Riungu v Republic (Criminal Appeal E004 of 2024)
[2025] KEHC 14439 (KLR) (30 September 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E004 OF 2024

RL KORIR, J

SEPTEMBER 30, 2025

BETWEEN

SILAS MUCHIRI RIUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Criminal Case S.O No. 14 of 2020 of the Chief Magistrate's Court at Chuka delivered by Hon. H.I. Mwendwa (PM) on 20th July, 2023)

JUDGMENT

1. Silas Muchiri Riungu (Appellant) was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars of the offence are that on 1st day of April, 2020 at [Particulars Withheld] in Meru South Sub-County within Tharaka Nithi County, the Accused person intentionally caused his penis to penetrate the vagina of C. M .N a child aged 17 years. The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(i) of the *Sexual Offences Act* No. 3 of 2006.

2. The Appellant denied the charges and the case went into full trial in which the Prosecution called 6 witnesses.

3. At the close of the Prosecution case, the trial court (Hon. Mwendwa P.M) found a prima facie case against the Appellant. Placed on his defence, the Appellant gave an unsworn statement and called no witnesses.

4. At the conclusion of the trial, the Appellant was convicted and sentenced to serve 15 years' imprisonment.

5. Aggrieved with the conviction and sentence, the Appellant filed his home-made petition of appeal dated 5th September 2023. From what I can decipher from the listed 5 grounds of appeal, the Appellant was aggrieved that:-

   i. He was not availed equal benefits of the law.

   ii. Section 216 and 329 of the Criminal Procedure Code were not considered

   iii. That the sentence was harsh and excessive

6. The Appeal was canvassed through written submissions as directed by the court. The Appellant's submissions were dated 14th March 2025 while the Respondent's submissions were also dated 14th March 2025.

7. I am conscious of my duty in this appeal to reconsider the evidence that was before the trial court and arrive at my own findings and conclusions. This duty was explained by the Court of Appeal in the case of Kiilu & Another-v- Republic (2005) 1 KLR 174 where the Court of Appeal stated:-

> " 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 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses."

8. I proceed in the succeeding paragraphs to consider whether the case against the Appellant was proven to the required legal standard. To do so I will consider each of the ingredients of the offence being, proof of age of the victim, penetration and the positive identification of the perpetrator.

Age of the victim

9. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in Kaingu Elias Kasomo vs Republic (2018) eKLR thus:-

> " Age of victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

10. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

11. The Appellant submitted that the case was not proven beyond reasonable doubt as the ingredients of the offence were not proven. He submitted that the complainant was 18 years' old at the time of the offence having been born on 12th January, 2003.

12. The Respondents on the other hand submitted that the complainant was 17 years' old as proven through her Clinic Card [Exhibit 5].

13. Evidence on age was given by PW2 BW who was the victim's foster mother. PW2 told the court that C.M's mother was deceased and that C.M was 17 years having been born on 12th January, 2003. She said that C.M had a Birth Certificate.

14. The Birth Certificate Serial No. XXXXXXX was produced by the Investigating Officer No. 254537 P.C Nkatha Irene as Prosecution Exhibit 5.

15. I have looked at Exhibit 5. It has the entry of 12th January 2003 as the date of birth. By simple calculation the complainant turned 17 on 12th January, 2020 and on the date of the offence (1st April, 2020), she was still 17 as she had not attained the next age. The Appellant's calculation that she was 18 is not tenable and must be dismissed.

16. It is my finding that the age of the complainant was proven to the required legal standard.

Proof of penetration

17. Penetration is defined by 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.

18. The Appellant did not submit on the fact of penetration. He only submitted that there was no medical evidence linking him to the defilement as no DNA was extracted from him and further that there was no evidence placing him at the scene.

19. Penetration is proved through the evidence of the victim corroborated by medical evidence. In the case of Bassita vs Uganda S.C Criminal Appeal Number 35 of 1995, the Supreme Court held that:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence...."

20. I have looked at the trial record and considered the evidence on penetration. The complainant (PW1) testified as follows:

> " In 2020 I was 17 years old. On 1st April, 2020, I had been sent to the shop to buy a jug, after I bought the same I left for home. On my way, I saw Silas Macharia on the side of the road (roadside). When I reached where he was, he came to the road and got hold of me. He covered my mouth and pulled me to his house. He then opened the door and told me that if I screamed he will kill me. He then threw me on the bed and removed all my clothes. He then removed all his clothes and started touching me. He then had sex with me. I stayed at his house the whole night. The following morning he did it again. He had sex with me again. After he finished he told me to put on my cloths and go home. He also warned me not to tell anyone because if I did, he would kill me."

21. The testimony of the complainant above shows that she had penetrative sex in the night and in the morning before she left for home.

22. PW1 stated that when she got home, she was asked where she had slept and she revealed and a report was made to the chief who showed up and advised that she be taken to hospital. She was first seen at Mbukoni health centre and then at Chuka general hospital.

23. Medical evidence was given by Joseph Mwenda Mwiragu (PW5). He testified that he signed the P3 Form in respect of C.M.N. That the physical examination did not show any sign of physical injury and the genital examination did not show any injury except the presence of a foul smell discharge. A vaginal swab indicated presence of spermatozoa and pus cells which indicated a urinal track infection. PW5 further testified that the medical documents from Kiamuchii Health Centre dated 2nd April, 2020 had the same findings. With respect to the PRC Form, PW5 stated that the same was filled by Bartha Kawira a clinical officer who was on duty at the time.

24. PW5 produced the PRC Form, and Treatment Notes dated 2nd April, 2020 and Treatment Note book from Kiamuchii Health Centre as Prosecution Exhibits 1,2, 3 and 4 respectively.

25. I have considered the evidence of PW5 and closely examined the Exhibits he produced. Exhibit 4 (Treatment Note Book) is dated 2nd April, 2020 and bears the stamp of Kamuchii Health Centre. It shows that the physical examination found the external genitalia normal with no laceration and that a urinalysis test was done which showed pus cells. The patient was then refereed to Chuka Hospital for vaginal swab.

26. The PRC Form (Exhibit 1) dated 2nd April, 2020 was filled by one Bretah Kagwiria. It contains observations as follows: Hymen not intact but not freshly broken, no lacerations, no bruises, no tears and foul smelling discharge. The results of the vaginal swab were that spermatozoa and pus cells were seen.

27. The Treatment notes made on the Treatment Card from the County Referral hospital were similar to that contained in the PRC Form.

28. I have also looked at the P3 Form [Exhibit 1] stamp dated 6th April, 2020. It contains the same findings in the PRC Form.

29. From the medical evidence above, it was clear that there was penetration. The hymen was not freshly broken implying that the complainant was sexually active prior to the date of the present offence.

30. It is my finding that the evidence of the complainant that she was penetrated was corroborated by the medical evidence. Penetration was therefore proven to the required legal standard.

Identification of the Perpetrator

31. The incident took place at night around 7 p.m. This means that the circumstances were not favourable for identification. In the case of Cleophas Wamunga vs. Republic(1989) eKLR , the Court held:-

> " 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 minimize this danger....."

32. The Appellant contends that he was not properly identified as the person who defiled the complainant. He submits that the complainant testified that she did not know him before and only came to know him on the Friday after she had made a report of the defilement and recorded her statement. That she was categorical that she did not know Silas. The Appellant urged that the prosecution evidence on identification was a case of mistaken identity. He urged that his conviction was not safe.

33. The Respondent on the other hand submitted that the complainant testified that she did not know the Appellant before the night of the incident but came to recognize him the next day in the morning after they had slept together. They urged that it was a case of recognition.

34. I have critically examined the identifying evidence. The complainant testified that she was coming from the shops when she saw Silas Macharia (wrongly typed Macharia, but indicated as Muchiri in the hand written proceedings) on the side of the road. That when she reached where he was, he got hold of her, covered her mouth and pulled her to his house where he proceeded to have sex with her. That she stayed the whole night upto morning when they had sex again before she went home.

35. PW1 testified that when asked where she had slept, she told her mother BW asked her where she had slept and her father WG called the area chief who advised that she be taken to hospital. That upon returning home from Mbukoni health centre, she found that Silas (Accused) had been arrested and handcuffed and was sitting under a tree at their homestead.

36. PW1 further told the court that she did not know Silas before and that he did not stay near where they lived. That she came to know him in the morning but had not known him the whole night. That she only came to know him in the morning of Thursday but did not know who it was the whole night. She identified the Accused in court.

37. Cross -examined, PW1 stated that she met the Accused on the road and that the distance they walked to his house was about 10 minutes' walk. She described that his parent's house was in the compound and that there were other houses nearby too. She however maintained that Accused dragged her and she did not scream because he had at the same time covered her face and threatened to kill her if she screamed.

38. The complainant's mother BW (PW2) told the court that she knew Silas Muchiri Riungu as their neighbour. That PW1 told her that she had spent the night at his place where he defiled her. She stated in cross-examination that she had known the accused for many years and that they had once engaged him to sell miraa for them.

39. WG (PW3) was the complainant's uncle who played the role of father or guardian as she was his brother's daughter. He told the court that he knew the Accused by the name Muchiri and he was a neighbour. That when PW1 returned home in the morning, she told him that she had slept at Muchiri's. That she had met Muchiri on the road and he requested her to go to his place and when she refused, he pulled her to his house.

40. In cross-examination, PW3 told the court that he knew the Accused whom he used to give work in Embu. That he had given him work to sell cigarettes worth Kshs.10,000/- and he spent the money. That he had also given him his car to do business in Lamu and he misused the funds. That the Accused later ran away from PW3's home leaving his ID and other belongings behind.

41. From the testimonies of PW2 and PW3, it was clear that the Appellant was a person very well known to the family who had even engaged him in their business, hired him, and even accommodated him in their property. They categorically stated that he was a neighbour. This brings to question the credibility of the complainant's evidence that she did not know or recognize him when they met on the road, when he dragged her to his house and when they slept together through the night. She was categorical in her testimony that she did not know him. That she only recognized him in the morning. However, it was clear from her answers in cross-examination that she knew him prior. She was however categorical in her examination in chief that she did not know him. Her evidence of identification was therefore clearly contradictory. Either she knew him as her boyfriend and tried to shield his identity or she actually was not sure of the identity of the person with whom she spent the night and had sex.

42. In the case of Ndungu Kimanyi Vs. Republic [1979] KLR 282, the Court of Appeal cautioned thus:-

> " 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

suspicion about his trust worthiness, 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."

43. The identification evidence of PW2 and PW3 while clearly showing that the Appellant was a person very well known to the family was founded on the evidence of the victim whom they said told them that she had spent the night at his place. Since the victim gave contradictory evidence in court regarding the identity of the Appellant as the person with whom she spent the night, the foundation for such identification by PW2 and PW3 collapsed.

44. It is my finding therefore that the identification of the Appellant, as the person who defiled the complainant on the material night was not proved beyond reasonable doubt. While the evidence created a strong suspicion that he was the culprit, such suspicion cannot form the basis of a conviction. This was the edict of the Court of Appeal in the case of Sawe Vs. Republic [2003] KLR 364 when it held that:-

> " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

45. The ingredients of defilement must be proved conjunctively. As the identification of the Appellant remained in doubt, I must, as required by law, resolve the benefit of the doubt in favour of the Appellant with the result that the charge against the Appellant was not proved beyond reasonable doubt.

46. I quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

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

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Appellant acting in person. Ms Rukunga for the Respondent, and Muriuki (Court Assistant).