Hamisi v Republic (Criminal Appeal E041 of 2022)
[2025] KEHC 13425 (KLR) (23 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E041 OF 2022

JN NJAGI, J

SEPTEMBER 23, 2025

BETWEEN

MOHAMED JILLO HAMISI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.B. Kabanga, SRM, in Hola Principal Magistrate's Court Sexual Offence Case No. E025 of 2021 delivered on 7/7/2022)

JUDGMENT

1. The Appellant was convicted for 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 the 8th day of November, 2021 at around 1500hrs at Tana North sub-county within Tana River County he intentionally caused his penis to penetrate the vagina of W.H.D (herein referred to as the complainant), a child aged 10 years.
2. The appellant was sentenced to serve life imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal.
3. The grounds of appeal as per the appellant`s memorandum of appeal are that;
    1. That, the trial court erred in law and fact by failing to attach documentary evidence supporting the prosecution case in the proceedings, contrary to Section 62 of the Appellate Jurisdiction.
    2. That, the trial court erred in law and fact by failing to see that crucial identification evidence was lacking.
    3. That, the trial court erred in law and fact by failing to consider my mitigation, in contravention of section 216 and 329 of the Criminal Procedure Code.

4. That, the trial court erred in law and fact by misconstruing the relevant penal law (Section 8(2)) as a mandatory provision.

4. The case for the prosecution was that the complainant who was PW1 in the case was at the material time aged 10 years and was on that day herding livestock in the forest with her younger brother, PW5. That the appellant found them in the forest. He got hold of the complainant by her hand. When she wanted to scream, he stuffed her scarf into her mouth. PW5 ran away from the place. The appellant then stripped her of her inner pant and removed his clothes. He lay on top of her and inserted his penis into her vagina. He did it three times and he then escaped. She walked to the road. She was in a lot of pain and fell down as she was unable to walk further.

5. Meanwhile the complainant`s brother PW5 went and informed HH PW2. PW2 was taken to the scene on a motor cycle by AA PW4. They found the complainant a distance away from the scene. She was bleeding from her vagina and could hardly walk. PW2 checked her and found her with tears on her vagina. They took her to the elders. PW4 went to the scene with the elders. They found it disturbed. On the following morning the child was taken to Bura police station. The case was investigated by PC Chikanda PW7. He escorted the girl to Bura sub county hospital where she was examined by a clinical officer PW6. He found her walking with difficulty and with fresh blood all over her clothes. She was bleeding from the vagina with tears on the same together with freshly broken hymen. The clinical officer assessed her age at 10 years. He found her badly injured and they referred her for further treatment. She underwent fistula surgery operation. The clinical officer made an opinion that she had been defiled. He completed a Post Rape Care form and a P3form to that end.

6. It was the evidence of HD PW3 he was grazing goats with the complainant and a small boy. That he left them grazing and went home. He was later informed by his wife that the complainant had been defiled. That on the following day they reported the incident to the police. The complainant then went with the police to where the appellant was and identified him. He was arrested.

7. PC Chikanda PW7 said that he learnt of the arrest of the appellant after he was identified by the victim. He charged him with the offence.

8. During the hearing of the case in court, the clinical officer PW6 produced the P3 form, the Post Rape Care form, the treatment notes and the age assessment report as exhibits, P. Exh. I, 2, 3 and 5 respectively. The investigating officer produced as exhibit the blood stained clothes that the complainant was wearing at the time of the incident, P.Exh. 4(a) and (b).

9. When placed to his defence, the appellant gave an alibi defence that he was at the material time in Garissa where he was then working. He produced a bus ticket receipt from T. Coach Express showing that he travelled to Garissa on 5/11/2021. He produced another one showing that he travelled back to Bura by Muhsin Express bus on 10/11/2021. He was then arrested and accused of defiling a girl. He said that he never knew the girl before the date of the arrest. He however admitted in cross-examination that at the time he was arrested, the girl pointed at him and he was arrested.

10. The appellant called one witness, SH, DW2 who said that the appellant is his friend for many years. That on 10/11/2021 the appellant had travelled from Garissa where he works. He gave him work to construct a toilet. That on 12/11/2021 he was inside his house and the appellant was working outside. Policemen entered his house in the company of a lady and arrested him. The lady was asked whether he was the one and she confirmed that he was the one. That as they went out of the house, the appellant was coming into the house to see what the police were doing inside the house. They changed and said that the appellant is the one who had defiled the complainant herein. The appellant was arrested.

11. Upon the appellant producing the two bus tickets, the prosecution made an application to the court for them to adduce further evidence in the case to counter the evidence that the appellant had travelled by the two buses on the dates indicated in the tickets. Mohamed Maalim PW8 testified that he works with T. Coach bus company as a ticketing attendant and a supervisor. That the ticket purported to have been issued by T. Coach was not issued by them though the document was from their company. That he was familiar with the handwriting of all their ticketing attendants but the handwriting on the ticket was not from any of them. That they charge Sh.500/= from Bura to Garissa and not Ksh.300/ = as indicated in the receipt.

12. AB PW9 told the court that he was previously working with Muhsin Bus Company. That the bus stopped operating on the Mombasa/Garissa route after it was involved in a serious road accident. That the bus was not operating on the said route the time the appellant purports to have been issued with the receipt in issue. He said in cross-examination that he did not know whether the receipt was a genuine one.

Submissions

13. The appeal was canvassed by way of written submissions. The appellant submitted that the case against him was not proved beyond reasonable doubt. That the investigating officer PW7 said in his evidence that the complainant had described the appellant to the chief who was helping them to get the accused. That the chief was therefore a crucial witness in the case but he was not called to testify in the case. That no reason was given for withholding the evidence of the chief yet he is the one who was given his description. That if he was arrested on the basis given to the chief it was crucial to call his evidence. In the absence of his evidence the inference was that his evidence would have been adverse to the prosecution case, as was held in the case of Bukenya v Uganda (1972) EA549. It was submitted that there was no proper identification of the appellant.

14. The appellant submitted that dock identification is worthless as was stated in the case of Fredrick Ajode Ajode vs Republic, Rr. App. No.87 of 2004 9UR).

15. The appellant further submitted that the imposition of life imprisonment against him was in breach of sections 216 and 329 of the Criminal Procedure Code which require the trial court to before sentencing an accused person to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. That there was no evidence to show that the trial court considered the evidence taken in compliance with the said sections since it sentenced him to the mandatory sentence of life imprisonment. The appellant urged the court to impose upon him a determinate sentence.

16. The respondent on the other hand submitted that the charge was proved beyond reasonable doubt. That the age of the complainant was proved by the age assessment report. That the evidence of the complainant that she was penetrated into her vagina was corroborated by the evidence of the clinical officer PW6 who found her bleeding from the vagina. That the appellant was positively identified by the complainant in court as the perpetrator. That she used to see him grazing goats in the area. That the complainant`s brother PW5 also identified the appellant. That having been identified by those two, failure to call the chief did not prejudice the appellant.

17. It was submitted that the alibi defence of the appellant had no substance as the bus tickets he produced were disowned by the employees of the bus companies.

18. On sentence, it was submitted that the appellant was sentenced to the minimum sentence as set by section 8(2) of the *Sexual Offences Act* as the victim was aged 10 years. That the complainant was not

only defiled but she had to undergo fistula operation. That the sentence of life imprisonment was justified in the circumstances of the case.

Analysis and determination

19. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. This principle was stated by the Court of Appeal in the case of Kiilu & another v Republic [2005]1 KLR 174, thus:

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

20. I have considered the grounds of appeal, the record of the trial court and the rival submissions by the appellant and the respondent. The trial court in convicting the appellant of the offence stated that the appellant was known to the complainant and her brother PW5. That the incident took place in broad daylight and the prosecution witnesses were candid, consistent and truthful. That there was no reason to disbelief their evidence. That the prosecution case was weak and did not dislodge the prosecution case. That the ingredients of the offence of defilement were proved beyond reasonable doubt.

21. The elements of the offence of defilement that the prosecution is required to proof beyond reasonable doubt are proof of the age of the victim, proof of penetration and identity of the of the perpetrator, see the Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.

22. Starting with the element of the age of the complainant, the law is that the age of a person can be proved in various ways. In the case of Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

> "... 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."

23. The complainant in this case told the trial court that she did not know how old she was. Halima PW2 who however did not tell the court of her relationship with the complainant told the court that the complainant was aged 10 years. The clinical officer who attended to the complainant at Bura sub-county hospital assessed her age at 10 years and filled an age assessment report to that end, P.Exh.5. The clinical officer in part C of the P3 form, P.Exh.1 and in his treatment notes, P.Exh.3 estimated the age of the complainant at 10 years. In the case of Evans Wamalwa Simiyu vs R Criminal Appeal No.118 of 2023 [2016] eKLR where there was no evidence in proof of age of the victim of defilement, the Court of Appeal held as follows:

> "As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did

not explain the source of this information. The complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimates age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under Part C of the P3 form the age required is estimated age and under the Children's Act 'age' where actual age is not known means apparent age. This means that in the doctor's opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

24. Moving on to the element of penetration, the same is defined in Section 2 of the *Sexual Offences Act* as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

25. Penetration may be proved by way of medical evidence or by oral or circumstantial evidence. In the case of Kassim Ali v Republic (2021) eKLR the Court of appeal stated that;

> " ....the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"

26. The complainant in this case testified on how she was defiled by a man who found her grazing goats in the bush who left him bleeding from the vagina. Her evidence that she was grabbed by a man was corroborated by her brother PW5 who ran away to seek for help. That she was found bleeding in the bush was corroborated by Halima PW2 and Abdille PW4. The clinical officer PW6 examined her and found her with freshly broken hymen with tears and lacerations on the vulva. All this evidence proved that the complainant was penetrated by a man into her vagina. Penetration was therefore proved.

27. Penetration having been proved, the question is whether the appellant is the person who penetrated the complainant.

28. The complainant told the trial court that the appellant found her grazing goats and grabbed her hand. She wanted to scream but he stuffed her scarf into her mouth. He removed her inner pant and then removed his clothes. He then lay on top of her and inserted his penis into her vagina. He did it 3 times. She bled from the vagina and the appellant then escaped. She walked to the road while in a lot of pain and collapsed. Her mother HH found her there bleeding. She told her that she had been defiled. She checked her private parts. 29. A person called Abdille went there on a motor cycle and took her to the chief. On the following morning she was taken to hospital at Bura.

30. The complainant said that she used to see the appellant looking after goats.

31. The brother to the complainant PW5 stated that he was grazing goats with the complainant when a man went to them and held his sister by her hand and pulled her. He blocked her mouth. He ran away and informed his mother. They went back to the scene and found his sister bleeding. He said that it is the Appellant who grabbed his sister. It was his evidence that he had seen him on several occasions before the day of the incident.

32. The question then is whether the complainant and her brother identified the appellant as the person who defiled the complainant.

33. It is trite that evidence on identification must be thoroughly and carefully scrutinized so as not to convict an accused person on evidence of mistaken identity. In the case of Kariuki Njiru & 7 others v Republic, Criminal Appeal No 6 of 2001 (unreported) the court held as follows:

> " The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

34. Similar observation was made by he Court of Appeal in the case of Cleopas O. Wamunga v Republic, Criminal Appeal No. 20 of 1989 where the court stated as follows:

> " ..... evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he (accused) alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification...."

35. I have examined the evidence of the identifying witnesses in this case - the complainant PW1 and her brother PW5. The complainant`s brother was at the material time aged 5 years. He never identified the appellant before he identified him in court as the person he saw grabbing his sister on the material day. His evidence amounts to dock identification. It is trite law that dock identification is generally worthless evidence - see Fredrick Ajode Ajode v Republic [2004] eKLR. There is no evidence that PW5 had given the appellant`s description to the police before he identified him in court. No reason was given as to why the police did not conduct an identification parade after the arrest of the appellant so as to test whether the witness could identify the appellant. The evidence that the witness identified the Appellant as the person who grabbed his sister is not reliable.

36. That leaves the evidence of the complainant as the sole identifying witness in the case. The complainant said in her evidence that she had seen the appellant on several occasions before the incident. HD PW3 and the investigating officer PW7 told the court that the complainant went out with police officers and she identified the appellant who was then arrested. The complainant however never gave such evidence. She never mentioned anything on the arrest of the appellant nor did she tell the court the reason that made her believe that the appellant is the person who defiled her.

37. The complainant stated in her evidence-in chief that she used to see the appellant herding goats. In cross-examination, she said that she used to see him at their place while walking. She said that the appellant was not working. Was the witness then denying her evidence as stated in her evidence-in-chief that she used to see the appellant herding goats and only used to see him walking in their area?

38. It is clear from the evidence that the appellant was not a person well known to the complainant. There is no evidence that she had given his description to the police. There is no reason why the police did not make the arrest and then test the complainant`s identification through an identification parade. Though the appellant admitted that the complainant pointed him out to the police who then arrested him, that is no guarantee that the complainant was not mistaken on the identity of the appellant as the person who defiled her. There is no reason why the police who were there during the arrest did not turn up to testify on the manner the complainant identified the appellant.

39. The complainant was at the material time aged 10 years. She was the sole identifying witness in the case. It is settled law that before a conviction can be based on such evidence the court must warn itself of the

danger of doing so and should only so convict if satisfied that the circumstances of identification were favourable and that the evidence is reliable and free from the possibility of error – see David Makokha v Republic (1989) eKLR and Abdalla Bin Wendo v R 20 EACA 166 at p 168, the court states that:

> Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, specially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it is circumstantial or direct pointing to guilt from which a judge or July can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.

40. Though the identification in this case took place during the day, the appellant was not a person well known to the complainant and therefore the trial court should have treated the evidence with extra caution. The fact that the complainant did not mention a particular feature on the person of the appellant that made her belief that he is the person who defiled her could mean that she was mistaken on the identity of the appellant. The trial court did not warn itself of such danger before convicting the appellant. There was no other evidence pointing to the guilty of the appellant.

41. Upon carefully evaluating the evidence on identification in this case, I am not satisfied that the evidence of the complainant PW1 and that of her brother PW5 was reliable and free from the possibility of error. The appellant should have been given the benefit of doubt.

42. In view of the foregoing, I find that the case against the appellant was not proved beyond reasonable doubt. The conviction is thereby quashed and the sentence set aside. I order the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 23RD DAY OF SEPTEMBER 2025

J. N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Respondent

Appellant – present in person at Shimo-la-Tewa G.K. Prison

Court Assistant - Rahma