Dida v Republic (Criminal Appeal E003 of 2024)
[2025] KEHC 13223 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13223 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MANDERA

CRIMINAL APPEAL E003 OF 2024

JN ONYIEGO, J

SEPTEMBER 25, 2025

BETWEEN

ABDI BORU DIDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence delivered on 4-10-2024 by Hon. Cornel Omondi (RM) in Mandera Criminal Sexual Offence case No. E001 of 2024)

JUDGMENT

1. The appellant was charged with two counts. The 1st count was in respect of defilement contrary to Section 8(1) as read with Section 8(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 03.01.2024 at around 2000hrs at Wargadud in Mandera County he intentionally caused his penis to penetrate the anus of CD, a child aged 8 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 03.01.2024 at around 2000hrs at Wargadud in Mandera County he intentionally touched the anus of CD with his penis against his will.

3. On Count II, he was charged with the offence of being unlawfully present in Kenya contrary to section 53(1) as read with section 53(2) of the Immigration Act no. 2 of 2011. The particulars were that on 06.01.2024 at around 1330hrs in Mandera Central Sub County within Mandera County being of Ethiopian national was found to have unlawfully been present in Kenya.

4. On his own plea of guilt, the appellant was convicted on the second Count and fined Kes. 20,000/- in default, serve 6 months' imprisonment sentence.

5. Having denied the first count, the matter proceeded to full hearing culminating to a conviction on the same thus attracting a sentence of 25 years' imprisonment to run from 06.01.2024 when he was apprehended.

6. Being dissatisfied with the said judgment, he lodged the present appeal citing the following amended grounds:

   i. That the learned trial magistrate erred both in law and fact by not considering that the prosecution evidence was contradictory and doubtful to warrant a conviction.

   ii. That the learned trial magistrate erred in both law and fact by relying on the evidence of PW1 in convicting him yet the said evidence was benign of belief as the voire dire conducted was unprocedural.

   iii. That the trial magistrate erred both in law and fact by convicting him yet the age of the complainant was not proved.

   iv. That the trial magistrate erred in law and facts by failing to consider the defence of the appellant which was worth of belief.

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

8. The appellant filed submissions dated 16.07.2025 in support of the grounds of appeal urging that the prosecution did not prove the charge beyond any reasonable doubt. While relying on the case of Fappyton Mutuku Ngui vs Republic Cr. Appeal 296 of 2010 where the Court pronounced itself on the elements of the offence of defilement being age, penetration and identity, the appellant urged that the elements of age and penetration were never proved thus making his conviction unsafe. That where medical evidence introduces uncertainty regarding penetration, the benefit of such doubt must go to the accused person. The court was urged that it cannot speculate or infer element of penetration solely from the presence of internal injury without medical confirmation.

9. That the trial court erroneously found that the complainant was penetrated yet the medical officer testified and described the incident as 'an attempted sodomy". The appellant urged that in as much as the complainant testified that he was penetrated, the same could not be relied upon as his evidence was full of gaps. He contended that compared to other witnesses' evidence, the complainant did not mention any torch and instead, started his evidence that the attack happened at night while in the bush with the appellant where the appellant ended up defiling him.

10. Equally, that the voire dire examination conducted by the trial court was erroneous as the court asked the complainant to state where he was but instead, he stated that he was in an office; that the people who lie, their sin will be recorded after which the court made a ruling that the complainant was capable of giving a sworn evidence. It was contended that the trial court failed to probe the child's comprehension of truth telling under oath and its legal implications or the consequences of lying. Additionally, that there was no indication that the court considered whether the child understood the oath.

11. Further, the court did not ask questions to assess the child's intelligence or capacity to give unsworn evidence. That the court formed an opinion without a genuine inquiry as the ruling allowing sworn evidence appeared pre-judged, lacking of good faith and rigor as required by the law. In buttressing the foregoing, the appellant relied on the case of JM vs Republic [2017] eKLR, where the court emphasized that a child must clearly understand the oath before giving sworn evidence. That failure to conduct a proper voire dire examination was deemed a fatal irregularity.

12. On the age of the complainant, the appellant contended that the same was not proved to guide the court in sentencing as the closest the issue of age was addressed is when the court directed that an age assessment be conducted. That the evidence in chief did not indicate that the complainant was 8 years save for the time during voire dire examination when the complainant informed the court that he was aged 8.

13. On the last issue, this court was urged to find that the trial court did not consider the defence of the appellant in reaching its determination despite the same being cogent. Thus the appellant on the strength of his submissions urged the court to re-evaluate the evidence of the trial court and draw its own conclusions. He prayed that his appeal be found favorable and allowed. He however did not submit on the issue of sentence neither did he raise it as a ground on appeal.

14. the respondent on the other hand urged that the prosecution proved its case beyond reasonable doubt. That it established the ingredients to wit age, penetration and identity. That the appeal herein is devoid of any merit and thus ought to be dismissed.

Analysis and Determination

15. I have had occasion to peruse through the record of appeal, grounds of appeal and the submissions by the parties. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions 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. Briefly, PW1, BG testified that on 03.01.2024 at 8.00 p.m., he was in the bushes when the appellant who was holding a knife started fighting him. That he defiled him and then warned him not to tell anyone of the incident. According to him, the appellant penetrated his anus with the thing which he uses to urinate thus causing him untold pain. After the incident, he returned home and slept and upon reaching morning, he informed his family about the incident. It was his evidence that his mother cried but after that, they boarded a boda boda to El wak hospital where he was examined and thereafter treated. Thereafter, the matter was reported to the police who eventually arrested the appellant.

17. On cross examination, he pointed at the appellant as responsible for defiling him. He pointed out that the appellant was still in the attire that he worn on the previous day when he defiled him.

18. PW2, UIH, PW1's mother testified that on 03.01.2024, she had left her son at around 7.30 p.m. at home. That the appellant approached his son and asked of him a torch and when the boy declined to give him, he later left with him to a place far away where he defiled him. It was her evidence that on the following day, she found PW1 crying and upon enquiring, he told her of the incident. She stated that she took the complainant to the hospital and thereafter reported the matter to the police where they recorded their statements. Afterwards, the appellant was arrested and charged. On cross examination, she demanded to know from the appellant why he chose to run away after the incident.

19. PW3, AGA, a casual labourer and father to PW1 testified that he was told that the appellant had defiled his son. That the appellant threatened him with a knife prior to defiling him. He stated that after the incident, the appellant ran away but was later arrested.

20. PW4, ANK a KPR officer testified that on 05.01.2024 at 7.30 p.m., PW3 told him about the defilement incident and therefore, he told them to go to El wak police station to report the same. He stated that they searched for the appellant and managed to find him at Gogora.

21. PW5, Shukri Ibrahim Ali Jirow, KPR officer testified that on 05.01.2024 at 7.30 p.m., he was at Wargadud when he was informed that a child by the name B been defiled. Noting that the town has no police station, he together with another colleague started investigating the issue leading to the arrest of the appellant. That they arrested him after which they handed over the appellant to the police at El wak and thereafter, they recorded their statements. On cross examination, he stated that the parents of PW1 had reported to them over the issue.

22. PW6, Ali Mohamed, a clinical officer testified that on 06.01.2024, he was at Elwak Referral Hospital when the complainant presented with an alleged case of sodomy. That on anal exam, he found lacerations and further, the region was tender. There was no discharge or visible injuries in as much as there were internal injuries. He opined that there was an attempted sodomy and physical injury. In the same breadth, he found that the complainant had low injury on the head and neck. On cross examination, he stated that the complainant was sodomized as the anal area was reddish and equally, presence of mild decorations. In his final observation, he concluded that there was attended sodomy and physical assault.

23. PW7, No. 244573 PC Isaack Lemiso, the investigating officer testified that the matter was reported on 06.01.2024 and therefore, he took witnesses' statements and thereafter embarked on carrying out investigations. He reiterated the evidence of the other prosecution witnesses and further stated that upon the completion of his investigations, he charged the appellant.

24. DW1, in his sworn statement stated that he was a labourer having been employed as a herder by the complainants. That the complainants brought him from Ethiopia to work for them but after working, they declined to pay his dues. According to him, the amount owed by the complainants was Kes. 48,000. Additionally, that he was framed by his detractors who had declined to pay his dues. He denied committing the offence as he contested that the charges were a mere fabrication. On cross examination, he stated that he had worked for the complainants for a period of 2 years 2 months and during this time, he was earning as wages Kes. 7,000/-.

25. Having evaluated the record of appeal, grounds of appeal and submissions by both parties, issues that are discernible for determination are;

    i. whether the prosecution proved its case to the required degree;

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

26. The appellant was charged with the offence of defilement contrary to Section 8 (1) (1) instead of Section (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

> 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement; 8(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."

27. The offence of defilement is rooted on three main ingredients being; the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to be sustained. [See George Opondo Olunga vs Republic [2016] eKLR].

28. Regarding the element of age, the Court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated as follows in respect of 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."

29. A child is defined as a person under the age of eighteen years. Was the victim herein a child?

30. The appellant contended that the age of the minor was not proved hence his conviction remained unsafe. It is important to note that apart from medical evidence, age may be proved by birth certificate, the victim's parents or guardian, victim himself or herself, by observation or common sense (see the case of Thomas Mwambu Wenyi vs Republic Criminal Appeal NO. 21 OF 2015 [2017]) e KLR.

31. PW1 during voire dire examination stated that he was aged 8 years; the testimony of PW6 who produced the Treatment Notes noted that the complainant was 8 years old. Most importantly, the trial magistrate who saw the complainant but also found him believable, was also of the view that the complainant was 8 years. In as much as age assessment was not carried out, it is my belief from the foregoing reasons, the complainant's age was sufficiently proved to be 8 years.

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

33. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.

34. The foregoing notwithstanding, it is trite that defilement can be proved not only by medical evidence but also by way of oral and circumstantial evidence. In Aml v Republic [2012] eKLR (Mombasa), the Court upheld the view that:

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

35. the above was re-affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

> " ... [The] absence of medical examination 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."

36. In the instant case, the complainant stated that the appellant defiled him and the same was corroborated by the evidence of PW6 who testified that there was an attempt to defile the complainant. Noting the evidence herein, it is my view thus the appropriate offence that the appellant ought to have been tried of was the offence as provided for under section 9(1) as read with (2). The foregoing notwithstanding provides that:

Section 9. Attempted defilement:

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

37. Additionally, section 186 of the *Sexual Offences Act* provides that:

> " 186. When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it."

38. Having considered and analyzed the evidence of the witnesses above, and specifically that of pw1 and PW6 who stated that on anal exam; he found lacerations on PW'1 anus, he opined that there was evidence of attempted sodomy and physical injuries as the complainant had no injury on the head and neck. As such, I come to the conclusion that there is ample evidence that there was attempt to penetrate the complainant.

39. The last ingredient is identification. PW1 stated that the appellant was responsible for his injuries while the appellant contended that he was simply framed for reasons that he demanded his dues from the complainant's family. The foregoing explains that the appellant was not a person unknown to the complainant. I say so for the reason that the appellant had worked for the complainant's family for a period over two years.

40. In supporting the foregoing, PW2 also stated that the appellant was her cousin's herdsman. It therefore follows that the appellant was someone whom the complainant recognized well. It follows therefore, that the identity of the appellant was also ably proved the two having gone together into the bush to look for camels while armed with torchlight

41. From the chain of events, it is my finding that the evidence by the prosecution leaves no doubt that the appellant is the one who attempted to penetrate the complainant. On the question of lack of corroboration, section 124 0f the *evidence Act* empowers a trial court to convict based on the evidence of a single witness in asexual offence upon satisfying itself as to the truthfulness of the witness. See David Ochieng Akectch v Republic (2015)KEHC 679(KLR). In the instant case the court was satisfied that the victim's evidence was of good quality hence reliable.

42. As to whether voir dire examination was properly conducted, the answer is that there is no fixed standard set save for the court to be satisfied that the minor is possessed of the necessary intelligence to be able to understand the importance of telling the truth and the nature of an oath. See Dismas Wafula Kilwake v Republic (2019) KECA 5 (KLR) where the court held that;

> " in mohamed v. republic [2008] 1 klr (g&f) 1175 and patrick kathurima v. republic (supra), although this court recommended verbatim recording of the questions put to the child in a vior dire examination and his or her answers thereto, it nevertheless states that it was not mandatory. there is no prescribed and rigid procedure for conducting a voir dire examination; the most important thing is that it must establish whether the child of tender years understands the nature of an oath and the duty to tell the truth. in james mwangi muriithi v republic [2016] eklr, after noting that section 19 of the *oaths and statutory declarations act* does not provide a format for voir dire examination and that the format has evolved through case law, this court stated:
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> > "in sula versus uganda [2001] 2ea 556 the supreme court of uganda approved two formats. the first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then makes its conclusion after the dialogue. in the second format the court may omit to record the questions put

to the witness but record the answers verbatim in the first person and then make his conclusion thereafter."

43. From the questions put forth, the court was satisfied that the child was intelligent enough to give sworn testimony. The appellant raised concern that the child when asked where he was he responded that he was in an office. Some court chambers look like offices hence nothing wrong with the answer. As to whether he understood the importance of telling the truth and the nature of an oath and as to what happens to people who lie, the child replied that he did and that sinners names would be listed against them. When asked whether he goes to mosque, he confirmed going five times a day. In my view, though the examination was not exhaustive, it met the objective bearing in mind that there is no standardized or measurable degree of exactitude in voire dire examination.

44. As to the question of the court not considering his defence, the record is clear that the same was considered extensively and dismissed.

45. On sentence it is trite that a person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years. In the case herein, it was not to be denied that the appellant was a first time offender and therefore, ought to have benefited from a less harsh sentence.

46. To that end, it is my finding that the 25-year sentence meted out by the trial magistrate was not only harsh but also severe in the given circumstances. As such, it is only mete that this court interferes with the same.

47. Consequently, I uphold the conviction but set aside the 25-year sentence with that of 10 years the minimum sentence provided for attempted defilement. The same to start running from the date of sentence of the trial court.

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

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J.N.ONYIEGO

JUDGE