Silibwa v Republic (Criminal Appeal E035 of 2024)
[2025] KEHC 12804 (KLR) (17 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E035 OF 2024

JN KAMAU, J

SEPTEMBER 17, 2025

BETWEEN

BOAZ SILIBWA ALIAS BOY .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of Hon M. M. Gituma (SRM) delivered at Vihiga in the Senior Principal Magistrate's Court in Sexual Offence Case No E058 of 2020 on 18th October 2022)

JUDGMENT

INTRODUCTION

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. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The Learned Trial Magistrate, Hon. M. M. Gituma (SRM) convicted him of the main charge. Hon S. O. Ongeri (SPM) sentenced him to twenty-five (25) years imprisonment after he took over the matter from the said Learned Trial Magistrate.

3. Being dissatisfied with the said Judgement, on 7th October 2024, he lodged an appeal herein. His Petition of Appeal was dated 3rd October 2024. He set out four (4) grounds of appeal. In his Written Submissions dated 18th November 2024 and filed on 19th November 2024, he set out six (6) Supplementary Grounds of Appeal. He combined the said grounds into four (4) Supplementary Grounds of Appeal in his Written Submissions.

4. The Respondents Written Submissions were dated 16th December 2024 and filed on 17th December 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-

   a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

   b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof of Prosecution's Case

9. Grounds of Appeal No (1), (2), (3) and (4) of the Petition of Appeal and Supplementary Grounds of Appeal No (1), (2), (3), (4) and (5) were dealt with under this head as they were all related.

10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Appellant did not submit on this issue. On the other hand, the Respondent submitted that the Charge Sheet indicated that the Complainant, MK, hereinafter referred to as "PW 1" was nine (9) years of age.

13. It relied on the case of Musyoki Mwakavi vs Republic[2014]eKLR where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim's parents and/or guardians, observation or common sense.

14. It contended that PW 1's father, SO (hereinafter referred to as "PW 2") testified that PW 1 was born on 15th March 2011 and was nine (9) years at the material time of the incident as was proven by No XXX PC Rebecca Jeruto (hereinafter referred to as "PW 4") who produced PW 1's Birth Notification.

It pointed out that the Appellant did not object to the production of the said Birth Notification and, therefore, the ingredient of age was proved satisfactorily.

15. This court had due regard to the case of Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It could also be proved by the victim's parents or guardian and observation or common sense as was held in the case of Musyoki Mwakavi vs Republic (Supra).

16. As was submitted by the Respondent herein, the Birth Notification that PW 4 produced in court confirmed that PW 1 was born on 15th March 2011. In view of the fact that the incident took place on 20th September 2020, PW 1 was nine (9) years old at the material time. As the Appellant did not challenge the production of the aforesaid Birth Notification and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven using medical evidence and that she was a child at all material times.

B. Identification

17. The Appellant placed reliance on the case of Simiyu & Another vs Republic (2005) 1 KLR 192 where it was held that there was no better mode of identification than by name and that when a name was not given at the first opportunity, then there was a challenge on the quality of identification and a great danger on mistaken identity. He argued that PW 1 did not mention his name or report at the earliest opportunity to the police and to PW 2 that the second person who defiled her was their neighbour who stayed behind the Church. He submitted that such subsequent evidence was an afterthought and/or later embellishment.

18. To buttress his point, he relied on the case of Terrekali & Another vs Rex (1952) EACA where it was held that the evidence of first report by a complainant to a person in authority was important as it provided a good test by which the truth and accuracy of subsequent statement could be gauged and a safeguard against later embellishment or made up case.

19. He contended that if PW 1 had named her defiler, then there would have been no need for PW 2 to guess about the five (5) people in the area who searched for pasture and grazed their cows. He asserted that PW 1 did not give the description of the suspects. He therefore averred that if he was the perpetrator, then they could have gone behind the Church and arrested him since she claimed to know him and where he stayed. He added that her identification of her perpetrator was based on suspicions from PW 2's speculations and influence yet he was not at the scene of crime and therefore, the same could not stand the test of first report.

20. He further submitted that a criminal conviction should not be based on suspicion, however strong, as was held in the case of Sawe vs Republic (2003)(sic). He invited the court to acknowledge that friends and close relatives made identification mistakes even in broad daylight and hence, dock identification was worthless without a lawful conducted identification parade. He added that the identification that was done at his home was not proper since it did not allow PW 1 the opportunity to identify him among people with similar appearance for the correctness of identification.

21. He also cited the case of Peter Mwangi vs Republic CA No 173 of 1985 (eKLR citation not given) where it was held that an identification parade was to test the correctness of a witness identification to the suspect or accused at the time of the alleged offence.

22. He was emphatic that in the instant case, it was unclear if PW 1 recognised her attacker and hence, the police officers were unfair to him for failing to conduct identification parade which was detrimental to justice pursuant to Article 50(4) of the *Constitution* of Kenya, 2010.

23. He asserted that PW 1 and PW 2's testimony raised questions as to when did PW 2 realised that his daughter was bleeding and who among Ombula or Omukuni beat PW 1. He was emphatic that he was not at the scene of crime but was in fact at Church.

24. On its part, the Respondent rehashed the evidence that was adduced by the Prosecution witnesses and submitted that PW 1 told PW 2 that it was the Appellant who had defiled her. It also submitted that PW 1 identified him to the police officers. It contended that the Appellant was PW 1's neighbour and was therefore someone who well- known to her and could not have been mistaken as to his identity.

25. It pointed out that PW 1's evidence was one of recognition, which courts had held to be more reliable and weightier than that of identification of a stranger as was held in the case of Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568. It was emphatic that there was proper identification as there was prior knowledge of the Appellant.

26. A perusal of the proceedings showed that on 20th September 2020, PW 1 had gone to fetch firewood at around 1.00 pm when one Ombula caned her. She pointed at the Appellant in the dock and explained how he held her hand, took her to the trees, took off her white dress and a pant, removed his trouser, shirt and pant and did "tabia mbaya."

27. It was her further testimony that she felt pain on her stomach and pointed at her private parts. When the Appellant left, she wore her clothes and went home with blood coming out from her private parts. PW 2 took her to hospital and reported the matter to the police. On cross-examination, she reiterated that Ombula beat her when she was fetching firewood and that was before the Appellant arrived.

28. PW 2 confirmed that both Omukuni and the Appellant were summoned and that PW 1 identified Omukuni as the person who beat her while the Appellant was the one who defiled her.

29. It was evident that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

30. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

31. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

32. Just as the Learned Trial Magistrate had found, there were no contradictions as to who actually defiled PW 1 as she confirmed that it was the Appellant who defiled her while the person she referred to as Ombula and referred to as Omukuni by PW 2 beat her. PW 1 told PW 2 that it was the Appellant who defiled her. When she was accompanied by PW 2 and police officers to the Appellant's house, she positively identified him as the person who defiled her.

33. There was no need for an identification parade as argued by the Appellant because the incident occurred during the day when lighting conditions were favourable for positive identification. There could not, therefore, have been any possibility of a mistaken identity because he was PW 1's neighbour. In fact, in his sworn evidence, the Appellant confirmed that he hailed from the same Village with her and that he used to see her in the Village.

34. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition and that PW 1 positively identified the Appellant herein as the perpetrator of the offence he was charged with.

C. Penetration

35. The Appellant submitted that the Trial Court failed to appreciate his defence was meritorious. On its part, the Respondent cited Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed vs Republic[2020]eKLR where it was held that in order to prove penetration, the key evidence relied upon by the courts in rape and defilement cases was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of the Clinical Officer, Paul Muturi (hereinafter referred to as "PW 3") corroborated PW 1's evidence and hence, penetration was proved.

36. It added that in sexual offences cases the victim was normally the only witness as the offence was committed in secrecy and the trial court warned itself of such evidence.

37. It was its contention that the contradictions and inconsistencies raised by the Appellant did not go to the core of the case and that the variance in itself did not in any manner distort or dislodge the case. It urged the court to consider the evidence adduced as a whole and not selectively. It placed reliance on the case of S.O.O vs Republic[2018]eKLR where the court reiterated the position held in Dickson Elia Nsamba Shapwata & Another vs Republic Cr App No 92 of 2007 where the Court of Appeal in Tanzania addressed the issue of discrepancies in evidence and concluded that the court had to decide whether the inconsistencies were minor or whether they go to the root of the matter.

38. It pointed out that pursuant to Section 211 of the Criminal Procedure Code, the Appellant chose to give a sworn statement and did not call any witness. It added that he denied the offence and gave an alibi defence claiming he was in Church on that day.

39. It asserted that courts had held that the defence of alibi had to be raised at the earliest opportunity for it to be tested by the prosecution as was held in the case of Isaiah Sawala Alias Shady vs Republic[2021]eKLR. It was emphatic that the Appellant's defence was a mere denial and had no probative value as it did not rebut the evidence of the Prosecution. It added that his claim that the court did not consider his defence was without merit.

40. PW 3 observed that PW 1's hymen was missing, the labia majora minora was swollen and she was bleeding from her vagina. He confirmed that the probable weapon was a penis. He concluded that she had been defiled. He produced the P3 Form, Post-Rape Care (PRC) Form and treatment notes as exhibits during trial.

41. In his defence, the Appellant testified that he was in Church at the material day and time. In ascertaining whether the Appellant's defence of alibi had value, this court had due regard to the definition of "alibi" in the Black's Law Dictionary, 10th Edition. It was defined as:-

> " A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".

42. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of Victor Mwendwa Mulinge vs Republic [2014] eKLR.

43. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:-

> " If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

44. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant's alibi evidence to have been watertight enough to have weakened the inference of guilt on his part. This is because the Prosecution had demonstrated the elements of the offence of defilement as PW 1's evidence was corroborated by the scientific evidence of PW 3.

45. This court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material date as there was proof of defilement as PW 1 testified.

46. In the premises foregoing, Grounds of Appeal No (1), (2), (3) and (4) of the Petition of Appeal and Supplementary Grounds of Appeal No (1), (2), (3), (4) and (5) were, therefore, not merited and the same be and are hereby dismissed.

II. Sentencing

47. Supplementary Grounds of Appeal No 6 was dealt with under this head.

48. The Appellant submitted that the Trial Court erred in not ordering that his sentence be computed from the time of his arrest pursuant to the provision in Section 333(2) of the Criminal Procedure Code and Paragraph 5.1.21 of the Sentencing Policy Guidelines.

49. He pointed out that he was arrested on 23rd September 2020 and was sentenced on 10th November 2022 and that his sentence was said to run from the date of sentence.

50. On its part, the Respondent referred to Section 333(2) of the Criminal Procedure Code and placed reliance on the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR where it was held that courts were obliged to take into account the period that the accused spent in custody before they were sentenced. It pointed out that the Trial Court was silent on the said Section 333(2) of the Criminal Procedure Code.

51. It, however, asserted that the sentence meted out to the Appellant herein was illegal and it was therefore mischievous of him to seek the benefit of the said Section when he was already enjoying a lenient sentence. It urged the court to enhance the Appellant's sentence to life imprisonment.

52. Notably, the Appellant was convicted and sentenced under Section 8(2) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). The said Section 8(2) of the *Sexual Offences 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."

53. This court noted that Trial Court sentenced the Applicant to twenty-five (25) years imprisonment instead of life imprisonment. This court could not fault the Trial Court for having sentenced him to a lesser sentence than was prescribed in the *Sexual Offences Act* as the jurisprudence at the time he was sentenced allowed courts to exercise discretion during sentencing.

54. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

55. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

56. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

57. This court was not persuaded that is should enhance the sentence that was meted out to the Appellant herein to life imprisonment as the Respondent had submitted as the it (the Respondent) did not put the Appellant on notice that it would be seeking an enhancement of the sentence which would have allowed him to make an informed decision as to whether he would have wished to proceed with his appeal or if he would have wished to abandon the same. Enhancing his sentence without giving him the opportunity to respond would be contrary to the principles of fair trial provided in Article 50 of the *Constitution* of Kenya.

58. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was ongoing as provided in Section 333(2) of the Criminal Procedure Code. The said Section 333(2) of the Criminal Procedure Code stipulates that:

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court)".

59. This duty is also contained in Clause 4.8.20 of the Judiciary Sentencing Policy Guidelines where it is provided that: -

> "The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...
>
> (ix) Time already spent in prison by the convict..."

60. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic (Supra).

61. The Charge Sheet herein showed that the Appellant herein was arrested on 23rd September 2020. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 10th November 2022.

62. A reading of the Trial Court's Sentence showed that it did not take into account the time that he spent in remand before sentencing him. It was irrespective that he was serving a lesser sentence than what was prescribed under the law. This court explained hereinabove that until 12th July 2024, the jurisprudence was to exercise discretion in meting out sentences under the *Sexual Offences Act*.

63. Section 333(2) of the Criminal Procedure Code was not conditional on the legality or otherwise of the sentence as it was couched in mandatory terms. This court was, therefore, persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

64. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 3rd October 2024 and filed on 7th October 2024 and his Supplementary Grounds of Appeal dated 18th November 2024 and filed on 19th November 2024 were not merited save for his ground pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). His conviction and sentence be and are hereby upheld as they were both safe.

65. For avoidance of doubt it is hereby ordered and directed that the period that the Appellant spent in custody between 23rd September 2020 and 9th November 2022 be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

66. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 17TH DAY OF SEPTEMBER 2025

J. KAMAU

JUDGE