero was at Keroka Police Station when the Appellant was brought in by members of the public. He noted that the Appellant had injuries on his face. PW4 also found the minor at the police post and escorted her to hospital where she was treated and the P3 form filled. PW4 produced the minor's Birth Certificate (P.Exh 1), the minor's clothes (P.Exh8 and 9), photos of the clothes (P.Exh10) and the Certificate of Printing (P.Exh11).

10. When placed on his defence, the Appellant elected to tender a sworn statement and did not call any witnesses.

**The Defence/Appellant's Case**

11. The Appellant (DW1) testified that he was on the material day heading towards the road to Keroka when he saw some children pushing each other before one of them ran to him. He told the child to go home and saw an abandoned house where he entered but that the same minor also went into the same house. The minor's mother soon thereafter confronted him and asked him where he was coming from with her child. He denied committing any offence but the victim's father assaulted him before arresting him and escorting him to the police station.

12. At the conclusion of the trial, the Appellant was found guilty of the offence of defilement and sentenced to serve 40 years' imprisonment.

13. Aggrieved by the trial court's decision, the Appellant filed the instant appeal and listed the following grounds of appeal: -

    1. That the trial court erred in law by failing to reconsider and re-evaluate the whole evidence afresh as provided by law.

    2. That the trial court erred in law by failing to appreciate that crucial witnesses were not called by the prosecution yet their evidence was vital for the just decision of the case.

    3. That the trial court erred in law by failing to observe that the case for the Prosecution contained contradictions and inconsistencies.

    4. That the trial court erred in law by failing to observe that the evidence relied upon by the Prosecution fell too short of the certainty required in law in cases of this nature.

    5. That the judgment of the trial court was a nullity as the trial proceeded without the court warning him that he had the right to a fair and impartial trial as enshrined in *the Constitution* as per Article 50 (2) (n) i.e. the right to be represented by an advocate.

    6. That the Appellant was not accorded a fair and impartial trial as guaranteed by Article 25 (c) of *the Constitution*.

14. The Appeal was canvassed by way of written submissions which I have considered.

15. The duty of the first appellate court was stated in the case of Okeno vs. Republic [1972] EA, 32 where it was held that an appellate court should reconsider and re-evaluate the evidence presented before the trial court with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify.

**Analysis and Determination**

16. I have carefully considered the record of appeal and the parties' rival submissions. I find that the main issues for determination are as follows: -

    a. Whether the Prosecution proved the charge of defilement to the required standard.

    b. Whether the sentence meted by the trial court was harsh and excessive.

**Whether the Prosecution proved the charge of defilement to the required standard.**

17. Section 8 of the *Sexual Offences Act* (the Act) provide as follows: -

    8. Defilement

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

        2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

18. In Dominic Kibet vs. R [2013] eKLR the court held as follows on the ingredients of the offence of defilement: -

    > " to prove defilement the critical elements remain to be proof of penetration, the age of the complainant and possible identification of the assailant."

19. On the first ingredient of age, courts have held that a victim's age can be determined in several ways. In JOA vs. Republic (2019) eKLR, it was held thus: -

> " It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim."

20. In this case, the prosecution adduced the evidence of the victim's mother PW1 who testified that her daughter was 4 years old having been born on 12th January 2019. PW4 the Investigating Officer produced the victim's Birth Certificate Serial No. (particulars withheld) which shows that she was born on 12th January 2019. I find that the victim was 4 years old at the time of the offence and that the minority age of the victim was proved to the required standard.

21. Penetration is defined under Section 2 of the Act as follows: -

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

22. Penetration can be partial or complete. In this case, the Court did not have the benefit of hearing the victim's own testimony. PW1 testified that when she found the victim with sperms on her clothes. PW3 testified that the lab tests revealed that the victim's clothes had spermatozoa cells. The clinical officer found that the victim's external genitalia was normal and that her hymen was intact but that her panty was blood-stained.

23. My finding is that since the victim did not testify in this matter, the evidence presented by the Prosecution was mainly circumstantial in nature. Lord Heward, C.J. had the following to say on circumstantial evidence in the case of R. v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

> " It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

24. Circumstantial evidence must satisfy a three-prong test in order to establish the guilt of an accused person. In Abanga Alias Onyango vs. Republic CR.A No.32 of 1990(UR) the Court of Appeal stated thus: -

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
>
> ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

25. Applying the above test to the present case, I find make the following findings; firstly, the circumstances leading to the Appellant's arrest were cogently and firmly established through the testimonies of PW1 and PW2. Both witnesses testified that they saw the Appellant inside the deserted house, where the minor emerged from moments later. The child's mother testified that she saw sperms on the minor's clothes, and both parents observed the Appellant dressing and appearing flustered or dishevelled. PW3, the Clinical Officer confirmed that the victim's clothes had spermatozoa.

26. Secondly, these circumstances were of a definite tendency pointing unerringly towards the Appellant's guilt. The Appellant was found in a secluded house with the minor, the child's underwear was blood-stained, spermatozoa were found on her clothes, and the Appellant himself had blood-stained underwear.

27. Thirdly, taken cumulatively, the chain of evidence leaves no reasonable explanation other than the conclusion that the offence was committed by the Appellant. I find that even though the victim did not testify, the evidence provided, particularly medical and physical findings, coupled with eyewitness accounts, form a complete and unbroken chain leading to the Appellant's culpability.

28. The Appellant submitted that the Prosecution failed to call crucial witnesses. While it is true that the minor did not testify, and that no DNA evidence was adduced, the law does not require the Prosecution to call a multiplicity of witnesses if the evidence presented proves the case beyond reasonable doubt. Section 143 of the *Evidence Act* stipulates as follows:

> "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."

29. On the issue of inconsistencies and contradictions raised by the Appellant, I find that the record does not reveal any material contradictions that would go to the root of the Prosecution's case. The accounts of PW1, PW2, and PW3 are mutually reinforcing and corroborated by the medical and physical evidence.

30. Regarding the Appellant's claim that he was not accorded the right to a fair trial and representation, I note that the trial record does not show that the Appellant raised any complaint during the proceedings regarding lack of representation or understanding of his rights. Article 50(2)(h) of *the Constitution* guarantees the right to legal representation, including State-funded counsel in the case of substantial injustice. However, the burden was on the Appellant to bring this to the court's attention. There is no indication on record that he did so or that the trial court deliberately denied him the opportunity to obtain legal counsel. Further, the proceedings do not reveal any procedural unfairness or bias on the part of the trial court. It is instructive to note that the Appellant ably participated in the trial and competently cross examined the prosecution witnesses. He was also able to present his sworn testimony when placed on his defence. I am not persuaded that the Appellant was not prejudiced in any way by the manner in which the trial was conducted.

31. On proof of penetration, I note that even though the victim's hymen was not broken, it is trite that under Section 2 of the Act, penetration must not necessarily be complete. In Erick Onyango Ondeng vs. Republic (2014) eKLR the Court of Appeal held thus: --

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

32. In this case, I find that the fact that the victim had sperm cells on her clothes and a bloodied panty is a clear indication that the penetration was partial. I am satisfied that the ingredient of penetration was established beyond reasonable doubt.

33. On identification of the Appellant as the victim's assailant, I note that evidence of PW1 and PW2 who saw the Appellant and the victim in the deserted house was sufficient in linking the Appellant to the crime. PW2 also testified, on cross-examination, that the Appellant informed him that he had ejaculated on himself. It is also instructive to note that the Appellant admitted that he was indeed in the said deserted house with the minor. I therefore find that the Appellant was positively identified by the two witnesses and that he cannot therefore be a victim of mistaken identity.

34. I have considered the evidence tendered by the Appellant in his defence and I find that it consisted of mere denial that did not displace the watertight evidence presented by the Prosecution.

**Sentence**

35. Section 8(2) of the *Sexual Offences Act* provides for a mandatory sentence of life imprisonment for defilement of a child aged 11 years or less. The sentence imposed by the trial court was forty (40) years' imprisonment, which, while severe, was actually below the mandatory life sentence. I therefore find that there is no legal basis for holding that the sentence was harsh or excessive under the applicable law. In any event, trial courts retain some discretion under Article 27 and 50(2)(q) of *the Constitution* to impose lesser sentences in appropriate cases, subject to the facts and mitigating factors. In this case, none were offered or proven.

36. In Bernard Kimani Gacheru vs. Republic [2002] eKLR, the Court of Appeal held thus: -

> " 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, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with 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."

37. Guided by the decision in the above cited case, I find no reason to interfere with the 40 years sentence passed by the trial court save to add that the sentence shall be computed from the date of the Appellant's arrest being 28th January 2023 in line with Section 333 (2) of the *Criminal Procedure Code*.

38. In the final analysis, I find that the Appeal lacks merit and I therefore dismiss it. The conviction and sentence are upheld save as expressly stated under paragraph *37* hereinabove.

39. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 10TH DAY OF JULY 2025.**

**W. A. OKWANY**

**JUDGE**