DO v Republic (Criminal Appeal E099 of 2024)
[2025] KEHC 15378 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15378 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E099 OF 2024

A MABEYA, J

OCTOBER 31, 2025

BETWEEN

DO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction & sentence of Hon. M.N. Olonyi RM delivered on the 11/12/24 in Tamu SPMC SO Case No. E031 of 2021, R. vs Dominic Osodo Odhiambo)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the charge were that, on the 16/11/2023 at Koru Trading Centre in Muhoroni sub county within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of M.A.A a child aged 9 years.
3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
4. In Count 2, the appellant was charged with the deliberate transmission of HIV contrary to section 26 (1) (b) of the *Sexual Offences Act* No. 3 of 2006.
5. The particulars of the offence were that on the 16/11/2023 at Koru Trading Centre in Muhoroni sub county within Kisumu County having actual knowledge that he was infected with HIV, the appellant intentionally and wilfully caused his penis to penetrate the vagina of M.A.A a child aged 9 years which he knew was likely to lead to M.A.A. being infected with HIV.
6. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of six (6) witnesses. The defence was based on the appellant's sworn testimony.

7. In in its judgment delivered on the 11/12/2024, the trial court found the appellant guilty on Count 1 and sentenced him to life imprisonment while acquitting him on the second charge.

8. Dissatisfied by the trial court's conviction and sentence, the appellant filed his undated petition of appeal raising six (6) grounds that can be summarized as; That the trial court erred in law and facts by convicting the appellant based on evidence that was inconsistent and that amounted to a conspiracy and fabrication against him.

9. The appellant did not file any submissions in support of his appeal but instead opted to rely on his grounds of appeal. The state submitted that all the ingredients of the offence of defilement were proved beyond reasonable doubt as set out in the case of George Opondo Olunga v Republic [2016] eKLR.

10. That the appellant's right to legal representation as enshrined under Article 50 (2) (h) of the *Constitution* was upheld as he was given an opportunity to prepare for his defence, seek legal representation, to call, challenge and cross-examine witnesses. That the appellant's sentence as meted was lawful and commensurate with the offence charged and ought not to be interfered with.

11. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion and findings but at all times bearing in mind that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

12. Before the trial court, Pw1, the complainant, gave an unsworn testimony that on the 17/11/2023 she was playing along the road with some friends when the appellant, Atieno's husband, called them. That her friends left heeding a call from their mother while she remained. That the appellant took her into his house, closed her mouth with his hand, removed her panty, pulled his short down a bit and took his 'dudu' and put it in her 'dudu'.

13. That after she left the appellant's home, she went home where her mother slapped her for ignoring her calls. That subsequently, she later told her mother about the defilement and they proceeded to Muhoroni Hospital. She testified that she is 9 years old.

14. Pw2 A.O. gave an unsworn testimony that on the 16/11/2023, they were playing along the road with Pw1 when the appellant called them to his house and told them to lie on his bed. That she left Pw1 in the house when her mother called and did not know what transpired after she left. She testified that they usually visited the appellant's house to visit Atieno, his wife.

15. Pw3 WOL, the complainant's father testified that on 17/11/2023 he noticed that the complainant looked sick and on inquiry from his wife, she informed him that the complainant had been sent to their aunt in Nyando to get maize but overstayed. That on 19/11/2023, he noticed the complainant scratching her private parts and implored her wife to follow up on the same.

16. That he later learnt from his wife that the complainant had been defiled by the appellant while playing with Pw2. He testified that the minor was 9 years old having been born on 27/11/2014.

17. Pw4 CAO, the complainant's mother corroborated Pw3's testimony. She further told the court that following discovery of the defilement, she took the child to the hospital from where they were told to proceed to the police. She and the complainant went to Koru Police Station. That the appellant was a regular customer at her stall.

18. Pw5 Salim Ouma Onyango a Senior Clinical Officer at Muhoroni County Hospital who alongside his colleague Dr. David Odhiambo examined the complainant testified that they found reliable bruises on her labia majora and minora with whitish discharge. That the hymen was torn and there was pain

while palpating the genitalia which were all features of penetration. That at the time of examination, the complainant tested negative for HIV/AIDS.

19. Pw6 No. xxx PC Daniel Oyugi, the investigations officer, testified that the case was reported on 20/11/2023 at Koru Police Station when the complainant narrated the incident to him and his colleague PC Purity. That the complainant helped them identify the appellant at his house where they arrested the appellant and found him with ARV tablets in his pocket. That he took both the complainant and appellant to Muhoroni Hospital where they were both examined and treated.

20. When placed on his defence, the appellant denied defiling the complainant. He testified that the complainant usually visited his home. That a dispute arose after the complainant's mother found him with a new wife. That the complainant's mother threatened to teach him a lesson, a threat he reported to his uncle and police and was issued with an OB but she convinced him to destroy.

21. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him accordingly.

22. From the outset, it is evident that the prosecution's case was anchored on the unsworn testimony of the complainant, Pw1 and Pw2 who were both taken through a voire doire and found not understanding of the nature of an oath.

23. In Amber May v Republic [1979] eKLR, the Court of Appeal reviewed English law on the subject and held as follows on the accused unsworn evidence:

> " What is said in such a statement is not to be altogether brushed aside; but its potential value is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences to be drawn from them in a different light. In as much as it may thus influence the jury's decision, they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and that tested by cross-examination has less cogency and weight than sworn evidence."

24. The court concluded that:

> " From all this we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence."

25. It is also not in doubt that that the evidence of a minor requires corroboration. In Bernard Kebiba v Republic [2000] Eklr, it was stated that: -

> " The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the

court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."

26. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

27. That however, is not the end of the matter. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the *Evidence Act* makes this quite clear:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> 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." [Emphasis added]

28. With the aforementioned in mind, the Court proposes to analyze the evidence presented before the trial court. Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* establishes the offence of defilement as follows:

8 (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8 (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

29. The specific elements of the offence defilement arising from section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are: -

a. Age of the complainant;

b. Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*;

c. Positive identification of the perpetrator.

30. The age of the victim is not in doubt. She testified that she was 9 years at the time of the incident. This was corroborated by the testimony of her parents Pw3 and Pw4 as well as the Birth Certificate produced by Pw3 as PExh1 which showed that the complainant was born on the 27/11/2014 and was thus 8 years 11months and 20 days old as at the time of the offence.

31. Penetration is also not in doubt. The victim testified in detail how the appellant defiled her. This testimony was corroborated by the medical evidence presented by Pw5, the Clinical Officer who examined the complainant following the incident.

32. The above medical evidence and witness testimonies all prove that there was penetration however the question is by who.

33. The appellant submitted that he was wrongly convicted on the evidence of identification which was not positively proved. He offered up an alibi defence that he was set up by the complainant's mother.

34. It is not lost to this Court that the appellant was well known to the complainant having interacted with her for some time prior to the incident. In any case, in Sexual Offences an accused can be convicted solely on the evidence of the victim as provided in Section 124 of the *Evidence Act*.

35. Pw2 told the Court how on the material day she was with the complainant. That the appellant summoned them to his house. How she, Pw2 left the complainant in the company of the appellant alone in the appellant's house. The complainant's testimony was aptly corroborated by the medical evidence adduced by Pw5 as well as the testimonies of other prosecution witnesses.

36. As regards his alibi defence, the appellant had legal burden of proof to place material before court under Section 107 of the *Evidence Act*.

37. In Kiarie v Republic {1984} KLR, the Court of Appeal held at page 3 that:

> " An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."

38. The time of bringing the defence also influences the mind of the Court, the appellant further failed to raise the defence at inception of the case and potentially casts doubt on the credibility of his case.

39. In the case of Karanja v Republic [1983] eKLR the Court of Appeal held at page 3 that:-

> " Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R v Ahmed Bin Abdul Hafid (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in R v Little boy, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought."

40. Consequently, I find that the prosecution's case remained intact throughout the trial thus the prosecution proved beyond reasonable doubt that the appellant penetrated Pw1, a child aged 9 years. Therefore, the conviction was proper. The appeal on conviction therefore lacks merit and is hereby dismissed.

41. As regards the sentence meted out on the appellant, the same was not raised in the petition of appeal in which the appellant relied on herein. However, I must note that section 8(2) of the Act provides for a sentence of life imprisonment upon conviction. This was the sentence meted out by the trial court. I find no reason to interfere with the same.

42. Accordingly, the appeal is found to be without merit and I proceed to dismiss the same in its entirety.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2025.

A. MABEYA, FCI Arb

JUDGE