CBK v Republic (Criminal Appeal E017 of 2024)
[2025] KEHC 16197 (KLR) (11 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E017 OF 2024

AK NDUNG'U, J

NOVEMBER 11, 2025

BETWEEN

CBK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No. E063 of 2021– Ben Mararo, SPM)

JUDGMENT

1. The Appellant, CBK was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between March 2020 and 31st May 2021 at Timau Buuri west subcounty Meru County intentionally caused his penis to penetrate the vagina of BK a child aged 14 years. On 28/03/2021, he was sentenced to fifteen (15) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he filed the petition of appeal. He also filed amended grounds of appeal accompanying his submissions and sought leave of this court to amend the earlier filed grounds and urged this court to invoke section 350(2)(iv) of the Criminal Procedure Code. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate erred by failing to note that the case was not proved beyond reasonable doubt.

    ii. The learned magistrate erred by failing to invoke Section 33 of the *Sexual Offences Act* while determining the case.

    iii. Th learned magistrate erred by failing to note that Section 77 of the *Evidence Act* was contravened.

iv. That his defence was quashed without cogent reasons.

3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that Section 124 of the *Evidence Act* requires that the court must believe that the witness is truthful and record the reason for such belief in the proceedings. That this was missing in the proceeding and in the judgment and the only reason that the trial court gave for believing PW1 was that there was no grudge against him. He submitted that the complainant's evidence was disjointed, inconsistent and incredible as she testified that he was the father to her child whereas PW5 proved that he was not the biological father to the child. She testified that in 2020, she was living with her mom and him but on cross examination, she testified that he would go for a while and leave. She further testified that she never lived with him but had gone to Ndungu's place during Covid. She testified that her sister went to Jikaze but on another instance, she testified that her sister found her and she did not tell her. PW2, the complainant's mother testified that she was with her children during Covid and discredited her children ever travelled.

4. The complainant stated that he used to work at night and would go when her mom was not around but this was discredited by PW2 who testified that he used to visit her but he was not going to her place. Complainant testified that he pulled her to his room whereas PW2 testified that he was living in Timau and she was living at Riverside. That she recanted her earlier statement that they lived with her mother and him when she testified that he used to go and stay with her mother although not all days. She testified that there was nobody else when he did bad things to her whereas she also testified that during the third time, her sister and brother were there but he sent them to the shop. That she testified that she stopped going to school after giving birth whereas PW4 testified that she gave birth and returned to school. The complainant proved to be a hostile witness who contradicts his/her former statement hence she lacked credibility and a conviction cannot be based on evidence of a hostile witness.

5. He submitted that the trial magistrate contravened Section 199 of the Criminal Procedure Code for he failed to consider the complainant's demeanour when she was testifying and in the trial court's judgment. That the complainant was a minor susceptible to third party influence and court should have treated such evidence with much caution. He submitted that the complainant was coached based on her incredible evidence. The trial court also failed to note that there was a grudge between him, the complainant and PW2 due to the breakup between him and PW2 which he raised in his defence. They were lovers and they separated and PW2 coached the complainant to fulfil her malicious intentions. That the prosecution failed to avail material witnesses including complainant's siblings and neighbours who would have witnessed the ordeal or give evidence on the surrounding circumstances. That there was need to adduce circumstantial evidence based on the fact that the learned magistrate relied on the inconsistent and disjointed oral evidence of the complainant.

6. That it was reported in the investigation diary, Dexhibit1 that the complainant was not involved with any other man apart from him. She testified that he was the father of her child and she also told this to her mother and the investigating officer. DNA test, however, exonerated him which shows that the complainant lied to other prosecution's witnesses and to the court. She was therefore not truthful as she lied that he was the defiler and the father of her child. The trial court therefore failed to note the circumstantial evidence which revealed that he was not the paternal father to her child. She therefore framed him shielding the real perpetrator. He placed reliance on the case of Simon Gichuki Maina vs R (2016) eKLR where the court acquitted an appellant based on the fact that the DNA did not prove that the Appellant had fathered the child. That the fact that DNA results exonerated him raised doubt on the complainant's testimony who testified that she was not involved with another man apart from him.

7. He submitted that Section 77 of the *Evidence Act* was contravened since PW3 did not state whether he was familiar with the signature of the doctor who filed the PRC form. That his defence was dismissed without cogent reasons and the court absolved the prosecution from the legal burden to rebut his defence.

8. In rejoinder, the Respondent's counsel submitted that leave was not sought to amend the earlier grounds of appeal filed pursuant to Section 350(2) of the Criminal Procedure Code. That the Appellant ought to have filed a formal application and this would have accorded the prosecution opportunity to respond to the new grounds of appeal. She urged the court to ignore the amended grounds of appeal filed. She submitted that complainant's age was proved through her birth certificate which was produced as Pexhibit1. That the prosecution produced medical evidence to corroborate the complainant's evidence which revealed that she was 34 weeks pregnant. The complainant testified that it was the Appellant who defiled her and she gave detailed testimony on the chain of events preceding the ordeal and how the Appellant defiled her on different occasions and warned her against telling anyone or he would kill her. She was solid and consistent and she was clear as to who defiled her, where and how. Her evidence remained unshaken during cross examination. Hence, penetration was sufficiently proved.

9. With respect to identification, she submitted that it was proved since the complainant testified that the appellant was her stepfather which was confirmed by PW2 who testified that he was her boyfriend and would visit her house when she was present or not. As to whether Section 33 of the *Sexual Offences Act* was contravened, she submitted that the complainant's testimony was in conformity with the provisions of section 33 since the evidence of the surrounding circumstances shows that a sexual offence was committed. That it was her evidence that he would go early in the morning after her mother had left for work and that was the opportunity he got to defile her. Further, the act of covering her mouth and threatening her with death show the use of force hence section 33 was complied with. As to contravention of Section 77 of the *Evidence Act*, she submitted that PW3 testified that she was also familiar with the signature of the maker of the PRC.

10. With respect to his defence, she submitted that his defence was a mere denial without any substantive explanation of the events that preceded the material day. That there was no explanation that would cast doubt on the facts set out by the prosecution and his line of defence that DNA test proved that he was not the father of the complainant's child is just a deviation from the main issue as this was not a case of paternity but defilement. With respect to sentence, she submitted that he was sentenced to 15 years which was lenient and the sentence ought to be enhanced. That there was no misdirection in terms of sentencing and the Appellant has not adduced any plausible reasons to warrant interference with the sentence. Hence, the sentence was proper and commensurate to the offence.

11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.

12. This duty was set out in Okeno vs. Republic [1972] EA by the Court of Appeal as follows;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own

findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."

13. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated 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 evidence before the trial court was as follows. The complainant in her sworn testimony testified that in 2020, she was living with her mother, sister and her step father, the Appellant. In March 2020, schools were closed due to Covid and her sister went to her father at Jikaze. Her mom was working at Timau farm and she would leave at 6:00am. The Appellant used to work at night but would return in the morning when her mon had left. She testified that she was sleeping in the bedroom when the Appellant went and lifted the blanket. She asked him what he wanted but he kept quiet, removed his trouser and pant and removed her trouser and pant. She wanted to scream but he covered her mouth and said he will kill her if she screamed. She testified, 'akinifanyia tabia mbaya'. He inserted his private part into her private part and when he finished, he told her that he will kill her if she told anyone. She got up and put on her clothes and she went to the shop. Her sister found her but she did not tell her. She did not also inform her mother.

15. He did 'tabia mbaya' to her four times. Her sister went to her father's place. She testified that on the second time, he found her doing house chores and he sent her to the shop. When she returned, he pulled her to his room and she stated 'akanifanyia tabia mbaya.' On the third time, he sent her sister and brother to the shop and he pulled her hand and threatened to kill her if she told anyone. When she went back to school, her teacher asked her if she was pregnant and she suggested that she be examined and they report to police. The doctor said she was pregnant. She told her that her mother was not aware. Her mother was called to the school. She told her teacher that it was the Appellant who did bad things to her. That she told the police what the Appellant had done. She was taken to hospital and she was given medicine for the child. She testified that the Appellant was staying with her mother though not on all days. His home was in Timau. There was no one else when he did bad things to her. She gave birth on 27/06/2021 and the Appellant is the father. She testified that she had no grudge with him and they had not disagreed.

16. On cross examination by Appellant's counsel, she testified that she knew Ndungu who was her step -father and that they went to his place during Covid and returned when schools were about to be opened. They did not go home again. That she did not know that she was pregnant when she was at Ndungu's place. School opened in October and she was pregnant then but she did not know how old. That she used to see the Appellant even before the school was closed as he used to visit for a while and leave. He would go at 7:00am and he would find her mother there. That she could have told her mother but she did not and she was living with her when she was pregnant but she did not know.

17. On re-examination, she testified that she did not stay with Ndungu during school holidays. That Glory and Esther used to go to Ndungu's place. The Appellant did bad things to her at her house when her mom was at work. He used to go to work at night.

18. PW2, complainant's mother testified that she was contacted by the head teacher at complainant's school and she was told to go to school where she was informed that the complainant was pregnant. The complainant also confirmed that she was pregnant and that the Appellant was responsible. He was her boyfriend and they were friends since 2015 to April 2021. He was living in Timau but used to visit her. He would go there during the day. During Covid, the children were at home. She would go to work at 7:00am and leave at 4:30. She had no grudges with the Appellant.

19. On cross examination, she testified that she did not note any physical change. The Appellant used to work day and night, day 6:00am and night till 5:00am. He never passed by her place during night shift and has never spent a night in her house and he would visit when she was there. That she was told that someday he would visit in her absence. Her children were with her during Covid. That they had not planned with the children after they parted.

20. PW3, A clinician produced the P3 form as Pexhibit2. She testified that the child was 34 weeks pregnant. She also identified the PRC form which was filled by her colleague Doris Kibiti whom she testified that she had worked with her for a period of four years and she was familiar with her handwriting.

21. On cross examination, she testified that she only diagnosed her pregnancy and P3 was filled in June 2021. There was no date indicated on the PRC form. P3 talked of November and PRC talked of September. The finding was 34 weeks regardless of the date of the offence.

22. PW4 was the headteacher at complainant's school. She testified that the complainant was washing her office but she noted that she was straining. She asked her if she was pregnant. She told her teacher to investigate further and a pregnancy test was conducted which was positive. She contacted her mother who said she was suspecting and she was taken to hospital. She gave birth and returned to school. She asked the girl who was responsible and she said it was father Busienei. She asked her mother to meet her in school and she went there with complainant's other sister who was also pregnant and she said it was her mother's friend.

23. On cross examination, she testified that she used to attend school regularly and they were suspicious of her pregnancy. That she said her mother's friend was responsible.

24. PW5 testified that he was contacted by Sgt Nancy and he was informed that a suspect had been spotted in Nanyuki and he was ordered to go and arrest him. They went to Nanyuki airstrip and the OCPD pointed out the man whom they arrested.

25. He testified on cross examination that they found him at his place of work and he did not resist arrest.

26. PW6, a government analyst testified that on 13/02/2022, they received Appellant's sample, complainant and that of the child which was escorted by John Kibe from Timau police station and they were required to determine paternity. She testified that the Appellant was excluded as the biological father to the child. She produced the report and the exhibit memo as Pexhibit4a and b respectively.

27. On cross examination, she testified that accused was not the father of the child.

28. PW6, the investigating officer testified that he accompanied the complainant and her mother during examination and the P3 and PRC forms were filled. He visited the scene and recorded statement. The appellant knew he was being wanted so he fled. He was arrested on 07/08/2021. On 13/01/2022, he took the Appellant, the complainant and the child to the government chemist for DNA. He filled the

exhibit memo. He produced the investigation diary as Pexhibti5. He also produced the complainant's birth certificate as Pexhibit1.

29. On cross examination, he testified that the complainant gave birth after commencement of this case. That she stated that the Appellant was responsible. He was arrested after 7 months since he had fled. That he did not know that he was employed elsewhere and learnt that he was arrested at Nanyuki as a security guard.

30. The Appellant in his sworn defence testified that on 13/08/2021 while at work, he was contacted by an officer who asked where he was and he told him that he was at the airstrip working. The officer went to his place of work, arrested him and told him he will know of the charges. He was taken to Timau police station where he was informed that he had raped two girls. He denied committing the offence and testified there was a grudge between him and PW2 who was his lover though they separated. That complainant testified that she was home whereas during cross examination she said she was at Jikaze and she did not return from March 2021 until September 2021. That PW6 produced DNA report which showed that he was not responsible and the complainant failed to prove that he had penetrated her. Complainant lied. Her mother testified that he had not been in her place. They separated and he was living in Timau and she was living in Riverside. He could not meet her children.

31. That upon cross examination, it was established that the date of conception was during the time she was at Jikaze. That one person cannot impregnate two sisters. He did not resist the arrest so the investigating officer misled the court. He did no investigate the case as he failed to interrogate the neighbours to verify whether he was seen in the plot. That he lied that he fled for 7 months whereas he was arrested on 17/08/2021, 1 month and 25 days after the report. He produced the investigation diary and DNA result as Dexhibit1 and 2 respectively.

32. On cross examination, he testified that they separated in 2018 and he was charged in 2021. She still had a grudge and she wanted them to reconcile but he told her that he had a wife and children. That he did not have a grudge with the teacher. That they worked together with PW2 and she might not have known who went to her house during the day.

33. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. Put another way, did the prosecution prove each and every ingredient of the offence against the Appellant?

34. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. These ingredients are set out in Section 8(1) of the *Sexual Offences Act* No. 3 2006.

35. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

36. In the present appeal, the complainant's age was not disputed. PW6, the investigating officer produced the complainant's birth certificate as Pexhibit1 which shows that she was born on 31/09/2006. The

offence was committed between the month of March and May 2020 and therefore the complainant was a minor at the material time.

37. On the question whether there was penetration of the Complainant's genetalia, there is medical evidence of pregnancy. This shows that the complainant, a minor was sexually penetrated which resulted to her pregnancy and birth of her young child.

38. The only question that remains is whether the Appellant was the perpetrator. The complainant gave a candid testimony on how the Appellant found her sleeping, lifted the blanket and when she asked him what he was doing, he kept quiet. He proceeded to remove his trouser and underpants and also removed the complainant trouser and underpants, covered her mouth, threatened her with death if she screamed and defiled her. She testified that he also threatened her with death if she revealed the ordeal to anyone. He did this several times. The second time he found her in the house doing house chores and he sent her to the shop and when she returned, he pulled her to his room and did 'tabia mbaya' to her and on the third time, he sent her brother and sister away and he pulled her and threatened her with death. She testified that her teacher noted that she was pregnant and she asked her who was responsible and she said it was the Appellant. That she told the police what the appellant did to her. She testified that the Appellant was her stepfather. Her mother, PW2 testified that he was her boyfriend. The complainant further testified that her mother would leave for work at 6:00am and the Appellant, who used to work at night would return in the morning. She testified that she gave birth on 27/06/2021 and the Appellant was the father.

39. The trial magistrate found the complainant and her mother as truthful witnesses. On the issue of DNA, he relied on the case of Williamson Sowa Mbwanga vs Republic (2016) eKLR where the court held that paternity could have proved who the father of the child was but that was not the only evidence by which defilement could have been proved.

40. The Appellant in his submissions attacked the complainant's credibility for reasons that she testified that he was the father to her child born after he defiled her yet the DNA results exonerated him. He submitted that the complainant was not truthful because according to Pexhibit5, the investigation diary which he also relied during his defence, it was reported that the complainant told the police that it was only the Appellant who defiled her and she was not involved with any other man.

41. PW5, a government analyst produced the DNA report as Pexhibit 4a. She testified that according to the results after DNA analysis, the Appellant was not the biological father to the complainant's child. PW6, the investigating officer testified that he took the Appellant, complainant and her child to the government chemist where samples were taken for purpose of DNA analysis. He also produced the investigation dairy as Pexhibit5. It was reported in the investigation diary that the two girls, the complainant and her sister reported to have been defiled by the Appellant. It was further recorded as follows in the investigation diary;

> 'The two girls are now pregnant and it is suspected that the two pregnancy belongs to the same suspect for the girls denied to have had an extra intimacy with other men.'

42. As stated, the DNA results exonerated the Appellant as the father of the complainant's child. The complainant reported to the police that she was defiled by the Appellant and she did not implicate any other man. The report to the police and the information to everyone else including the mother to the complainant, the teacher and clinical officer by the complainant was that it is the Appellant who defiled her and got her pregnant. The DNA results exonerated the Appellant.

43. I hasten to add, however, and as rightly pointed out by the trial court that the fact of penetration can be proved by way of other evidence other than medical evidence. Indeed, under Section 124 of the

Evidence Act, a conviction can lie on the basis of the uncorroborated evidence of a victim of a sexual offence so long as the court believes that such a witness is telling the truth and the reasons for such belief is recorded.

44. In my view, however, when the available evidence from a complainant is to the effect athat a particular person defiled her leading to a pregnancy and a scientific analysis leads to a finding that the named person is not responsible for the preganancy, the whole matrix changes and a big cloud of doubts envelope the question whether the person Accused really defiled the complainant.

45. For clarity and for avoidance of doubts, let me state that it is very possible for more than one person to defile a minor at different or same time. If a pregnancy results from a defilement by one and not the other, a conviction of the one not responsible for the pregnancy would still be achievable against the one not responsible for the pregnancy so long as evidence is adduced to prove the fact.

46. A word of caution though. When the complainant maintains that only one person defiled her, like in this case, and it turns out that pa paternity test exonerates him, the credibility of the complainant is shaken and the logical inference would be that the complainant could be shielding a perpetrator of the offence thus raising doubts in her case against, like in this case, the Appellant. The veracity of her testimony is put into serious question.

47. The court in Eliud Ouma Agwara v Republic [2016] eKLR while faced with a similar issue stated as follows:

> " The DNA results having not connected the appellant with the complainant's child as a result of the alleged result of defilement and the complainant having not connected the appellant with any other previous act of defilement or having not stated that she has had an earlier encounter with another person who could in view of the DNA results be said to be the father of the child, meaning the age of pregnancy and the child should have related to the incident and results should have confirmed the Appellant was the father of the child. The appellant should have been accorded the benefit of doubt. The trial Court fell into an error when it held that DNA results could never be a defence in an offence of defilement as the Court did not properly evaluate and analyze the evidence which prosecution was relying upon thus as a result the defilement of the complainant she became pregnant meaning the age of pregnancy and the child should have related to the incident and results should have confirmed the Appellant was the father of the child. It was therefore apart from proving defilement the duty of the prosecution to prove as they alleged the complainant has had no other sexual intercourse with any other person prior to the date of defilement to prove that as a result of the alleged defilement PW1 became pregnant, bore the child whose DNA test report connected the appellant with the act of defilement."

48. The Appellant relied on the case of Simon Gichuki Maina v Republic [2016] eKLR where it was stated that:

> " Whilst paternity test cannot conclusively prove the fact of defilement, these DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If as proved appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the appellant and that person fathered her child. Her identification of the appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named (identified) the appellant purely to shield some other third party cannot be entirely ruled out.

> Nobody witnessed the defilement. Nobody saw appellant in the company of the complainant. The complainant's claim that the appellant fathered her child through this act of defilement has been disproved by scientific evidence. I find that pertinent and genuine doubts remain regarding the identification of the appellant by the complainant. Once a witness is found to have been untruthful in one aspect of his testimony, then the entire testimony of that witness is cast into doubt. The benefit of such doubt must be awarded to the appellant. As such he was entitled to an acquittal. The trial magistrate erred in rendering a conviction in this case."

49. The complainant throughout the trial testified that the Appellant was her defiler and testified that he was the father to her child. She did no mention whether there was another man who was involved. The report made to the police was that the Appellant was the only perpetrator as she denied having been involved with any other person. This cast doubt as to whether she was truthful or not.

50. The court of appeal in Joseph Ndungu Kimanyi v Republic [1979] KECA 5 (KLR) stated that;

> " The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."

51. The decision in Joseph Ndungu Kimanyi v Republic supra falls on all fours with the facts and circumstances of this case. The evidence of the complainant was completely unreliable and it was most unsafe to accept and believe the same as truthful. Serious doubts were established in the prosecution's case and the benefit therefrom ought to have, as provided in law, gone to the Appellant. The trial magistrate fell to a grave error in her findings.

52. With the result that the appeal herein has merit. I allow the same. The Appellant is to be set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF NOVEMBER 2025.

A.K. NDUNGU

JUDGE