Mwaura v Republic (Criminal Appeal 54 of 2019)
[2025] KECA 1487 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KECA 1487 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 54 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

SEPTEMBER 19, 2025

BETWEEN

EVANS MWAURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Kapenguria (R.N. Sitati, J.) dated 27th January 2018 in HCCRA No. 16 of 2018)

JUDGMENT

1. Evans Mwaura, the appellant, is before us on a second appeal against his conviction on the charge of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the charge stated that on 12th September 2017 at (particulars redacted) the appellant penetrated the vagina of M.K., a 5-year old child with his penis. Arising from the same facts, the appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act*. The appellant entered a plea of not guilty but after a full trial he was found guilty, convicted and sentenced to life imprisonment on the main count. The conviction and sentence were affirmed by the High Court, prompting the present appeal.

2. To do justice to this appeal, it is proper that we rehash the evidence adduced at the trial. In a nutshell, L.M. (PW1) testified that on 14th September 2017, at approximately 4:00 p.m., her daughter, M.K. (PW2), went missing from her usual play area near her stall at the market. M.K. reappeared after about two hours. She assumed she had been playing. When the child came from school the following day, PW1 noticed that she was walking with difficulty. It was while washing the child's clothes that she noticed that the inner garment was slimy. PW2 asked the child what the matter was, but the child was hesitant to speak. After striking her twice with a stick, the child informed her that the appellant, who also operated a stall nearby, had given her 10 shillings, taken her to a maize farm, did "bad manners" to her before cautioning her against telling her (PW1) about the incident. At that juncture, PW1

examined the child's private parts and observed swelling. She then took the child to the hospital and reported the matter to the police.

3. In her testimony, M.K. (PW2) recounted how the appellant, a man she recognized as the operator of a stall adjacent to her mother's, had given her ten shillings before taking her to a house located in a nearby maize farm in the Mathare area, where he did "bad manners" to her. The appellant then cautioned her against disclosing the incident to anyone. M.K. also stated that she bled from her private parts.

4. At Kapenguria District Hospital, M.K. was seen Kennedy Kosgei Korit (PW3), a clinical officer, who upon examining her found tenderness in her inner thighs, lacerations on both labia, inflammation of the labia minora, and a broken hymen. He also observed a discharge. Urine analysis disclosed red blood cells and pus cells.

5. Police Constable Peter Mureithi (PW4) from Kapenguria Police Station gave an account of the investigation process.

6. When the appellant was placed on his defence, he denied committing the offence and gave an account of the events of 14th September 2017 at about 1.00 p.m. when he was arrested by police officers for allegedly stealing a motorbike, only to be later charged with defilement.

7. When this appeal came up for hearing on 7th May 2025, the appellant appeared in person, while learned prosecution counsel Mr. Majale appeared for the respondent. Both the appellant and Mr. Majale opted to rely on their filed written submissions.

8. In his undated submissions, the appellant referred to the holding in Okethi Okale & Others vs. Republic [1965] EA 555 as cited in John Muriithi Nyagah vs. Republic [2014] KECA 506 (KLR) to urge that the court should only form a conclusion based on the evidence on record and not any other fanciful theories. Having so stated, the appellant argued that the evidence on record was insufficient to prove penetration and that PW2 did not provide evidence of penetration that could have been corroborated by the medical evidence. He submitted that the language used by PW2 was not conclusive as to what happened. According to the appellant, PW2 having disclosed his name after being assaulted, her evidence could not be relied upon as it was obtained in contravention of Article 50(4) of *the Constitution*. Contending that the charge sheet was defective, the appellant submitted that the omission of the word "unlawfully" from the particulars of the offence rendered the charge defective. Finally, the appellant argued that he was not informed of his right to legal representation, and therefore, the trial was not fair. He urged us to allow the appeal, quash the conviction and set aside the sentence.

9. Opposing the appeal, Mr. Majale, through the submissions dated 6th May 2025, urged that penetration was proved to the required standards. Regarding the appellant's claim that the charge was defective and that his right to legal representation was violated, counsel relied on Alphayo Gombe Okello vs. Republic [2010] eKLR to urge that issues not raised in the first appeal should not be determined on a second appeal. It was therefore counsel's submission that the two issues were not properly before us for determination and we should not entertain them. Counsel nevertheless submitted that the charge was clear and the appellant understood the charge he was facing, and that penetration was proved as can be seen from the analysis of the first appellate court. Additionally, counsel referred to David Njoroge Macharia vs. Republic [2011] eKLR to argue that the appellant had failed to establish that he suffered any substantial injustice by not being informed of his right to legal representation. Ultimately, Mr. Majale urged us to dismiss the appeal.

10. Before delving into this appeal, it is imperative that we restate our mandate on second appeals. Our jurisdiction, which the appellant is invoking, stems from section 361 (1) of the Criminal Procedure Code and is focused on matters of law and not facts, as it is presumed that matters of fact have been

settled by the two courts below. Our interference with factual conclusions is warranted only when the two courts below consider irrelevant facts, neglect relevant ones, or clearly err in their judgment-see Dzombo Mataza vs. Republic [2014] KECA 831 (KLR). Additionally, as was held by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR), we must limit our determination to issues that were raised before the first appellate court.

11. With that in mind, we have reviewed the record and appreciated the tone and significance of submissions and authorities of the parties. We note that the question of infringement of rights to fair trial and the constitutionality of the sentence were not raised before the first appellate court. The two issues are therefore not available for our determination in this appeal. What therefore arises for our determination is whether the offence of defilement was proved.

12. In the supplementary grounds of appeal, the appellant raises three grounds, to wit, that penetration was not proved; that the charge was defective; and that his rights to a fair trial as guaranteed by Articles 50(2)(b) and (g) of *the Constitution* were infringed. We have reviewed the original grounds of appeal and the supplementary grounds of appeal before the first appellate court, and we note that the issues of a defective charge and the violation of rights under Articles 50(2)(b) and (g) of *the Constitution* were never raised. That being the case, as was pronounced by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (supra), we do not have the authority to determine these issues. Therefore, the only issue alive for our determination in the supplementary grounds of appeal is whether penetration was proved. The issue ties up with the question we have already identified for our consideration as to whether the offence was proved.

13. In a charge of defilement, the prosecution is required to prove that the victim was a child, was penetrated and the accused person was the perpetrator. Under section 2 of the *Sexual Offences Act*, any partial or complete insertion of the genital organs of a person into the genital organs of another person qualifies as penetration. The principles surrounding proof of penetration in sexual offences were aptly captured by the Supreme Court of Uganda in Bassita vs. Uganda SC Criminal Appeal No 35 of 1995 as cited with approval by the Court in Muguanah vs. Republic [2023] KECA 828 (KLR) thus:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.
>
> "For evidence to be capable of being corroborated it must:
>
> a. Be relevant and admissible Scafriot [1978] QB 1016.
>
> b. Be credible DPP vs. Kilbourne [1973] AC 729
>
> c. Be independent, that is emanating from a source other than the witness requiring to be corroborated Whitehead J IKB 99
>
> d. Implicate the accused."

14. In this case, the evidence of PW2 was that the appellant took her to a house in a maize farm, laid her on a bed and did "bad manners" to her. She testified that she felt intense pain during the ordeal and bled from her private parts. Even though the appellant contends that the use of the phrase "bad manners"

was insufficient to prove penetration, we find the description by the complainant sufficient to establish how the sexual offence was carried out. In so finding, we note that the "bad manners" talked of by PW2 resulted in her bleeding from her private parts. Was this evidence corroborated? We answer in the affirmative. PW1 testified that she noticed the child walk with a bit of difficulty and that her inner garment was slimy. PW3 on his part noted lacerations on both labia minora and labia majora, and that the hymen was perforated. He also noted pus cells and red blood cells in the complainant's urine as well as a discharge. He concluded that all these were as a result of defilement. This set of evidence clearly removes the doubt as to whether there was penetration of the complainant. We therefore do not find merit in the appellant's contention that penetration was not proved.

15. The other contention by the appellant was that the evidence on his identity as the perpetrator was not foolproof. He submitted that the complainant did not know him prior to giving her evidence and that it was PW1 who informed her of his name. In this regard, the proviso to section 124 of the *Evidence Act* states:

> " Provided 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim was talking the truth."

16. Section 146(1) of the *Evidence Act* on the other hand compliments section 124 above and provides that:

> " 146(1) Witnesses shall first be examined in chief, then if the adverse party so desires, cross-examined, then if the party, calling them so desire, re- examined."

17. In John Mutua Munyoki vs. Republic [2017] KECA 376 (KLR), the Court appreciated the complementary nature of the two provisions, albeit indirectly, thus:

> "In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eyewitness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully."

18. In this case, the complainant, although of tender years, was subjected to cross-examination. In her cross-examination, she was adamant that she informed her mother about what the appellant had done to her. The record shows that although PW2 did not know the appellant by name, she referred to him as a person who had a stall next to that of her mother at the market. PW1 also confirmed that the appellant had his stall next to hers. In cross- examining PW1, the appellant spoke of an alleged sexual affair between him and PW1, but PW1 denied it. However, in his defence, the appellant simply identified himself as a motorcycle operator without responding to the evidence that he owned a stall at the market. We are therefore satisfied that the evidence of PW2 in regard to the description and identity of the appellant was without doubt. The complainant knew and recognized the appellant as the person who committed the act against her.

19. There was also a contention by the appellant that the evidence of PW2 was irregularly obtained and that the same offended Article 50(4) of *the Constitution*. This issue was never addressed before the trial court or the first appellate court. We will only add that since we did not observe the witnesses testify, we cannot speak to their demeanour. Furthermore, we note that the appellant did not challenge the admissibility of PW2's evidence before the trial court, nor did he raise this issue during cross-

examination. In our view, the argument is but an afterthought without any weight to impeach the evidence of PW2, and we would not find any merit in this ground either way.

20. In the end, we are satisfied that the charge of defilement was proved against the appellant. Consequently, this appeal lacks merit and is dismissed.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF SEPTEMBER 2025.

J. MATIVO

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar