Rotich v Republic (Criminal Appeal E013 of 2025)
[2025] KEHC 15605 (KLR) (29 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15605 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E013 OF 2025

RPV WENDOH, J

OCTOBER 29, 2025

BETWEEN

DENNIS ROTICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal challenging the decision of the Resident Magistrate, Kitale in Criminal case SO E033 of 2024)

JUDGMENT

1. Dennis Rotich, the appellant herein, has filed this appeal challenging the decision of the Resident Magistrate, Kitale in Criminal case SO E033 of 2024, where the appellant was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act*.

2. In the alternative, he faced a charge of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The particulars of the charge were that on 22/2/2024, at about 7.20 hours at (particulars witheld) village, Biribiriet Sub Location in Trans Nzoia County, intentionally and unlawfully caused his genital organ namely penis, to penetrate the genital organ i.e vagina of R.A., a child aged fourteen (14) years or that, intentionally and unlawfully touched the buttocks/breasts/anus/vagina of R.A a child aged fourteen (14) years.

4. The appellant denied the charge and the prosecution called a total of five (5) witnesses in support of their case. Upon the close of the Prosecution case, the appellant was called upon to defend himself whereby he testified on oath. He did not call any other witness.

5. The trial court convicted the appellant and sentenced him to twenty (20) years imprisonment. The appellant is aggrieved by both the conviction and sentence and has preferred this appeal listing sixteen (16) grounds.

6. The grounds of appeal can be condensed into the following

    1. That the appellant was not positively identified as the perpetrator. (Grounds 3 and 11);

    2. That the prosecution evidence was full of contradictions and discrepancies (Grounds 2 and 15);

    3. That the prosecution failed to call crucial witnesses to the case (grounds 5 and 10);

    4. That the offence of defilement was not proved beyond reasonable doubt (grounds 12 and 14);

    5. That the prosecution shifted the burden of proof to the appellant (Grounds 6 and 16);

    6. That the sentence is illegal and excessive.

7. The appellant therefore prays that the conviction be quashed, sentence set aside and appeal be allowed.

8. This being a first appeal, this court is required to exhaustively reconsider all the evidence that was tendered before the trial court, evaluate it and arrive at its own independent conclusions, but bear in mind that it neither saw nor heard the witnesses testify in the lower court. This court draws guidance from the case of Okeno -V- Republic (1972) EA 32.

The Prosecution Case.

9. PW1 R.A recalled that on 22/2/2024 in the evening. She went to Jombas home where she was going to stay; that she met the appellant who grabbed her and took her to a nearby forest where he undressed her and put his thing 'ya Kususu" (thing for urinating) in hers; that he held a knife to her and threatened to kill her. After the act, he then left her and went towards (particulars witheld). At (particulars witheld), she met a man who led her to the Chief's office to whom she reported, then they went to report at Kabolet police; that Chemangara took her to Kapsara Sub County Hospital then to Kitale County hospital. She said that she had once met the appellant at their market while in company of her mother. She said that she had left home at 18.00 hours (6.00.p.m.)

10. PW2 David Chemangara, a police Reservist of Kabolet police post in Cherangany recalled the 22/2/2024 in the evening, he was in a hotel at (particulars witheld) and left for home after eating his super. He found the appellant drunk and sleeping at the gate of the Chief's office at his garage and carried him to his mother's house. He saw a group of boys with PW1 who on seeing him ran off leaving PW2 who went to sleep. Next morning a businessman called 'Baba Raila' went to the Chief's office with PW1 saying she was lost. The Chief took PW1 to the hotel to take tea as she was shivering; that the hotel attendants observed that PW1 did not look well and he took her to (particulars witheld) Dispensary and they were referred to Kapsara Sub-County Hospital. Before going to Kapsara, he opened the appellant's door which he had locked from outside. At the hospital, they were informed that PW1 had been defiled and they went back to (particulars witheld) to look for her family and they found the brother at (particulars witheld) Secondary school and he revealed that their home is in Kaptiret. On interrogating, PW1, she told PW2 that she was defiled by Fundi wa Pikipiki. (Motor cycle mechanic), that the appellant is a motor cycle mechanic and that he later surrendered to (particulars witheld) Police Station

11. PW3 Julius Savatia Oduor, Chief of (particulars witheld) Location stated that on the morning of 22/2/2023, he was at the office when he saw Juma Wafula Khalendi alias Baba Raila in company of a

child and shouted to him that he had brought his property pointing at the child. He interrogated the child and she was escorted to Hospital by PW2 as he was busy. He later learnt that the child was defiled but did not ask her who had committed the act.

12. PW4 Shadrack Kosgei, a Clinical Officer at Kapsara recalled that on 22/2/2024, the complainant went to the facility in company of a police officer with a history of defilement on 20/2/2024. He found that she had a freshly torn hymen, and he formed the opinion that the girl had been defiled.

13. PW5 PC (W) Viola Chepkemei of Kabolet Police Post was the Investigating Officer in this case. She recalled that on 22/2/2024 about 12.35 hours she was at work when the complainant went to the post in company of National Police Reservist (NPR) David who reported a case of defilement. He interrogated the girl who said she knew the person who led her into a blue gum plantation and defiled her and threatened her with killing; that on 29/2/2024, PW1 identified the suspect at the police station; that the person presented himself to the police station after he heard his neighbours say that the complainant was accusing him of defiling her; that an age assessment confirmed that the complainant was aged fourteen (14) years old; that the complainant on seeing the appellant coming to the police station started crying; that the complainant described her assailant as brown, man, tall, Kalenjin and mechanic staying at 'Kwa Chief'.

14. When called upon to defend himself, the appellant stated on oath that he is a mechanic at (particulars witheld) and on 29/2/2024 while at work, he received information that a child had been defiled by 'fundi Mweupe' (brown mechanic). He went to the Police Station to find out and was arrested; He denied being the one and that there was another brown mechanic who fled the area at the time; that on 22/2/2024 he was drunk.

The Appellants Submissions

15. The appellant was represented by the firm of Kiprop Rutto Associates who filed submissions and Ms. Ruto highlighted the same. The key issue raised by the appellant is one of identification. It was urged that sometimes even what appears to be recognition of a person may be quite erroneous; that the complainant did not identify her assailant, in her statement to the police nor did she do so in the lower court; that it is PW5, the Investigating Officer who identified the appellant and that the Prosecution admits the fact; that there should have been an identification parade. Counsel cited several cases which have dealt with the issue of identification and courts have held that where a case entirely rests on the issue of identification, the trial court must warn itself of the dangers of relying on such evidence and the possibility of the witness making a mistake. Some of the cases cited are;- R.V. Bently (1991) CLR 120; Krishnarayana Babu – V- State (1996) CR.C LJ 4484). Owen Kimotho Kiarie -V- Republic, Wamunga -V- Republic (1989) KLR 424, Ndidi -V- State (2007) 13 NWLR P.653 and Baraza -V- Republic (1992) KRR 98.

16. It was submitted that if PW1, 2 and 5 had the description of the culprit, then they would have arrested the appellant before he presented himself to the police station. It was the appellant's submission that the appellant was not positively identified and that an identification parade should have been mounted. On the need for a parade, Counsel relied on the decision of Ravindra alias Ravi Bansi Gohar -V- State of Maharashtra & others (1998) 6 SCC 609; SV Tandwa & others (2008)(1) SACR.613 (SCA) and Mohd Iqbal M. Shaikh -V – State of Maharashtra (1998) 4 SCC 494.

17. It was also the appellants submission that the prosecution case was marred with material contradictions that go to the root of the charge. Relating to the date and time of the incident, Counsel submitted that whereas PW1 said that the incident was on 22/2/2024 at 18.00 hours, PW4 said that it was on 20/2/2024 at 21.00 hours; that if the incident occurred on the 22/2/2024, the appellant was locked up

in his house by PW2 and could not have committed the offence; that the complainant made a report to the police on 22/2/2024 hence she could not have been defiled on that day.

18. The Counsel also pointed out the differences given by the narratives of PW2 and 3, that while PW2 claimed the Chief took PW1 to the hotel to take tea, PW2 said it was Raila; that while PW1, 2 & 4 said that the complainant did not go to school, PW5 said she does. Counsel relied on the decision of Tarakali -V- Republic (1957) (EA) 773, where the court held that contradictions which go to the root of the prosecutions case are fatal and that the contradictions in this case render the conviction fatal. He also cited the case of Uganda -V- Nakato Perepetwa CRC 255/2009 and Ongayo -V- Republic (1982-1988) 1 KAR where the court held that "where discrepancies are unresolved, the conviction is unsustainable."

19. On failure to call crucial evidence, it was submitted that the prosecution failed to call the businessman Juma Wafula Khalidi alias Baba Raila and the hotel worker who took PW1 to hospital; that Baba Raila having been the first person to meet the complainant would have been in a better position to shed light on the credibility of the events. Counsel relied on the decision of Michael Omwenga Mokula -V- Republic CRA.6/2006; Halkano Matu Bagoja -V- Republic (2015) eKLR and Bukenya & others -V- Republic (1972) EA 549 where courts have held that where the prosecution fails to call relevant witnesses to the case, then an inference will be drawn that the evidence if tendered may have been adverse to the prosecution case.

20. On whether the offence was proved to the required standard: - The Counsel submitted that the action of penetration was not proved save that the hymen was said to be freshly torn; that it was in no way attributed to the appellant; that there was no evidence of bruises to the complainants' genitalia to prove that force was used.

21. Counsel urged that the burden always lies on the prosecution to prove its case beyond reasonable doubt and at no stage does it shift to an accused to prove his innocence see Okethi Okale & others -V- Republic (1965) EA 555.

22. Counsel submitted that the trial court erred in shifting the burden of proof to the appellant when he said that the evidential burden lay on the appellant to prove that another 'fundi Mweupe' existed and had fled the area; Counsel also relied on the Ugandan case of Uganda -V- Ssebyale (1969) EA 204.

23. As regards the sentence, it was Counsel's submission that although the minimum sentence under section 8(3) *Sexual Offences Act* was meted on the appellant, the court failed to consider the appellant's age, mitigation and personal circumstances and the Pre-sentence report that had been filed; that the court failed to consider the principles espoused in Francis Muruatetu -V- Republic (2017) where the court emphasized individualized sentencing.

24. The Counsel urged that all the doubts raised in the case be resolved in favour of the appellant.

Respondent's Submissions.

25. The appeal was opposed and the Prosecution Counsel submitted that all the three (3) ingredients which are required to prove an offence of defilement were proved. On age, the complainant had stated that she was thirteen (13) years and upon her age being assessed, she was found to be fourteen (14) years which still falls within the definition under Section 8(3) of *Sexual Offences Act*.

26. On penetration, Counsel urged that the complainant was examined on 22/2/2024 and injuries to the genitalia were found including a freshly torn hymen.

27. On the issue of identification, Counsel observed that the complainant claimed to have seen the appellant once before and the question was how she came to know that he is a mechanic; that PW2 confirmed that the appellant was a Mechanic and the appellant admitted that fact.

28. As to contradictions, Counsel relied on the provisions of section 382 Criminal Procedure Code by which the court cannot reverse or alter an order or finding of the court on account of an error, omission or irregularity unless it has occasioned a failure of justice.

29. He relied on the case of Sigei -V- Republic (2023) KECA 154 where the court observed that for the contradictions in evidence to be fatal, they must be material and go to the substance of the case. Counsel submitted the contradictions on the date of the offence is minor and has not occasioned any injustice. Counsel urged the court to dismiss the appeal in its entirety.

Determination: -

30. I have duly considered all the grounds of appeal, the evidence on record and submission of both Counsel.

31. To prove a charge of defilement, the Prosecution has to establish the elements pointed out in Dominic Kibet Mwareng -V- Republic (2013) eKLR where the court said

> "That critical ingredients forming the offence of defilement are: the age of the complainant, Proof of penetration and positive identification of the assailant".

Proof of age: -

32. In the case of Joseph Kiet Seet -V- Republic (2014) eKLR, the court held that

> "It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence."

33. In Francis Omuroni -V- Uganda CRA 2/2000, the Court of Appeal of Uganda said thus

> "In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from Medical evidence, age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense"

34. PW1 testified that she was thirteen (13) years old. pw1 was subjected to an age assessment and she was found to be fourteen (14) years old. Since the month that the complainant was born was not known, the difference between what she told court and what the Doctor found is not material. Besides thirteen (13) and fourteen (14) years still fell under the same bracket as respects Section 8(3) of the *Sexual Offences Act*.

Proof of Penetration: -

35. The term penetration is defined in section 2 of the *Sexual Offences Act* as the mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

36. In the case of Mark Oiruri Mose -V- Republic (2013) eKLR the Court of Appeal explained what amounts to penetration as follows: - "so long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ".

37. In Eric Onyango Ondeng -V- Republic (2014) eKLR, the court held;

> "In sexual offences, the slightest penetration of the female sex organ by the male organ is sufficient to constitute the offence. It is not necessarily that the hymen be raptured".

38. In this case, the complainant vividly narrated how the assailant grabbed her, took her to the nearby forest, undressed her and put his thing "ya kususu" for urinating into my thing for urinating. PW4 who later examined her found her hymen freshly torn. The medical evidence corroborated PW1's testimony. This court is not in doubt that penetration was proved.

Identity of the perpetrator,

39. As is in most Sexual Offences, the only witness to the incident is the complainant. PW1 talked of having been defiled on 22/2/2024; that she left home at 18.00 hours (6.00p.m.) but the court was not told how long she had walked and whether at the time she was accosted there was still daylight. However, the testimonies of the other witnesses as to when the incident occurred sharply differs. PW2 talked of the events of 22/2/2024 and the next morning is when he saw 'Baba Raila' with the complainant whom Baba Raila took to the Chief's office as a lost child. PW3 talked of the child having been taken to him on the morning of 22/2/2024 and that the child was shivering and that is why she had to be given tea. PW4 also examined PW1 on 22/2/2024 and filled the P3 form on that date.

40. PW4 testified that PW1 informed him that she was defiled on 20/2/2024. PW5 told the court that she received the report of defilement from PW1 and Baba Raila at 17.35 hours on 22/2/2024.

41. It therefore follows that the complainant could not have been defiled on 22/2/2024 but on an earlier date.

42. As submitted by the Prosecution Counsel in such a case an error in a date is curable by section 382 of the Criminal Procedure Code which provides that an appeal court cannot alter, an order, or finding an amount of an error or omission or irregularity.

43. The other question is, at what time did the incident take place, at 18.00 hours as stated by PW1 or was it at 7.30 hours as per the charge sheet. The only person who would have shed light on the time the offence was committed is the person who was not called as a witness by name 'Baba Raila' I find this to be important because if the complainant was defiled on 20/2/2024 or 21/2/2024, where was she till 22/2/2024 when the report was made to the Chief and then the Police.

44. The complainant told the court that she had met the appellant once in the market while with her mother and in cross examination, she also said she had seen the appellant that day. She however, did not disclose where, and how she was able to recognize him.

45. In Wamunga (Supra) the Court of Appeal had this to say on identification by a single witness

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction"

46. In Ndidi Supra case, the court said

> "A trial judge must not only warn himself but must meticulously examine the evidence proffered to see whether there are any weakness capable of endangering or rendering worthless any contention that the accused was sufficiently recognized by the witness".

47. Although PW2 told the court that PW1 described the perpetrator as a Mechanic based at (particulars witheld) and even gave his description, PW1 never gave this description to the court. Besides, PW1 claimed to have met the appellant once in the market and that day but did not say where or exactly when. The question then is, at what stage did she know that the assailant was a tall, brown, Kalenjin man who was a Mechanic, as described by the Investigating Officer, PW5. The trial Magistrate did not warn himself of challenge/ dangers of basing a conviction on evidence of a single identifying witness. As correctly submitted by both the Prosecution and appellant's Counsel this is a case where the police needed to conduct an identification parade. In the case of S.V Tandwa & others (2008), SACR 613 the Supreme Court of South Africa had this to say of identification parades.

> "In ordinary circumstances, a witness should be interrogated to ensure that the identification is not in error. Questions include what features, marks or indication they identify in the person whom they claim to recognize. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and un investigated, leaves the door wide open for the possibilities of mistake."

48. In this case, there is not enough evidence to demonstrate that PW1 knew her assailant before the incident or that she had described him to anybody before she encountered him at the Police Station. I find that the identification of the appellant was not watertight or without error. The appellant may be a prime suspect in this case but suspicion alone is not sufficient to found a conviction.

4.9 Having found that the identification of the appellant as the culprit was not watertight, the offence of defilement was therefore not proved beyond reasonable doubt. The doubt will be resolved in favour of the appellant. Having found as above I find no need to deal with the other grounds of appeal.

50. The appeal succeeds. The conviction is quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

JUDGMENT DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 29TH DAY OF OCTOBER, 2025

R. WENDOH

JUDGE

Judgment delivered in the presence of:-

Mr. Majale holding brief for Mr. Mugun for Respondent/ Prosecution Counsel

Ms. Ruto for Appellant

Appellant – present(virtually)

Juma/Hellen – Court Assistants