Koech v Republic (Criminal Appeal E062 of 2022)
[2025] KEHC 13435 (KLR) (29 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13435 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E062 OF 2022

HI ONG'UDI, J

SEPTEMBER 29, 2025

BETWEEN

LEONARD KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment delivered by Hon. D. Mosse (Senior Resident Magistrate) in Nakuru MCCH S. O. case No. E059 of 2019 on 13th June, 2022)

JUDGMENT

1. Leonard Koech hereinafter referred to as 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*, No. 3 of 2006. The particulars being that the appellant on 21st March, 2021 at [Particulars Withheld] in Njoro sub-county within Nakuru county unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (Vagina) of A. C. a child aged 10 years which caused penetration. He also faced an alternative count of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. He denied the charges and the matter proceeded to full hearing with the prosecution calling five (5) witnesses. The appellant gave an unsworn statement of defence without calling any witness. Thereafter the trial Magistrate found the appellant guilty, convicted him and sentenced him to life imprisonment.

3. Being aggrieved with the Judgment the appellant filed this appeal on the following grounds:

    i. That the learned trial magistrate erred in law and in facts by convicting him on insufficient medical evidence that could not sustain such conviction and sentence of life.

    ii. That the learned trial magistrate erred in law and in facts by convicting him on evidence of witness PW1 who gave out false information and hearsay information in the court.

iii. That the learned trial magistrate erred in law and in facts by failing to appreciate that the prosecution evidence was marred with contradiction which greatly violated the credibility of the prosecution evidence.

iv. That the learned trial magistrate erred in law and in facts by failing to appreciate that the investigating officer's evidence was marred with contradiction and the same was not proved to the best standards of beyond reasonable doubt

v. That the learned trial magistrate erred in law and in facts by concluding penetration was proved solely relying on the broken hymen, which the medical doctor stated to be intact ie no blood stains, hymen not torn and every test turned out negative.

vi. That the learned trial magistrate erred in law and in facts by convicting him on the strength of the prosecution case which was evidently full of glaring gaps.

vii. That the learned trial magistrate erred in law and in facts by finding that the prosecution evidence was quite overwhelming notwithstanding the glaring contradictions between prosecution witnesses and the investigation officer.

viii. That the learned trial magistrate erred in law and in facts by convicting him on the strength of the prosecution case which was evidently full of glaring gaps

ix. That the learned trial magistrate erred in law and in facts by failing to appreciate that the nature of the appellant's arrest was consistent with innocence.

x. That the learned trial magistrate erred in law and in facts by relying on the evidence of a single witness without cautioning himself/ herself on the dangers of relying on such evidence.

xi. That the learned trial magistrate erred in law and in facts by failing to consider the appellant's defence yet the same was cogent, plausible and strong enough to water down the prosecution's case.

xii. That the learned trial magistrate erred in law and in facts by failing to appreciate the glaring discrepancies in the witness statements on the date the same were recorded.

xiii. That the learned trial magistrate erred in law and in facts by failing to appreciate that the medical evidence adduced by the prosecution did not support or corroborate the charges and neither created a nexus between him and the alleged offence.

xiv. That the learned trial magistrate erred in law and in facts by according undue weight to the purported evidence of the prosecution convicting the appellant harshly while it is obvious that the prosecution's case was full of glaring gaps, inconsistences, contradictions, uncorroborated evidence and the same was not proved beyond reasonable doubt.

4. The victim (A. C.) testified as PW1 without being sworn. Her evidence was that the appellant also known as Ronald removed her trousers and defiled her. The appellant had no questions for her in cross examination. Her mother SK testified as PW2. She said PW1 was born on 29th June, 2012. That on 21st March, 2021 the appellant had been to her house as it was raining and they were warming at the fire place. He asked to have PW1 go buy him Omena. She released her and she returned after an hour.

5. She further stated that on being told by a neighbor (Irene) that the appellant had pulled the child by the neck, she went to look for her and found the appellant fastening her trousers. She found the appellant having removed PW1's trousers and removed his and got his penis inserted into the child. She screamed and the child ran without the trousers and disappeared. She screamed and people came but they did

nothing. At another point she said she had approached the house from behind and peeped. It was then that she saw the child without trousers and screamed. The door was wide open. The matter was reported and the appellant arrested, while PW1 was taken to Njoro sub-county hospital. She identified the appellant as the culprit.

6. In cross examination she said she found the appellant red handed. He was drunk and had a bottle of alcohol. She said PW1 was intercepted while running away.

7. PW3 Kipkurui Cheruiyot a clinical officer at Njoro sub county hospital stated that PW1 was on 22nd March, 2021 brought to their facility on allegations of defilement. She had a freshly broken hymen, inflamed labia minora. Tests for HIV, Pregnancy and STD were all negative. He produced the P3 and PRC forms as PEXB 2 & 3.

8. In cross examination he said there was evidence of recent penetration. He said PW1 complained of pain in her private parts. She came with her mother to the hospital.

9. PW4 – Irene Chepkwony a neighbor to PW2 and the appellant testified that on 21st March, 2021 5pm there was rainfall at their residence and she went out to pick her clothes. She saw the appellant pulling PW1. She immediately notified PW2 who ran to the appellant's house and screamed. She saw PW1 running while holding her trousers in the hands. A crowd started joining and then dispersed. She later learnt that the appellant was found lying on the child (PW1).

10. In cross examination she said she saw the appellant pulling PW1 and took her to his house. She did not see PW1 coming out of the house, and she did not witness any defilement.

11. PW5 No. 101254 P. C. Naomi Kinya was the investigating officer. He said the appellant had been beaten by members of the public. He was treated alongside the complainant for injuries suffered. That PW2 and PW3 told her that the former had found the appellant defiling PW1. She produced the clinic card copy (P. EXB1) showing PW1 was born on 15th March, 2021.

12. In his unsworn statement of defence the appellant denied committing the offence. He stated that PW2 was his girlfriend and he had given her a shamba. That he took it from her and she got angry and promised to do something to him. He said the evidence of PW1 and PW2 was contradictory. He wondered why there was no response from the village if PW2 indeed screamed.

13. The appeal was disposed of by written submissions.

Appellant's submissions

14. The appellant set out the 3 ingredients to be proved for a charge of defilement to be proved. These are: Age of minor, penetration and identification of the assailant. He relied on the case of Kaingu Elias Kasomo V Republic Malindi Criminal Case No. 504 of 2010, on this.

15. On penetration he submitted that the same was not proved and there were no blood stains nor spermatozoa since he was not tested. He also wondered why the victim's clothes were not collected for forensic examination.

16. The appellant further submitted that the evidence of PW2 was contradictory on what she exactly witnessed on the material day. He wondered who between PW2 and PW4 witnessed the act of defilement.

17. Finally, that his defence of a grudge between the appellant and PW2 was not considered by the trial court.

Respondent's submissions

18. The same were filed by M/s Emma Okok Principal prosecution counsel and are dated 27th May, 2025. Counsel opposed the appeal. While referring to the three (3) ingredients for proof of a case of defilement counsel argued that all the three (3) had been proved. For penetration she relied on the evidence PW1, PW2, PW3 and PW4. She thus submitted that the evidence on penetration was solid.

19. For proof of age she relied on PW2's evidence and the clinic card (PEXB 1) produced by PW5. On identification she referred to the evidence of PW1, PW2 and PW4 who identified him, as the appellant was their neighbor. Counsel dismissed the appellant's unsworn defence as being of no probative value.

20. Additionally, counsel submitted that the sentence of life imprisonment is provided for under section 8(2) of the *Sexual Offences Act* as the minimum sentence. She made reference to the Supreme Court case of Republic V Mwangi: Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus curiae) (Petition E018 of 2023) [2014] KESC 34 KLR.

Analysis and determination

21. This being a first appeal this court is duty bound to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. It must also bear in mind that unlike the trial court it did not hear nor see the witnesses testify and must give an allowance for that. This is in line with the holding in:

    i. Okeno V Republic [1972] EA 32

    ii. Pandya V Republic [1957] E.A 336

    iii. Peters V Sunday Post [1958] E. A 424

    iv. Kiilu and another V Republic [2005] IKLR 174

22. I have carefully considered the evidence on record, the grounds of appeal, submissions, decided cases and the law. The main issue I find falling for determination is whether a case of defilement was proved against the appellant. Section 8(1) of the *Sexual Offences Act* defines defilement as follows

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

23. From the above definition, there are three (3) ingredients which must be satisfied for a charge of defilement to be proved. These are:

    i. Age of the victim

    ii. Penetration of the victim's genital organ

    iii. Identification of the culprit Age

24. PW1 did not say anything about her age but the trial court seemed to know her age to be eight (8) years as per the record at Page 8 line 17. The charge sheet shows that PW1 was aged ten (10) years. PW2 (mother to PW1) stated that the child was born on 29th June, 2011. However, the clinic card produced by the investigating officer (PW5) shows the child was born on 15th March, 2011. (PEXB1). Going by the clinic card which appears to be more reliable, PW1 was ten (10) years old. I therefore find age to have been proved.

Penetration

25. Section 2 of the *Sexual Offences Act* defines "penetration" as follows:

> "The partial or complete insertion of the genital organs of a person into the genital organs of another person"
>
> This is expected to clearly come out of the evidence.

26. In her evidence this is all that PW1 told the court about the incident, at page 8 line 23 – page 9 line 1:

> "Leonard removed my trousers and defiled me. My mother Stella came. He did not do anything else to me....."

The prosecution and the court appeared contended with that since they did not ask PW1 to explain what Leonard exactly did to her, where she was, what was used and what happened, next. Saying she was defiled without any details is not sufficient. Did this ten (10) year old child know what being defiled is or that was what she had been told to tell the court?

27. Secondly PW1 did not in her evidence tell the court where she was and how the culprit found her or met her. Where did this incident take place? Her mother Stella came from where? She did not explain this.

28. Thirdly a perusal of the evidence of PW2 (mother of PW1) is another version that is not clear. Her evidence is so mixed up. She says she found the appellant defiling PW1. Later she says she is the one who allowed the appellant to go with PW1. Next, she says the child returned home about 6pm.

29. Again, she says she went to look for PW1 and found the appellant zipping her trousers. Later she says she ran to the appellant's house and found him having removed the child's trouser. That he then removed his trousers and got his penis inserted into the child. She screamed and the child ran away without the trousers and disappeared. She further stated that the appellant's door was wide open as the appellant did this unlawful act. Again, that she approached the appellant's house from behind and peeped, and that's when she saw PW1 without trousers and she screamed.

30. I have purposely set out all this to show the confusion in PW2's evidence. What did she really witness? Was it PW1 running away without trousers, was it the appellant removing PW1's trousers and his own trousers and inserting his penis in the child's vagina as she watched? All these questions remain unanswered.

31. PW4 said she saw PW1 running away with trousers in her hands. On the other hand, PW2 said the child ran away without trousers. So, who between the two (PW2 and PW4) told the court the truth? The medical evidence is usually brought on board to support the evidence that has already been laid out by the victim and any other witness if any by the prosecution. In this case the evidence by PW1, PW2 and PW4 is so wanting. These are people who are neighbours and claim to have been at the scene, but their evidence is so confusing and contradictory.

32. I have perused the Judgment by the trial court. After setting out the evidence by the prosecution witnesses and the defence the trial court did not do a proper analysis of the evidence of PW1, PW2 and PW4. Had the trial court done that it could have noted the contradictions which go to the root of this case.

33. The appellant may have done what is claimed but where is the evidence of what he did? PW2 who claimed to be an eye witness gave various versions of what she allegedly witnessed.

34. Upon careful analysis of the evidence adduced before the trial court, I find that the prosecution case fell short of proof beyond reasonable doubt. The appeal has merit and is allowed. For my part I find the conviction not safe and I quash it, and set aside the sentence. The appellant shall be released forth with unless lawfully held under a separate warrant.

35. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER, 2025 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE