Kiprono v Republic (Criminal Appeal E082 of 2018)
[2025] KEHC 14234 (KLR) (8 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14234 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E082 OF 2018

HI ONG'UDI, J

OCTOBER 8, 2025

BETWEEN

SAMUEL KOECH KIPRONO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment delivered Hon. E. Soita (Resident Magistrate) on 3rd October, 2018 in Molo Chief Magistrate's Court Criminal Case No. 2659 of 2014)

JUDGMENT

1. Samuel Koech Kiprono hereinafter referred to as the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars being that the appellant on 7th September, 2014 in Molo district within Nakuru county, intentionally caused his penis to penetrate the vagina of FC a child aged 13 years. He faced an alternative count of committing an indecent act with a child.

2. The prosecution called a total of four (4) witnesses, while the appellant gave an unsworn statement of defence without calling any witnesses. Thereafter the trial Magistrate delivered a Judgment convicting the appellant on the main count on 3rd October, 2018. He was thereafter sentenced to twenty (20) years imprisonment.

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

    i. That the learned trial magistrate erred in law and in fact by relying on uncorroborated, incredible, contradictory and unreliable evidence to convict the appellant.

    ii. That the learned trial magistrate erred in law and in fact by failing to appreciate that the core ingredient of the offence termed defilement was not proved beyond any reasonable doubt.

iii. That the learned trial magistrate erred in law and in fact by failing to appreciate that crucial witnesses were not called upon by the prosecution to testify.

iv. That the learned trial magistrate erred in law and in fact by failing to appreciate that in totality the prosecution case was not proved beyond any reasonable doubt as prescribed by law.

4. A summary of the case before the trial court was that PW1 then aged 13 years went to Doswa Centre on 7th September, 2014 at 7 pm to buy salt, having been sent by one Caren. On her way back she was offered 1½ pieces kangumu and a ball gum and phone by the appellant whom she had been seeing around. He then carried her into a maize farm. He threatened to kill her if she screamed. He removed her panty and laid her on the ground, and pulled up her white dress. He then removed his trouser, took his penis and inserted it into her vagina. She screamed and someone called Rodgers came and that was when the appellant took off with his phone.

5. She bled and used her panty to wipe herself. She then went home and reported to her aunt, who checked her private parts and panty. Her mother (PW2) came over on 17th September, 2014 and she was taken to Njoro Health Centre then Elburgon Health Centre. A report was eventually made at Elburgon police station. In cross examination she insisted that the appellant had a shop at Doswa centre and on the material day he was wearing what he had in court on the hearing day.

6. PW2 – MM is PW1's mother. It was her evidence that she had on 7th September, 2014 6.50pm looked for her daughter through Viola but did not get her. She then left to search for her at Caren's house when she met her coming from a maize plantation. On asking her where she ws from she said Samuel had cheated her and defiled her. She identified the appellant as the Samuel. She went to Caren's house to notify her. The rest of the process followed. In cross examination she said PW1 was not immediately taken to hospital since they stay far from the facility.

7. PW3 Dr. Ngure from Elburgon sub-county hospital produced a P3 form (P.Exb 2) filled by Dr. Robinson Kipsinet who had examined the child. He also produced the treatment notes in respect of PW1 as P.Exb 1. P.Exb 2 which showed that PW1 had no injuries on the genitalia but her hymen was broken meaning did not have forceful sex.

8. PW4 – No. 66xxx Cpl Charles Mutembei from Elburgon police station was the investigating officer. He said a report of the defilement was made at the station on 17th September, 2014. The report was that PW1 and others had gone to the shops to buy sugar. They bought the sugar from the appellant's shop and thereafter PW1 was asked by the appellant to remain behind while the others left. She was given doughnuts and the shop was then closed. The appellant went with PW1 to the maize field from where he defiled her. The appellant was arrested 20 days later as his shop had remained closed.

9. In his unsworn defence the appellant denied the charge. He said on the fateful day he was in his shop and locked it at night and went home without any issues. He heard of the incident the next day and police came to his house. They showed him the girl whom he did not know and he was arrested. He pointed out that the complainant did not come with witnesses from the area. He said PW2 resides near his shop.

10. The appeal was canvassed by written submissions

Appellant's submissions

11. These are dated 1st April 2025 having been filed by the appellant in person. He referred to the cases of Okeno V Republic 1972 EA32, Sylvester Wanjau Kariuki V Republic [2016] eKLR, and K.

Anbazhagan V State of Karnataka and others Criminal Appeal No. 637 of 2015 (Supreme court of India) which outline the duty of the first appellate court.

12. On the 1st ground of contradictory and incredible evidence the appellant submitted that such evidence mutilates the truthfulness and credibility of the witnesses evidence. He pointed out the contradictions in the evidence of PW1 and PW2 on the alleged scene of crime and what had happened. He urged that the doctor ruled out any forceful penetration while PW1 and PW2 talked of bleeding meaning forceful penetration. He thus submitted that there was no proof of penetration.

13. It is the appellant's submission that there was a delay of ten (10 days before PW1 was examined with no explanation being given. Further more that a missing hymen by itself is not evidence of penetration. Reference was made to the case of P.K.W. V Republic [2012] eKLR where the court observed as follows:

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences, we have dealt with courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of fearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen.
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> See the Canadian case of The Queen vs Manuel Vincent Quintanila 1] 999] AB QB 769".

14. On the 3rd ground of critical witnesses not testifying he contended that Rongers who allegedly responded to PW1's screams was a crucial witness. The other crucial witness whom PW1 reported to was her aunt. Both these two witnesses did not testify. Referring to section 143 of the *Evidence Act* he said the same does not relieve the prosecution of its responsibility in criminal matters to call crucial witnesses to testify. On this he referred to the case of Bukenya & another V Uganda [1972] E.A 549. He further referred to the case of Juma Ngondia V Republic [1982 – 1988] KAR 454 where it was held as follows:

> " The prosecution has in general discretion whether to call or not call someone to witness. If he does not call a vital reliable witness, it runs the risk of the court presuming that the evidence which is not produced would if produced be unfavorable to the prosecution"

15. Finally, the appellant submitted that the prosecution case was not proved beyond reasonable doubt. On this he referred to several decisions namely: Republic V Kipkering Arap Koske and another [1949] 16 EACA 135; Republic V Stephen Kiprotich Leting & 3 others Criminal Case No. 34 of 2008 [2009] eKLR among others.

Respondent's submissions

16. These were filed by M/s Emma Okok principal prosecution counsel, and are dated 16th June 2025. The respondent is opposed to the appeal. Counsel outlined the ingredients required for an offence of defilement to be proved.

17. On penetration she submitted that the same had been proved by the evidence of PW1 and PW3 who produced the P3 form and treatment notes. Counsel contended that the use of force may not have been noted since PW1 was presented to the hospital ten (10) days after the incident.

18. Counsel submitted that PW2 who is PW1's mother said the child was 13 years in 2014. An age assessment done indicated that PW1 was aged between 15-17 years old as at 14th November, 2017 (P. Exb 4), which was 3 years after the incident. The doctor who examined PW1 estimated her age to be 13 years.

19. On the appellant's identity counsel submitted that PW1 knew him though not by name. She also knew he operated a shop at Doswa. That PW2 also knew him as he used to sell at a shop in Doswa.

20. Counsel in reference to the appellant's submissions on certain witnesses not being called referred to sections 124 and 143 of the *Evidence Act*. She contended that failure to call Rodgers and PW1's aunt was not fatal as the four (4) prosecution witnesses gave credible evidence.

21. On the issue of sentence, it was counsel's submission that under section 8(3) of the *Sexual Offences Act* the minimum sentence is twenty (20) years which was meted out on the appellant. Counsel referred to the Supreme Court decision in Republic V Mwangi Initiative for Strategic Litigation in Africa (USLA) & 3 others (Amicus Curiae) Petition No. E018 of 2023) [2014] KESC 34 (KLR). She urged the court to dismiss the appeal in its entirely.

Analysis and determination

22. Upon careful consideration of the record of appeal, grounds of appeal submissions by both parties, cited authorities and the law I find the main issue for determination to be whether the prosecution proved the case of defilement against the appellant. This being a fist appeal this court is called upon to re-consider and re-evaluate the evidence before the trial court and arrive at its own independent conclusion. It should also bear in mind that it did not hear nor see the witnesses testify and so give an allowance for that. This has been the position in several decisions including those cited by the appellant. Others are: Kiilu & another V Republic [2005] IKLR 174, Simiyu and another V Republic [2005] IKLR 192.

23. For a charge of defilement to stand the following ingredients must be proved:

    i. Age of the victim

    ii. Penetration of the victim's genital organ

    iii. Identification of the victim

24. There is no dispute in respect of the age of PW1. PW2 who is her mother told the court the child was 13 years old at the time of incident. PW1 was sent for age assessment which was conducted on 14th November, 2017 and the results produced vide the report produced as P.exb 4 by the investigating officer (PW4). The report shows PW1 was 15-17 years old as at 14th November, 2017 which was three (3) years after the incident. It therefore means she was in the age bracket of 12-14 years which corresponds with what PW1 and PW2 told the court about the age. I therefore find that PW1's age was proved.

Penetration of the victim's genital organ

25. Penetration is defined under section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person"

26. It was PW1's evidence that her genital (vagina) had been penetrated by a male organ namely penis. That as a result she felt pain and bled. She wiped herself with her pant which was blood stained. The blood-stained pant was however never produced nor taken to the police station. The incident complained of occurred on 7th September, 2014. From the treatment notes and P3 form produced as P, Exb 1 and 2, the victim was only taken to hospital on 17th September, 2014 while the P3 form was filled on 18th September, 2014. The P3 form (PEXB 2) also shows that the report of the defilement was only made to Elburgon police station on 17th September, 2014 ie ten (10) days after the date of incident.

27. No explanation was given by the prosecution as to why there was this long delay in reporting the incident and taking PW1 for treatment. In cross examination PW2 told the court that the reason for delay in taking action was the distance from the home to hospital. What about the distance to the police station? There was no evidence placed before the court to support PW2's claim.

28. Another observation I have made is on the medical documents (P.Exb 1 & 2) produced by PW3. It is clear that PW3 was not the maker of any of the two documents. PW3 said the victim (PW1) was seen by Dr. Robinson Kipsinet who filled the P3 form on 18th September, 2014. No basis was laid by the prosecution for the production of these important documents by one other than the maker. It is also no where indicated that the appellant was asked by the court to confirm whether he had any objection to the production of the documents by PW3 who was not the maker. That is the whole purpose of section 33 of the *Evidence Act* which provides as follows:

> Statement by deceased person, etc., when. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
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> a. .....
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> b. made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

This was clearly overlooked by the prosecution and the trial court in this case.

29. From the notes in P. Exb1 & 2 it is clear that there were no injuries observed on the victim's genitalia. The only notable thing noted was a broken hymen. It is not indicated as to whether the hymen was

freshly broken or not and why this to the author proved defilement. This would only have been explained by the doctor who examined the victim which was not the case here.

30. The next issue is the identification of the perpetrator. PW1 told the court she had been sent to the shops to buy salt. She then said the person who had sent her to the shops at Doswa centre at 7.00pm was one Caren. In her evidence she did not state who Caren was but she said when she went home she informed her aunt what had happened. She did not say whether this aunt is the Caren who had sent her. The said aunt was a crucial witness because she was the first person to receive the report from PW1. What did PW1 tell her in terms of what had happened to her? Did she tell her who the perpetrator was?

31. There is another person mentioned by the name of Rogers who allegedly responded to PW1's screams in the maize plantation. If what PW1 told the court is what happened then Rogers must have seen the person who had been in the maize plantation with PW1. Why did the prosecution not find it necessary to avail Rogers as a witness? The prosecution should not hide behind section 124 and 143 of the *Evidence Act* to deny the court the opportunity to weigh all the available evidence of key witnesses.

32. Besides the above is the evidence of PW2 who is PW1's mother. She told the court that she met PW1 on the night of incident as she emerged from the maize plantation. That she examined PW1's private parts the next morning and she was bleeding. The evidence given by PW1 is in total contrast with what PW2 told the court about PW1. If indeed what PW2 told the court was true, why did she not take the bleeding minor to hospital? Did she really meet PW1 on the material night as claimed? PW2's evidence is very suspicious even if she is PW1's mother. PW1 never mentioned having met her on the material night.

33. Another angle to this emanates from the investigating officer (PW4). It was his evidence that PW1 went to the appellant's shop with her siblings to buy sugar. After buying the sugar she was given doughnuts by the appellant who asked her to remain behind while the siblings left. Who were these siblings as none testified? PW4's evidence does not line up with the evidence of PW1 on what transpired on that night. The same goes with PW2's evidence. The court was also not told how the appellant was identified by PW1. The incident occurred at night and the court was never told by PW1 how she was able to identify the appellant. Indeed, she told the court she had been seeing him around but did not know him by name so how was he identified by PW1 leading to his arrest? PW4 said PW1 identified the appellant at the AP's camp. What kind of identification was conducted? PW4 did not explain this to the court.

34. I have perused the Judgment by the trial court. On the ingredient of identity of the perpetrator the trial court simply rehashed the evidence of PW1, PW2 and PW4 without doing any analysis of the same. Infact it is this ingredient that is critical in this case. If indeed PW1 went to the appellant's shop with her siblings, any one of them was a critical witness just as Rongers and or Caren/aunt. I have already mentioned the issue of the manner of identification of the appellant which was never given to the court.

35. In total, I find that the contradictions in the evidence of PW1, PW2 and PW4 could have been cured if any of the following persons was called as a witness i.e Rogers, Caren/aunt and the siblings PW1 allegedly went with to the shop to buy sugar and not salt as stated by PW1.

36. The burden of proof lies on the prosecution and that is why I have analyzed its case in detail. The defence of an accused only comes in after the proof of the prosecution case. In this case I find that the case against the appellant was not proved to the required standard.

37. The upshot is that the appeal has merit and I allow it. The conviction is hereby quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise held under a separate warrant.

38. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 8TH DAY OF OCTOBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE