



**DAO v Republic (Criminal Appeal E002 of 2025)  
[2025] KEHC 16327 (KLR) (12 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16327 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKADARA  
CRIMINAL APPEAL E002 OF 2025  
J WAKIAGA, J  
NOVEMBER 12, 2025**

**BETWEEN**

**DAO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence in  
Criminal Case No SO 164 of 2018 of the chief Magistrates court at  
Makadara by Hon. I. Gichobi PM delivered on 21 st December 2023)*

**JUDGMENT**

1. The appellant was charged, tried convicted and sentenced to serve life imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *sexual offences Act*.
2. Being dissatisfied with the said conviction and sentence, he filed this appeal initially at the High Court Criminal Registry at Milimani being Criminal Appeal No E201 of 2024 and raised the following grounds of appeal:
  - a. That the trial court erred in law and fact by failing to find that the prosecution failed to prove penetration of the alleged complainant's genitalia as required by law.
  - b. The court erred in law and fact by failing to find that the prosecution never proved the age of the complainant
  - c. The trial court erred in law and fact by failing to find that he was not properly identified
  - d. That the honourable court erred in law and fact by failing to find that the witnesses in the case were incredible witnesses whose evidence could not be used to base a conviction.



- e. Trial court erred in law and fact in convicting the appellant based on the complainant single evidence without giving reason for believing her testimony.

### **Submissions**

3. This appeal was transferred to this court upon its establishment and directions issued on its disposal by way of written submissions and the appellant who was un-represented submitted that the evidence tendered by the prosecution was not credible reliable and admissible. It was contended that the alleged incidence occurred on the 27<sup>th</sup> of July 2018 and reported to the police the following day yet the appellant was arrested on 8<sup>th</sup> august 2018 as an afterthought. It was submitted that the victim's testimony was not trustworthy and uncorroborated .
4. It was contended that the trial court ought to have warned herself that it was not safe to convict the appellant on the uncorroborated evidence of the complainant. The case of Chila versus Republic [1976] EA 722 was submitted in support thereof.
5. It was the appellant's contention that there was contradiction between the victim's testimony in court and her first information to the police when the matter was still fresh in her mind. In support of the submissions, reference was made to the case of Sv Janse Van Rensburg 2009SACR 216 (C) where the court stated that where there are two conflicting versions of two mutually destructive stories, both could not be true.
6. It was the appellant case that he raised an alibi defence to the effect that he was at his place of work on the material day contrary to the evidence tendered by the prosecution, he contended further that the police did not investigate to disapprove his claim and that the burden of proving the falsity of the defence was with the prosecution as was stated in the case of Victor Mwendwa Mulinge versus Republic.
7. Since the defence raised a doubt as to whether the appellant committed the offence the trial court was duty bound to weigh it against the totality of the evidence on record.
8. It was the appellants case that the charge sheet was defective as it was at variance with the evidence tendered before the court. In support of this line of submissions, reference was made to the case of Nedzambu versus S (911/2021) [2013]ZASCA69 where the court stated that the only available remedy is to amend the charge sheet if it will not prejudice the accused.
9. It was the appellants case that the p3 form was un-procedurally produced and that the trial courts finding that the complainant's hymen was broken , was not supported by the evidence on record and therefore the doubt created thereon , the benefit thereof should have been accorded to the appellants .
10. It was finally submitted that the trial was unfair in that he was not given the benefit of the provision of section 200(3) of the CPC and that the same was not explained to him so to make an election on whether to recall the witnesses who had testified or to have the trial started De novo .
11. It was finally submitted on sentence that its purpose is not to destroy the offender but to reform and rehabilitate. It was contended that imprisonment for life to an ailing 54-year-old is akin to death sentence and did not conform to paragraph 23.9 of the Sentencing Policy Guidelines.
12. On behalf of the prosecution it was submitted that penetration was proved through the P3 form and medical report which confirmed that there was a tear in the vagina of the victim. The age was proved through the evidence of the mother that she was born on 28/2/2008 and the baptism certificate card. On identification of the appellant, it was submitted that that he lived together with the victim in the same plot which he confirmed in his defence.



13. It was contended that the appellant asked the victim to take to him a basin in his house upon which he locked the door and defiled her and therefore the identification was proper and free from error. His alibi defence that he was at work as a guard at Dandora Equity was not corroborated. It was submitted that the difference in the victim's name on the charge sheet and the medical documents did not prejudice the appellant, as the court considered the same to be mere pronunciation issue.
14. On the sentence it was contended that the appellant was sentenced to life imprisonment, the court having considered his mitigation. The appellant having been out on bond throughout trial, there was therefore no time spent in remand to be considered under the provisions of section 333(2) of CPC.

### **Proceedings**

15. This being a first appeal, the court is duty bound to re-evaluate the proceedings before the trial court and to come to its own conclusions thereon giving allowance to the fact that unlike the trial court, it did not have the advantage of seeing and hearing witnesses.
16. PW1 a minor who was found to be intelligent and understood the duty to tell the truth, testified on oath that she met the appellant at the corridor of the plot and he asked her to take to him his basin which was outside the house and as she entered the house he closed the door and threatened to kill her if she did not undress. He then removed his trouser and inserted his penis inside her vagina three times. He warned her that he will kill her should she scream and if she told anyone. thereafter he told her to leave his house and not to tell anyone. She later on told her mother after five days since she was in pain.
17. PW2 the complainants mother testified that on 27<sup>th</sup> July 2018 at 8.00 pm, she found her daughter at home crying and said that she was in pain when she pees and that on the 21<sup>st</sup> the appellant had asked her to take a basin to his house where he defiled her and warned her not to tell anyone. It was her evidence that they were two weeks old ant the plot and that the appellant was her opposite neighbour, who disappeared immediately she informed the landlord, only to come back after one week, upon which he was arrested.
18. She gave the date of birth of the complainant as 28/2/2018 as per the baptismal certificate. In cross examination she stated that PW1 was in class five and that the appellant told her to settle the matter which she declined and that she decided to move out of the plot.
19. PW3 Rose Ngendo Waweru a nurse examined the victim who had normal genitalia with a whitish discharge. PW4 Dr Farah Mohamed a medical officer at Mama Lucy testified and produced the P3 form on behalf of Dr Kosgei which confirmed that the victim had a 7 o'clock old tear on the vagina. He also produced a P3 form on the appellant who had no injuries on his genitalia.
20. On the 13<sup>th</sup> may 2022 the matter was placed before Hon Thibaru who complied with the provisions of section 200(3) of CPC by explaining to the appellant his rights therein in Kiswahili to which the appellant elected that the matter proceeded from where it had reached.
21. PW5 PC Faith Kirui received the complainant who was ten years old and her mother, who reported the incidence herein and recorded their statements. It was her evidence that according to the investigation dairy PW2 stated that the complainant had been sent by the appellant to buy a match box and paraffin who then lured her in the house and defiled her.
22. When put on his defence, the appellant testified on oath and stated that on the material day he was at work at Equity ATM Dandora from 6.00 am to 6.15 pm and that at the ATM there was a CCTV to capture if he was at work which the investigating officer did not check. He attempted to produce the OB at his place of work, which was objected to by the prosecution and sustained by the court and that



the mother of the complaints initially report differed with the evidence in court. He further testified that he was HIV positive while the minor tested negative.

23. When recalled by the appellants Advocate PW4 stated that the appellant was examined by Dr Maundu, he stated that the victim's hymen had a tear at 7 o'clock which was more than 72 hours and that it was caused by penetration and that the victim name in the medical report and PRC is E while P3 form refers to I =, which must have been an error. PW 5 stated that this matter was reported on 27<sup>th</sup> July 2018 while the appellant was arrested on 8<sup>th</sup> August 2018 because he was at large. It was her further evidence that the report was made by the victim's mother and father in her absence.
24. This order on recall was set aside by the high court in Revision no E275 of 2023.

### **Determination**

25. From the proceedings herein the court has identified the following issues for determination:
  - a. Whether the provisions of section 200(3) of CPC was complied with
  - b. Whether the prosecution case against the appellant was proved beyond reasonable doubt
  - c. Whether the appellant defence was considered and properly rejected by the court
  - d. Whether the sentence was harsh and severe
  - e. What order should the court make herein
26. On the issue of section 200(3) of the CPC, the record of the proceedings shows that the appellant trial commenced before Hon J. Kibosia who took the evidence of four prosecution witnesses, before proceeding on transfer. On the 15<sup>th</sup> May 2018, the cause was placed before Hon. M Thibaru who explained to the appellant his rights under section 200(3) of the CPC to which the appellant chose to have the matter proceed from where it had reached .
27. The only part which is missing is whether Hon I Gichobi complied with the provision of section 200 CPC when she took over the matter when she received the submissions of the parties and proceeded to write and deliver the judgement herein and whether the appellant was prejudiced .
28. It must be noted for record purposes that there was no trial conducted before Hon Gichobi , the same only proceeded to write a judgement on behalf of a judicial Officer who had ceased to exercise jurisdiction which is provided for under the provisions of section 200(1) (b) of the CPC and was therefore lawful. The appellant submission of unfair trial ,has no merit and is dismissed.
29. On proof of the prosecution case , the age of the complainant was not in doubt, the same was proved by the testimony of her mother to the effect that she was born on 28<sup>th</sup> February 2008 as corroborated by her baptism card and P3 form which gave her age as ten years as well as PRC Form which also gave her date of birth as 28<sup>th</sup> February 2008. I therefore find and hold that age was proved beyond reasonable doubt.
30. Penetration was also proved through the evidence of PW1 , the post rape care (PRC) and the P3 form which confirmed that the hymen had an old tear at 7 o'clock and as corroborated with the compliant account and as confirmed by her mother that she was in pain while peeing.
31. On the identification of the appellant, the same was identified by recognition, the same was a neighbour of the complainant in the same plot as confirmed by her testimony and that of her mother. Soon after the commission of the offence, the appellant went at large only to surface a week later and cannot now be heard to state that his arrest after ten days was an afterthought. I find the explanation by



- the compliant that she could not report immediately because the appellant had threatened to kill her should she tell anybody plausible.
32. The contradiction on the name of the victim , the time when the alleged incidence occurred and the information given by the mother at the first report on the appellant having sent her to the shop against the evidence that he had asked her to take a basin to his house were of minor nature and did not make the charge sheet defective. The evidence on record clearly point to the fact that the appellant lured the victim to his house wherein he defiled her. I therefore find no fault with the trial court finding thereon.
  33. The only issue which the appellant raised and which is of substance is his defence. The appellant raised an alibi defence to the effect that he was on duty at the material time and attempted to produce the OB record at his place of work which the court rejected. It is not true as stated by the court that the appellant did not produce the OB report. The appellant being un represented , the court was duty bound to assist the same in presenting his defence .
  34. It is trite law that the alibi defence can be raised by an accused person at any time in the proceeding, the court should have allowed the appellant to have the OB marked for identification, he further stated that there was CCTV at his place of work which would have confirmed that he was at the station at the time when the compliant alleged that she was defiled, which line of defence was not looked at by both the Court and the prosecution which had a duty to bring to the notice of the court all culpable and in culpable matters. Once the appellant had raised an alibi defence, it was for the prosecution disapprove the same as the burden of proof is always with the prosecution and not the accused to prove his innocence .
  35. Whereas there is high likelihood of the appellant having committed the offence herein having stated in his mitigation that he was a widower, the fact that he was not accorded chance to present to two vital evidence which might have exonerated him, makes his conviction herein unsafe and to that extend I allow the appeal and set aside the conviction herein.
  36. This is a matter which in the ordinary cause of things would have been referred for retrial but I have noted from the proceedings herein that both the victim and her mother having moved out of the scene could not be traced for purposes of pre-sentencing report and therefore the possibility of tracing them for the purposes of fresh trial could not be ease.
  37. On sentence , in view of the current jurisprudence from the supreme court , the sentence mated herein is very lawful and had I not set aside the conviction, I would not have interfered with the same.
  38. In the final analysis I allow the appeal herein, set aside the conviction and quash the sentence herein. the appellant shall be set free forth with unless otherwise lawfully held.

**DATED THIS 12<sup>TH</sup> DAY OF NOVEMBER 2025**

**J.WAKIAGA JUDGE**

In the presence of

Court Assistant - Irene

Ms Kariuki for the Prosecution

The appellant in person

