Balozi v Republic (Criminal Appeal E007 of 2025)
[2025] KEHC 13174 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13174 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E007 OF 2025

JN ONYIEGO, J

SEPTEMBER 25, 2025

BETWEEN

ANWAR SAID BALOZI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Garissa chief magistrates court S.O case No. E032 of 2024 delivered on 05.03.2025 by Hon. R. Lemayan – R.M.)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 21.10.2021 at around 1300hrs at [Particulars Withheld], Mororo location in Tana River North sub County within Tana River County, he intentionally and unlawfully caused his genital organ namely penis to penetrate the vagina of F.R., a girl child aged 10 years.

2. The appellant equally faced an alternative charge of committing an indecent act with a child contrary to section 11(1) *Sexual Offences Act*. No. 3 of 2006. The particulars of the offence were that on 21.10.2021 at around 1300hrs at [Particulars Withheld], Mororo location in Tana North sub County within Tana River County, he willfully and intentionally touched the vagina of F.R., a girl child aged 10 years old with his organ namely penis.

3. Having the denied the charge, the matter proceeded to full trial. Consequently, he was convicted and sentenced to life imprisonment.

4. Being dissatisfied with the said judgment, the appellant lodged an amended petition dated 10.07.2025 citing the following grounds:

i. That the learned trial magistrate erred in both law and fact by convicting him when the prosecution did not prove its case beyond any reasonable doubt.

ii. That the learned trial magistrate erred in both law and facts by failing to consider his defence despite the same being cogent.

iii. That the trial magistrate erred in law and facts by meting out a harsh sentence in the prevailing circumstances.

5. The appeal was canvassed by way of written submissions.

Appellants' submissions.

6. The appellant in person filed detailed written submissions dated 10.07.2025 faulting the prosecution for having failed to prove its case against him beyond reasonable doubt. He urged that the ID parade that was conducted was below par and inconsistent to the provisions of the Police Force Standing Order No. 6. That in as much as the form showed that he participated in the two parades, he was never a participant on the same. He wondered why the prosecution found it necessary to conduct an ID parade yet the complainant allegedly was his neighbour hence identification by recognition would be sufficient as ID parade is ordinarily conducted when the alleged aggressor is unknown. In urging that he was not properly identified, he relied on the case of David Mwita Wanja & Others vs Republic [2007] eKLR where the court held that:

> 'the purpose for and the manner in which identification parades ought to be conducted have been subject of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right...that value of identification parade would depreciate unless an identification parade was held within scrupulous fairness and in accordance with instructions contained in police force standing orders"

7. He urged that despite the fact that there was another witness being cousin to the complainant, the police did not see the value of bringing him in as a witness. Additionally, that the trial court did not warn itself of the danger of relying on the evidence of a single witness before convicting him. In that regard, reliance was placed in the case of Kiragu Vs Republic (1955) KLR. While relying on the case of Republic vs Turnbull & Others [1976] 3 All 549 where it was held that recognition is more reliable that identification of a stranger, the appellant urged that the police ought to have brought along the alleged cousin who allegedly witnessed the offence being committed to identify him in the purported ID parade conducted.

8. He further submitted that he was simply framed after having reported the loss of his phone at Madogo Police station. That he was prejudiced by the fact that the doctor who produced the P3 Form was not the examining doctor. That he was denied an opportunity to examine the examining doctor in reference to the findings presented before the court. He contended that penal penetration was not proved as the medical report produced did not mention whether the hymen was freshly broken or not.

9. He faulted the trial court for failing to consider his alibi defence and the fact that he was framed for having demanded his phone back. He urged that the court failed by casting the burden on him to prove his innocence.

10. On sentence, he submitted that the same was harsh and excessive. That this court be guided by the finding of the Court of Appeal Case in Evans Nyamari Ayako and sentence him to 30 years' imprisonment or less. He urged his appeal be allowed as prayed.

Respondent's submissions.

11. The respondent in opposing the appellant filed submissions dated 29.04.2025 wherein it was urged that the prosecution proved its case to the required standard. That as was held in the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013, the prosecution was expected to prove three things namely: there was penetration; that the complainant was a child and; that the accused was indeed properly identified.

12. On age, counsel contended that the same was established through production of a birth certificate indicating that the victim was born on 13-08-2011. On penetration, counsel opined that the doctor confirmed that there was some indication of penetration and penetration need not be deep inside the victim's genital organ or presence of spermatozoa. In that regard the court was referred to the case of Mark Oiruri Mose v Republic (2013) e KLR.

13. That the court properly convicted the appellant after satisfying itself that the complainant was a child and reliable. On penetration, counsel urged that PW1's evidence was corroborated by the testimony of the medical doctor. Regarding identification, counsel urged that PW1 and her mother positively identified the appellant. It was submitted that the prosecution established the elements of the offence charged to the required standard and therefore, the appeal as lodged was destitute of any merit.

14. On sentence, counsel relied on the case of Francis Karioko Muruatetu and Anor vs Republic [2021] eKLR where the Supreme Court gave guidelines to the effect that the said case could not be used as an authority to infer that all laws prescribing mandatory or minimum sentences are inconsistent with *the constitution*. This court was thus urged not to interfere with the finding of the trial court.

Analysis and determination .

15. I have considered the grounds of appeal herein, record of appeal and submissions by both counsel. Being the first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions and or determination bearing in mind that it did not have the advantage of hearing and observing the general demeanor of the witnesses. See Peter M. Kariuki vs Attorney General [2014] eKLR].

16. PW1, F.R, a 13-year-old girl testified that on 21.10.2021 at around 1 p.m., she arrived home from school and then proceeded to fetch firewood. That in as much as she no longer attends school, she recalled meeting the appellant, who was also his neighbour. The appellant had in his hands a panga and therefore, she assumed that the appellant was also on his way to fetch firewood.

17. She stated that while collecting firewood, the appellant suddenly attacked her from behind thus knocking her down onto the ground inside mathenge trees. That the appellant stabbed her with a knife and in the process, tore her trouser. It was her evidence that the stab led to an injury on her private parts when the appellant removed his clothes thus inserting his penis into her vagina. Meanwhile, he covered her mouth with a piece of cloth as he held her neck

18. It was her evidence that her young cousin who was collecting fruits nearby saw what had happened but the appellant upon realizing his presence, he threatened him of dire consequences in case he reported the same. She stated that she became unconscious and only found herself in the hospital bleeding. That the police officers later visited her in the hospital and recorded her statement. According to her, the appellant was a person known to her as he was her neighbour. On cross examination, she stated that her cousin was in the thicket although he was on his own. That the appellant threatened her cousin

and further, that she knew the appellant's family in as much as the appellant escaped for some time after the incident.

19. PW2, ZI, PW1's mother testified that on 21.10.2021 at 1.00 p.m., she arrived home from Bura. she was however informed that PW1 had left to fetch firewood. That while taking a bath, she was called and informed that PW1 had been assaulted. After leaving the birth room, she found her daughter bleeding. Upon asking her what transpired, she told her that someone she found in the bushes was responsible for her attack and sexual assault. That PW1 informed her that she did not know the name of her aggressor in as much as she only knew his family.

20. She told the court that together with her sister, they took PW1 to the hospital where she left her and headed to the police station. That the police accompanied her to the hospital and thereafter started investigations. She stated that PW1 upon gaining consciousness, told them that her aggressor was the person married to her aunt and therefore, she informed the police about the same. That the appellant ran away from home and only returned in the year 2024.

21. On cross examination, she stated that PW1 knew the appellant and the same prompted him to run away from home as he feared being arrested. She stated that in as much as PW1 did not know the appellant's name, she knew his family as they live in the same village.

22. PW3, Nicholas Koech, a clinical officer testified that PW1 was attended to by Dr. Shaffie Omar who was away at the moment. On behalf of Dr. Shaffie, he stated that the minor was presented at the hospital when they were directed to examine her on the injuries she had suffered. That her clothes were torn and blood stained, she was in pain and her neck was tender, lower limbs were normal and further, there were blood stains on her legs.

23. On her private parts, it was noted that she was bleeding and in great pains and therefore, was referred to theater. In the same breadth, there was a wound on the left side of her vagina and the probable cause of injury was a blunt object. It was noted that her wound was stitched and thereafter medication was administered as they admitted her in the facility. According to him, the wound was classified as grievous harm. On cross examination, he stated that there were no injuries in her stomach save for physical injuries noted. In conclusion, the doctor confirmed the injury was as a result of defilement

24. PW4, No. 119069 P.C Jackson Muli stated that on 24.12.2024, he was at work when the OCS called and informed him that there was a previous report on defilement that had been made in the year 2021. That the suspect who had fled from the area had been spotted at Heller Petrol station and so, they did their surveillance and together with Constable Makori and Gilbert Korir, managed to arrest the suspect. On cross examination, he stated that PW2 identified the appellant.

25. PW5, No. 257082 Police Constable Gilbert Korir testified that on 24.12.2024, the OCS informed them of a suspect who had been accused of defilement and that they were directed to go arrest him. It was his evidence that the suspect had been spotted at Heller Petrol station and therefore, together with Police Constable Muli and Police Constable Makori, accompanied by PW2, they followed the appellant up to town where they arrested him. He identified the appellant as the person that they arrested.

26. PW6, No. 106654 Police Constable Anda Austin, the investigating officer testified that on 21.10.2021, at around 5.00 p.m, a report was made at the station by ZI from [Particulars Withheld]. That she alleged that her daughter had been defiled by a person known to her as she had gone to fetch firewood. He stated that he recorded a statements from the witnesses and that he also recorded PW1's statement upon being discharged from the hospital on 28.10.2021. He stated that the suspect could not be found

as he had run away till 24.12.2024, when he was arrested. That an ID parade was conducted and the appellant was identified.

27. DW1, Anwar Said Balozi in his sworn testimony denied committing the offence as he claimed that in as much as he hailed from Ziwani, Tana River County, on a month before October, 2021, he was not in Garissa. That he got a customer whom he took to Bura and returned on 29.10.2021. He contended that by that time, the alleged incident herein had already happened. He stated that he was arrested while heading for work and that he had left his phone to a customer, the complainant herein and upon returning, he found his phone missing.

28. He stated that he had planned to report the incident to Madogo Police Station when his children were taken ill thus disabling him from reporting. Few days later, he met the customer and upon asking her his phone, she told him that she was aware he reported the theft case and that she will teach him a lesson. According to him, the charges herein were simply a fabrication as he had never been away from his home.

29. On cross examination, he stated that on 25.12.2024, he was identified in the ID parade in as much as PW1 and PW2 are not his neighbours and further, it was his first time meeting the complainant in as much as he previously met PW2 at the police station.

30. Having considered the evidence as above, record of appeal and parties' respective submissions, I find that the issues that arise for determination in this appeal are;

    i. Whether the prosecution proved its case against the appellant beyond reasonable doubt on the following elements; age of the victim; penetration and the identity of the perpetrator.

    ii. Whether the sentence meted upon the appellant was appropriate.

31. The appellant was charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* which provides that: -

    (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.

32. The offence of defilement is rooted on three main ingredients interalia; the age of the victim, penetration and the proper identification of the perpetrator. [See section 8(1) of the *Sexual Offences Act* No. 3 of 2006].

33. Regarding the first element of age, the Court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated as follows in respect to proving the age of a victim in cases of defilement :

> "... 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."

34. Thus, under the children's Act, a child is defined as a person under the age of eighteen years. The question that must be answered is whether the minor herein was a child?

35. PW1 in her testimony stated that she was aged 13 years. PW2 equally stated that her daughter, PW1 was aged 13 years at the time the offence was allegedly perpetrated in the year 2021. This fact was established by the production of a birth certificate as Pex 1 to corroborate the fact that she was born on 13-08-2011. The appellant did not challenge the issue of age but rather paid much more attention to the question of identification. The foregoing notwithstanding, it is my finding that the age of the complainant was proved to the required standard. As such, I find that the age of the complainant was 10 years old.

36. The second element is the question of penetration. Section 2(1) of the *Sexual Offences Act* defines penetration as: "The partial or complete insertion of the genital organs of a person into the genital organ of another person."

37. It follows that penetration is proved through direct or indirect evidence. This can either be through the evidence of the victim corroborated by medical evidence or other corroborative evidence. PW1 testified that the appellant defiled her and her testimony was corroborated by PW2 who saw her bleed and that of PW3 who examined the complainant. From the P3 Form, it was clear that the complainant had been defiled as the doctor noted that approximate age of the injury was within 1 hour and the probable weapon causing injury was a blunt object.

38. Obviously, the genital injuries were not imaginary but a true reflection of what actually happened. I do not think the injuries were self- inflicted. With the direct evidence of the complainant coupled with the evidence of pw2 and the medical report, I have no doubt, there was sufficient proof of penetration.

39. The last ingredient for consideration is identification. PW1and PW2 stated that the appellant was a person known to them. PW1 stated that in as much as she did not know the name of the appellant, she knew him as he was married to her aunt. Additionally, that they were neighbours from Ziwani estate. In as much as the appellant denied knowing PW1 and PW2, it was clear that the same was simply an afterthought. I say so for the reason that in his exam in chief, he stated that he previously left his phone to his customer, PW2 to charge the same for him. Later, in cross examination, he stated that he met PW2 for the first time at the police station. In the same breadth, it is important to note that he lived at Ziwani Estate at the very time when the offence herein was allegedly committed.

40. The foregoing notwithstanding, the offence herein was committed during day time hence enough light to enable positive recognition. It is trite that recognition is more reliable than identification of a stranger. In fact, I do agree with the appellant that it was not necessary to conduct an id parade because the appellant was known by pw1 before

41. In my view, Identification was free from any error considering that the assailant was well known by pw1 before the incident and the offence was committed during the day time. See the case of Wamunga v R(1989) KLR where the court of appeal emphasized the need for a court to carefully re-examine evidence and to be satisfied that circumstances of identification were favourable and free from any error where the only evidence against the defendant is that of identification or recognition. See also Anjononi and Another v R (1980) KLR 54 at p.60.

42. The appellant claimed that the alleged a cousin to pw1 who witnessed the incident did not testify hence prejudicial to the prosecution's case. In Bukenya and others v Uganda (1972)EA343 the court held that the prosecution has the discretion as to who are the material witnesses to call. Failure to call that cousin who in any event was threatened not to reveal the incident does not in any way discredit the evidence of pw1 and the medical evidence which is well corroborated. In any event, an adverse inference could only be made if the available evidence is barely inadequate. See Peter Ngure Mwangi v Republic (2014) KECA 405(KLR). In the instant case, there is sufficient evidence to connect the appellant with the commission of the offence

43. As to failure by the court not to have warned itself of the consequences of convicting on the evidence of a single witness, the trial court found that the complainant was truthful and had no reason to fabricate the offence in question.

44. In the cases of R vs Turbull and Others (supra). Lord Widgery C.J had this to say: -

> " First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" was the observation impended in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before" How often" if only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."

45. I am alive to the fact that under Section 124 of the *evidence Act*, a court can convict on a sexual offence based on the evidence of a single witness alone as long as it is satisfied of the truthfulness of that witness.

46. As to the claim that the trial court did not consider the appellant's defence, the record is clear. The court fully considered his defence and more particularly the alibi defence. The only mistake made was to shift the burden of proving the alibi defence to the appellant. As regards the defence of alibi, the same was an after-thought. A basis ought to have been laid earlier.

47. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not err in convicting the appellant. The appeal on conviction therefore lacks merit and is hereby dismissed.

48. The appellant prayed that the sentence meted be set aside. Section 8(1)(2) of the *Sexual Offences Act* under which the appellant was charged provides as such:

> (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.

49. Bearing in mind the objectives and principles of sentencing, the gravity of the offence, mitigation offered by the appellant, and the provisions of Section 333(2) of the Criminal Procedure Code, the appropriateness of the custodial sentence cannot be challenged. A close look at the manner in which the offence was carried out, it is my humble view that a custodial sentence was proper.

50. Additionally, the Supreme Court in the case of Republic vs Joshua Gichuki Mwangi, Petition No. E018 of 2023 held that where a sentence is set in statute, the legislature has already determined the

course unless it's declared unconstitutional. From the foregoing, it is thus clear that the trial court exercised its mandate in sentencing and, in doing so, meted an appropriate, lawful sentence.

51. For this reason, I hereby uphold the decision of the trial court on both conviction and sentence and as such, the appeal fails.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER 2025

... .

J. N. ONYIEGO

JUDGE