



REPUBLIC OF KENYA



KENYA LAW
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**Randu v Republic (Criminal Appeal E044 of 2023)
[2025] KEHC 15832 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E044 OF 2023
M THANDE, J
OCTOBER 31, 2025**

BETWEEN

LAZARUS KARISA RANDU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (SOA). The particulars of the offence are that on diverse dates between 1.4.2020 and 7.10.2020, at Jilore sublocation, Malindi Sub-County within Kilifi County, the Appellant unlawfully caused his penis to penetrate into the vagina of P. R. S. (the Complainant), a child of 3 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the SOA. The particulars of this offence are that in the same period and in the same place, the Appellant intentionally and unlawfully committed an indecent act with the Complainant by touching her vagina with his penis.
2. Following trial, the trial court convicted the Appellant of the minor and cognate offence of sexual assault contrary to Section 5(1) as read with Section (2) of the SOA and sentenced him to 15 years imprisonment.
3. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court. The grounds of appeal are that the trial court erred by:
 1. failing to appreciate great contradictions, inconsistencies and lack of corroboration in the prosecution evidence.
 2. shifting the burden of proof on to the Appellant.
 3. by failing to consider that the prosecution did not prove its case beyond reasonable doubt.



4. The Respondent opposed the appeal in submissions dated 17.1.25.
5. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v Republic* [1972] EA 32.
6. On contradictions, it was submitted that the Complainant in her testimony stated that mkazalaza circumcised her and further that it was his wife who circumcised her and that the Appellant did nothing else and that it was the Appellant and his wife who jointly circumcised her. Further that when PW2 was recalled to shed light on mkazalaza, he stated that it means mkazalazaro which in Giriama means Lazarus' wife.
7. The Respondent conceded that there was contradiction as to whether penetration was by the Appellant's penis as stated by the Complainant or finger as stated by PW4, the clinician. The Respondent however submitted that there was evidence of penetration and urged the Court to find that the contradiction was minor.
8. The record shows that in her testimony, the Complainant stated that she knew the Appellant and that he circumcised her; that he removed her panty and lay on her and she felt pain; that he did not do anything else. She then stated that the Appellant's wife who was plaiting her hair circumcised her. She pointed at her vagina and stated that they circumcised her there. In cross examination, she stated that it was the person who plaited her who circumcised her.
9. The testimony of PW2 Safari Katana Charo, the Complainant's father stated that in April 2020, they found her with wounds on her private parts. She told them that Mkazalaza had circumcised her. She identified the Appellant as Mkazalaza. She was taken to Jilore Hospital. Again, in October, the Complainant had an itchy discharge in her private parts. She was taken to Kakuyuni and it was confirmed that she had been defiled. The fact of penetration was confirmed by PW4 Ibrahim Abdullahi, a clinician at Malindi Subcounty Hospital who produced the P3 form, treatment notes and laboratory results which were completed by Dr. Rimba. He stated that the Complainant was brought in by her parents complaining of vaginal itchiness and discharge. Upon examination the Complainant was found to have old scars on her labia and her hymen was perforated. Dr. Rimba concluded that there was vaginal penetration. PW4 stated that there was no direct penetration but that it seemed like it was fingering.
10. While the contradictions and inconsistencies are acknowledged, the Court finds that they cannot render the prosecution evidence unreliable or negate the fact that there was penetration of the Complainant's vagina. What perhaps this says is that based on the Complainant's testimony, the Appellant's wife ought to have been charged alongside the Appellant, with the offence of which he was convicted. The contradictions and inconsistencies are not sufficient ground to quash the conviction. In this regard, I am guided by the decision in *Willis Ochieng Odero vs. Republic* [2006] eKLR, where the Court of Appeal held:

As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code.
11. After considering the evidence adduced, the trial Magistrate concluded that the Complainant's vagina was penetrated by the Appellant but not with his penis. Relying on section 179 of the Criminal



Procedure Code (CPC), the trial magistrate convicted the Appellant of the minor and cognate offence of sexual assault under Section 5 of the SOA.

12. The offence under Section 5 of the SOA makes provision of the offence of sexual assault as follows:

1. Any person who unlawfully—
 - a. penetrates the genital organs of another person with—
 - i. any part of the body of another or that person; or
 - ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
 - b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body;

is guilty of an offence termed sexual assault.
2. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

13. What constitutes the offence of sexual assault is the unlawful penetration of a person's genital organs with any part of the body of that person or of another, or with an object manipulated by that person or another. The unlawful manipulation of any part of a person's body so as to cause penetration of a genital organ into or by a part of the other person's body also constitutes the offence of sexual assault.

14. In *John Irungu v Republic* [2016] KECA 516 (KLR), the Court of Appeal had this to say on the offence of sexual assault:

The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.

15. As indicated herein, the evidence on record shows that there was penetration of the Complainant's vagina, not with a penis but by what PW4 concluded was by fingering. The Complainant identified the Appellant as the person who circumcised her. She stated that he removed her panty and lay on her and she felt pain. In the premises, I am satisfied that the offence of sexual assault was established and that the Appellant was the perpetrator. The offence of sexual assault is minor and cognate to the offence of defilement under Section 8(1) as read with 8(3) of the SOA.

16. Section 179 of the CPC provides:

1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.



2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
17. The connotation that can be drawn from the above provision is that a court may convict a person of a minor and cognate offence where such person is charged with a more serious offence. Such lesser offence must be related to and of the same class or category of the greater offence and must share several of the elements of the greater offence. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.
18. In *Robert Mutungi Muumbi v. Republic*, Cr App. No. 5 of 2013, the Court of Appeal had occasion to consider the import of Section 179 of the CPC and stated:

An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.
19. After considering the evidence, the trial Magistrate found that although penetration by the penis was not proved, there was nonetheless sufficient evidence to establish all the elements of sexual assault. The trial Magistrate in her discretion, proceeded to convict the Appellant of that offence. I am satisfied that committing the offence of sexual assault is a minor and cognate offence of defilement with which the Appellant was charged. The elements of the offence of sexual assault are ingrained or subsumed in the elements of the offence of defilement. The offence of defilement of a child of 3 years attracts a mandatory sentence of imprisonment for life, while that of sexual assault attracts a much lesser sentence of imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life. I accordingly find that pursuant to the provisions of Section 179 of the CPC, the Appellant was properly convicted of the offence of sexual assault even though he was not charged with that offence and had not pleaded thereto.
20. In view of the foregoing, it is evident that the prosecution proved its case beyond reasonable doubt and there is nothing on record to support the Appellant's claim that the burden of proof was shifted to him.
21. In the end, I find that the Appeal lacks merit and is accordingly dismissed. Both conviction and sentence are upheld.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 31ST DAY OF OCTOBER 2025

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M. THANDE

JUDGE

