Kahati v Republic (Criminal Appeal E0110 of 2024)
[2025] KEHC 15114 (KLR) (22 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15114 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E0110 OF 2024

JN NJAGI, J

OCTOBER 22, 2025

BETWEEN

MAGWENJE KITHI KAHATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from original conviction and sentence by Hon. J. Ongondo, SPM, in Malindi Chief Magistrate's Court Sexual Offence Case No. E0601 of 2023 delivered on 19/12/ 2024)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve 20 years imprisonment. The particulars of the offence were that on diverse dates between March 2021 and 2nd March 2022 in Magarini sub county within Kilifi county he intentionally caused his penis to penetrate the vagina of SCS (herein referred to as the complainant/victim), a child aged 15 years.

2. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds of appeal:

    1. That the learned magistrate erred in law and facts by failing to consider that the prosecution did not prove their case beyond reasonable doubt as required by the law in breach of section 109 and 110 of the *Evidence Act*.

    2. The learned magistrate erred in law and fact by failing to consider sharp contradictions by the prosecution in contravention of section 163(1)© of the *Evidence Act*.

    3. That the trial magistrate erred in law and fact by failing to consider both conviction and sentence were against the weight of the evidence adduced by the prosecution.

4. That the learned magistrate erred in law and facts by failing to adequately consider any defense evidence.

5. That the learned magistrate erred in both law and facts by failing to adequately consider the appellant's defense evidence.

6. That the learned magistrate erred in both law and facts by failing to appreciate contradictions and consistencies on prosecution case.

3. The case for the prosecution was that the complainant who was PW2 in the case was in the year 2021 aged 15 years and was in primary school. She was living with her mother PW3 and her father, PW4. That the Appellant was doing some farming at her father`s farm. It was her evidence that she befriended him and they started engaging in sex in June 2021. That she had sex with him 5 times at his house where she used to visit him at night. He would give her money after every sex session. In 2022 she started getting sick. Her mother PW3 took her to Marafa Health centre where she was examined and found to be pregnant. An ultra sound was on done on 14/3/2022 at Malindi sub county hospital which showed that she was 5 months pregnant. He father PW4 reported the matter at Marafa police station.

4. The case was investigated by PC Beth Kagendo PW5 of Marafa police station. She issued the complainant with a P3 form that was completed at Malindi sub county hospital. She recorded statements of witnesses. She obtained the complainant`s birth certificate from her parents that indicated that she was born on 3/2/2007.The appellant was arrested and charged with the offence. During the hearing of the case in court the investigating officer produced the birth certificate as exhibit, P.Exh.5. A doctor from Malindi sub county hospital PW1 identified the treatment notes, the P3 form, the ultra sound report and the X-ray request form, MFI. 1 – 4.

5. In his defence the appellant stated that he had leased 5 acres of land from the father to the complainant where he was growing water melons. The lease was for one year. That later a mzee called Kenga went to the farm and told him that the land belonged to him. He asked him as to who had given permission to farm the land. He said it was the complainant`s father. Kenga demanded to be paid money. He paid him Ksh.45,000/= for the remaining 3 years. Later the complainant`s father told him to leave the land. He protested that the land belonged to Kenga. The complainant`s father vowed that he will ensure that he has left the village. That in February 2022, the village learnt that the complainant was pregnant. He was accused of impregnating her. Later it was said that it is his brother who was responsible. He denied that he is the one who impregnated her.

6. The appellant called one witness, Charles Kishali, DW2. The witness testified that the appellant had a land dispute with the father to the complainant. That land belonged to a person called Kenga and he DW2 was living on the land. That the appellant paid money for lease of the land to Kenga for a period of 3 years. The father to the complainant then asked for money from the appellant. He told the appellant to leave the land. That in February 20222 the complainant herein got pregnant and said that a person called Willy from Sabaki was responsible. That in April it was alleged that he, DW2, is the one who impregnated the girl. In the same month it was alleged that the appellant is the one who was responsible for the pregnancy.

Submissions

7. The appeal was canvassed by way of written submissions of the counsel for the appellant and those of the prosecution counsel.

8. The appellant`s counsel submitted that the age of the complainant was not proved as the birth certificate is not included in the list of exhibits produced in court.

9. It was submitted that penetration was not proved. That the complainant in her evidence merely said that she had sex with the appellant on multiple occasions. That the evidence lacked the specific details necessary to establish whether the acts met the legal definition of penetration. This is so because sexual intercourse does not automatically equate to penetration.

10. Counsel for the appellant submitted that medical reports were not produced in court by the maker, contrary to the provisions of section 77 of the *Evidence Act*. That this rendered the documents inadmissible as the trial court did not ascertain whether the author possessed the necessary qualifications to provide expert medical evidence, as held in Kagina v Kagina & 2 others, Civil Appeal 21 of 2017. That the conviction was based on inadmissible expert evidence.

11. It was submitted that the prosecution did not adduce evidence such as a DNA test to prove that the pregnancy resulted from penetration by the appellant.

    The prosecution counsel on the other hand submitted that the case was proved beyond reasonable doubt. That the age of the complainant was proved by the birth certificate produced in the case. That penetration was proved by the fact that the complainant got pregnant which was evidence of previous penetration. That the pregnancy was proved by an ultra sound scan. More so that the appellant was a person well known to the complainant and was therefore positively identified as the perpetrator. It was submitted that the complainant was a credible witness and that the evidence adduced against the appellant was watertight. That the same was corroborated by medical evidence and the testimony of other prosecution witnesses. That there were no grave or material discrepancies in the evidence tendered by the prosecution.

12. On the defence of the appellant that the case was a frame up by the complainant`s parents, the prosecution counsel submitted that the same was an afterthought as it was not put to the complainant`s parents during cross-examination. It was submitted that the appellant`s defence did not shake the prosecution evidence. The respondent urged the court to dismiss the appeal.

Analysis and determination

13. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of Kiilu & another v Republic [2005]1 KLR 174, thus:

    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 first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and 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."

14. The appellant was facing a criminal charge. Proof in a criminal trial is that of beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows on the standard of proof in criminal cases:

    > " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities

to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

15. The offence of defilement is premised under Section 8 of the *Sexual Offences Act* No. 3 of 2006. The law states as follows: -

    8. Defilement

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

        4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

16. Thus, for the Offence of defilement to stand, three ingredients must be proven. These ingredients were outlined in the case of George Opondo Olunga v Republic [2016] eKLR, as the age of the victim, positive identification or recognition of the offender, and penetration.

17. I have considered the grounds of appeal, the record of the trial court and the submissions of the appellant and those of the respondent. The issues for my determination are as follows: -

    1. Whether the offence of defilement was proven to the required legal standard.

    2. Whether the sentence was legal and appropriate.

18. On the question of age, it is trite that the age of a person can be proved in various ways including documentary evidence, oral evidence of the parents or the child if the child is old enough to know her age or even by observation of the court. In the case of Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

19. The complainant in her evidence did not tell the trial court how old she was. Her parents PW3 and PW4 however stated that she was at the time aged 15 years. The investigating officer produced the complainant`s birth certificate that indicated that she was born on 3/2/2007, which placed her age in March 2022 at 15 years. A copy of the birth certificate is in the trial court`s file. I thus find that the age of the complainant was proved at 15 years.

20. On the element of penetration, the same is defined in 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."

21. The trial magistrate in her judgment held that the evidence of the complainant on penetration was corroborated by medical evidence. Though the medical personnel who examined the complainant at Marafa Health Centre did not testify in the case, the complainant was also examined at Malindi sub

county hospital where a scan was conducted that revealed that she was pregnant. The medical report therein did not prove much. A doctor at the said hospital PW1 produced the scan report as exhibit. It was therefore proved that the complainant was pregnant. However, pregnancy in itself did not proof the charge against the appellant. There was thus no medical evidence to support penetration on the complainant by the appellant.

22. The law is however that lack of medical evidence to support a charge of rape is not fatal to the case as the offence may be proved by oral evidence of the complainant or by circumstantial evidence, see Kassim Ali v Republic [2006] KECA 156 (KLR). Section 124 of the *Evidence Act* allows a court in sexual offences involving children to convict on the sole evidence of the child if the court is satisfied that the child is telling the truth.

23. The trial court in this case believed the evidence of the complainant she was defiled by the appellant. The court found that the appellant was a person well known to the complainant a period of 3 years as he was working at her father`s farm. The court dismissed the appellant`s defence that there was a dispute between him and the complainant`s father PW3 as he did not cross-examine PW3 on such a dispute.

24. I have on my part re-examined the evidence of the complainant that the appellant penetrated her into her vagina vis avis the appellant`s defence. I have no reason to differ with the finding of the trial court in believing the evidence of the complainant that the appellant defiled her. The complainant stated that she visited the appellant`s house on 5 occasions in which they engaged in sex. That she was later examined at Malindi Hospital and found to be pregnant. That she got pregnant means that the sexual intercourse she was talking about was penetrative sex. The appellant in his evidence in court did not bring out any reason why the complainant would fabricate the evidence against him. Though he stated in his defence that he had a dispute with the father to the complainant on a piece of land he had leased from him, he did not cross-examine the complainant`s father PW4 on the existence of such a dispute. I a m in agreement with the trial court that the allegation was an afterthought. There is no reason to doubt the finding of the trial magistrate that the complainant was a credible witness. The appellant`s defence was a mere denial. No contradictions at all were pointed out in the evidence for the prosecution and none of the grounds of appeal put forward by the appellant have cast doubt on the evidence for the prosecution.

25. In view of the foregoing, I find the appellant to have been rightly convicted of the offence and the conviction and the sentence are upheld.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 22ND DAY OF OCTOBER 2025

J. N. NJAGI

JUDGE

In the presence of:

Appellant present

Mr. Oluoch for State

Court Assistant - Jumaa