SMM v Republic (Criminal Appeal E007 of 2023)
[2025] KEHC 15848 (KLR) (3 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15848 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E007 OF 2023

RC RUTTO, J

NOVEMBER 3, 2025

BETWEEN

SMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

A. Background

1. The Appellant being dissatisfied with the decision of the trial court, which convicted and sentenced him to life imprisonment for the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offence Act, lodged this Appeal.

2. The appeal is premised on nine grounds of appeal, summarised as follows, that the learned trial court erred in law and in fact;

    a. In convicting the Appellant when there was no evidence to support the charge of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act*.

    b. In finding that the Appellant was guilty when the evidence adduced did not prove the offence beyond reasonable doubt

    c. And misdirected herself in convicting on the strength of circumstantial evidence and relying entirely on evidence of the complainant which was not corroborated by any independent witness.

    d. By wholly relying on the evidence by the prosecution witnesses and totally failing to consider the merits of the defence tendered by the Appellant and/or miscomprehending the said defence and its legal effect on the case before her.

e. In finding, as she did, a conviction against the weight of the evidence on record and in total disregard of the glaring discrepancies, contradictions and blatant falsehoods in the evidence tendered by the prosecution witnesses.

f. In that the learned magistrate's decision in finding the Appellant guilty was actuated or guided by grief, emotion and sympathy for the complainant arising from the age of the complainant at the time of the offence and not by law, facts and merits of the defence tendered by the Appellant and the said decision was therefore arbitrary, harsh and not guided by or based on sound and acceptable judicial practice hence unfair and prejudicial to the Appellant.

g. In relying on a defective charge sheer to convict the Appellant.

h. By failing to observe that one of the ingredients establishing the offence of defilement, that is, penetration was not proved by the prosecution beyond reasonable doubt as required by law.

i. By sentencing and convicting the Appellant without considering the circumstances surrounding the case as per Section 33 of the *Sexual Offences Act*.

3. The particulars of the offence were that on 6th December 2021 at [Particulars Withheld] in Gatundu North Sub County within Kiambu County, the Appellant intentionally and unlawfully caused penetration of his genital to T.W. a child aged 4 years 9 months.

4. In the alternative, the Appellant was charged with the offence of committing an indecent Act with a child contrary to Section 11(1) of the Sexual Offence Act. The particulars were that on 6th December 2021 at [Particulars Withheld] in Gatundu North Sub County within Kiambu County, he intentionally touched the buttocks of T.W.C a child aged 4 years 9 months.

5. The Appellant pleaded not guilty and the prosecution called 4 witnesses. At the close of the prosecution case, the Appellant was put on his defence, where he gave unsworn evidence and called two witnesses.

6. Upon consideration of the evidence in totality, the Appellant was found guilty, convicted and sentenced to life imprisonment.

B. The case before the trial court.

7. PW1, DMC, stated that T.W.C, the victim was her daughter. That she was born on 25th May 2017. That the Appellant was her neighbor. She stated that on 6th December 2021 at about 4.30pm, she went to church for about an hour and left the victim at the house of the accused person, as they are adjacent neighbours. That she returned at about 6pm and asked the victim to follow her. The victim was crying behind the house. She got into the house, removed all her clothes and the victim told her that K2 put a stick in her private parts while they were on his bed. She was still crying. She then took her to hospital at Ngorongo Health Centre where she was treated and issued with a treatment card and medicine. PW1 then reported to the police and was issued with a P3 form and took it to Igegania. The P3 form dated 8th December 2021 was produced as exhibit1; treatment notes from Igegania Level 4 Hospital as exhibit 2(a) and (b), and the child birth certificate as exhibit 3.

8. On cross examination she stated that they were good neighbours and she had the habit of leaving the victim at the Appellant's place. That the child did not tell what time it happened. That she did not know why the victim's clothes were wet and thought she had urinated on herself. She checked her genitalia and they were red, swollen and smelly. That the victim had difficulties urinating. She changed clothes and took the wet clothes to Igegania hospital. She did not bath the victim.

9. She also stated that K2 was the Appellant in court and that he was also known as M. She further stated that the Appellant's family approached them wanting to resolve the case and that she did not ask for money.

10. The trial court conducted a voire dire examination on PW2, T.W.S and observed that she did not understand the nature of oath and directed that she gives unsworn evidence. TWS stated that she knew the accused. He was K2 from Mubutiti and that he put a stick 'kamti' as he slept on her. She pointed her crotch. She further stated that she was with S3 and K2 at the house. That he put the stick when they were on the bed. That she was wearing a blue cloth and that she told her mum and was taken to the hospital. She further stated that it was the first time K2 put a stick there and her mum had gone to the market.

11. On cross examination she stated that on that day she was playing with S3 until mum called and she went home. That K2 and S3 were in that house. That S3 was in there when K2 did that to her.

12. PW3, Lilian Kerubo Okinyi stated that she was a medical doctor, a pediatrician. That T.W.S was seen at their facility, Igegania level 4 hospital on 7th December 2021 on allegation of defilement by a known person. That the act was witnessed by a child in the village. She stated that T.W.S was 4 years 9 months. She stated that on examination, the victim was sad and withdrawn, conscious and well oriented as to time and place. That the skin around the genetalia was dark and rough and there were tears on the labia minor. The hymen was not visualized, there was no discharge and no blood. The age of injury was 24 hours. No weapon was used, no prior treatment. That urinalysis showed UTI infection which was treated. HVS did not pick any spermatozoa.

13. Pw3 informed court that the P3 form was filled by Dr. Josephine Njoki whom she had worked with. This was after the Appellant raised an objection to the production of the P3 form by the witness (PW3). The trial court overruled the objection noting that the primary documents, to wit, the Treatment notes, had been filled by the witness who had also worked with the doctor who filled the P3 form.

14. PW4, P.C. W Charity Karenga stated that on 6th December 2021 at around 9pm she received a complaint from PW1 that PW2 had been defiled by a known person. She did a report and was advised to go to hospital. She issued the P3 form and recorded her statement.

15. According to PW4 the complainant (PW2) reported to her mother that K2 had put 'kijiti' into her 'masusu'. That PW2 was 4 years 7 months at the time of incident. She produced the child's birth certificate as an exhibit.

16. On cross examination, she stated that the report was made at 9.00pm. that PW1 had first gone to Ngorongo Health Centre. That it is the medical officer who examined the child and asked her to report to the police. That the complainant was seen by the doctor on 7th December 2021.

17. At the end of the prosecution case the trial court found that the prosecution had established a prima facie case and the Appellant was placed on his defence.

18. DW1 SMM denied the charges. He gave a chronology of his day starting from when he woke up at 4am. He stated that he was not at home on the alleged date and time of offence. That he was at his grandmother's place when his uncle called his grandmother via a phone and asked to talk with him. He asked if he knew anything about it.

19. DW2 Joseph Kamau Njoroge stated that on 6th December 2021 at about 5pm, the Appellant came as he had been chased from school due to fees. He assisted to repair motorcycle. That the kids S1, S2 the complainant, M and KK were there. That he then sent him to buy meat. That the Appellant went with

the motor cycle. That DW2 then asked the children to go home. It was dark. That after some time, PW2 came crying that there was no one at their home. It was about 7 pm and the Appellant brought the meat and left. That the complainant was then called by her mother and she left.

20. He stated that PW1 returned and said that PW2 had told her that she had been defiled by K2. He confirmed that John is the one who took the complainant and her mother to hospital at Ngorongo Health Centre. He then went and picked the Appellant's grandmother (his mother) and proceeded there. That they found the complainant and her mother at a private hospital. That the doctor said that the child had no issue but advised them to proceed to Igegania hospital. That the complainant stated that her child had chest issues and could not go to Igegania at night.

21. That the following day, he went to the complainant's mother with 2 pastors and an elder. They indicated that they were not ready to engage. Later they asked for ksh.100,000/- which they could no afford. That PW1 told them that she had given the doctor ksh.40,000/- and bought medicine.

22. On cross examination he stated that he started repairing his motor cycle from 4pm. That the complainant was playing near there which was within the compound where the accused was. That the complainant knew the Appellant very well. He also stated that they first went to Ngorongo Health Centre, St. Anens and then to Igegania. That he went to OCS Kanjeria police station to report about the ksh.100,000/- the complainant family asked for. That their children schooled with the complainant.

23. DW3 Rose Wangari gave sworn statement stating that the Appellant was his nephew, a son to his daughter. That on 6th December 2021 the Appellant was sent home from school at about 5pm. She asked him to go unhung his uniform. He did and returned. That at around 7.00pm DW2 called and asked to give the phone to M. She suspected things were not okey. She asked him to go home to find out. He came back and said the complainant's mother had gone to hospital as he had defiled her daughter. She went to the Centre and found them in a private hospital where they were denied treatment because the girl was given a clean bill of health; that they were surprised that she later reported.

24. On cross examination she stated that she did not know if the complainant was at their place on that day. That the house is near that of DW2, and that the complainant is normally left at the home of DW2. They are neighbours and there is not grudge between them. That the private hospital is called 'Kwa Mwitungu'. The defence closed its case and parties proceeded to file their respective submissions.

25. Upon evaluation of the evidence on record, the trial court found the Appellant guilty and convicted him he was sentenced to life imprisonment.

C. The Appeal

26. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 25th June 2024, while the Respondent's submissions are dated 23rd October 2021.

Appellant's Submissions

27. The Appellant outlined the background of the case and set out three issues for determination namely;

    i. Whether there was prove beyond reasonable doubt in the eye of insufficient evidence, uncorroborated evidence of the complainant and glaring discrepancies, contradictions and blatant falsehoods.

    ii. Whether the learned trial magistrate decision was harsh and guided by grieve, emotion and sympathy.

iii. Whether the Appellant's defence was plausible and demanded courts consideration.

28. On the 1st issue, it was submitted that the prosecution has a duty to prove its case beyond reasonable doubt and any benefit of doubt must accrue to the accused person. Further that penile penetration is a vital element of the offence of defilement and must be proved to warrant conviction. Numerous decisions were referred to to buttress this assertion.

29. The Appellant submitted that the penile penetration of the complainant's genitalia was in doubt and not proved as required by law. That no PRC form was produced as part of medical evidence. Further, that despite PW2 testifying that they were playing with S3 until her another called out, there was no explanation why S3 was not interrogated and yet he was present when the complainant is alleged to have been defiled.

30. The Appellant also contended that scientifically, even playing can contribute to a broken hymen. In addition, it was submitted that the medical evidence procured through P3 form was erroneously admitted since the medical expert who filled it and the one who signed it are different people and no cogent reasons were given why the author could not be summoned to testify. Further, that the P3 form was defective as it does not disclose the name of the doctor who filled it, as the author was not summoned to testify and that it did not show any weapon used that caused the hymen to break and as such the prosecution did not rebut the defence witness evidence that the child was not defiled. He urged the Court to find that the complainant was not a credible witness and that she lied on what transpired.

31. On the 2nd issue, it was submitted that the trial court was bias and sided with the prosecution case by filing the gaps and prejudicing the Appellant. They faulted the trial court for misapprehending the provision of Section 124 of the *Evidence Act* by believing the complainant's evidence.

32. Further, that despite taking into account the Appellant's mitigation he was still sentenced to life imprisonment. Reference was made to the case of Republic versus Otieno 1983 which followed the decision in Arrisol versus Republic (1957) EA 447 that emphasized that a maximum sentence should not be imposed on a first offender. He urged the Court to find that life imprisonment was archaic, unreasonable and absurd. He urged the Court to find that the conviction was unsafe and to acquit him.

33. On the third issue, it was submitted that the Appellant's defence was consistent, corroborated and remained unrebutted by the prosecution and hence the trial court erred in failing to consider its merits.

34. In conclusion, he urged the Court to consider the totality of the evidence and do find that the conviction was unsafe, since there was not proof other than speculation on the capability of the Appellant. He urged the Court to allow the appeal in its totality and in the alternative sentence the Appellant to a lesser sentence than the one pronounced by the trial court and to take into account Section 333(2) of the CPC.

Respondents Submissions

35. The Respondent summarized the issues raised in the appeal as follows;

a. Whether the prosecution failed to prove its case beyond reasonable ground.

b. Whether prosecution case was marred with contradiction and inconsistencies and evidence based on suspicion.

c. Whether prosecution case was circumstantial and based on a single witness.

d. Whether the Appellant defence was considered.

e. Whether the sentence was harsh and based on emotions.

36. The respondent submitted that the critical ingredients for the offence of defilement had been met: that age of the victim had been sufficiently proven by production of the birth certificate; on identity of the perpetrator, it was submitted that the Appellant was well known to the complainant, they were neighbours and the complainant used to go and play within the homestead. And that from the evidence adduced, it was clear that the Appellant is the person who defiled the victim.

37. It was further submitted that there were no contradictions and inconsistencies, and even if they were there, they were so minor and did not go to the root of the prosecution case and hence they should be ignored. On reliance on a single witness, reference was made to Section 124 of the *Evidence Act* to urge that corroboration of evidence by the victim is not mandatory as long as the court believes the victim is telling the truth and records the reasons for believing the victim. They urged that the evidence against the Appellant was watertight and corroborated by PW1, PW3 and PW4 which was consistent and sufficient to support the conviction.

38. It was their further submission that the trial court considered the Appellant's defence but did not in any way discredit or challenge the prosecution case. They urged the Court to find that sentence was legal, appropriate and not based on emotions.

39. The Respondent concluded by urging the Court to find that it discharged its burden and to proceed to dismiss the appeal for lack of merit and to uphold the conviction and sentence.

D. Analysis and Determination

40. This being a first appeal, this Court has a duty to re-c0nsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusions. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. (See the cases of Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009, David Njuguna Wairimu v. Republic [2010] eKLR).

41. Upon considering the record before this Court, the petition and respective parties' submissions, the issues arising for determination are;

i. Whether the offence of defilement was proved beyond reasonable doubt.

ii. Whether the Appellant defence was ignored and;

iii. Whether the sentence was harsh.

Whether the offence of defilement was adequately proved beyond reasonable doubt

42. The ingredients for the offence of defilement are proof of age of victim, proof of penetration and identification of perpetrator. See the case of George Opondo Olunga versus Republic (2016) eKLR; Kyalo Kioko versus Republic (2016)eKLR. The issue of age was not contested. The charges indicates that the complainant was 4 years 9 months. PW1 testified that the complainant was 4 years. This was corroborated by PW4 who testified and produced the child's birth certificate as exhibit 3 indicating that the child was born on 5th May 2017. This fact was not substantially challenged and establishes that the offence falls under the category of section 8(2) of the *Sexual Offences Act*.

43. On penetration, the Appellant argues that penile penetration of the complainant's genitalia was in doubt and not proven as stipulated for reason that the complainant's evidence was not corroborated,

and that S3 was never called as a witness yet he was there when K2 (Appellant) defiled her. No reason was advanced why Samido was not called as a witness.

44. The victim, aged 4 years old, was subjected to a voire dire examination and was deemed not to understand the nature of the oath; consequently, she gave unsworn evidence. In her testimony, she identified the Appellant (K2) and stated that he "put a stick 'kamti' as he slept on her". She pointed to her crotch, confirming the location of the assault. She also stated that it was the first time K2 did it. This testimony was corroborated by that of the mother who stated that the complainant had informed her that K2 put a stick in her private parts while they were on his bed.

45. This was further corroborated by the evidence of PW3, the pediatrician doctor, who examined PW2 on allegations of defilement by a known person. She observed that the child was sad and withdrawn. That the skin around the genitalia was dark and rough and there were tears on the labia minora, and the hymen was not visualized. This medical evidence corroborated the oral testimonies and proved that indeed the victim had been penetrated.

46. The Appellant impugned the trial court for reliance of a single witness in proving the charge against him. He also faulted the prosecution for failing to interrogate and/or call S3 as a witness. Section 124 of the *Evidence Act* permits a conviction in a sexual offense case based solely on the uncorroborated evidence of the alleged victim, provided the court records reasons for being "satisfied that the alleged victim is telling the truth". The trial court stated that it did not note any demeanor to discredit the complainant's evidence. Noting the tender age of the child, she provided a descriptive account consistent with penetration. All this evidence taken together leaves no doubt that the victim was sexually assaulted.

47. Notably the Appellant seeks to challenge the authentication and credibility of the P3 form on grounds that it was not produced by the maker. This Court notes the evidence of PW3 who stated that she was the examining doctor and produced the treatment notes while her colleague Dr. Elizabeth is the one who filled the P3 form and signed it. She further stated that she is familiar with the handwriting having worked with her for a period of 3 years. Section 33 and 76 of the *Evidence Act* allows for production of medical document/report by another person where there is sufficient grounds why the maker of such a document may not be procured to testify without unnecessary delay. I therefore find that the production of the medical evidence, in particular the P3 form by PW3 was in order. Thus, taking the evidence in its totality this Court finds that penetration was proved beyond reasonable doubt.

48. On identity of the assailant, it is common ground that the Appellant was well known to the victim, they were neighbours and the incident took place in the evening in broad day light. The Appellant was known to the victim as 'K2' and 'M,' and the victim was frequently left at his adjacent home. In addition, DW2 confirmed that the complainant knew the Appellant very well as she goes to their place. Identification was thus by recognition, which is generally considered strong evidence. I therefore find that the identity of the assailant was clearly established. Notably, this ingredient has not been impugned in this appeal.

49. The upshot is that I find that the prosecution's case was proved to the required standard of beyond reasonable doubt.

Whether the Appellant defence was ignored.

50. The Appellant gave unsworn evidence and call two witnesses in support of his case. In particular, the Appellant presented a defense of alibi, denying being at home at the time of the offence stating that he was at his grandmother's place. Ordinarily, it would be expected that the Appellant's witnesses are to corroborate his defence and not contradict it. In this case, his witnesses contradicted his alleged

alibi when they placed him at the scene. DW2 stated that the Appellant was with him assisting with motorcycle repair and was later sent to buy meat, hence placing him at home. DW3 confirmed that the Appellant went to unhung clothes and returned.

51. This Court find that the evidence of the Appellant's witnesses apart from contradicting each other placed the Appellant at the scene where the incident occurred at about the same time it is said to have occurred, hence his alibi does not count. All this was also considered by the trial court and hence I find that the assertion that the trial court failed to consider the appellant defence fails.

Whether sentence was harsh

52. The Appellant challenged the mandatory life sentence as harsh and arbitrary. Section 8(2) of the Sexual Offenses Act states unequivocally that a person who commits the offense of defiling with a child aged eleven years or less shall, upon conviction, be sentenced to imprisonment for life. Since the victim was 4 years old, the life sentence is the mandatory statutory penalty.

53. The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) overturned the decision of the Court of Appeal which had found Section 8 of the Act to be unconstitutional for prescribing a mandatory minimum sentence upon conviction. The Supreme Court upheld the constitutionality of the said law and this Court is bound by such precedent. Consequently, a person convicted contrary to section 8(2) of the *Sexual Offences Act* shall ordinarily be sentenced to life imprisonment.

54. Consequently, this ground of appeal, challenging the legality of the sentence structure itself, fails on legal merit due to binding superior court precedent.

55. The upshot of the above is that the appeal lacks merit and is dismissed in its entirety.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF NOVEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant