Omari v Republic (Criminal Appeal E056 of 2024)
[2025] KEHC 13555 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13555 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E056 OF 2024

JN NJAGI, J

SEPTEMBER 24, 2025

BETWEEN

BWANA IDD OMARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L. N.Wasige, PM, in Garsen Senior Principal Magistrate's Court Sexual Offence Case No. E020 of 2021 delivered on 24/4/2023)

JUDGMENT

1. The Appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates of 19/6/2021 to 23/6/2021 in Tana Delta sub-county within Tana River County he intentionally caused his penis to penetrate the vagina of AEK (herein referred to as the complainant), a child aged 14 years.

2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal. The grounds of appeal are that;

    1. That the prosecution failed to give an explanation of why the appellant was medically examined six days after the alleged offence.

    2. that the learned magistrate erred in law and fact in convicting the appellant of defilement while penetration was never proved.

    3. That the learned magistrate erred in law and fact by failing to give due regard to the material contractions, discrepancies and inconsistencies in the prosecution case.

4. That the learned magistrate erred in law and fact in misapprehending the application of section 124 of the *Evidence Act*.

5. That the learned magistrate erred in law and fact in refusing to draw an adverse interference against the prosecution for failing to call certain crucial witnesses.

6. That the appellant's fundamental right to a fair and impartial trial as enshrined under Article 25(c) of *the Constitution* was violated.

7. That the learned magistrate erred in law and fact in making a specific finding in relation to the burden of proof.

Prosecution case

3. The case for the prosecution was that the complainant (PW1 in the case) was at the material time a standard five pupil. She was staying with her parents, one of whom is her father, SAY (PW2 in the case). It was the testimony of the complainant that she was on a certain Saturday watching television at the house of her aunt. She returned to her parents' house at 5 pm and found her mother at home. Her mother chased her away and told her to pack her clothes and leave the house. She left and went to the house of her boyfriend, the appellant. She stayed at his house for 4 days. On the following Wednesday they were picked by an aunt to the Appellant and taken to the office of the chief. She was told to go back to school. She did not go back as her mother had chased her from the home. She went back to the house of the Appellant. She stayed there for another 4 days after which she was picked by a village elder and taken to her school. Her head teacher, PW4 took her to Kipini police station and then to Tarasaa Dispensary where she was examined.

4. It was the evidence of the complainant that she was having sex with the Appellant during the time she stayed at his house.

5. The father to the complainant testified that on the 19/6/2021 he was in his shamba when the complainant went to the shamba and found him and her mother at the shamba. That the complainant was dressed inappropriately. Her mother told her to go back home and change clothes. She went away. When they returned home in the evening, they did not find the complainant. She returned home at 9 pm. Her mother asked her where she had been but she did not disclose. Her mother got stern with her. The complainant left the home and slept out. She stayed away for three days. On the fourth day he was called by the OCS and informed that the complainant was at the police station. He went there and found her.

6. The head teacher of the Appellant's school, PW4 testified that sometimes in the month of June 2021, he noticed that the complainant was missing from school. He went to her parents and asked them to take her back to school. Her parents took her back to school but she disappeared again. She was taken to the chief's office and taken to school. She told the head teacher that she just wanted to get married. The head teacher took her to the police station.

7. The clinical officer who examined the complainant, PW3 told the court that he attended to the complainant on the 25/6/2025 and found her with normal genitalia with a broken hymen but no bruises. A high vaginal swab was conducted that revealed a high concentration of epithelial cells which meant that she was sexually active. He completed a P3 form. He also examined the suspect, the Appellant.

8. A police officer from Kipini police station, PC Kigen PW5 testified that the complaint was taken to the police station and a report made that she had ran away from school. He investigated the case.

He interrogated the complainant wherein she disclosed that she had been living with the Appellant. He took her to Ngao County Hospital for examination. The complainant was remanded at Malindi Juvenile Home. She later escaped and went to live with the Appellant. On 16/8/2021, he went to the house of the Appellant with other police officers. They found the complainant and the Appellant in the house of the Appellant. They arrested both of them and took them to the police station. He charged the Appellant with defilement. During the hearing of the case in court the investigating officer, PW5 produced the complainant's birth certificate as exhibit, P.EXH.3. The clinical officer, PW3, produced the P.3 form and the treatment notes as exhibits, P.Exh.1 and 2 respectively.

Defence case

9. When placed to his defence, the Appellant stated in a sworn statement that he never knew the complainant and he first saw her in court when she testified. He denied that he was her boyfriend. He denied her ever going to his house and that he had sex with her. It was the evidence of the Appellant that he was a fisherman. That he and the complainant's father, PW2, were employed by the same company as fishermen. That in August 2021 he gave his fish to the complainant's mother to sell at Tezo. On the 12/8/2021 he went to PW2's farm to collect his money. He was however not paid his money and he stole PW2's sack of bhang to sell to recover his money. That on the 14/8/2021 PW2 went looking for him at his house. On the 15/8/21 his family and that of PW2 had a sitting to resolve the matter. PW2 said that his bhang was worth Ksh. 60,000/=. He demanded that he, the Appellant, pays him Ksh.45,000/= and he retains Ksh.15,000/=. He disputed the value of Ksh.60,000/=. They did not agree. PW2 vowed to teach him a lesson. That on the 16/8/2021 PW2 went to his house while accompanied by the complainant, the chief and police officers. He was arrested and taken to Tarasaa police station. He was told that he defiled the complainant in June 2021. He was taken to hospital and examined. He was charged with defiling the complainant. He said that the charges were a fabrication.

Submissions

10. The appeal was canvassed by way of written submissions of counsel for the Appellant and those of the prosecution counsel. The Appellant submitted through his counsel that the complainant testified that she was chased away from home by her mother while her father PW2 told the court that she went away on her own accord. That this was contradictory evidence.

11. It was submitted that the complainant's teacher PW4 said that he was informed that the complainant had gotten married at Semi Karo village. That it was not proved that the Appellant was residing at the said village.

12. It was submitted that crucial witnesses in the case such as the chief and a woman called Mwanahamisi were not called to testify. That Mwanahamisi is said to have reported the matter to the chief and was therefore a crucial witness in the case. That failure to call the two witnesses leads to the inference that had they been called, their evidence would have been adverse to the prosecution case, as was held in the case of Bukenya & others v Uganda (1972) EA 49.

13. It was submitted that the trial court erred in relying on the provisions of section 124 of the *Evidence Act* to convict the Appellant without it satisfying itself that the child victim was telling the truth. It was submitted that the complainant was not a credible witness. That she first testified before the first trial magistrate that she did not know the Appellant and that he never defiled her but changed this evidence when she testified before the magistrate who convicted the Appellant wherein she gave evidence that the Appellant had defiled her which portrayed the complainant as a witness not worthy of belief.

14. Counsel for the Appellant submitted that medical examination in the case was done 6 days later and therefore the findings of the clinical officer were not credible. It was submitted that the elements of

defilement were not proved beyond reasonable doubt. Counsel for the Appellant urged the court to allow the appeal.

15. The prosecution counsel on the other hand submitted that the three elements of defilement of proof of the age of the victim, proof of penetration and identity of the offender were proved beyond reasonable doubt. That the age of the complainant that she was of the age of 14 years was proved through the production of her birth certificate. That penetration was proved by the evidence of the complainant that the Appellant was her boyfriend and that they had sex countless times when she was at his house. That that evidence was corroborated by the evidence of the clinical officer, PW3.

16. The prosecution counsel submitted that the complainant stayed in the house of the Appellant for several days and was found there by the investigating officer, PW5. That the Appellant's defence that the case was a fabrication arising from a fall out with the complainant's father, PW2, was false as the Appellant was found in his house in the company of the complainant. That there was no reason for the clinical officer and the investigating officer to fabricate the case against him when they did not have any fall out with him. It was submitted that the defence evidence did not cast doubt on the prosecution case and the defence ought to be dismissed.

17. On the sentence imposed on the Appellant, it was submitted that the Appellant was sentenced to the legal sentence imposed by the law for defiling a child aged 14 years. The Respondent urged the court to dismiss the appeal.

Analysis and determination

18. This being a first appeal, this court is mandated to analyze and re-evaluate afresh the evidence adduced before the trial court in line with the holding in the case of Odhiambo v Republic Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

19. The ingredients of the offence of defilement are proof of the age of the victim, proof of penetration and proof of identity of the perpetrator, see George Opondo Olunga v Republic [2016] eKLR.

20. The age of the complainant in this case was proved by production of the birth certificate of the complainant that indicated that she was born on 10/9/2007. This placed the age of the complainant at the time of the incident in June 2021 at 13 years and 9 months. The age of the complainant was therefore proved.

21. On the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as insertion of the genital organs of a person into the genital organs of another person. Penetration can be proved by oral evidence or by circumstantial evidence which can be corroborated by medical evidence. The medical evidence adduced against the appellant was that the complainant had a broken hymen and a high concentration of epithelial cells in her vagina. That the latter meant that she was sexually active.

22. The trial magistrate in her judgment stated that though a broken hymen is not proof of defilement, the evidence of the clinical officer that the complainant had a high concentration of epithelial cells coupled with a broken hymen proved defilement. There was however no evidence to connect the epithelial cells with the appellant. There was no sufficient medical evidence to prove penetration.

23. However, lack of medical evidence in support of defilement is not fatal to a charge of defilement as the same can be proved by the oral evidence of the victim. In Kassim Ali V Republic [2006] eKLR the court noted that:

> " ....absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

24. More so, the proviso to Section 124 of the *Evidence Act* allows a court in sexual offence cases involving children to convict an accused where the only evidence in the case is that of the child victim if the court is satisfied that the child is telling the truth. The court is required to record down the reasons for believing that the child is truthful. The section provides as follows:

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

25. In this case the trial magistrte believed that the appellant stayed with the minor for four days in his house during which period he was having sex with her. The court dismissed the appellant's defence that the case was fabricated by the complainant's father due to a disagreement as an afterthought.

26. The trial court at the same time noted that the complainant had earlier on testified before another magistrate during which time she had denied having engaged in sex with the Appellant. The court however noted that the OCS had thereafter appeared in court and told the court that he had interrogated the girl who told her that she had been threatened by the aunt of the Appellant called Mwanahamisi that she would face serious consequences if she testified against the Appellant. The court stated that that would explain why the complainant recanted the contents of her statement when she first gave evidence in court on 26/10/2021.

27. The evidence of the complainant on the 26/10/2021 before Hon. Rotich was that the Appellant was her cousin. That she went to his house on 7/8/2021 but she never had sex with him. Further that she never had any sexual relationship with him.

28. The complainant thereafter appeared before another magistrate, Hon. Wasige, on 14/9/2022, during which time she stated that the Appellant was her boyfriend since the year 2020. That on a day she did not specify in 2021, she was chased away from home by her mother. She went to the Appellant and explained to him her predicament. He allowed him to stay with him in his house. She stayed there for close to a week during which time she was having sex with him. She was then picked and taken to the police station and to hospital.

29. Though Hon. Wasige said that the complainant recanted her evidence because she had been threatened by the complainant's aunt, the complainant herself never told Hon. Wasige that she had been so threatened by the Appellant's aunt. In fact, she was not asked and she never told the court why she was giving evidence contrary to what she had told Hon. Rotich that she had never engaged in sex with the Appellant. The sum total of the complainant's evidence is that at one time she said that the Appellant was her cousin and she had never engaged in sex with him. At another time she said that she lived with him for one week during which time she was having sex with him. Which of two versions was the court to believe? Was the complainant a witness worthy of belief?

30. The Court of appeal in the case of Ndungu Kimanyi v Republic [1979] KLR 283, held the following on credibility of witnesses:

> The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

31. In view of the contradictory evidence that the complainant gave to the two magistrates and considering that she did not tell the court why she gave differing stories about the incident, I do not think that the complainant was a credible and reliable witness. The convicting magistrate had no good reason of holding that the complainant had been threatened by the appellant's aunt when the complainant never gave such evidence in court. In any case when the OCS appeared in court to say that the complainant had told him that she had been threatened by the Appellant's aunt, he never did so as a prosecution witness and was not put to cross-examination by the Appellant. It was not proper for the trial court to rely on such a statement made not subject to cross-examination to hold that the complainant had been threatened by the Appellant's aunt. It was not safe to convict on the contradictory evidence of the complainant.

32. In the final end, I find that the Appellant was not convicted on solid evidence. Consequently, I find the appeal to be merited. The conviction by the trial court is therefore quashed and the sentence set aside. I order the Appellant to be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 24 TH DAY OF SEPTEMBER 2025.

J. N. NJAGI

JUDGE

In the presence:

Miss Mkongo for Respondent

Appellant –present

Court Assistant – Ms Rahma