Kariuki v Republic (Criminal Appeal 26 of 2023)
[2025] KEHC 12568 (KLR) (9 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 26 OF 2023

RC RUTTO, J

SEPTEMBER 9, 2025

BETWEEN

EVANS MATHAKA KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence of the judgment delivered on 18/10/2022 by Hon. O. Wanyaga (SRM))

JUDGMENT

A. Introduction

1. The appellant aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* Cap 63A (the Act) has lodged this appeal. He seeks that his conviction be quashed and the 20 years imprisonment sentence set aside.

2. The appeal is premised on the following grounds: -

    a. That the Hon. Trial court Magistrate erred in law and fact by failing to find that he was not properly identified as the perpetrator of the offence alleged as defined by law.

    b. That the Hon. Trial court Magistrate erred in law and fact by failing to find that the prosecution failed to prove penetration of the alleged complainant's genitalia as required in law.

    c. That the Hon. Trial court Magistrate erred in law and fact by failing to find that the prosecution never proved the age of the complainant as required in law.

d. That the Hon. Trial court Magistrate erred in law and fact by failing to find that the complainant in this case was an incredible witness whose evidence could not be used to base a conviction.

e. That the Hon. Trial court Magistrate erred in law and fact for failing to find that the trial court never established the age of the complainant as it forms the main element of defilement case.

f. That the Hon. Trial court Magistrate erred in law and fact in convicting the appellant based on the complainant's single evidence without giving the reason for her believing in the said complainant's testimony.

B. Background

3. Before the trial court, 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 offence were that on 26/11/2018 at[Particulars Withheld] in Thika district within Kiambu County, he intentionally and unlawfully penetrated the vagina of a girl, TWM aged 6 years old. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the Act with particulars that the appellant on 26/11/2018 at [Particulars Withheld] in Thika district at Kiambu County intentionally touched the vagina of TWM, a child aged 6 years with his penis.

4. The appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 6 witnesses.

C. Prosecution case

5. TWM testified as PW1. She stated that she knew A as they lived in the same estate. That she also knew the accused who she saw in their estate. That she was playing with PW2 when the accused carried her to his house which was near her home. That the accused then did bad manners to her and there was another young man in the house. That the accused removed all her clothes and removed his too and inserted his thing into her urinating thing while the other man just stayed there and looked at them. That he made her lie down and went on top of her and she felt pain at her urinating place. That the accused then told her to put on her clothes and she went home and told Regina, PW2's sister.

6. On cross-examination, she stated that she was playing with other children before the accused carried her. That the other children thought she was taken away by her father as they were playing hide and seek. That she took herself home after the incident where she found PW2 waiting for her but he later left with his mother. That police officers went in the morning as well as her brother. She testified that she had never seen the accused before and had never gone to his house. That she only reported the incident after she was asked.

7. PW 2 AM, a minor stated that PW1 was her friend and in 2018 he was at home playing with her. That he saw a man carrying PW1 to his house and locked the house. He rushed to PW1 home and found no one. On his way back he found Wambui, PW1 sister, and told her and she called her mother. There was a big case. PW1 later came out of the house. He identified the appellant as the one who carried PW1 on that day.

8. PW3 Beatrice Martha stated that she is a clinical Officer at Thika Level 5 and was testifying on behalf of Dr. Wanja and Dr. Wanyaga whom she had worked with for 3 and 7 years respectively and was familiar with their handwritings and signatures. She referred to the PRC form for TW filled on 28th November 2018. The report indicated that the offence occurred on 24th November 2018, there was no discharge or tear. Outer genitalia was swollen, hymen was broken, antibiotics and analgesics were administered,

pregnancy test was negative and no spermatozoa were seen. She also referred to the P3 form which indicated that the outer genitalia was swollen, hymen and vagina were swollen. Hymen was freshly torn and there was evidence of defilement.

9. PW4 NW stated that she is PW1 mother. That she was called by her husband and told that something had happened. She found him home with the police. That she asked the complainant what had happened and she told her that the appellant had gone to their gate, took her into his house and defiled her. That she told her "älinitoa nguo na akafanya tabia mbaya." She took the child to Thika Level 5 for examination. She also stated that the appellant lived nearby. During cross examination she stated that the incident took place on 26th November, 2018 and that the complainant was bathed by her sister.

10. PW5 David Mburu Muingai stated that on 28th November 2018 children were playing at his compound, when PW2 said that PW1 alifanyiwa tabia mbaya . That he called PW1 and asked if he could recognize who had done bad manners to her and if she knew where she had been taken. That PW1 said yes and led them to the house. He knocked the door and another boy opened the door. PW1 then stated that it was not the person who had opened the door. While leaving, they heard noises and went back to the house. They then found the appellant and another man on bed. PW1 identified the appellant who was then questioned. Many people came, and he was locked in the house until when the police arrived and arrested the appellant and the other young man.

11. PW6 was PC Prisca Kanini attached at Juja Police Station. She stated that she was assigned the instant case and found that TWM had been taken to Thika Level 5 and P3 and PRC forms were filled at the hospital. She reiterated PW1's statement of account leading to the accused's arrest who was then charged but his friend was released. She produced the birth certificate as PEXH3. she stated that she visited the scene and found that the houses in the estate look alike and there was no gate to the estate. That the offence occurred during the day around 1830hrs when PW1 was playing with her friends. That no identification parade was conducted. That PW1 was bathed on the day of the incident and her pants were not provided. That she did not report the incident on the day of the defilement and it was only reported three days later.

D. Defence Case

12. DW1, the appellant, in his defence, gave sworn evidence and denied that he ever committed the offence and claimed that he was in school at Mt. Kenya University at the material time. That he did not know the complainant before 26/11/2018 and he used to live in Kenol. That he was arrested on 28/11/2018 when he went to visit his friend Alex Mwangi in [Particulars Withheld]. That he went on 27/11/2018 and slept there. That he had an afternoon class the following day and he went with one Luke Clavin who lived with Alex. That at around noon, a man came with the complainant and identified him. That they were locked in the house and the police were called. That he had never seen the complainant before and there were many students in [Particulars Withheld] and the houses were familiar. That there were about five tenants in one plot and it was his first time there. He urged the court to acquit him and stated that he did not commit the offence.

13. In its judgment, the trial court found that there was evidence that sexual assault took place as per the PRC and P3 forms which recorded that the outer genitalia and hymen were swollen and vagina open, and that the hymen was freshly swollen. Further, that the contradiction in the dates in both documents was minor and the police reference number verified that the report was made to the police on 28/11/2018. That all the witnesses were consistent that the incident was known two days after it occurred in addition to PW1's account of what happened. That PW2's evidence was also consistent with the evidence of PW1 in that she was taken to a house within the same estate where she was defiled. That the inconsistencies did not go the root of the case and was not fatal to the prosecution evidence.

14. On the issue of identification, the trial court found that the incident occurred during the day, in a house. That the complainant described how the accused removed her clothes and proceeded to defile her. That she had an opportunity to identify the accused's friend but did not and instead waited and identified the real culprit. That she even testified that the accused' friend just watched the whole ordeal. The trial court thus concluded that the complainant had ample time to see the accused and was able to recognize him thus there was no need for an identification parade. That she also identified the accused when she led her father to the house where she was defiled and any identification parade conducted after the arrest would be a charade.

15. The trial court also found that there was nothing to show why the complainant would frame the accused for an offence he did not commit. That there was nothing to show there was a grudge between the accused and complainant's family and she had a hard time facing the accused during her evidence indicating the trauma she went through. The trial court was satisfied that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the accused of the main count and later sentenced him to twenty years imprisonment.

E. The Appeal

16. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and the sentence set aside. He relied on his written submissions dated 10th September 2024 while the respondent relied on their submissions dated 19th September 2024.

Appellant's Submissions

17. The appellant filed submissions dated 10/9/2024 in which he framed these issues: whether the prosecution had proven its case to the required standards and disregarding the appellant's defence; whether the trial court erred by relying on the testimonies of witnesses full of contradictions; and whether the trial court reached conclusions on facts and giving opinions not founded or supported by the evidence and imagined an offence where none existed.

18. On the first issue, it was submitted that the prosecution did not rebut the defence of alibi and the evidence was not tested, hence that the judgment contravened the law. That on penetration, the complainant said she could not recall what was inserted and also contradicted herself on the time of offence. That the medical evidence found that the victim's vagina had no discharge outer genitalia was swollen, hymen was broken and no spermatozoa was seen. That the clinical officer confirmed there was variance between the P3 and PRC forms as to the nature and extent of injuries on the hymen. It was submitted that if a child of 6 years was penetrated to the extent of breaking the hymen open, there would have been tears and discharge even two days after the incident. That penetration was thus not proven.

19. On identification, it was submitted that the complainant testified she did not know the appellant and had not met him before thus the appellant was a stranger to the victim and her family thus she could not be able to identify or recognize him as the offender. That the complainant testified that the appellant carried her on the back and it was night around 9 pm and could not have seen her captor clearly. That even PW2 could not recognize him as he thought the complainant was taken by her father. That the house where the appellant was arrested did not belong to him and he was only a first-time visitor on 27th November 2018 and was arrested the following day. That since there were two people in the house during arrest, an identification parade ought to have been carried out to ensure that any doubt was cleared. That the complainant was not present during the arrest thus there was no one to positively identify the accused for arrest.

20. On the second issue, it was submitted that there were incurable contradictions and inconsistencies. That the complainant did not remember what was inserted inside her, contradicted herself on time of the incident, there must have been other people in the estate at the time of the incident, that PW1 and PW2 contradicted on whether the complainant screamed and PW2 stated that he heard the screams and people came out yet no immediate arrest was made. That it did not make sense why PW1 told her sister and not her parents, or why Wambui did not tell her parents of the incident. That according to PW2, PW1's mother came at 7:00pm with five policemen who broke the door and found the complainant and the accused inside on 26/11/2018. That PW5 on the other hand testified that he was informed by A of the incident and asked PW1 to lead him to the house whether the accused was found. That PW1's mother also had a different version of the incident and all were guessed work.

21. That the inconsistencies in the P3 and PRC were also serious yet held to be trivial by the trial court. That the witnesses' testimonies were not credible and the court ought to have made a different decision.

22. On the third issue, it was submitted that the trial court was aware of the problematic nature of the evidence tendered by the medical officer but covered up the same. That the court dismissed the need for an identification parade despite the fact that there were two people in the house and further addressed the issue of grudges though it was not raised by either party. That the trial court found that the outer genitalia was swollen, vagina swollen and hymen freshly torn which was a misrepresentation of what was contained in the PRC form which indicated that the hymen was swollen but not torn. Those crucial witnesses such as PW1's sister Priscilla Wambui and Joakim Mungai, her brother, were not called to testify yet were bearers of crucial information.

23. This Court was thus urged to allow the appeal, quash the conviction and set aside the sentence.

Respondent's Submissions

24. The respondent's submissions were dated 19/9/2024. The respondent opposed the appeal in its entirety on grounds that the prosecution established and proved its case beyond reasonable doubt. That the ingredients of defilement namely; age, penetration and identification of accused were all proven.

25. On age, it was submitted that PW6 stated that the complainant was aged 6 years and produced her birth certificate as PEXH3 thus the complainant fell within the bracket defined by Section 8(2) of the *Sexual Offences Act*. It was thus submitted that the prosecution proved age of the complainant.

26. On penetration, it was submitted that according to PW1, the appellant did bad manners to her. That PW3, a clinical officer, produced the PRC and P3 forms that indicated that the complainant was defiled and that her genitalia was swollen, the hymen was freshly torn and there was evidence of defilement. It was thus submitted that the evidence produced clearly proved the element of penetration to the required standards.

27. As regards identity, it was submitted that the evidence produced during the trial pointed that the appellant was the person who defiled the victim and there was no possibility of mistaken identity as the appellant was known to the victim.

28. That the appellant's defense was analyzed and considered by the trial court but the prosecution's case was overwhelming against him. That all the prosecution witnesses were consistent and corroborated each other.

29. As regards the sentence, it was submitted that the trial court considered the appellant's mitigation and report and sentenced him for twenty years imprisonment for an offence that carries a life imprisonment

thus the trial court was very lenient. It was thus submitted that the sentence was legal and appropriate, however, this court was urged to enhance the same to life imprisonment. This court was urged to dismiss the appeal as the prosecution had discharged its burden and its evidence was not in any way discredited by the defence during cross-examination.

F. Analysis and Determination

30. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that: -

> " the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

31. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination: -

    a. Whether the offence of defilement was proved and if the appellant's defence was ignored;

    b. Whether there were contradictions and inconsistencies in the prosecution case; and

    c. Whether the sentence was harsh and excessive.

Whether the offence of defilement was proved and whether the defence was ignored

32. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Act. In the case of George Opondo Olunga v Republic (2016) eKLR the ingredients for the offence of defilement were set out as: proof of age of the victim; proof of penetration or indecent act; and identification of the perpetrator.

33. On the issue of age, the charge sheet indicated that the minor was 6 years. PW6 produced the minor's birth certificate as Exhibit 3 and the same is evidence that the minor was 6 years old at the time of the alleged incident. 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."

34. I am thus satisfied that the age of the victim was sufficiently proved before the trial court.

35. On penetration, Section 2 of the *Sexual Offences Act* define penetration as: "The partial or complete insertion of the genital organ of a person into the genital organs of another person." The Court of Appeal in Chila v. Republic (1967) E.A 722 articulated this position and held that: -

> " The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

36. PW1 testified that the appellant carried her and took her to his house which is near her home and he did bad manners to her while his friend watched. That he removed all her clothes and also removed his clothes and he inserted his urinating thing into her urinating thing. That he made her lie down and he went on top of her and she felt pain on her urinating thing. That he later asked her to put on her clothes and she went home and told Regina, PW2's sister. She maintained this main narrative even during cross-examination. I do take judicial notice that the trial court noted that PW1 was having difficulties dissembling the ordeal. I have no doubt that a court properly directly, as the trial court herein, will have no difficult discerning that what PW1 was narrating was an act of sexual penetration on her by the appellant. That evidence alone, unless satisfactorily rebutted is proof of penetration.

37. There was also the medical evidence on record given by PW3, the clinical officer. She produced the PRC and P# forms which all confirmed that there was penetration and that the minor was defiled. Though there was a contradiction on the date of the alleged incidence between the P3 and PRC, I do find that PW3 gave a satisfactory explanation being that the PRC was the first contact with the patient and the information on the P3 was derived from the PRC. I find that the contradiction is four dates apart and according to the explanation, the date indicated in the PRC being 26/11/2018 takes precedence. I do agree with the trial court that the report at the station was made on 28/11/2018 as per the OB number and that all the prosecution witnesses were consistent that the offence came to light two days after it occurred being 26/11/2018 as indicated in the charge sheet and PRC.

38. As to the alleged contradiction on whether the hymen was freshly torn as indicated in the P3 form or swollen as indicated in the PRC form, I do note that it is not material that a hymen must be torn or broken to proof penetration. Noting that both documents indicate that there was some sort of trauma on the hymen, and further noting that the minor's vagina was similarly swollen as well as the vagina, I do find that there was evidence of defilement. I do accept PW3's testimony that the swelling was caused by trauma due to a blunt object. This together with the minor's testimony on how the incident occurred proves that there was penetration.

39. Though no spermatozoa was seen, I do note that penetration must not necessarily be complete, and it is not always that the offender will complete the act of defilement so as to leave spermatozoa. I also do note that the offence was discovered two days later and by then the minor had already been bathed and it is no surprise that no spermatozoa was seen.

40. Consequently, I agree with the trial court that penetration was proven. There was sufficient evidence from PW1, which was credible and the trial court never adjudged her to be untrustworthy, contrary to the allegations of the appellant before this court. Her testimony was corroborated by the other prosecution witnesses, and particularly the Medical evidence by the clinical officer, PW3. I refer to the

case of Bassita Hussein v Uganda, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

41. On identification, I am satisfied that the complainant positively identified the appellant as the offender. PW5, the minor's father, testified that on 28/11/2018 around noon, children were playing in his compound when his son Mungai called him after PW2 said that 'T*y alifanyiwa tabia mbaya'. That he then called the minor and asked if she could recognize who had done bad manners to her and she said yes. That the minor then led him to the house and when they knocked, the door was opened by another boy and the minor stated that it was not the person who opened the door that had defiled her. That as they were leaving, they heard noises in the house and went back whereby they found the appellant and another young man on the bed. That the minor identified the appellant as the offender and other neighbors joined and turned violent towards the appellant and the other man. That the two were locked in the house and the police officers arrived at the scene and arrested them.

42. I do agree with the trial court that the minor had an opportunity to identify someone else but she did not, and instead waited until she could identify the appellant as the real offender. From her own account, the minor appeared to remember details of the house and of the incident. She testified that the house was locked and the appellant unlocked it. She recalled that there was another man who was just watching the appellant as he undressed her and that there was no TV in the house, only a radio. I do also note that she took herself home after the incident and yet she was still able to remember the exact house where the incident happened.

43. Indeed, PW6, the police officer, testified that she visited the scene and that the houses in the estate looked alike and they were over five houses around where the incident happened. Despite the striking similarity and number of houses, the minor was able to take her father directly to the house where the incident happened. I have nothing to cast doubt on her identification of the appellant. Though the appellant strongly submitted that an identification parade ought to have occurred, I do agree with the trial court that the arrest only occurred after the minor positively identified the accused and there was no need to conduct an identification parade. Flowing from the foregoing I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court.

44. Turning to the appellant's defence, I find nothing that cast doubt to the prosecution's case. Though the appellant claimed to have been in school on 26/11/2018 when the offence occurred, hence raising a defence of alibi, I find that this was correctly dismissed by the trial court. It is trite law that once an alibi defence is raised, the onus is on the prosecution to rebut and/or disapprove the same. However, it is required that the same be raised early enough so as to accord the prosecution time to rebut the same. However, where the same is raised later in the proceedings when the prosecution has no chance to rebut, the same is considered alongside the totality of the prosecution evidence already on record.

45. In this case, the appellant raised his alibi defence, that he was in school, during his defence. As the prosecution had closed its case, the onus fell on the court to analysis that defence alongside the prosecution evidence already on record. While, he was under no obligation to prove or disapprove his alibi defence, the same was weakened by the strong prosecution evidence that had placed him at the scene of crime on 26/11/2018 vide the testimonies of PW1 and PW2. PW1 testified that it was the appellant who took her away when she was playing with her friends and he defiled her. PW2 saw the appellant taking away the minor and he reported the incident the same day to his mother and to the minor's sister. The appellant's alibi defence was thus dislodged.

46. The second on contradictions and inconsistencies has been addressed in the analysis of the first issue above and I find no reason to rehash their consideration. I have stated that the alleged contradictions were not material as to prejudice the appellant in comprehending and understanding the charge(s) he was facing so as to mount a defence.

47. For those reasons, the trial court's conviction is hereby upheld.

Whether the sentence was harsh and excessive

48. Turning to the issue of sentence, Section 8 (2) of The Act provides that: 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. The appellant was sentenced to 20 years imprisonment. This is clearly against the mandatory life sentence imposed by the Act.

49. The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) overturned the decision of the Court of Appeal which had found Section 8 of the Act to be unconstitutional for prescribing a mandatory minimum sentence upon conviction. The Supreme Court upheld the constitutionality of the said law and this Court is bound by such precedent. Consequently, a person convicted contrary to section 8(2) of the act shall ordinarily be sentenced to life imprisonment.

50. The question that follows is whether this Court should accede to the respondent's invitation to enhance the sentence to life imprisonment. I have perused the record and there is clearly no cross-appeal filed by the respondent on sentence and more importantly, the appellant was never given notice of enhancement of his sentence by the respondent.

51. Consequently, given lack of Enhancement Notice to the appellant, I will not interfere with the sentence of the trial court.

52. The upshot is that the appeal is without merit and the same is dismissed.

53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant