Munare v Republic (Criminal Appeal E046 of 2024)
[2025] KEHC 15137 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15137 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E046 OF 2024

RC RUTTO, J

OCTOBER 23, 2025

BETWEEN

AMOS MUNARE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against both the conviction and 30 years sentence in Mavoko SO Case No E026 of 2023 judgment delivered by Hon. E. K Suter, Principle Magistrate on 7th May 2024)

JUDGMENT

A. Background

1. The Appellant being dissatisfied with the decision of the trial court which convicted and sentenced him to 30 years imprisonment for the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act* No. 3 of 2006, lodged this appeal.

2. The appeal is premised on the following summarised amended grounds as contained in the Appellant's submissions, that; the learned trial court erred in both law and facts;

    a. In convicting the Appellant for defilement in the absence of credible evidence of penetration, as required by law.

    b. In failing to summon essential/critical witness contrary to section 150 of the Criminal Procedure Code and section 146 of the *Evidence Act*.

    c. In failing to consider the Appellant's plausible defense, presented during the trial in violation of the right to fair trial under Article 50(2) of *the Constitution* thereby resulting to miscarriage of justice.

d. In imposing a sentence of 30 years for the offence of defilement which was harsh and excessive in light of the mitigating factors and circumstance of the case.

3. The particulars of the offence were that on 11th April 2023 at [Particulars Withheld] in Athi River East sub county, within Machakos County, the Appellant intentionally and unlawfully, cased his male genital organ (penis) to penetrate the female genital organ, namely vagina, of A.M, a child aged 6 years.

4. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that 11th April 2023 at [Particulars Withheld] in Athi River East sub county, within Machakos County, he intentionally and unlawfully touched the vagina, of a child A.M, a child aged 6 years with his genital organ penis.

5. The Appellant pleaded not guilty and the trial commenced with the prosecution calling four (4) witnesses. When put on his defence, the Appellant gave sworn testimony and called two (2) witness. Upon consideration of the entire evidence on record, the trial court found the Appellant guilty and convicted him accordingly. He was sentenced to 30 years imprisonment.

B. The case before the trial Court

6. The trial court conducted voire dire examination on PW1 and established that she understood the importance of telling the truth but since she did not understand what an oath was, the trial court directed that she gives unsworn evidence. PW1 stated that on 11th Aril 2023 at about 5pm she got from school and went to her aunt, mama F but did not find her at home. She then went to Baba Frida and knocked the door. That he (Baba Frida) opened the door and told her to remove her clothes. She refused to remove and he forced her to remove the clothes. The trial court noted that at this point PW1 dropped her head in resignation.

7. PW1 further testified that the Appellant removed her trouser and did tabia mbaya to her. He also removed her panty, slept on her private parts (trial court noted that she touched her private part) and gave her tea and rice which she ate. She then went to mama F but did not tell her. That later when her mum went for her, she told her what had happened and she took her to the police and later to hospital. PW1 identified the Appellant as Baba F by pointing him out in court.

8. On cross examination PW1 stated that she left school at about 4pm. That F is a child and Q is her friend. She stated that she knocked the door and baba Q opened the door, he was alone and slept on her. That it was the first time someone did something like that. That blood came out after he slept on her, she felt a little pain. It was her evidence that her mum saw the blood. PW1 identify the Appellant as baba F, she pointed him out.

9. On re-examination she stated that Q is still F and the Appellant is baba F and still Q.

10. Notably the trial court sought clarification and PW1 responded that Q is still F and pointed at her in Court.

11. PW2 DMK stated that PW1 is her child and goes to mama F when she comes from school. That on 11th April 2023 she got home late, and noticed PW1 was not looking ok. PW1 then told her that she was feeling pain on her private parts. She decided to go to mama F and told her to ask the child what happened since they were close. Mama F then told her that PW1 knocked at the Appellant's house and found him alone. He asked her to remove clothes and sleep on the seat and did tabia mbaya to her and gave her tea and rice.

12. PW2 together with mama F decided to examine PW1 they saw blood coming out. They took her to hospital and later reported to the police. She stated that she had never seen the Appellant before and he was arrested from his house.

13. On cross examination, PW2 stated that she did not know the Appellant before the incident. That PW1 told them that it was baba Frida and she also identified the Appellant to the police. That she saw blood coming out from her and that tabia mbaya is having sex with the child. She also stated that she has never asked for money to finish the case.

14. PW3 PC Dorcas Kwea the investigating officer stated that she interrogated PW1 and PW2 and was told that on 11th April 2023, PW 1 came from school and as a routine, she goes to mama F. That on that day she did not find mama F and decided to go play with KKQ the Appellant's child. She entered and found baba Q seated. He asked her to sit next to him and to remove her clothes. She removed her biker and panty and the Appellant removed his trouser and made her to sleep on the seat and penetrated her vaginally using his penis. He defiled her. That the Appellant then asked her to wear her clothes. That the child was crying. The Appellant then told the child to be quiet and not to tell anyone and gave her tea and rice and left her to leave. That the child then went to mama F and her mother came for her as usual and when she was cleaning her she cried of pain and when asked she said that baba Q had defiled her.

15. That the child was then taken to Mlolongo Health Center and later to Nairobi Women Kitengela. PW1 was examined, treated and discharged. A P3 form and PRC were filed. Statements were recorded and the Appellant was arrested. It was her evidence that PW1 identified the Appellant's house and when they knocked, the Appellant opened the door. He was alone. PW3 stated that PW1 was shaken, ran outside saying that the Appellant will do it again. They called her and she pointed out where it was done. The Appellant was arrested and charged. PW3 produced the clinical card as Exhibit 1 to show that the accused was 6 years old.

16. On cross examination she stated that the child was first taken to Mlolongo Health Centre and later to Nairobi Women's Kitengela. That mama F confirmed that she was not in when PW1 came from school. She confirmed that PW1 was 6 years and the Appellant 41 years and that they took the child to hospital as they are not specialists but concluded on charging him with defilement based on the medical evidence. She also confirmed that mama F refused to record a statement and they could not force her.

17. PW4, Jared Milimo stated that he was a clinical officer and worked at Nairobi Women Hospital Kitengela. He confirmed that he examined the minor AM (PW1) on 12th April 2023 at 1.20am. He established that the libia was inflamed with pain from tear with fresh edges. He also took HIV test, STD test, full haemogram, and the results showed epithelial cells and microscopic bleeding that was significant. He produced the PRC form as exhibit 2; GVRC form as exhibit 3; and P3 form as exhibit 4.

18. Upon considering the prosecution evidence, the trial court found that the prosecution had established a prima facie case and placed the Appellant on his defence.

19. In his defence, the Appellant gave sworn testimony and called 2 witnesses. He stated that he worked for Megriel Company and would work in shifts. He gave an account of his events on the fateful day. That on 11th April 2023 after he took breakfast his wife asked him not to leave but stay with the child in the house as she went to wash clothes. That at about 4.oopm his friend Juluis called and he invited him his house. At about 5pm he told his wife to prepare supper so that he could leave. She went to buy food cooked and they ate. Then the door was knocked he saw a child she peeped and went back. He stated that he had seen her twice playing in the plot. That his wife then called the child who came

in and sat at the corner besides his wife and was given food rice and tea. At about 5.45pm he left with Juluis. Later he was arrested and told that he had defiled a child.

20. On cross examination he stated that that he has seen PW1 play in the plot, that his wife was in the house and he did not remain with the child alone at anytime and that they did not have a grudge with PW2.

21. DW2 MBM stated that the Appellant is his husband and they have a four year old daughter. That the Appellant used to work on shifts and would leave at 5.45am and report back at 7pm. That on 11th April 2023 he was to go for night shift and so she asked him to take care of the child as she went to wash clothes. At 12.30pm she went to the house prepared lunch and went back to finish washing. That she came back at 4pm and found them asleep. At 4.30pm he requested to be cooked for super which she did. She states that she heard his friend Julius Onzari call him. She heard the door being knocked the Appellant opened the door, and PW1 peeped and ran out. She called her inside as she plays with her daughter. She stated that PW1 told her that she did not find mama F, she came inside and sat beside her and she gave her tea and rice. Thereafter the Appellant friend Julius arrived and they both left.

22. It was DW2's further evidence that he remained with the kids and PW1 was jumping from the chair. They watched Sultana and later she told her to leave and she saw her enter mama F's house. On the next day the Appellant was arrested. She confirmed not having any grudge with both PW1 or PW2 and that the Appellant cannot defile a child.

23. On cross-examination she stated that she knows the child, she was in her house and she went to her house since mama F was not at home.

24. DW3 Julius Onzare stated that the Appellant is his friend and he knew him since they were young since they come from the same village and he was a person of good character. On the 11th April 2023 he called him at about 4.00pm -4.30pm. He then went to his house and his wife opened the door. He saw two girls playing. That he left with the Appellant and later each went their separate ways. He was then informed that the appellant had been arrested.

25. It is upon evaluation of this evidence on record that the trial court found the Appellant guilty and convicted him, sentencing him to 30 years imprisonment.

C. The Appeal

26. The Appeal was canvassed by way of written submissions. The Appellant's submissions were dated 26th February 2025 and rebuttal submissions dated 22nd April 2025 while the Respondent's submissions were dated 15th April 2025.

Appellant's submissions

27. The Appellant outlined the background of the case and urged the Court to re-evaluate, re-analyse the evidence and find that the conviction was unsafe.

28. On the first ground it was submitted that the prosecution failed to prove beyond reasonable doubt the essential element of penetration. Reference was made to the case of Mutie Musauli vs Republic (2019) and Michael Kihara Kariuki v Republic (2017) eKLR. According to the Appellant, it must be clear that his genital organs penetrated the genital organs of another person such that there is no doubt as to what transpired. That the PRC did not indicate any physical signs of penetration.

29. Further it was his submission that the prosecution failed to expound what PW1 meant when she said that the Appellant slept on her. That if any other body part other than the penis came into contact with the vagina then penetration will not suffice since penetration is the exclusive use of the penis. That

merely placing one's penis on the vagina of a victim does not constitute penetration. He referred to the case of Raphael Mutunga Mutinda v Republic (2019) eKLR.

30. The Appellant also submitted that the injuries observed on the victim were not consistent with a sexual assault reliance was placed on the case of Elizabeth Waithiegeni Gatimu vs Republic (2015) eKLR.

31. On the second ground of failure to summon essential/critical witnesses contrary to section 150 of the Criminal Procedure Code and section 146 of the *Evidence Act*, the Appellant submitted that the prosecution failed to call mama F who was a very critical witness in the prosecution case. That no efforts were made to summon her to appear as a witness to substantiate the prosecution claims. Reference was made to the case of John Kenga vs Republic Criminal Appeal No. 1126 of 1987.

32. On the third ground the Appellant asserts that the trial court failed to adequately consider key elements of his defence, leading to an unjust conviction. He stated that at no time did he interact with PW1 alone. That he presented a robust defence that included eye witness evidence but the Court failed to consider it. That the Appellant defence taken objectively would have led to a different conclusion.

33. On the fourth ground that the sentence was harsh and excessive. The appellant submitted that the trial court did not take into account several mitigating factors namely age, health, and family obligations. He relied on the Court of Appeal decision in Hamisi Bakari & Another v Republic (1987)eKLR as well as the Judiciary Sentencing Policy guidelines to urge the Court to, in the default of granting an acquittal, exercise its discretion and review the sentence.

34. He concluded by urging the Court to quash the conviction and set aside the sentence of 30 years imprisonment.

Respondent's Submissions

35. In response, the Respondent submitted that it does not support the conviction and conceded to the appeal on the basis of the following reasons: that there was no enough evidence linking the Appellant with the offence of defilement; that penetration was not adequately proven beyond reasonable doubt; that there were contradictions and inconsistencies on the part of the prosecution witnesses; that the victims's testimony was in doubt as she did not neither show mama F the blood she claimed to have come out when she was defiled nor did mama F see any indication that she had been defiled. She did not tell her mother anything that had happened.

36. On the issue of identification, the respondent submitted that it was never established since there was inconsistency and contradiction in PW1 testimony regarding the names of the applicant and there was no corroboration regarding the identity of the person who assaulted the person. Further that the complainant's friend by the name F or Q was never called to testify so as to confirm whether it is the same person. There was no corroboration regarding the identification of the Appellant. Reference was made to the case Paul Kinyanjui Kimauku alias George v Republic (2015)eKLR.

37. According to the Respondent failing to call mama F as a witness to clarify some of the issues regarding the commission of offence greatly undermined the prosecution case. They relied to section 150 of the Criminal Procedure Code and section 124 of the *Evidence Act* to urge that the trial court erred in failing to give reasons for believing that PW1 was a credible witness despite the fact that no other witness corroborated her evidence.

38. In conclusion they urged the court to find that the conviction against the Appellant was not safe and proper.

D. Analysis and Determination

39. This being a first appeal, this Court has a duty to re-c0nsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusions. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. (See the cases of Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009, David Njuguna Wairimu v. Republic [2010] eKLR).

40. Upon considering the Trial Court record, the petition of appeal and the parties' submissions on record, I delimit the following issues for determination ;

    i. Whether the offence of defilement was proved, in particular whether penetration was proved.

    ii. Whether crucial witnesses were not called, and if this impugned the prosecution case;

    iii. Whether the Appellant's defence was ignored; and

    iv. Whether the sentence was harsh and excessive.

41. Before delving into the consideration of the matters herein, there is a preliminary issue that needs to be dispensed with. This Court has noted that the Respondent has conceded the appeal in its entirety. The Respondent has even gone further in its concession to raise what one may term as "further grounds of appeal not raised by the Respondent". This stretch of concession and support of the appeal before this Court cannot go unnoticed by this Court.

42. While the Prosecution and/or respondent may concede to an appeal, that concession does not preclude and/or extinguish the court's role to re-examine the evidence before it and determine the appeal on its merit. This requirement springs from the fact that the judgment ordinarily being appealed against is a decision of a competent court of law, and the same may only be set aside upon solid and legal grounds.

43. In Godfrey Ngotho Mutiso V Republic (Criminal Appeal 17 of 2008) [2010] KECA 487 (KLR) (30 July 2010) (Judgment), the Court of Appeal held as follows on concession of appeals:

> " For our part, we think the Attorney General is at liberty to exercise his right to be heard or not to be heard as counsel before any court. It is also within his province to concede the appeal before us if he is so persuaded. Such concession will be taken into account, but that will not preclude the court from considering the matter on merits and on the material placed before it."

44. Indeed, Section 352A of the Criminal Procedure Code on summary allowance of appeal creates a discretion on the appellate court where the appeal is not opposed. It provides:

> " Where an appeal against conviction has been lodged and a judge of the High Court is satisfied that the conviction cannot be supported, and the Director of Public Prosecutions has informed the court in writing that he does not support the conviction, the judge may summarily allow the appeal."

45. Consequently, while the Respondent has wholly conceded and supported the appeal, I will proceed to consider the appeal on its merit.

Whether the offence of defilement was proved, in particular whether penetration was proved.

46. In the case of George Opondo Olunga v Republic (2016) eKLR the ingredients for the offence of defilement were set out as: proof of age of the victim; proof of penetration or indecent act; and identification of the perpetrator. The issue of age was not in issue. In this appeal, the issue of age, the charge sheet indicated that the minor was 6 years. PW3 testified and produced the child clinic card as Exhibit 1 to prove age. I will not belabour on age.

47. Turning to penetration, the Appellant argues that the evidence must be clear that his organ penetrated the victim. He further argues that it is not clear what the victim meant when she stated that the Appellant "slept on her". Further that mere placing of the penis on the vagina is not penetration and that the injuries were not consistent with sexual assault. In their concession, the Respondent submitted that penetration was not proved beyond reasonable doubt.

48. I have examined the record of appeal. PW1 testified how she entered the Appellant's house and the Appellant removed her clothes and "slept on her private parts" and did "tabia mbaya". That she felt pain. This testimony from a 6 years old child taken by a competent court law leaves no doubt that the child was describing an act of penetration and/or sexual assault. Notably, the court recorded the child's demenour as being resigned to fate. This testimony was corroborated by that of the mother, PW2 who testified that she observed PW1 not looking well and when they examined her together with Mama F they saw blood from her vagina.

49. This was further corroborated by the evidence of PW4 the clinical officer who examined the victim. His observations were that the libia was inflamed with pain from tear with fresh edges. Further that a full haemogram showed epithelial cells and microscopic bleeding that was significant. The totality of this evidence leaves no doubt that the victim was sexual assaulted and penetrated.

50. I find the Appellant's assertion that to prove penetration, one has to establish that his penis, that is the assailant's sex organ indeed penetrated the victim to be without any oita of merit. In establishing penetration, we look at the victim. The test is victim centric as we seek to establish whether indeed the victim was sexually assaulted. It is after confirming this that we proceed to now establish who the assailant was.

51. Consequently, I have no doubt that penetration was proved in this matter. I curiously not that the Respondent submitted that penetration was not proved, negating all the above glarring evidence by its own witness! The less I say on this concession the better!

52. The last ingredient is identity of the assailant. In determining this ingredient, the court asks itself whether the victim was able and did identify the assailant. Notably, the Appellant has not contested this ingredient. Again, it is the Respondent that raised the ground of identity stating that there were contradictions in the names the victim referred to the Appellant with.

53. I have perused the record and it is common ground that first the incident happened during the day, at about 5.00p.m. secondly, it is common ground that the parties were neighbours. The Appellant, together with his wife, DW2 confirmed that the victim was at their house and that they are neighbours. Consequently, the Appellant and the victim were persons well known to each other. DW2 stated that the victim used to go to their house to play with her child. Hence identification was clearly by recognition rather than identification of a stranger.

54. Contrary to the Respondent's submissions, there is no mandatory legal requirement that there must be corroboration in identification of the assailant in sexual offences case. Such a requirement will negate the provisions of section 124 of the *Evidence Act* on admissibility of evidence of a single witness in sexual

offences cases, and also neglect the fact that in most cases, sexual offences are committed in secrecy away from a third eye. I thus find the Respondent's concession to be baseless.

55. The upshot is that I am satisfied that the offence of penetration was proved to the required standard and in particular, that penetration was proved.

Whether crucial witnesses were not called, and if this impugned the prosecution case;

56. The Appellant argued that mama F was a critical witness who was not called as a witness. His position is supported by the Respondent who argue that mama F ought to have been called to come and clarify some issues on the commission of the offence! I pose here to note that the duty to call witnesses rests on the prosecution, the Respondent herein. Consequently, this Court is baffled that having not called a witness, the same prosecution, without any oita of explanation, will support an appeal on the ground that that witness was a crucial witness! Be that as it may, as earlier noted, I will proceed to consider this ground on its merit.

57. As stated in Bukenya vs Republic (1972) EA 549, the prosecution bears the duty to call all crucial witnesses in a matter, even those whose testimony may injure its case. Failure to call crucial witnesses so as to avoid impugning the prosecution case renders a trial fatal. However, the law is clear that the prerogative on the number of witnesses to be called to prove a fact is that of the prosecution. In determining whether a witness was a crucial one, the court has to be satisfied that indeed, he/she held crucial material facts that would have helped either absolve the accused and or cast doubt on the prosecution case. It must be shown that failure to call that witness caused prejudice to the accused.

58. The Appellant herein does not state the prejudice he suffered by the prosecution failing to call mama F. The Respondent says she was key without elaborating in what aspects, notwithstanding that it is the prosecution that had the duty to call her. I have however examined the record. Mama F was never in the house of the Appellant where it was alleged the offence occurred. Secondly, when the victim spoke to Mama F on what happened, it was in the presence of PW2. Pw2 testified. Hence, I find that Mama F would have ordinarily given similar evidence as that of PW2. Her failure to testify was thus not prejudicial to the Appellant. Equally, contrary to the Respondent's submissions, failure to call F for her to clarify whether she is indeed F or Q is too remote a ground given that the record shows that the court on its own motion questioned the complainant who stated that Q is still F and pointed to a small child in court. I dismiss this ground of appeal.

Whether the Appellant's defence was ignored

59. The Appellant argued that the key element of his defence was not considered. That his defence was clear that he never interacted with the victim, PW1, alone. That he had eye witnesses who supported his testimony.

60. Looking at the trial court judgment, the trial court considered the defence and noted that the two defence witnesses were not present in the house with the appellant throughout the day. That the appellant in his testimony confirms that at about 5.oopm he asked his wife to prepare food for him and the wife went to buy food and cooked.

61. I have reviewed the record of appeal. The Appellant's defence was that he was at home with his wife when at about 5pm he told his wife to prepare supper so that he could leave. She went to buy food cooked and they ate. Then the door was knocked he saw the victim who peeped and went back. That it is when his wife, DW2 called her that she came in and sat beside her as they ate rice and tea.

62. The Appellant's testimony is para material with that of his wife, DW2 except that according to the Appellant at around 5pm he asked DW1 to prepare food for him and she went to buy the food. DW2 does not speak about going to buy food. Again, both the Appellant and DW2 state that the victim came in while Julius, DW3 was already in the house, DW3 stated that when he arrived, he found two girls already playing in the house. This contradicts the Appellant's testimony. I thus find that this contradiction and the fact that of the Appellant's wife having called PW1 inside the house being not put to PW1 in cross examination, renders the defence weak and not credible. Further, the court having been informed by the Appellant own testimony that DW2 went to buy food at around 5pm, discredits his evidence that he was with DW2 throughout the time.

63. While the trial court occasionally recorded the victim's demeanor during her testimony, it never adjudged her as someone who was not trustworth. Consequently, I find that the Appellant's defence, did not dislodge the strong prosecution evidence on record and dismiss this ground of appeal.

64. Ultimately, I find the conviction safe nd uphold the same. The Respondent's assertion that there were contradictions and inconsistencies in its own evidence is equally dismissed. This was not a ground raised by the Appellant in his petition and in any event the Respondent did not specify the alleged contradictions.

Whether the sentence was harsh and excessive

65. Upon conviction, the appellant was sentenced to 30 years imprisonment. Section 8 (2) of the Act provides that: 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. The appellant having been sentenced to 30 years imprisonment for defiling a child aged 6 years, this was clearly against the mandatory life sentence imposed by the Act.

66. The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) overturned the decision of the Court of Appeal which had found Section 8 of the Act to be unconstitutional for prescribing a mandatory minimum sentence upon conviction. The Supreme Court upheld the constitutionality of the said law and this Court is bound by such precedent. Consequently, a person convicted contrary to section 8(2) of the *Sexual Offences Act* shall ordinarily be sentenced to life imprisonment.

67. The question that follows is what this Court should do in regard to the 'illegal' sentence imposed by the trial court. The Respondent, even in its concession, failed to offer this Court any guidance on the same, and lost in this concession, the Respondent never filed a cross-appeal, or more importantly, a notice of enhancement of his sentence.

68. Consequently, given lack of Enhancement Notice to the appellant, I will not interfere with the sentence of the trial court.

69. The upshot is that I find that the appeal lacks merit in its entirety and dismiss it.

70. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 23RD DAY OF OCTOBER 2025

RHODA RUTTO

JUDGE

In the presence of;

……………………………….Appellant

……………………………….Respondent

Selina Court Assistant