Ambwori v Republic (Criminal Appeal E012 of 2023)
[2025] KEHC 17156 (KLR) (20 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17156 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E012 OF 2023

PN GICHOHI, J

NOVEMBER 20, 2025

BETWEEN

EDWARD ANGWENYI AMBWORI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against conviction and sentencing delivered by Hon. Benjamin Limo (SRM) on 1st February, 2021 in Nakuru Chief Magistrate, Sexual Offense case No. 156 of 2018)

JUDGMENT

1. Edward Angwenyi Ambwori, (the Appellant), had been charged with the offense of defilement contrary to section 8(1) as read with section 8(2) of the *akn ke act 2006 3 sexual offences Act* No. 3 of 2006.

2. The particulars thereon were that on diverse dated between June 2016 and 5th August, 2018 at Bartimore Estate in Nakuru East Sub-County within Nakuru County, he unlawfully and intentionally caused his penis to penetrate the Vagina of Margaret Kwamboka Edward, a child aged 10 years.

3. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *akn ke act 2006 3 sexual offences act* No. 3 of 2006.

4. He denied both the main and the alternative charge and the case proceeded for hearing with the prosecution calling a total four (4) witnesses while the Appellant was the only witness for his case.

5. After hearing both parties, the trial court rendered its judgment on 1st February, 2021, whereby the Appellant was convicted on the main charge of defilement and sentenced to serve a term of Twenty (20) years imprisonment.

6. Aggrieved by that decision, the Appellant lodged this Appeal challenging both his conviction and sentence on two major grounds:-

1. The learned trial Magistrate erred in law and in fact by failing to appreciate that the prosecution case was not proved beyond any reasonable doubt as prescribed by law.

2. The learned trial Magistrate erred in law and fact by failing to consider the appellant defence yet the same was not rebutted by the prosecution.

7. The appellant therefore urged this Court to allow the Appeal, quash the conviction, set aside the sentence and set him at liberty.

8. The Respondent opposed the Appeal and the matter was canvassed by way of written submissions.

Appellant's Submissions .

9. On whether the prosecution proved its case beyond reasonable doubt, it was submitted that the legal burden of proof in criminal cases never shifts and remains with the prosecution as was reiterated in R.V Kipkering Arap Koskei and Another[1949] 16 EACA 135 and that the standard of proof is beyond any reasonable doubt.

10. Citing decision in Republic Vs Stephen Kiprotich Leting And 3 Others[2009] eKLR, the Appellant argued that it is better to acquit a great number of criminals than to convict one innocent person.

11. He also cited the Supreme Court of Canada case being R VS LIFCHUS[1997] 3SCR 320 and submitted that reasonable doubt is defined as being not imaginary or frivolous, but logically derived from the evidence or absence of evidence. That the Crown is not required to prove the case to an absolute certainty.

12. Accordingly, that the prosecution was required to prove three critical ingredients of defilement: penetration, identity of the perpetrator, and the age of the complainant, as held in Dominic Kibet Mwareng Vs Republic [2013] eKLR.

13. On proof of penetration, he argued that though PW1 asserted that he defiled her on the material dates by inserting his penis into her vagina, her testimony was not sufficient and it required the trial court to examine her credibility.

14. He argued that the court was duty-bound to ensure the complainant provided sensory details such as her mental state, feelings, post-incident effects like bloodshed pain, and coping. That lack of these sensory details made the evidence scanty, ambiguous, and wanting, and therefore insufficient for a conviction.

15. He supported that argument by citing the case of Julius Kioko Kivuva Vs Republic [2015] eKLR, which emphasised the need for evidence of sensory details in proving penetration.

16. It was also submitted that PW1's evidence lacked corroboration and that though the illegal corroboration is not required for a child's sworn evidence, the court should have been guided by the principle that it is unsafe to convict without it, citing Johnson Muiruri Vs Republic [1983] KLR 445.

17. It was argued that the trial court erroneously relied on the finding of an old broken hymen to establish penetration, without ascertaining the age of the injuries. While relying on PKW VS REPUBLIC[2012] eKLR, the Appellant argued that the absence of a hymen is not a conclusive proof that penetration occurred.

18. Further that the prosecution failed to present evidence on the nature of the clothing and further confirmed no spermatozoa or masculine discharge was seen. Thus, the medical evidence failed to

establish a link between the appellant and the offence. It is thus, his view that the count of defilement must fail because the appellant was not subjected to any medical or DNA examination.

19. He submitted that the trial court grossly erred by relying on the uncorroborated and incredible evidence of the complainant, which failed to meet the necessary thresholds for conviction.

20. On whether his defence was considered, he argued that the defence of an accused is a constitutional right and must be considered to ensure justice is not perverted. He submitted that he presented an alibi that he was not at home on the material time of the alleged offence, specifically on 5th August, 2018.

21. He submitted that his defence was cogent enough to cast considerable doubt on the prosecution's case and should have been considered, which would have led to an acquittal. He therefore implored this Court to perform a fresh evaluation of the evidence.

22. Lastly , he urged this court to allow the amended grounds of appeal, quash the conviction, set aside the sentence, and set him at liberty.

Respondent's Submissions

23. Mr. Kihara for State argued that all the three ingredients of defilement , that is age of the minor, identity of the perpetrator, and proof of penetration, were proved with cogent evidence.

24. It was submitted that the victim's (PW1) compelling testimony established a pattern of sexual abuse perpetrated by the Appellant, identified as her father, spanning from June 2016 to August 2018.

25. He submitted that PW1 detailed the initial incident which occurred on a Saturday around 1:00 p.m. while her mother was absent and her sisters were asleep. That the Appellant reportedly returned home, had lunch, and then, under the threat of a cane, he commanded PW1 to undress before proceeding to insert his penis into her vagina.

26. This initial act was followed by an explicit threat from the Appellant, warning her against disclosure, thereby enabling him to continue defiling her repeatedly, approximately every three to four days, usually during the day when the mother was away on casual work, and once at night.

27. Although PW1 admitted to informing her mother, Jackline Kemunto, on a prior occasion, the mother allegedly failed to take decisive action, merely suggesting she would send her upcountry. The matter finally came to light on 5th August, 2018, when two concerned women, Mama Yvonne and her friend, intervened after inquiring about the abuse. They promptly took PW1 to Nairobi Women's Hospital, where the requisite Post-Rape Care (PRC) and P3 forms were issued.

28. It was submitted that the medical evidence tendered by Dr. Njoroge (PW4), who produced the P3 and PRC forms, corroborated the sexual assault. That the doctor confirmed that the victim's hymen was broken, which he attributed to a blunt object and affirmed that, despite the absence of spermatozoa, the minor had indeed been defiled.

29. The Respondent concurred that the appellate court is duty-bound to re-evaluate the evidence, but maintained that the Respondent discharged its mandate by presenting cogent evidence. He argued that the Appellant's cross-examination was limited, and nothing tangible was communicated to the court.

30. Further that the Appellant's defence, that he was at work on the day in question, was short and failed to shake the prosecution's case, especially since no alibi was availed.

31. It was argued that the Respondent is not directed on how to conduct its investigations including the issue of DNA), and the Appellant was free to seek his own evidence.

32. He submitted that with the undisputed age and identity, and the strong evidence from the minor and the doctor, the Appellant's defence was weak and did not displace the credible and consistent prosecution evidence. That the proceedings were above board and with no irregularity noted, thus no miscarriage of justice was occasioned.

33. On the issue of convicting on the minor's sole evidence, the Respondent cited Section 124 of the *akn ke act 1963 46 Evidence Act*, and submitted that the evidence of a single sexual offence victim does not require corroboration, provided the court records reasons for believing it.

34. In this case, he submitted that the magistrate's judgment gave such reasons, as the court had a first-hand account of the minor's demeanour and found her to be truthful. In conclusion, the Respondent urged this Court to find that the appeal lacks merit, and therefore uphold the conviction and sentence. It was argued that the 20-year sentence handed was lenient and should not be disturbed.

Analysis and Determination

35. After considering the grounds of appeal, the submissions by both parties, the issues for determination are:-

    1. Whether the prosecution proved its case beyond reasonable doubt.

    2. Whether the Defence evidence was ignored.

36. In order to determine the above issues, this Court's duty as a first appellate court is well settled in the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal held that:-

> " 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 v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E. A. 424."

37. In this case, the specific elements of the offence defilement under Section 8 (1) of the *akn ke act 2006 3 Sexual Offences Act* and which the prosecution must prove beyond reasonable doubt are:-

    a. Age of the complainant.

    b. Penetration.

    c. Positive identification of the assailant.

38. In regard to age, the victim , Margaret Kwamboka (PW1) testified that she was born on 19th August, 2006 as per her Birth Certificate (PMFI1). She was in class Seven at Nairobi Road Primary School as at time she testified . The P3 Form (PEXH. 3) indicated that she was 12 years old as at the time it was being filled.

39. Further, the PRC For, (PEXH 2)indicated that she was born in year 2006. That means she was age about 13 years at the time she gave her evidence and about 10 years as at the time the offence was said to have been committed against her starting from June 2006.

40. From the Court record, it is clear that the issue of age was not only unchallenged but also proved beyond reasonable doubt.

41. Regarding penetration, Section 2 of the *akn ke act 2006 3 Sexual Offences Act* defines it to mean;-

> " the partial or complete insertion of the genital organs of a person into the genital organs of another person."

42. The victim (PW1) testified that between June 2016 and 5th August, 2018, her father did 'tabia mbaya' to her. The first incident occurred on a Saturday around 1:00 p.m. at home.

43. Her mother had gone to wash clothes, and her two younger sisters, Nancy (9 years) and Rose (7 years), went to sleep in a partitioned room due to heavy rain while she remained in the kitchen.

44. Her father, who had been doing construction work at Lunai Hotel, returned. He questioned her about going to help another woman till her land as he sat down and finished eating in the sitting room.

45. She knew the Appellant, Edward Angwenyi as he is her father, though she was unsure if he is her biological father and that she was the second-born child.

46. She testified that her father told her to remove all her clothes. She initially refused but he took a cane near the door, threatened to beat her, and told her to take off all her clothes.

47. She removed her clothes and panty, and the top under her blouse. He pushed her onto the sofa, unzipped his trouser, lay on her, and inserted his penis into her vagina, causing her a lot of pain.

48. He covered her mouth with his hand to prevent her from screaming and did not remove his own clothes. He told her not to tell anyone and threatened to kill her if she did.

49. After the first time, he would repeat the act several times, every 3 to 4 days later. She did not report it then because of his threat.

50. She stated that another incident happened on Sunday, 5th August, 2018. The Appellant did not go to work, and her mother was out doing laundry. Her two sisters went to the shop. She was washing utensils when the Appellant called her to his bedroom.

51. He put her on the bed and told her to remove her clothes. She removed only her panty, as she was wearing a dress. The Appellant took off his trouser and panty. He held his penis, pulled it, and pushed it inside her vagina, which caused her pain.

52. She decided to report this incident to her mother, Jackline Kemutho. She recalled that she had previously told her mother about the earlier defilement, but her mother only said she would find money to send her upcountry.

53. After the 5th August incident, a lady called Mama Yvonne, inquired about rumours of her defilement, which she confirmed with mama Yvonne. Mama Yvonne (PW3) took her to Nairobi Women's Hospital on 12th August, 2018, where she was examined and interviewed. A document (PEXH. 2,) was filled.

54. The next day on 13th August, 2018, Mama Yvonne reported the matter to Mwasila police station, and her father was arrested the same day. She was later taken to the police and issued with a P3 form, P EXH3. She currently resides with Mama Yvonne.

55. PW1 recalled that the Appellant never used a condom and usually defiled her during the daytime when her mother was away. She recalled being raped at night on 23rd December, 2017, when her mother was delivering her last born.

56. Dr. Njoroge (PW4) who was familiar with the handwriting and signature of his colleague Dr. Calvin Oluoch who had travelled for further studies, testified that the said doctor examined this victim and confirmed that her hymen was torn. Both the PRC Form and the P3 Form filled herein captured evidence that the victim had been defiled. This Court is satisfied that penetration was proved beyond any reasonable doubt.

57. As regards the identity of the perpetrator, PW1 knew the Appellant as her father. Her evidence was a sworn statement after the trial court carried out voire dire examined on her and was satisfied that she understood the purpose of oath and the duty to tell the truth.

58. Further, the court record shows that the Appellant did not challenge that line of evidence and this now leads to his alibi defence. It is noted that that this was raised in one short sentence in his equally short defence. He stated :- " On 5th August 2018, I was at work. I was not at home."

59. In his Judgement, the learned magistrate held :-

> " The accused did not dispute the issue of identification nor avail a witness to lend credence to his defence that he was not at the scene at the time and the commission of this offence and was not involved. I therefore find PW1 evidence to be reliable and credible in the circumstances."

60. The evidence on record shows that the child was defiled severally and on different dates and by a person known to her, that is her father, who is the Appellant herein. His line of defence does not affect the prosecution case. The defence was a sham. This Court is satisfied that the conviction was safe and therefore upheld.

61. As regards the sentence, the Appellant did not argue much. Nonetheless, a person convicted under Section 8(2) of the Sexual offenses Act as in this case is liable to serve life imprisonment.

62. While sentencing the Appellant to 20 years imprisonment, the trial court held:-

> " In deciding the appropriate period, I bear in mind that the accused is a first offender. , the mitigating factors, the seriousness and gravity of the offence. And having taken into account the time taken while in custody, I shall accordingly sentence the accused to twenty (20) years in jail."

63. From that reasoning, it is clear that the trial court exercised its discretion in arriving at that sentence. There is no reason to interfere with it. That sentence is affirmed. It is noted that though the trial court mentioned about period spent in custody, there is nothing to show that he was complying with Section 333 (2) of the Criminal Procedure Code, yet tha provision is in mandatory terms.

64. From the record, the Appellant was arrested on 14th August 2018 placed in custody and brought to court for plea on 15th August 2018. There is nothing to show that he ever went out on bond during trial.

65. In conclusion, this court makes the following orders:-

    1. The appeal is dismissed.

    2. The conviction is upheld and the sentence affirmed.

    3. The sentence of 20 years imprisonment shall run from the date of arrest being 14th August 2018.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20 TH DAY OF NOVEMBER, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Edward Angwenyi Ambwori - Appellant

Mr. Kihara for Respondent

Kamau, Court Assistant