BKL v Republic (Criminal Appeal E003 of 2025)
[2025] KEHC 13571 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13571 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E003 OF 2025

RPV WENDOH, J

SEPTEMBER 30, 2025

BETWEEN

BKL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. BKL, 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*, by Resident Magistrate Kitale.

2. The particulars of the charge were that on diverse dates between 1st December and 31st December 2020 at Kapsigilai Location, Trans Nzoia, caused his penis to penetrate the vagina of M.J.K. a child aged nine (9) years.

3. In the alternative, the appellant faced a charge of committing an indecent Act contrary to section 11(1) of the *Sexual Offences Act*, in that the appellant intentionally touched the vagina of M.J.K, a child aged nine (9) years.

4. No finding was made on the alternative charge.

5. The case proceeded to full trial with the prosecution calling a total of five (5) witnesses.

6. When called upon to defend himself, the appellant testified on oath and called one witness.

7. Upon conviction, the appellant was sentenced to serve sixty (60) years imprisonment. He is aggrieved by both the conviction and sentence and preferred this appeal based on the amended grounds of appeal. They are as follows-

    1. That the medical evidence tendered does not meet the threshold to prove penetration;

2. That the court failed to consider that the appellants fundamental rights under Article 49 (f) of the *Constitution* were violated;

3. That the charge sheet was defective;

4. That the sentence is harsh and excessive.

8. The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set aside and he be set at liberty.

9. This is a first appeal and the duty of this court is to exhaustively examine the evidence tendered in the trial court, evaluate it and arrive at its own conclusions. The court will however, make allowance for the fact that it neither saw nor heard the witnesses testify. This court draws guidance from Okeno -V- Republic (1972) EA 32 where the court said

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -V- Republic (1957) EA 336) 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. (Ruwalla -V- Republic (1957) EA 570). 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. I must make its own findings and draw its own 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, see Peter -V- Sunday Post (1958) EA 424"

Prosecution case:

10. PW1 told the court that she was fourteen (14) years old having been born on 4/8/2010. She recalled that in 2020, she was at her grandmother's place and went to herd sheep in the forest which is nearby. When herding sheep, the appellant whom she knew as a brother to her aunt's husband, found her there and asked her if his child had ever beaten her but she did not respond; that the appellant got hold of her, removed her dress and pant, and also removed his and put his penis in her vagina. When she wanted to scream, he gave her his phone to watch cartoons. He threatened to kill her if she told anyone what happened and she did not tell anybody.

11. PW1 said that she started falling sick and was found to have Pneumonia. Her parents were also tested and found to be fine. The doctor then interrogated her as to whether she had ever slept with anyone and it is then she revealed what the appellant had done to her in the forest. She has continued on medication. When she was discharged from hospital, she went to record her statement at the police station, that the appellant was arrested by her father and a police Reservist.

12. PW2 SKR is the father of the complainant, PW1 testified that in 2022 his daughter became sick and was diagonized with Pneumonia in Hospital. In December, 2023, she became sick again and was taken to Iten hospital where she was found to have TB. HIV tests were done and she was found to be positive while PW2 and the complaints mother tested negative; that the complainant disclosed to them that BK had defiled her on 2020. He reported to police station. He identified the appellant as a neighbour at his mother's house. He denied that they had ever had any dispute with the appellant.

13. PW3 P.C. Winnie Kemboi of Cherangany Police station received a defilement report from PW2. By then, the complainant was admitted at Iten Hospital. She issued him with a P3 form and the appellant was arrested. PW3 took the minor to Kitale County Referral Hospital on 21/2/2023 for age

assessment. The complainant was assessed at twelve (12) years (P.Exh.1). The P3 form had been filled and she saw the treatment notes which indicated that the complainant had HIV. She took the appellant to Cherangany to establish his HIV status and the results confirmed that he was HIV positive.

14. PW4 DR. Philemon Kimutai Batony of Iten Hospital testified that the P3 form was filled on 20/12/2023; that the complainant had been treated for Pneumonia and opened up to him that she was sexually assaulted in 2020; that she was sickly, weak and wasted and tests revealed that she was HIV positive and she had an old hymen tear. The perpetrator was arrested and he too was tested at Cherangany Sub-County Hospital where he tested positive; that he was in touch with the Investigating Officer who sought a court order to have the appellant to be tested.

15. PW5 Damaris Chepchumba Kiplangat a Nurse at Cherangany sub-county hospital recalled that on 22/12/2023, the appellant was taken to her department by police officers for Counseling and medication. He was tested and confirmed to be HIV and report prepared by Irene Chepkorir whom she had worked with and knows her handwriting; that he was involved in treatment and she produced the results (P.Exh.4)

Defence Case: -

16. In his sworn defence, the appellant (DW1) testified that his home is in Kapsigilai and he was a visitor at M place and left Kapsigilai in 2003 for Marakwet where he stayed till August, 2020; that he had conflict with the brother over land; that by then he spotted dreadlocks; that the brother threatened to teach him a lesson; that four days he was arrested and taken to court in 2021 for an offence of defilement but it was thrown out i.e. CR.C.2024/2021 and that the child there had framed him; that on 14/12/2023 the complainant's Aunt called to ask whether he had not finished the case and on 15/12/2023, he was arrested. He claimed that his case arises from a land dispute between him and his brother and that he had no relationship with the minor but that she used to visit the brother's house.

17. DW2 PC is the appellants wife. She confirmed knowing PW1 and 2 as neighbours and denied that there existed any land dispute between the appellant and the brother. She said that she lived at Kapsigilai till 2023 when she moved to Ziwa and only learnt of the appellants arrest for defilement cases. She confirmed that she lived in peace with the appellant and even his brother.

Appellant's Submissions.

18. It is the appellant's contention that penetration was not proved because the Doctor only found an old tear to the hymen and that in any event, a torn hymen is not proof of penetration as provided in section 2 of the *Sexual Offences Act*; that nothing linked the appellant to the old broken hymen. The appellant also submitted that the finding of PW1 HIV positive cannot be used as proof of penetration; that because of the time taken between 2020 and 2023, PW1 may have contracted the disease from somebody else.

19. On the second ground, it was submitted that the appellant was held in police custody for more than twenty four (24) hours without cogent reasons or explanation to the court; that he was arrested on 17/12/2023 and arraigned in court for plea on 28/12/2023. He relied on the case of Gerald Macharia Gichugu -V- Republic (2007) eKLR where the appellant was held in police custody for over twenty four (24) and the court found that his constitutional rights under Article 49(f) of the *Constitution* were violated.

20. The third ground of appeal is that the word "unlawfully" was not included in the charge thus rendering the charge defective. He relied on the case of David Odhiambo -V- Republic CRA 5/2005 where the said word was not included and the appellant was acquitted of the offence of rape.

21. Lastly, the appellant submitted that the sentence does not serve the purpose and objective of the Judiciary Sentencing Policy Guidelines.

Respondent's Submissions.

22. The appeal was opposed. The Prosecution Counsel filed submissions. On whether the offence of defilement was proved, Counsel submitted that the complainant was born on 5/8/2011 and the offence took place in 2020 and therefore she was nine (9) years old at time of incident.

23. As regards penetration, it was Counsel's submission that PW1 clearly narrated how the appellant inserted his male genital organ into hers and that since time had passed, it was not expected that any injuries would be found; that there was evidence that the complainant tested HIV positive and so did the appellant. The complainant's parents were negative and that fact goes to support PW1's testimony.

24. On identification of the appellant as the perpetrator, Counsel submitted that PW1 knew the appellant before, a fact the appellant did not deny and was confirmed by PW2 and DW2,

25. As regards sentence, Counsel argued that section 8(2) of the *Sexual Offences Act* prescribes a sentence of life imprisonment upon conviction; that the complainant was a child of tender years and that her life was totally changed by the callous act of the appellant; that the court was lenient to the appellant by sentencing him to sixty (60) years instead of the mandatory life imprisonment.

26. In conclusion, Counsel urged that the defence was considered by the trial court and rejected it for good reason.

Determination: -

27. Having considered the evidence on record, the grounds of appeal and the rival submissions, the court will go ahead to consider the following issues;

    1. Whether the charge was defective;
    2. Whether the appellants Constitutional rights were violated;
    3. Whether the offence of defilement was proved;
    4. Whether the defence was considered;
    5. Whether the sentence is harsh and excessive

Whether the charge was defective: -

28. The appellant complained that the charge was defective because the word "unlawfully" was omitted.

29. Section 134 of the Criminal Procedure Code provides for the manner in which a charge should be framed. It reads as follows

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"

30. Indeed, the word 'unlawfully' was not included in the charge. The courts have severally pronounced themselves on the above issue. In Sigilani -V- Republic (2004) 2 KLR 480, the Court of Appeal said, "The principle of the law governing charge sheets is that an accused should be charged with an offence

known in law. The offence should be disclosed and stated in a clear and unambiguous manner sot that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence"

31. In Kaaka Masare Manget; -V- Republic (2020) eKLR, the Court of Appeal stated thus, "similarly, we reject the ground that the charge sheet was defective because the words 'intentionally' and 'unlawfully' were not included. The act of defilement in itself is unlawful. The words do not constitute any of the elements of the offence of defilement as we explained in the case of Josphat Wanjala Olbai -V- Republic (Eld) CRA 92 /2015 which stated; 25. The offence of defilement is unlawful and the absence of the words 'intentional' and 'unlawful' in the particulars of the charge do not render the charge defective".

> " The words 'intentional' and 'unlawful' are not ingredients of the Offence of defilement under section 8(1) of the *Sexual Offences Act*. Defilement itself is unlawful. Those words are only elements of the charge of rape under section 3(1) and section 4 of the *Sexual Offences Act* respectively".

32. The same view was accepted by the Court of Appeal CRA.27 of 2015 CRA 27/2015 Marindany -V- Republic (2023) KECA 450. As held in the above cases, the charge herein is not defective.

33. In David Odhiambo case (Supra) the charge was one of rape and it was necessary that the word 'unlawful" be included in the charge.

34. In any even the said defect cannot render the charge fatally defective in view of Section 382 of the Criminal Procedure Code which provides as follows: Section 382 of the Criminal Procedure Code provides as follows:-

> 382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, Omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> > Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

Whether the appellant's right under Article 49(f) was violated.

35. The appellant complained that he was in remand for eleven (11) days before he was presented in court for plea. I have seen the court record. The appellant never complained to the court that the police had violated the said right to be presented before a court of law within twenty-four (24) hours. I say so because it is not the trial court that allegedly violated the said right and if the appellant has any complaint, then he can prefer a Constitutional petition against the police. Otherwise, this is a different jurisdiction. There is a complaint against the appellant and the prosecution has the duty to prove whether or not the appellant committed the offence and the alleged violation of his rights by police cannot render the charge or conviction invalid.

Whether the offence of defilement was proved;

36. In the case of Dominic Kibet Mwareng, -V- Republic (2013) eKLR, the court held "the critical ingredients forming the offence of defilement are;

-the age of the complainant;

-proof of penetration;

Positive identification of the assailant".

Proof of the complainant's age:

37. In the case of Joseph Kiet Seet -V- Republic (2014) eKLR the court held "it is trite law that the age of a victim can be determined by Medical evidence and other cogent evidence.

38. Again, in Francis Omuroni -V- Uganda CRA 2/2000, the Court of Appeal of Uganda held thus

> In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."
>
> See also Mwalongo Chichoro Mwajevbe -V- Republic CRA 24/2015 and Edwin Masara Onsogo -V- Republic (2016) eKLR.

39. In this case, although PW1 said that she was born on 5/8/2010, PW2 said she was born on 5/8/2011. An age assessment was done at Kitale Hospital (P.Exh.1) which confirmed that as of 2023, the complainant was 12 years old. It confirms the complainant's assertion that she was nine years in 2020 as indicated in the charge sheet. The complainant's age was proved by medical evidence.

Penetration

40. Section 2 of the *Sexual Offences Act* defines penetration to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

41. In the case of Mark Oiruri Mose-V- Republic (2013) eKLR the Court of Appeal explained what amounts to penetration as follows; "..... 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".

42. Again, in Eric Onyango Ondeng – V- Republic (2014) eKLR, the court held; "In sexual offences, the slightest penetration of the female sex organ by the male organ is sufficient to constitute the offence. It is not necessarily that the hymen be raptured".

43. In this case, PW1 vividly narrated to the court how the appellant accosted her while herding goats in the forest, undressed her, undressed himself and inserted his genital organ into her genital organ. She did not disclose this incident to anybody for fear of being killed. It would never have come to light had she not been infected with HIV. It took the prodding of PW3 that she revealed her ordeal in 2020 and named the appellant as the culprit. Of course, since it was revealed over two (2) years later, it cannot be expected that any hymen would still be fresh, although a torn hymen could be caused by other factors other than penetration. The trial court found that the complainant's testimony was firm, unshaken and truthful. After naming the appellant, he was examined and found to be HIV positive. I do not think that was a mere coincidence. I agree with the trial court that from a consideration of the prosecution evidence, there is no evidence that the appellant could have been framed. The appellants wife, DW2, corroborated PW1 and 2's testimonies that there was no dispute or grudge existing between the appellant and PW1's family. DW2 also denied that there was no dispute between the appellant and his brother as the appellant had alleged in his defence. The trial court also observed that there was no evidence to show that the appellant was not at Kapsigilai at the time the offence was committed. The appellant admitted that from August 2020 he was in Kapsigilai. I find that PW1's testimony on

penetration was corroborated by the torn hymen and HIV infection which must have occurred during the sexual act with the appellant who was also found to be HIV positive.

Identity of the perpetrator;

44. The appellant was not a stranger to the complainant. They are neighbours and related as confirmed by DW2. According to PW1, the incident occurred between 9.00a.m. and midday, in broad daylight. Further, the complainant described the perpetrator as having plaited hair. In his defence, the appellant admitted that he, he had dreadlocks. It was not just a coincidence that PW1 was found to be infected with HIV. PW1 named the appellant as having sexually assaulted her and on examination, it turned out that the appellant was HIV positive. There is overwhelming evidence that the appellant was the assailant.

Whether the defence was considered;

45. The trial court did consider the defence and rejected it. The appellant alleged that he was framed because of a land dispute between him and his brother. PW1 and 2 denied the existence of such dispute and their testimonies were corroborated by DW2. She added that the complainant's family and hers lived at peace. DW2's testimony totally contradicts that of the appellant. The defence was unbelievable and properly rejected.

46. This court finds that the conviction was well founded and this court affirms it.

Sentence: -

47. 3Under Section 8(2) of the *Sexual Offences Act*, upon conviction for defilement where the child is below eleven (11) years, the convict is liable to life imprisonment. In the recent Supreme Court case of Republic -V- Julius Kitsao Manyeso Petition E013/2024 the court held that the courts must comply with the mandatory sentences provided in the *Sexual Offences Act* because the Act has not been amended. The prosecution had issued a notice of enhancement of sentence and the appellant insisted on proceeding with the appeal. The sentence of sixty (60) years imprisonment is hereby set aside. The complainant was a child of nine (9) years, apart from her innocence being stolen, she was infected with a life-threatening disease which she has to live with, depending on medication and visits to the doctors. The appellant's act was callous, inhuman and he should be removed from society to protect other would-be victims. The appellant is sentenced to serve life imprisonment. The appeal is dismissed in its entirety.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 30TH DAY OF SEPTEMBER, 2025.

R. WENDOH

JUDGE

In the Presence of:-

Appellant – in person – virtual

Mr. Majale holding brief for Mr. Mugun for Respondent

Juma/ Hellen Court Assistants