



**Bowen v Republic (Criminal Appeal E005 of 2024)
[2025] KEHC 16163 (KLR) (5 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E005 OF 2024
RB NGETICH, J
NOVEMBER 5, 2025**

BETWEEN

TOBIAS BOWEN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant Tobias Bowen was charged with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *sexual offences Act* No. 3 of 2006. The particulars of the charge are that the Appellant on the date of the 2nd April,2021 at around 2330hours at [Particulars withheld] Village in Baringo North Sub- County within Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of VJL a child aged 17 years.
2. The appellant 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. The particulars of the charge being that the Appellant on the date of the 2nd April,2021 at around 2330hours at [Particulars withheld] Village in Baringo North Sub- County within Baringo County, intentionally and unlawfully did caused his penis to penetrate the vagina of VJL a girl aged 17 years.
3. The Appellant denied all the charges and the matter was set down for full trial where the prosecution called a total of 5 witnesses in support of the charges facing the accused. Upon the close of the prosecution’s case, the court found the accused to have a case to answer and he was placed on his defence where he gave a sworn evidence and called one witness.
4. Upon the close of the defense case, the trial court through judgment delivered on the 25th day of April, 2024, found the accused guilty as charged, convicted him under section 215 of the C.P.C and sentenced him to serve 15 years imprisonment.



5. Dissatisfied with the conviction and the sentence of the trial court, the Appellant filed a petition of appeal dated 10th day of May,2024 on the following grounds:-
- i. That the learned trial magistrate erred in law and fact when he failed to consider that the Appellant was examined medically and cleared the doubts he was involved in the incident.
 - ii. That the learned trial magistrate erred both law and fact as it enforced a mandatory sentence on him depriving him the benefit of Article 50(2(p) for either appropriate or a lesser sentence.
 - iii. That the learned trial magistrate erred in law and fact by failing to invoke section 333(2) of the CPC so that the period of time in pre-trial custody is taken into account as part of the time served. The sentence should commence on 19th October,2022 to factor this omission.
 - iv. That the learned trial magistrate erred in law and fact in not considering there was room for his acquittal or imposing a lenient sentence on account that the complainant implicated him in the case after being placed in the police cell and the court failed to declare her a hostile witness and disregard her testimony for being unreliable.
 - v. That the Learned trial magistrate erred in law and in fact by failing to make a finding that most elements of the offence of defilement were not conclusively proved to warrant a conviction as provided by law. The conviction was not safe in the circumstances that the age was not properly established and penetration.
 - vi. That the learned trial magistrate erred in law and in fact by erroneously adopting the evidence of the complainant as she can be presumed to be a hostile witness because she was locked up in the police cell to coerce her testify against the Appellant.
 - vii. That the learned trial magistrate did not strictly comply with section 124 of the *Evidence Act* as the complainant was not credible enough and reliable to be a single identifying witness and he did not warn herself on the same.
 - viii. That the Learned trial magistrate erred in law and in fact by failing to consider that the evidence of the doctor was an exculpatory piece of evidence as it confirmed that the complainant was not defiled when the physical and lab test examination yielded nothing to confirm that she was defiled by the Appellant as there was no traces of sexual intercourse, the two months pregnancy cannot be attributed to him.
 - ix. That the learned trial magistrate erred in law and in fact by failing to make a finding that the case had many material inconsistencies and discrepancies that cannot be cured under section 382 of the CPC.
 - x. That the learned trial magistrate erred in law and in fact by failing to follow up on its doubt as to whether the accused defiled the complainant. The benefit of doubt should have turned in favour of the Appellant and should have entitled him to acquittal under section 215 of the CPC.
 - xi. That the learned trial magistrate erred in law and in fact by failing to make a finding that Nathan who was the boyfriend to the complainant was being simultaneously charged with the same offence in a separate court which raises the issue of the true identity of the perpetrator in this case.
 - xii. That the learned trial magistrate erred in law and in fact in not making a finding that after the doctor presented evidence that did not support defilement, furthermore the circumstances of



the case did not point to a normal defilement scenario such as the complainant did not exhibit trauma of a person who had undergone defilement for instance she did not run away when PW 3 presented itself.

- xiii. That the trial magistrate erred in law and in fact for mis trying him for the offence of other persons who were in this instance responsible for the pregnancy of the complainant despite being charged separately the case did not go far as he was let off the hook (Nathan).
 - xiv. That the trial magistrate erred in law and in fact by not passing over the benefit of the major contradiction on age. That the parent is the best guide to matters regarding the age of his child, the complainant also indicated she was 15 years. This leaves doubts the court was probably presented with a questioned document in terms of the authenticity and content. The court should investigate this issue and discharge the appellant from prison.
 - xv. That the petitioner will adduce more grounds when the record of appeal becomes available.
6. The appellant prays that this Honourable court be pleased to allow the appeal by setting aside the sentence and set him at liberty.
7. The Appellant filed an amended grounds of appeal dated 27th September,2024 raising the following grounds of appeal:-
- i. That the Honourable Magistrate erred in law and fact in shifting the burden of proving the offence from the prosecution to the Appellant herein.
 - ii. That the Honourable Magistrate erred in law in holding that the prosecution had proven the element of penetration.
 - iii. That the Honourable Magistrate erred in law and fact in holding that the presence of spermatozoa in PW1'S vagina proved that the Appellant had defiled PW 1 yet no tests had been carried out to link the appellant to said spermatozoa.
 - iv. That the Honourable Magistrate erred in law and fact by disregarding and/ or failing to consider the Appellant's defence, evidence and submissions.
 - v. That the Honourable Magistrate erred in law and fact in holding that the age of the victim had been proven yet questions on the authenticity and the chain of custody of the victim's birth certificate had been raised by the appellant during the trial.
 - vi. That the Honourable trial court erred in law and fact by not considering that the complainant's behaviour was that of an adult, that is;
 - a. Renting her own house;
 - b. Living with her young child;
 - c. Providing for herself and her child's basic needs and;
 - d. Employing a house help
 - vii. That the Appellant is aggrieved that the trial court did not consider that the birth certificate tendered in court was obtained 13 years later after the complainant's birth and therefore a possibility of ingenuity in obtaining the birth certificate.



- viii. That the trial court did not consider that at the time of the alleged defilement, the complainant was 17 years, 11 months; that is one month short of being an adult and therefore the Appellant could not have seen her as a child considering her behaviour acting as an adult.
8. The Appellant prays for judgement of this court in the following terms:-
- i. The Appeal herein be allowed.
 - ii. The trial court's judgement dated and delivered on 25th April, 2024 be set aside and or quashed.
 - iii. The sentence of Fifteen (15) years imprisonment imposed on the appellant by the trial court on 2nd May, 2024 be set aside.
 - iv. That in the alternative, the Honourable Court orders for a retrial.

Appellant's Submissions

9. The Appellant's submissions is summarized into three issues;
- i. Whether the birth certificate obtained 13 years after the complainant's birth and tendered during trial as an exhibit was authentic?
 - ii. Whether the complainant's age was proved satisfactorily?
 - iii. Whether the trial court erred in fact and law by not considering that the fact that the complainant's behaviour was that of an adult, that is;
 - a) Renting her own house;
 - b) Living with her young child;
 - c) Providing for herself and her child's basic needs and;
 - d) Employing a house help.
10. On whether the birth certificate obtained 13 years after the complainant's birth and tendered during trial as an exhibit was authentic, the Appellant submits that he challenged the procedure used to obtain the birth certificate 13 years after the complainant's birth. That Section 8 of the Births & Deaths Act Cap 149 provides for a period for registration of births and states that a registrar shall not register a birth or death after the expiration of six months from the date of such birth or death, except upon receiving the written authority of the Principal Registrar issued in accordance with the rules, and upon payment of the prescribed fee.
11. That *births and deaths registration act*, the births and deaths (late registration) rules legal notice 154 of 1971 under section 2 defines what late registration means.
12. They submit that the defence sought for its authenticity and the process used during registration of the birth certificate through the letter dated 27th September, 2024 which was responded to by the Assistant Director of Births and Deaths-Baringo County that the details of birth certificate No. xxxxxxxx in the name of VJC is not captured in their records.
13. That the prosecution sought to cross examine the Assistant Director of Births and Deaths-Baringo County before admission and production of the letter as the defence exhibit.
14. They submit that the Assistant Director of Births and Deaths-Baringo County testified that birth certificate No. xxxxxxxx, entry No. L0016021xx was registered on 12th February, 2016 and issued the same



day in the name of VJC which indicates that she was born on 05th May,2003 and that it was registered 13 years later beyond the mandatory 6 months after birth. That as per the authority, he stated that it bears Authority Number xxxx, BRNGO/CA No. 1999 of 12/2/2016, approved by Arap Lagat and issued by J.Y Lolkurum.

15. That the witness proceeded to testify about the process of entering details during registration of birth. That a primary number is supposed to be in the authority book and the entry number in the authority register in his possession read a different number and name and from their records, he testified that he did not get the name of VJ in entry number L00116021xx in the authority register/book. That he further testified that during late registration, the documents required include the name of the child, date of birth which is gotten from the clinic card together with the details of the parent which entail the identification card, passport or a death certificate. Then there is a B3 form to be filled by the chief but in this case, they did not trace any particulars pertaining to this name. The parent's particulars were not also captured. He concluded that the birth certificate was not authentic.
16. They submit that he produced a list of exhibits including his letter of promotion to the assistant director, civil registrar - Baringo county, letter of confirmation of non-authenticity of the birth certificate, the birth certificate (original) which was produced after it was availed during cross examination, bearing the same entry number. That he told the court that he was looking at the entry for 12th February,2016, authority number xxxx which captured the name of BKC and not VJC.
17. That in cross examination, he stated that the common seal in the original birth certificate for VJC is not only for Baringo County and that the details of the birth certificate are not captured in the authority book then it is not authentic. That in this case, the details entered in the authority book number xxxx for birth certificate No. xxxxxxxx, entry No.L0016021xx registered on 12/2/2016 are not for VJC and thus he could not ascertain how the birth certificate was obtained and he termed the process a fraudulent one.
18. On whether the complainant's age was proved satisfactorily, they submit that it has been held severally that it is of utmost importance to prove the age of the victim in a case of defilement. They place reliance in the case of Hadson Ali Mwachongo v Republic. That the court proceeded to state that the age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR.
19. They submit that the birth certificate tendered in court was not authentic, fraudulently acquired and therefore the same cannot sufficiently prove the complainant's age. The complainant's parents did not testify to corroborate the document during trial. That the complainant must have relied on the age indicated in the birth certificate which shows that at the time of the offence, she was 17 years, 11 months. They therefore submit that there was no proof of the complainant's age beyond the required standard.
20. On whether the trial court erred in fact and law by not considering that the complainant's behaviour was that of an adult, that is;
 - a. Renting her own house;
 - b. Living with her young child;
 - c. Providing for herself and her child's basic needs and;
 - d. Employing a house help.



21. They submit that a person charged with defilement is entitled to raise a defence that he was misled by the complainant to believe that she is an adult. That this is provided for under Section 8(5) & 6 of the *Sexual Offences Act*.
22. That though the Appellant did not raise the fact that the complainant's behaviour was that of an adult, the trial court had the opportunity to assess those facts that the complainant was 17 years, 11 months at the time of the offence, rented her own house, lived with her young child, provided for herself and her child's basic needs and employing a house help.
23. That this being a first appellate court, this court is alive to its duty as was set down in the case of *Okeno vs. Republic* (1972) EA 32.
24. They submit that for the issues raised hereinabove, the prosecution did not prove its case beyond reasonable doubt and for all purposes, the benefit of doubt should have been in favour of the appellant. They pray that the magistrate's court's decision be set aside, quashed and the appellant be set at liberty.

Respondent's Submissions

25. The Respondents on their part oppose the instant appeal and pray that this court finds the same void of any merit and dismiss it in its entirety.
26. They invite this honourable Court to take consideration on the vital ingredients to proof the offence of defilement. On the issue of age of Complainant, they submit that the certificate of birth belonging to VJ the victim was produced as exhibit 4. That during her testimony, the complainant stated that she was 18 years old at the time of giving her testimony (14th June,2022).
27. That at the time of the offence (2nd April,2021) the complainant was 17 years of age which is corroborated by the birth certificate that indicates that the complainant was born on 5th May,2003.
28. That the medical documents to wit the treatment chits also indicated the complainant's age as 17 years.
29. They submit that on appeal, the appellant attempted to introduce new facts to the case by calling a witness to challenge the authenticity of the birth certificate produced before the trial court. They submit that the witness confirmed that the birth certificate was indeed original and bearing the seal of the Registrar of persons. That although the witness stated that it was not captured in their records, they invite this honourable court to take into consideration that the record was handwritten and thereby devoid of any errors.
30. They submit that it is trite law that there is no one particular means of proving age which has been well settled by the court of appeal in the case of *Mwalago Chichoro Mwanjembe Vs. Republic, Mombasa Criminal Appeal No.24 of 2015 (2016) eKLR* and from the holding by the court of appeal, they submit that the complainant's age was sufficiently proved using the birth certificate and the complainant's oral evidence stating that she was 17 years at time of the offence.
31. On proof of penetration, they submit that the complainant testified that she was defiled by the appellant. They submit that this was proof enough that was supported by the medical evidence produced to wit the p3 form and the PRC form. That PW3 confirmed that on examining the complainant's private parts, the labia had abrasions and were painful and therefore he formed the opinion that the findings were consistent with allegation of defilement and they thus submit that this important ingredient was equally proved.
32. On identification of the Perpetrator, they submit that PW1 stated that when she entered the house from answering a call of nature, she found the appellant whom she referred to as Kemei. She stated



- that the electricity was on and that the appellant was her neighbour and she could clearly identify her assailant. That she went straight to call Pw2 after the ordeal and indeed pw2 found the appellant in PW1's house. They submit that the ingredient of identification was well proved by the corroborating evidence of Pw 1 and Pw2.
33. They submit that there is no instance during the trial that the prosecution failed to discharge its duty of proving its case against the appellant and the trial court rightfully held so, the appellant was not required to prove his innocence and that ground of his appeal should fail.
 34. On the issue of spermatozoa being present in Pw1's vagina, they submit that the failure to carry out a forensic test to determine whether or not the same belonged to the appellant was not fatal to the case. They rely on Section 2 of the *Sexual Offences Act* and submit that it is immaterial whether or not the perpetrator leaves any spermatozoa on the victim. They submit that this ground of appeal should fail as well.
 35. On the ground that the trial Court erred in law in imposing an excessive mandatory minimum sentence which was declared unconstitutional, they submit that Supreme Court has since settled the matter in *Republic V. Mwangi; initiative for strategic litigation in Africa (ISLA) & 3 others (Amicus Curiae)*. (Petition E018 of 2023) (2024) KESC 34 KLR.
 36. They further submit that the Supreme Court issued directions on applicability of *Muruatetu I* case in which the judgement in *Machakos* petition No. E017 of 2021, *Maingi and 5 others, vs Director of Public Prosecutions & Another* KEHC 13118 KLR were premised. That the Supreme Court held that the decision in *Muruatetu I* case applied only to the mandatory death sentence for the offence of murder prescribed under section 204 of the Penal Code and not any other sentence. They therefore submit that the sentence of 15 years imposed on the appellant was in no way unconstitutional.
 37. In conclusion, they submit that the case against the appellant was proved beyond any reasonable doubt, the trial court rightfully found him guilty and convicted him and passed a valid sentence and they urge this honourable court to find so.

Analysis and Determination

38. 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*. He was sentenced to serve twenty years imprisonment. Being dissatisfied, he filed this appeal challenging both conviction and sentence.
39. The main grounds raised in the petition of appeal were that the prosecution failed to prove its case beyond reasonable doubt in that the age of the complainant was not proved beyond reasonable doubt. The Appellant's argument is that the birth certificate relied on by the trial court was not genuine as it had been irregularly obtained.
40. At the appellate stage, counsel for the appellant applied to be allowed to adduce additional evidence. The application was allowed and the Assistant Director of Civil Registration Services, Baringo County, Mr. Benjamin Nyagaka Nyakoe, was summoned to attend court and adduce evidence on verification of the authenticity of the complainant's birth certificate. He confirmed that the certificate bearing serial number xxxxxxx and entry number L00116021xx in the name of Viola Cheboisho Cheptoo was registered on 12th February 2016, a period more than thirteen years after the alleged date of birth of 5th May 2003. He stated that it was a late registration, and no B3 form or supporting hospital or parental documents were traced in the registry.
41. Upon cross-examination, he indicated that although the certificate bore a proper seal and appeared genuine on its face although corresponding entry number did not appear in the authority register,



which instead contained particulars of a different person. He concluded that the certificate before court could not be authenticated and appeared to have been obtained irregularly and that the certificate as not traceable in the official records.

42. The main issue for determination in this appeal is whether the prosecution proved all the ingredients of the offence of defilement, particularly the age of the complainant. It is settled law is that for court to find a conviction on offence of defilement, the three ingredients of the offence being (i) the age of the complainant, (ii) proof of penetration, and (iii) identity of the perpetrator must be proved beyond reasonable doubt.
43. In the present case, the trial court relied on the birth certificate produced by the prosecution to find that the complainant was 17 years and 11 months old at the time of the offence, thus within the definition of a child under the *Sexual Offences Act*. However, following the testimony of the Registrar of Births, serious doubt has arisen regarding the authenticity and reliability of that certificate. The witness confirmed that the record was not captured in the official authority register, and the entry number corresponded to a different individual. Further, it was a late registration done thirteen years after the alleged birth date, without supporting documentation.
44. The question is whether such evidence can sustain a finding on age beyond reasonable doubt. Given that age is a critical element of the offence of defilement, any doubt in proof thereof must be resolved in favour of the accused. The complainant was said to be 17 years and 11 months old only one month shy of attaining the age of majority. In view of the discrepancies and the Registrar's testimony disowning the record, I am of the view that the proof of age was not established to the requisite standard. Upon finding that one ingredient being age of the complainant was not proved beyond reasonable doubt, I find that it was unsafe to convict the appellant. The benefit of doubt in age goes to benefit the appellant. This appeal therefore succeeds.
45. Final orders: -
 - a. The conviction is hereby quashed and the sentence set aside.
 - b. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 5TH DAY OF NOVEMBER 2025.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis/Momanyi

- Mr. Kipkulei for Appellant

- CA, Elvis/Momanyi.

- Appellant

