



**Isheria v Republic (Criminal Appeal E069 of 2023)
[2025] KEHC 13450 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E069 OF 2023
AC BETT, J
SEPTEMBER 30, 2025**

BETWEEN

IMMANUEL NDUKWE ISHERIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. J. R. Ndururi (PM) in
Kakamega CM's Court Criminal (S. O.) Case No. 61 of 2019 dated 8th November 2023)*

JUDGMENT

1. The Appellant was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* and sentenced to 15 years imprisonment.
2. The particulars were that on the 10th day of July 2019 at (particulars withheld) within Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of EM, a child aged 16 years.
3. The Appellant was aggrieved with the conviction and sentence and filed a petition of appeal in which he set out the grounds of appeal as follows:-
 1. That the learned trial Magistrate grossly erred in law and facts by presiding over a trial that seriously violated the rights of the appellant as enshrined under Article 50 (2) of *the Constitution*.
 2. That the learned trial Magistrate grossly erred in law and facts by failing to note and make a finding that the medical evidence tendered was inadequate and inconducive to prove penetration by the appellant.
 3. That the learned trial Magistrate grossly failed to appreciate that the three elements of defilement were not conclusively proved.



4. That the learned trial Magistrate misdirected himself in law by convicting the appellant in reliance to evidence of PW2 the father without observing that the same evidence contradicted that of PW1 the victim herein.
 5. That the learned trial Magistrate failed to note and consider that there was augmented planned and implemented strategy to implicate the appellant with this crime.
 6. That the learned trial Magistrate grossly erred in law and facts by shifting the burden of proof to me and thereupon mis-evaluating my pleas able defence.
 7. That the learned trial Magistrate erred in law by failing to appreciate that the minimum mandatory sentence under Section 8 (4) is unconstitutional contrary to article 25 (a) of *the Constitution*.
 8. That more grounds to be adduced upon receipt and perusal of the trial court proceedings and judgement.
4. The prosecution called five (5) witnesses. The Complainant testified that she was born on 13th December 2002 and identified her certificate of birth. She said that she had a child whom she gave birth to on 18th May 2019. She said that she knew the Accused by appearance only and that she first saw him in July 2019 when he went to her home to hire a tent. She further said that she was sick and did not know what she was suffering from but could recall that one day, she was found out of their house at night. She said that she could not recall anything that happened to her while she was sick. On being cross-examined, she said that it was her mother who hired out the tent to the Accused.
 5. PW2 was the Complainant's father. He recalled that in 2019, the Complainant gave birth and shortly thereafter, suffered a mental illness that led to hospitalization. It was his evidence that he was forced to discharge the Complainant before she recovered because the hospital bill was becoming unaffordable to him. He recollected that on 10th September 2019, between 12.00 to 1.00 a.m., he heard his granddaughter crying. He woke up to take her to the Complainant for breastfeeding but found the Complainant missing from her room. He then started searching for her. He decided to go to Shimanyiro Centre to look for her as he thought she had gone to her grandmother's place. On the way, he saw a motorcycle parked on the road. He stopped his motorcycle to check as there was no one near the motorcycle. He heard sound nearby and on approaching, he found the Accused and the Complainant. The Accused was lying on top of the Complainant with his trousers and inner pants lowered. He pointed his torch at them and the Accused stood up and pulled up his clothes while the Complainant stood up and went to hide behind him. He refrained himself from confronting the Accused and went and locked the Accused's motor cycle, removed the key then took the Complainant to Shimanyiro Police Station. He also phoned some people and directed them to the scene where the Accused was found struggling with the motorcycle. PW2 said that he knew the Accused as he was a friend and a colleague boda boda rider. On further clarification, PW2 stated that he recorded his statement on the date of the incident which was on 9th July 2019.
 6. On cross-examination, PW2 said that he had known the Accused for more than 10 years and that his wife was not at home on 9th July 2019. He denied that he found the Accused atop his motor cycle and that the Accused reported him for snatching his key from him.
 7. PW3 was a paternal uncle to the Complainant. He said that on 10th July 2019 at about 2.00 a.m., he was asleep when he received a call from his brother PW2 who informed him that his daughter was missing and he was looking for her. He also told him that he had found her with someone. PW3 said that he proceeded to the scene where he found PW2 with the Accused alongside other people. The Accused



had been arrested and his motorcycle was at the scene. PW2's daughter was also at the scene and he could see the two from the light that came from PW2's torch. The Accused was escorted to the AP Camp as PW3 rode his motorcycle to the AP Camp.

8. PW4 was Patrick Mambiri, a Clinical officer who testified that on 10th July 2019, PW1 went to Kakamega General Hospital with a history of being defiled by a person known to her on the same date in a bush near their home at 3.00 p.m. According to him, the patient had a psychiatric problem known as puerperal psychosis and went to the hospital sixteen (16) hours after the incident. On examination, there were no injuries on the patient's private parts. However, laboratory tests found epithelial cells and ketones as well as sperm cells in her vulva. PW4 said that he also examined the Accused and saw no bruises and scars on his penis. It was PW4's testimony that Dr. H. Opondo who no longer works at the hospital filled the PRC. PW4 said that he also filled the P3 form which he produced alongside the PRC and the laboratory report as PExh 2, PExh 3 and PExh 4 respectively.
9. Upon cross-examination, PW4 reiterated that the patient had a psychiatric condition but was not taken for psychiatric assessment despite his instructions for one to be done. He said that there was nothing to link the spermatozoa found on PW1's vulva to the Accused.
10. PW5 was the Investigating Officer who narrated that on 10th July 2019, PW2 went to Kakamega Police Station accompanied by his daughter whereupon he lodged a complaint of defilement in which he alleged that his daughter had been defiled by one Emmanuel at 3.00 a.m. Emmanuel was brought to the police station by members of the public. The next morning, she escorted the Complainant and the Accused for examination where P3 and PRC forms were filled. She recalled that efforts to interrogate the Complainant were fruitless as she was not communicating. Further investigations revealed that the Complainant had given birth while with her mother in Nairobi and was brought home while in a state of confusion. On the date of the incident, she met the Accused who defiled her but was caught in the act by her father. PW5 said that the Complainant had forgotten about the incident one month later. She produced the birth certificate that proved that the Complainant was born on 3rd December 2002.
11. In defence, the Accused gave a sworn statement and denied the charges. According to him, on 10th July 2019, he was from a funeral wake at about midnight atop his motorcycle when he saw a girl and decided to stop due to parental concern. He decided to inquire what was the matter and as he was talking with her, he saw another motorcycle approaching from the front. The rider stopped and he saw it was his friend David. David pushed him and he fell down with the motorcycle. He then locked the motorcycle after putting it off then took the ignition key. The Accused explained that after David left with the girl, he lifted the motorcycle and pushed it to the edge of the road since it was locked. David and his brothers, among them Kevin came without the girl and escorted him to the police post. They pushed the motorcycle there and from there, he and the girl were escorted to Kakamega Police station from where the case started.
12. On cross-examination, the Accused said that he was slightly injured after being pushed but did not make a complaint. He said that the incident occurred between midnight and 1.00 a.m. and the motorcycle headlights were on. He reiterated that he did not defile the girl.
13. Both parties filed written submissions.

Appellant's Submissions

14. The Appellant submitted that the ingredients of defilement were not proved beyond reasonable doubt as PW4 did not establish penetration as there was no lacerations nor discharge from PW1's vagina. In regard to the spermatozoa that was found on PW1's vulva, the Appellant posited that there was nothing to link it to the Accused since PW4 had stated on cross-examination that the lifespan of



spermatozoa is around 72 hours. The Appellant's argument was that the victim could not recall what happened to her and although PW4 testified that she had a psychiatric condition, no medical report was produced to confirm the allegations. The Appellant relied on *Mwangi v. Republic* [1984] KLR 595.

15. The Appellant further submitted that the Accused was not positively identified by the victim as she did not state whether the Accused removed her clothes and defiled her. It was the Appellant's further submissions that there were contradictions in the prosecution's case as the Accused was initially said to have committed the offence on 10th September 2019 which was later clarified to be 16th July 2019 yet the alleged incident as per the charge sheet occurred on 10th July 2019. Further, PW2 is faulted for having said that he called Ken and Douglas and not PW3 while PW3 stated that he was called by PW2 to the scene and on arrival, he found PW1 and PW2 and escorted the Accused to the police station.
16. The Appellant also submitted that the medical evidence tendered was inadequate and conclusive to prove penetration by him and pointed at the failure to ensure that the victim underwent a psychiatric assessment and to conduct a DNA test to establish whether the spermatozoa found on the victim belonged to him in view of the fact that the victim had a history of previous sexual engagement. The Appellant relied on the cases of *Okoch v. Republic* (Criminal Appeal No. E011 of 2024) [2024] KEHC 7872 (KLR) and *Philip Shivachi John v. Republic* [2017] eKLR.

Respondent's Submissions

17. On its part, the prosecution submitted that the penetration was proved by the evidence of PW2 and PW4 as PW2 caught the Accused in the act a fact that was corroborated by PW3 who said that PW2 called him on the fateful night and upon going to the scene, he found the Appellant and the victim at the scene. PW4's evidence was that the victim was examined about 14 hours after the act and epithelial cells and spermatozoa were found on the victim's genitalia. The Respondent cited the case of *Aloyo Ewoi v. Republic* [2017] eKLR to advance its case that penetration does not have to be complete in order to prove an offence of defilement and that penetration can be proved by direct evidence.
18. It was the Respondent's further submissions that the presence of epithelial cells coupled with spermatozoa confirmed penetration and to support their submissions, they relied on *Ogechi v. Republic* [2023] KEHC 24673 (KLR) where a Clinical officer expounded that the cause of epithelial cells could only be due to sexual intercourse unless another explanation was tendered.
19. The Respondent further submitted that the Appellant was positively identified as the perpetrator since he was well known to the witnesses and he was caught in the act.
20. As to whether the sentence was harsh, the Respondent submitted that the mandatory minimum sentence as prescribed was fifteen (15) years and the court had no option but to impose the same.

Analysis And Determination

21. Being the first appellate court, the duty of this court is as was held in the case of *Okeno v. Republic* [1972] EA 32 which is to revisit the evidence adduced before the trial court, re-evaluate and analyse it afresh, and come to its own independent conclusion while bearing in mind the fact that unlike the trial court, it did not have the benefit of seeing and hearing the witnesses as they gave evidence.
22. The ingredients constituting the offence of defilement are proof of penetration, the age of the victim and the identity of the assailant.



23. The issue in this case is whether the prosecution proved its case beyond reasonable doubt. In a criminal case, an accused person is presumed innocent until proven guilty. The standard of proof was described in the celebrated case of *Woolmington v. DPP* [1935] AC 462 at pp 48 when the court held that:-
- “Throughout the web of the English criminal law one golden thread is always to be seen, that is, the duty of the prosecution to prove the prisoner’s guilt..... no matter where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
24. In determining whether an accused person is guilty, the court must objectively weigh the evidence and consider whether it is sufficient to sustain a conviction. This does not mean that the evidence must be beyond the shadow of a doubt for it has been held that “it is virtually impossible to prove anything to an absolute certainty...” See *R. v. Lifchus* [1997] 3 SCR 320. The burden is never upon the accused to establish his innocence, but the prosecution must prove the accused’s guilt.
25. Penetration is defined under Section 2 of the *Sexual Offences Act* as:-
- “The partial or complete insertion of the genital organs of a person into the genital organs of another person.”
- It therefore follows that for the offence of defilement to be deemed to have occurred, penetration or full insertion of one’s genitalia on the victim’s genitalia is not necessary. In *Mark Oiruri Mose v. R* [2013] eKLR, the Court of Appeal held that:-
- “Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”
26. Penetration can be proved by direct evidence or medical evidence. PW4 testified and produced a P3 and PRC forms. Laboratory tests showed the presence of epithelial cells and spermatozoa in the victim’s genitalia. The Appellant’s contention was that there was no lacerations nor discharge to prove penetrations. However, the spermatozoa was found in the vulva which comprises the inner and outer lips of the vagina. For spermatozoa to be found in the vulva, there must have been complete or partial penetration. The presence of epithelial cells in the victim’s genitalia point conclusively to penetration and not mere ejaculation of the spermatozoa into the vaginal opening. Despite the fact that the victim did not describe the act in person, I find that the element of penetration was proven to the required standard.
27. Regarding the age of the victim, the Appellant did not contest the same. The victim knew her date of birth and so did her father. Her birth certificate was produced by the prosecution and it proved that at the date of the incident, the victim was 16 years old. The birth certificate is conclusive proof of age as was held in *Edwin Nyambogo Onsongo v. Republic* [2016] eKLR.
28. Regarding identification, the Appellant took issue with his being identified as the assailant and argued that the medical evidence was insufficient to connect him to the crime. He argued that the failure to submit the spermatozoa to DNA testing rendered the medical evidence insufficient to prove that the spermatozoa that was found on the victim’s vulva originated from him.



29. Section 36 (1) of the Sexual Offence Act provides that:-

“Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

30. A reading of Section 36 (1) of the Act shows that the requirement for a DNA test is not mandatory and is meant to augment the prosecution’s case especially where there is no clear evidence as to who may have committed the offence. It can by no means be the only conclusive evidence of a sexual offence. In *Robert Mutungi Muumbi v. Republic* [2015] KECA 584 (KLR), the Court of Appeal affirmed the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved and cited the case of *George Kioji Criminal App. No. 270 of 2012 (Nyeri)* where the Court of Appeal stated the following in regard to proof of commission of a sexual offence:-

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

31. Where there is other evidence to sustain a conviction, medical evidence is not an imperative. In this case, the victim testified that she had no recollection of the incident as she was sick at the material time. So the evidence that tied the Appellant to the offence was the evidence of the victim’s father, his brother, and the medical evidence as corroborative evidence.

32. From the evidence, it is not in doubt that the Appellant was well known to PW2, who testified that he caught him in the act of defiling his daughter. He was also known to PW3 who testified that he was one of the people who went to the scene in response to his brother PW2’s distress call and assisted in the instant arrest of the Appellant. There is no doubt in my mind that the Appellant was properly identified by recognition. In *Reuben Tabu Anjanoni & 2 Others v. Republic* [1980] eKLR, the Court of Appeal acknowledged recognition as the best form of identification and stated thus:-

“... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).”

33. The Appellant argued that there were contradictions in the evidence of PW1 and PW2 and faulted the trial Magistrate for placing reliance on PW2’s evidence in the circumstances. I have reviewed the evidence and agree with the Appellant that the prosecution’s evidence is contradictory. The victim claimed that she recalls that one day she was found out of their house at night but did not know what had happened. This is a hiatus in the prosecution’s case that needed conclusive resolution. The prosecution called PW2 and PW3 in a bid to seal the gaps in its case. According to PW2, when he



caught the Appellant defiling PW1, he locked the Appellant's motorcycle, removed the key, then took PW1 to Shimanyiro Police Station. He stated that he called "others" and directed them to the scene where they arrested the Appellant and took him to the Shimanyiro police post from where he was taken to Kakamega Police Station. PW3 on the other hand said that on the material day, PW2 summoned him to the scene where he found PW2, the Appellant, and PW1 alongside other people. He said that they escorted the Appellant to the Shimanyiro AP Camp and that he was the one who rode the Appellant's motor cycle to the AP Camp. On cross-examination, PW3 who could not recall the registration number of the Appellant's motorcycle said that when he arrived, he found the key in the ignition of the Appellant's motorcycle. This claim was in total contradiction of PW2's evidence that he had taken the ignition key and that the people he had called are the ones who took the Appellant to Shimanyiro "police station".

34. On critically analyzing the two versions of PW2 and PW3's oral testimony. I find that there are material contradictions therein. Two people who claimed to have been eyewitnesses to such a serious crime and who recorded their witness statements immediately after the incident ought not to have such divergent narratives regarding the chain of events unless one of them is misleading the court or the incident did not happen as claimed. It is therefore impossible to distinguish with certainty, who between PW2 and PW3 is telling the truth.
35. In regard to the act of penetration which I earlier held had been proven, the evidence of PW4 is that PW1 had no discharge or bruises on the vagina when she was examined on 10th July 2019 which was 16 hours after the alleged assault. This raises doubt as to whether the sexual act occurred that day as it is highly unlikely for a girl not to have any discharge, bruises, or tenderness of the vulva or vagina following a sexual act. This is further compounded by the fact that PW4 stated that spermatozoa has a lifespan of 72 hours in the human body. Considering the fact that the spermatozoa was extracted through a high vaginal swab and PW4 admitted that there was nothing to link the spermatozoa to the Appellant, added to the fact that the victim claimed nor to recollect the incident, there is a serious lacuna in the prosecution's evidence that casts doubts on its case. I also note that the primary treatment notes, which are the source documents to the P3 and PRC form, were not produced.
36. One other issue that casts doubt to the prosecution's case is the failure by the Complainant to testify. Although PW2 alleged that the Complainant had suffered from mental illness, he did not produce any treatment records. According to the P3 form, the Complainant was referred for psychiatric assessment which was never done. And despite the Complainant claiming she could not recall what happened to her on the material date, she was coherent enough to state her name and age and recall that the Accused had gone to her home to hire a tent. She could even recall the date she gave birth. In the absence of a mental assessment report, the court is not able to ascertain whether she opted to plead ignorance of the incident out of her mental condition or because the Appellant was not the person who defiled her. A DNA test would have sealed the gaps in the prosecution's case.
37. In view of the fact that there was no other witness to the alleged offences save for PW2 whose evidence I have held to be unreliable due to the innate contradictions in his evidence vis-à-vis that of PW3, in absence of evidence of PW1 that it was the Appellant who defiled her on the material date, the possibility of the Appellant's defence being the true version of the events cannot be disregarded.
38. The upshot is that I find the conviction unsafe. I allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be set free immediately unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF SEPTEMBER 2025.

A. C. BETT



JUDGE

In the presence of:

Appellant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

