Mwendwa v Republic (Criminal Appeal E035 of 2023)
[2025] KEHC 16567 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16567 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E035 OF 2023

CW MEOLI, J

NOVEMBER 13, 2025

BETWEEN

PHILADE MWENDWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence in Loitokitok S.O. Case No.10 OF 2020)

JUDGMENT

1. Philade Mwendwa, the Appellant herein was charged in the main count with Defilement contrary to Section 8 (1) as read with Section (2) of the *Sexual Offences Act*. The particulars stated that on 29.4.2020 at Kimana trading centre, Loitoktok Sub- County, Kajiado County, he intentionally caused his penis to penetrate the vagina of C.K a child aged 16 years. In the alternative count, he faced a charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He denied the charges, but following a full trial, the Appellant was convicted for the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* and sentenced to serve 15 years imprisonment.

2. Aggrieved with this outcome, the Appellant filed the present appeal via his undated petition of appeal raising the following grounds:

    a. That the learned Trial Magistrate erred in both law and facts on whereby the prosecution case was proved beyond the threshold of criminal law standard as enshrined by Section 107 of the *evidence act*.

    b. That the learned Trial Magistrate erred in both law and facts by failing to prove the Age as contemplated by Section 2 of the child Act.

    c. That the Learned Trial Magistrate erred in both law and facts in failing to establish the penetration and medical nexus between the appellant and victim.

d. That the learned Trial Magistrate erred in law and fact on whereby the appellant was not positively and properly identified as the perpetrator of the act.

e. That the learned trial magistrate erred in both law and facts on whereby the victim was not truthful.

f. That the learned Trial Magistrate erred in both law and facts in whereby the entire prosecution case was contradictory, inconsistent and incredible and mired with grave illegalities and discrepancies.

g. That the learned trial magistrate erred in both law and facts on whereby no points of determination were in accord to Section 169(1).

h. That the appellant may adduce more grounds during the hearing.

3. As directed by the court, parties canvassed the appeal through written submissions. The Appellant's submissions are dated 5.5.2025. Starting by setting out the principle in Section 107 of the *Evidence Act* that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist, the Appellant reiterated that the standard of proof in criminal cases was beyond reasonable doubt. And highlighting the statement in Charles Kibara Muraya -vs- Republic CR.APP.NO 33 of 2001 that "the more the serious the charge, the heavier the burden of proof on the prosecution."

4. He submitted that although Section 124 of the *Evidence Act* provides that the sole testimony of a complainant can secure a conviction for a sexual offence, the truthfulness of such witness is critical. He asserted in this case that the complainant's and that by PW4 were lacking in credibility. That the reference by PW1 to someone called Cheupe who texted he was not known by such name or alias. Moreover, the said text was not produced in court, and relying on the statement that " a court of law cannot act on assertions unless such are proved by evidence before court" in the case of Muiruri Njoroge -vs Rep (1982)KLR .

5. Arguing that PW4's evidence was unreliable, he took issue with the assertion that though sleeping next to PW1, she did not hear the commotion of the alleged offence of defilement. And later having woken up and asked PW1 to switch on the lights to go to the toilet was unable to identify him. He posited that the evidence of such a witness could not be relied on citing the case of Abel Morari & Another-vs-Rep CR APP No. 86 of 1994. Further, he asserted that the age of the complainant which was a critical ingredient of a charge of defilement was not proved to the required standard, relying on the case of Kaingu Elias Kasomo -vs- Rep in Court of Appeal at Malindi Criminal Appeal no 504 of 2010.

6. Here, the Appellant taking objection to the age assessment of the victim done 11 months late, on 15.03.2021, while the offence was alleged to have been committed on 29.04.2020. Therefore, questioning how the charges were drafted without first determining the age of the complainant, he concluded by stating that the prosecution evidence was inadequate and marred by inconsistencies which ought to have been resolved in his favor. Citing the case of JOO -vs- REP (2015) eKLR.

7. Regarding the sentence, the Appellant asserted that the time he spent in custody was not considered as required by Section 333(2) of the Criminal Procedure Code (CPC).

Respondent's submissions.

8. By their submissions addressing the ingredients of the offence of defilement including penetration, proof of age and identification of the offender, the prosecution submitted as follows. Penetration was proved through the testimony of PW1 to the effect that the accused person Cheupe, touched her body,

breasts and finally removed her clothes and inserted his penis into her vagina as well as medical evidence confirming broken hymen, bruises on her labia majora and labia minora. Besides, under Section 2 of the *Sexual Offences Act* penetration includes partial or complete insertion of a genital organ into the genital organs of another person. As held by the Court of Appeal in Mohamed Bachero -vs Republic(2015) eKLR.

9. As regards identification of the perpetrator, the prosecution highlighted evidence that the offence happened in a lit room; that the Appellant was well known to the victim and her family whom they referred to him as Cheupe ; and this being a case of recognition, the evidence is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant, and reducing chances of mistaken identity, as held in Anjononi & Others -vs- Republic [1980]

10. Finally, concerning proof of age, it was submitted that PW1 testified that she was 16 years old at the time of the offence, and confirmed by her father who stated that the child was born on 1.01.2005, while the clinician upon conducting an age assessment established that she was 15 years old.

11. As to the credibility of PW1's evidence, the prosecution took the view that the trial court was best placed to assess the demeanor of the witnesses and determine their truthfulness. And citing Republic-vs- Oyier (1985)eKLR stated that the appellate court will not interfere with the findings of credibility unless it is demonstrated that the trial court misapprehended the evidence or acted on wrong principles. Moreover adding that the only inconsistency related to the age of PW1, which were not fatal to the prosecution case, and is curable under Section 382 of the Criminal Procedure Code. Thus, in the prosecution contend that the appeal lacks merit and ought to be dismissed.

Analysis and Determination

12. The court has considered the entire record of the lower court and rival submissions. As a first appellate court, this court is duty-bound to analyze the evidence adduced before the trial court with a view to arriving at its own conclusions. As stated in Okeno -vs- Republic (1972) E.A 32:-

> " 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) EA. 424."

13. Three ingredients namely, penetration, age of the victim and identity of the perpetrator must be proved in a successful prosecution for defilement. The prosecution evidence at the trail was as follows. C.K (PW1) testified that she was born on 31.12.2004 and was 16 years old in the material period, and living at Kimana with her father Musyoka Kyalo (PW2) and a younger sister M.W (PW4). PW1 stated that the Appellant was a neighbour residing with his wife at the same plot. On the night of 29.04.2020, PW1 was home with PW4 who was asleep, their father being away.

14. The Appellant whom she knew by the alias Cheupe had earlier seduced her and established a relationship with her had given her a Nokia phone, and on the material night, he sent her a text message saying that he had a dispute with his wife and would pass by her house. Finding her seated on a sofa seat, the Appellant asked to have sex with her while fondling her and eventually the two joined PW4 in the bed where the Appellant undressed her and forced her to have sex. PW4 said she was woken up by voices of people talking and then asked for a torch to be lit as she wanted to go out to the toilet and that PW1 said she had no torch prompting PW4 to switch on lights.

15. PW4 stated that she went to the toilet and came back when she noticed the clothes, including a pair of white and green striped shorts which she recognized to belong to the Appellant and their neighbour, having previously seen him wearing them while going to the external bathrooms at the plot. He had covered himself while lying next to PW1 at the foot of the bed.

16. That upon returning to bed, she was disturbed by being pushed and said she wanted to visit the toilet again, whereupon PW1 then opened the door and the Appellant slipped out, before returning to inform her the Appellant had come over because he had disagreed with his wife. On the next day when PW2 came home, PW4 reported the night's incident to him. PW2 therefore proceeded to report the matter at Kimana Police Station and later took PW1 to hospital. He stated that PW1 was born on 1.01.2005, and that he knew the Appellant as lived in the same plot and did the same work as him.

17. Francis Nana (PW3) is a clinical officer at Loitokitok sub-County Hospital who on 4.5.2020 examined PW1 who had been treated earlier and noted bruises on her labia minora and labia majora, and that she had no hymen. He assessed the injuries as grievous harm and prepared the P3 form as Exh 1, PRC form as Exh 2 and the age assessment Exh 3 showing PW1's age as 15 years in 2021. On the same date (4.05.2020), the Appellant was arrested at his home by police on patrol who were alerted by PW2. PC Dorcas Chirchir (PW5) testified that she investigated the matter and confirmed that the age assessment of PW1 was done on 15.3.2021, having been delayed by the relocation of the family to Voi. .

18. Upon being placed on his defence, the Appellant elected to make a sworn statement. To the effect that PW2 whom he knew as a neighbour owed him Shs. 1800/- as wages for work done for him and Shs. 5000/- for a Nokia phone the Appellant had lent him while attending a party at his house and that PW2 had refused, despite the demands by the Appellant to pay him. Instead, threatening to make him suffer, and eventually he brought police officers to his home and arrested him.

19. From the Appellant's grounds of appeal and submissions, the Appellant challenges evidence brought in proof of the three ingredients of defilement, namely, the age of the victim, penetration and identity of the perpetrator. The duty to prove these ingredients beyond reasonable doubt lay with the prosecution and the burden of proof never shifts to an accused person.

20. PW1 testified that she was 17 years old in 2021 when she testified, and which means she was 16 years old in 2020. PW2 who is her father gave her date of birth as 1.01.2005, which would make her about 15 years old in 2020. The age assessment done subsequently on 15.03.2021 indicated she was 15 years old. The Appellant highlighted this inconsistency to assail the credibility of PW2. The trial court in its judgment noting the age of the complainant in the charge particulars correctly observed that he ought to have been charged under Section 8(1) as read with 8 (4) of the *Sexual Offences Act*, the latter subsection which deals with defilement of a child between the age of sixteen and eighteen years.

21. It appears that there were no formal documents available regarding the date of birth of the complainant, and apparently, her mother was not in her children's lives. It is possible that PW2 as a father was not able to tell the exact age of the daughter, who equally considered herself 16 at the material date, the latter which was the basis of the charge particulars. In this scenario, the age assessment though carried out late in 2021 due to Covid pandemic according to PW5, may be more reliable. Because PW1 was in form 1 in 2021, and assuming she had joined primary school at 6 or 7 years of age, as usually happens, she would have been about 15 years old at the time of testifying.

22. Whatever the case, PW1 was on all accounts a minor under the age of 18 at the material time, and no prejudice was visited on the Appellant because the trial court evidently accepted her age to be 16 years at the material time. Hence invoking the provisions of Section 382 of the Criminal Procedure Code,

the court convicted the Appellant accordingly under subsection 8 (4) of the *Sexual Offences Act*. This means that his sentence was less severe.

23. In Mwalongo Chichoro Mwanyembe -vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR) cited in the case of Edwin Nyambaso Onsongo -vs- Republic (2016) eKLR, the Court of Appeal stated:

> ''... ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable''.

24. On penetration, PW1's testimony was descriptive; narrating how the Appellant had befriended her and given her a Nokia phone, a matter confirmed by the Appellant's own reference to his Nokia phone allegedly given to PW2, on which he announced his intention to visit her on the material night and when he came insisted and did have sex with the minor after undressing her. It was clear from her evidence that the Appellant had previously groomed PW1 who considered herself his ''girlfriend'' as she stated in her testimony that, "Alikuwa ananikatia, nilikuwa dame wake." The medical evidence by PW3 documenting her broken hymen, bruises on the labia minora and labia majora about five days later corroborate PW1's assertions of recent defilement.

25. Moreover, PW4 while honest enough to say she did not see the Appellant in her bed on the material night because he covered himself said that she was woken up by people talking and being pushed while in her bed, only to discover two people including her sister lying close together at the foot of the bed, while the Appellant's clothes including shorts lay by the floor. PW4 who appeared to the trial court to be a smart child had the sense of duty on the material night not only to wake up to find out what the commotion in her bed was about, she also promptly informed her father when he came home on the next day that a man had spent time with PW1 in the house on the previous night, and naming him, having learned of his identity from the sister on the material night. Both PW1, PW4 and their father PW2 denied that they had falsely implicated the Appellant because of a dispute over money

26. As concerns identification of the perpetrator, while the Appellant was known to the above witnesses by the alias Cheupe, there was no dispute that he was known to them as their neighbour and that in fact he and PW2 did the same job at Kimana. In addition, he was PW2's acknowledged ''boyfriend'', hence the exchange of text messages prior to his night visit on the material date when he found the complainant seated and started groping her before eventually taking her to bed and having sex with her.

27. This narrative receives corroboration from the testimony of PW4 who was asleep and upon being woken up by voices, became aware of the presence of a man in her bed with PW1, and whose shorts she identified as belonging to the Appellant, a fact subsequently confirmed to her by PW1 after the night visitor left. This therefore was not a case based on identification of the perpetrator but of recognition, hence reliable. See Anjononi & Others (supra).

28. Thus, reviewed as a whole, the prosecution evidence established all the ingredients of defilement beyond reasonable doubt. And effectively displaced the Appellant's allegations of a frame-up instigated by PW2 because of a debt he owed the Appellant and a phone he borrowed from him, which at any rate were never put to the witness during cross-examination. If anything, PW1 and PW2 testified that after the incident they subjected to pressure by persons acting at the behest of the Appellant to withdraw the complaint, this apparently eventually moved his family to Voi, from court proceedings. The conviction herein is sound, and the appeal thereon is without merit and must fail.

29. Regarding the sentence, the Appellant complained that time spent in custody was not factored in his sentence. From the proceedings, the Appellant was arrested on 4.05.2020 and was released on bail on 22.12.2020. Thus, he was held in custody before bail for 7 months and 18 days. Pursuant to Section 333(2) of the Criminal Procedure Code, and dicta thereon in Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR) [supra], the Appellant is entitled to a deduction of seven months and eighteen days from his sentence of 15 years imprisonment. It is so ordered. To that extent, only the appeal on sentence has succeeded.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 13TH DAY OF NOVEMBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the State: Ms. Kihumba h/b for Mr. Kilunda

Appellant: Present

C/A: Lepatei