Omar v Republic (Criminal Appeal E018 of 2025)
[2025] KEHC 16091 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16091 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E018 OF 2025

JN ONYIEGO, J

NOVEMBER 7, 2025

BETWEEN

SAID OMAR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment and sentence of Hon. Xavier B. - RM, delivered on 8-06-2025 in Wajir SPM's Court in S.O. Case No. E027 OF 2024)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006.The particulars of the offence were that in the month of June,2024 at [name withheld]area, Wajir East Sub County within Wajir County he intentionally caused his penis to penetrate the vagina of H.M.H., a child aged 16 years.

2. In the alternative, he was charged with 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 offence were that in the month of June,2024 at [name withheld]area, Wajir East Sub County within Wajir County he intentionally touched the vagina of H.M.H., a child aged 16 years with his penis.

3. The appellant took plea and denied the charges. The prosecution called four witnesses to prove its case. On being placed on his defence, the appellant gave a sworn testimony and called three witnesses.

4. At the conclusion of the hearing, he was convicted of the main count and consequently sentenced to 16 years' imprisonment.

5. Dissatisfied by the said conviction and sentence, he filed a petition of appeal on grounds summarised as follows;

i. The learned magistrate erred in law and fact by convicting him on the basis of the prosecution's evidence which was riddled with inconsistencies and contradictions.

ii. The learned magistrate erred in law and fact by convicting him based on the testimony of the government analyst's evidence which was unreliable.

iii. The learned magistrate erred in fact and law by finding that the appellant was guilty yet the prosecution did not prove its case beyond reasonable doubt.

6. PW1, H.M.H. testified that she was 16 years old and that previously, she was in a relationship with the appellant and that they had even exchanged phone numbers. She stated that in the month of June, the appellant took her to her brother's place at Oheya while enroute to Wajir. That the appellant had prior to the act herein called her severally but she refused to pick the calls. She stated that noting that she failed to pick the calls, the appellant opted to visit her at her brother's place where he gave her some water in a bottle that eventually made her lose her consciousness. It was her evidence that upon waking up, she found blood oozing from her private parts and therefore, she changed her clothes.

7. It was her evidence that she called the appellant demanding to know why he had defiled her. That upon calling the second time, the appellant blocked her thus prompting her to hide in the bush for a period of 15 days where her father found her. She was then taken to the hospital for medical checkup where it was found that she was pregnant.

8. On cross examination, she reiterated that indeed she was defiled by the appellant as they were in a relationship. According to her, the appellant had promised to marry her the following day after defilement a promise the appellant reneged from.

9. PW2, DBS, the complainant's aunt testified that on 22.12.2024, PW1 was taken to her home and upon being asked why she had run away, she said that she was afraid of her brother. Upon being asked who was responsible for her pregnancy, she stated that it was the appellant. She further stated that the appellant was a friend to her brother(PW1) hence a person who was well known to them. That they took PW1 to the hospital and later, to the police station to record a statement. It was her evidence that PW1 was found to be 7 months pregnant.

10. PW3, Ahmed Isack Mohamed, a medical officer stated that the complainant presented herself with a case of defilement and that during that time, she had already bathed and changed clothes. That she visited the health facility when she was 7 months pregnant and that the alleged act had been committed 7 months prior to the visit.

11. He further stated that the abdomen was extended. According to him, the pregnancy was 34 weeks in as much as the ultra sound showed that she was 28 weeks pregnant. That the complainant had a normal labia majora and minora noting that she had allegedly been defiled 7 months prior. He filled the P3 Form and produced the same as Pex 2, Treatment notes as Pex 3, Ultra sound results as Pex 4 and Lab request and Form as Pex 5.

12. On cross examination, he stated that pw1's medical examination was conducted on 24.12.2024 and that the complainant was a minor as per the information that was provided. In buttressing the fact that PW1 was a minor, the witness stated that from his examination, he noted that PW1 was a minor and further, physically she appeared 16 years.

13. PW4, Sgt. Bashuna Godana, the investigating officer reiterated the evidence adduced by the other prosecution witnesses and further stated that the appellant was a person known to the complainant as they used to travel together using the appellant's car as a passenger. He went further to state that the appellant prior to defiling the complainant had convinced her that he would marry her but after the

act, he discontinued communication with PW1. It was his testimony that noting that the appellant was someone familiar to PW1, it was PW1 who took them to the residence of the appellant where they arrested him.

14. On cross examination, he stated that PW1 was 17 years of age as per the birth certificate presented before the court. On re-examination, it was stated that the time between the offence and reporting was 7 months and that even if PW1 engaged in other sexual activities, the same did not defeat the fact that she was defiled by the appellant.

15. DW1, Said Omar Adow in his sworn evidence denied committing the offence thus claiming that the complainant was a stranger to him. That he only heard of the allegations when he was arrested and also through the evidence adduced in court. He testified that he was simply framed as the persons who committed the offence are known as Mohamed and Musa Olle. On cross examination, he stated that the complainant's family knows him as previously, he had carried PW1's brother in his vehicle.

16. DW2, ZKI, mother to DW1 testified that she heard of the names of the men who allegedly defiled PW1 and therefore, the accusation against DW1 was unfounded. That it was not possible for the mother of the house not to know of an occurrence of defilement against PW1. Additionally, that given that they live in the same area and the area being small in size, such an incident could not have escaped her knowledge. She stated that her son has a young family and that he was simply framed. On cross examination, she stated that in the area where they live, if such a thing like defilement were to occur, then she would definitely not fail to hear the same and that the chief would also not fail to know.

17. DW3, Adow Omar, father to the appellant and a taxi driver testified that he was informed of the offence herein but the same notwithstanding, it was not possible for the appellant to commit such an offence without the area chief failing to know.

18. The appeal was canvassed by way of written submissions.

19. The appellant in his submissions dated 05.08.2025 submitted that the prosecution did not prove its case beyond any reasonable doubt. That the age of the complainant, being a critical component of the charge was not proved to the required standard. It was urged that the court's finding to the contrary was based on inadmissible evidence and flawed assumptions and therefore, the same must be set aside by this court. To support the foregoing, the appellant relied on the case of Basil Okaroni v Republic [2016] eKLR where the court held that:

'We agree with the appellant that in sexual offences, ascertainment of the victim's age is crucial and the courts have underscored the necessity of this requirement"

20. That the trial court's acceptance of the complainant's age was based on an unauthenticated, uncertified document unsupported by parental, official or medical evidence which fell short of the required threshold noting that this is a criminal case.

21. On penetration, it was urged that the same was not proved noting that the medical report did not confirm fresh injuries or evidence of penetration. That the complainant was found to be several months pregnant and that the prosecution did not prove that the pregnancy was as a result of the alleged act. It was contended that the water bottle which was alleged to have contained the contents that intoxicated the complainant was not produced in court as exhibit and neither did the medical report show that the complainant was intoxicated.

22. Counsel contended that the actions of the complainant were not in consonance with that of a child as pointed out in circumstances such as when she allegedly woke up from unconsciousness, she called the appellant to inquire why he defiled her and when he would marry her. Equally, that the alleged

relationship between the appellant and the complainant was not proved to have been in existence. In the same breadth, the appellant submitted that the delay in reporting the issue was dubious as the same was reported 7 months after the alleged fact. That the inconsistencies as enumerated in the appellant's case went to the root of the case and therefore, the same demands that this matter be resolved in favour of the appellant.

23. It was argued that the failure by the prosecution not to call crucial witnesses dented its case. That the complainant's sister in law would have been called as a witness to either confirm or refute whether the complainant was present at her home during the time in question. In the same breadth, it was urged that the complainant's father also ought to have been called to testify where he found his daughter and how she was fairing during that time.

24. That the complainant's version of events lacks credibility, consistency and logical coherence thus raising serious doubt as to the veracity of her allegations. It was contended that the trial court erred by failing to fully and accurately record and more importantly, failing to consider crucial parts of the testimony of the government analysis, a witness whose evidence was central in the case.

25. Equally, the trial magistrate was faulted for failing to consider and evaluate the defence offered by the appellant and in so doing, effectively shifted the burden of proof from the prosecution to the defence contrary to the fundamental principles of criminal justice. To that end, reliance was placed on the case of Woolmington v DPP [1935] AC 462 where the court reiterated that an accused person is only required to raise a reasonable doubt in the prosecution's case and not to prove his/her innocence. In the end, this court was called upon to allow the appeal as prayed.

26. The respondent in its submissions dated 19.09.2025 contended that the prosecution proved all the requisite elements to support the charge of defilement. That as was held in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013, the prosecution was expected to prove three things namely; that there was penetration; the complainant was a child and; the accused was indeed properly identified.

27. That the court properly convicted the appellant after satisfying itself that the complainant was a child whose evidence was reliable. It was submitted that the prosecution established the elements of the offence charged to the required standard and therefore, the appeal as lodged was destitute of any merit.

28. On sentence, counsel relied on the case of R v Ruth Wanjiku Kamande, Criminal Appeal No. 102 of 2018, where the Court of Appeal confirmed the mandatory death penalty as had been meted out by the High Court. That the court stated that there are circumstances where the court is at liberty to mete out the mandatory sentences and the same is not illegal. This court was urged not to interfere with the finding of the trial court and further, be guided by the collective resolve and aspirations of the citizenry through their representatives at the legislature that saw the offenders who defile minors aged between 16 – 18 kept away from the society for a minimum of 15 years.

29. I have considered the trial court's record, the grounds of appeal and the submissions filed by both parties. In my view, the following issues call for determination;

    i. Whether the ingredients of the offence of defilement were proven.

    ii. Whether the sentence is harsh.

30. This being the first appeal, this court is as a matter of law enjoined to re-analyze and re-evaluate a fresh all the evidence adduced before the lower court and draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses testify. [See Okeno v Republic (1072) EA 32].

31. Section 8 (1) and (4) of the Sexual Offence Act No 3 of 2006 provides that;

1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

2. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

32. The ingredients of the offence of defilement were outlined in the case of Dominic Kibet v R [2013] eKLR as follows: -

> " To prove defilement the critical elements remain to be proof of penetration, the age of the complainant and possible identification of the assailant."

33. It is trite that the age of a person can be proved by both medical, oral and documentary evidence as was held by the Court of Appeal in Mwolongo Chichoro Mwanyembe v Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR) (as cited in) Edwin Nyambaso Onsongo v Republic (2016) eKLR where it was held that:

> " ...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 preferred in proof of the victim's age, it has to be credible and reliable."

34. In the case of Joseph Kieti Seet v Republic [2014] eKLR, HC at Machakos, Criminal Appeal No 91 of 2011, the court stated as follows and I concur that:

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

35. The appellant contended that the issue of age was not proved as the trial court's acceptance of the complainant's age based on an unauthenticated, uncertified document unsupported by parental, official or medical evidence fell short of the threshold. That this being a criminal case, a high threshold of proof was required.

36. From the record, it is clear that the trial court conducted a voire dire examination in which the court concluded that the minor was possessed of sufficient intelligence to give evidence and understood the meaning of giving evidence on oath. The complainant in her sworn evidence stated that she was aged 16 years and the same was corroborated by the medical officer who also testified that PW1 was a minor as she stated that she was 16 years of age and further, physically she appeared 16 years. The foregoing notwithstanding, from the birth certificate, the same showed that the complainant was born on 10.02.2008 hence a child at the time when the alleged offence was perpetrated.

37. The appellant submitted that it was not practical for the complainant to state that he was the one responsible for the alleged penetration. That the same was fortified by the complainant's own testimony that she was stupefied prior to the alleged act being perpetrated.

38. Besides pw1's evidence, this court is confronted by circumstantial evidence revolving around the case. This court is further guided by the finding in the case of Republic v Kipkering arap Koskei & Another 16 EACA 135, where the Court of Appeal held:

> " In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt".

39. Noting that the appellant denied defiling the complainant who was already 7 months pregnant, the trial court exercised its discretion and ordered that DNA be conducted to determine whether PW1's child was fathered by the appellant herein.

40. It is trite that section 36 of the *Sexual Offences Act* gives a court the discretion to direct that an appropriate sample be taken from an accused person for the purposes of forensic and other scientific testing, including a DNA test. This is meant to ascertain whether or not the accused person committed the offence. But it should not be lost that the foregoing is not mandatory as was guided by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic (2016) eKLR where the court while citing Robert Mutungi Murumbi v Republic, Cr. App No. 524 of 2014 (Malindi) stated that:

> " Section 36(1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

41. In the premises, I must thus add that failure to comply with the provisions of the said section was not fatal to the prosecution case. [Also see the Court of Appeal in the case of AML v Republic (2013) eKLR; Kassim Ali v Republic in Mombasa Criminal Appeal No. 84 of 2005].

42. As regards to paternity, the court in Evans Wanjala Wanyonyi v R {2019} eKLR stated thus:

> " An essential ingredient in the offence of defilement is penetration and not impregnation."

43. It is trite that a victim of a sexual offence must describe the specifics of the act of penetration. This was the finding of the court in the case of IMW v Republic {2024} KEHC 15434 (KLR) citing the decision in Julius Kioko Kivuva v Republic [2015] eKLR.

44. In Julius Kioko Kivuva v Republic [supra] the court held as follows;

> " The complainant (PW1) testified as follows in this regard: "The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept upto 9.00 a.m the following day"PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the

ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."

45. Further, it is trite that medical evidence is not the only proof of penetration in defilement cases. The element of penetration can be proved by the testimony of the complainant. This court has severally held that what is most important to prove the allegation of rape or defilement is not medical evidence but also the oral evidence tendered by the victim. [See section 124 of the *Evidence Act*].

46. Therefore, what matters is whether there was sufficient oral evidence or circumstantial evidence to link the appellant to the offence. The complainant herself explained to court how she met the appellant and how they became friends. She testified that the appellant had prior to the act herein called her severally but she refused to pick the calls. She testified that having failed to pick his calls, the appellant availed himself by visiting her at her brother's place where he gave her some water in a bottle that eventually made her lose her consciousness.

47. Further, PW1's evidence was well corroborated by the medical evidence that revealed that her abdomen was extended, 34 weeks as per the examination in as much as the ultra sound showed that she was 28 weeks pregnant. Later, after giving birth, a DNA test was conducted which revealed that there was a 99.99+% that the appellant was the father to the child. PW3 evidence was also corroborated by medical evidence as well. That in as much as PW1 had no injuries on her genitalia, her hymen was broken given that she was pregnant. The medical officer classified the degree of injury on the complainant as bodily harm. In my view, I find no reason to differ with that finding.

48. On identity, it is trite that to sustain a conviction, the element of identification of the perpetrator must be treated with caution especially where the conviction is reliant on visual identification by a sole victim.

49. In the case of Francis Kariuki Njiru & 7 others v Republic [2001] eKLR, the Court of Appeal held thus: -

> " The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

50. In the case of Peter Musau Mwanzia v Republic [2008] eKLR, the Court of Appeal held as follows: -

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."

51. Having reviewed the evidence on the record, the same points to the fact that the appellant was known to the complainant even prior to the alleged occurrence herein. The appellant from his evidence stated that the complainant knew him as he operated a taxi and there before, he had ferried the family of PW1 before. It follows therefore that the appellant and the complainant were people who not only knew

each other but also closely interacted. The same was buttressed by the fact that PW1 took the police to the residence of the appellant and clearly identified him as having defiled her.

52. The trial court in its judgment stated that there was no discernible motive for the complainant to frame up the appellant with the case. The trial court found the complainant's evidence to be candid and credible as that of the appellant was a mere blanket denial hence the same was found to be hollow. This is in line with section 124 of the *evidence Act* which provides that in sexual offences, a court can convict based on the evidence of a single witness as long as it is satisfied that the witness is truthful.

53. I have no reason to differ with the trial magistrate on his findings on the credibility of the complainant and the proper analysis of the competing evidences that were adduced before him. As such, I find that the trial court did not err in dismissing the appellant's defence. And in that regard, I affirm the conviction of the appellant.

54. On sentence, section 8 (1) as read with Sub-section 8 (4) of the *Sexual Offences Act* prescribes a minimum sentence of 15 years' imprisonment.

55. It is clear that unlike before, this court is not at liberty to review the sentences prescribed under section 8 of the *Sexual Offences Act*. This is buttressed by the Supreme Court holding in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR), Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) and Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) where the court adequately guided on this issue and stated that the sentences prescribed should be applied as prescribed unless in cases where parliament revises them as the law-making branch of government.

56. Based on the foregoing, it is clear that where a minimum sentence is prescribed, the trial court has discretion to impose the minimum sentence or a higher sentence and in this case, the trial court exercised its discretion and sentenced the appellant 16 years' imprisonment. As such, I do not find fault with the same as the trial court considered all the circumstances.

57. In the end, I find that the appeal lacks merit in its entirety. The appeal is therefore dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF NOVEMBER 2025.

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J.N.ONYIEGO

JUDGE