Brashi v Republic (Criminal Appeal E123 of 2023)
[2025] KEHC 17164 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17164 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E123 OF 2023

JN NJAGI, J

NOVEMBER 21, 2025

BETWEEN

KATANA KENGA BRASHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. E.K.Usui, CM, in Malindi Chief Magistrate's Court Sexual Offence Case No. E082 of 2022 delivered on 5/12/2023)

JUDGMENT

1. The Appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *akn ke act 2006 3 Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 1st August 2022 and 31st August 2022 ay Mueye area of Malindi sub-county within Kilifi County he intentionally and unlawfully caused his penis to penetrate the vagina of N.K.M (herein referred to as the complainant), a child aged 15 years.
2. The appellant was sentenced to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal. The grounds of appeal as per the appellant`s memorandum grounds of appeal are that;
    1. The learned trial magistrate erred on both points of law and facts by failing to appreciate the defence by the appellant.
    2. The learned trial magistrate erred on both point of law and fact by failing to appreciate the fact that the prosecution witnesses failed to prove the case against the appellant beyond any reasonable doubt.
    3. The trial magistrate erred on both point of law and facts by ignoring the contradictions on the prosecution witnesses whose benefit ought to have gone to the appellant.

4. The learned magistrate erred on both point of law and facts by convicting the appellant on unreliable and questionable medical exhibits.

3. The case for the prosecution is that the complainant was at the material time a class 8 pupil. The appellant was her uncle. That in the month of August 2022 she engaged in sex with the appellant on 5 occasions. Thereafter she felt unwell and she was taken by her father, PW2, to Malindi sub-county hospital on 10 9 2022 where she was examined and an ultra sound taken that showed that she was one month and 22 days pregnant. She informed her father that it is the appellant who had made her pregnant. They reported the matter at Malindi police station. She was issued with a P3 form. On 4 11 2022, she felt unwell and she was taken to hospital, she had a miscarriage.

4. The case was investigated by Cpl Marian Hussein PW4 of Malindi police station. She issued the complainant with P3 form. It was filled by a clinical officer at Malindi Sub-County Hospital. The police looked for the appellant who at the time had gone underground. He was on the 20 11 2023 arrested by the area chief and handed over to the police. He was charged with the offence. During the hearing a clinical officer, PW1 from Malindi sub county hospital produced the complainant`s treatment notes, the P3 form, the laboratory request form and results and the ultra sound film as exhibits, P.Exh.1 – 5 respectively.

5. When placed to his defence, the appellant stated in a sworn statement that his father and the mother to the complainant are siblings.

6. That his father had inherited land and distributed it among his siblings. That the siblings sold their land. His father bought 4 acres and his siblings demanded for a share. He opposed it. His father died. The siblings reported to the police that he was blocking the sharing of the land. The chief was involved. He explained how his father acquired the land. He was then arrested and charged with the offence he was convicted of. He said that the charges were fabricated by his relatives so that they can grab his land.

Submissions

7. The appeal was canvassed by way of written submissions of the counsel for the Appellant. The Respondent did not tender in submissions in the appeal.

8. Counsel submitted that no exact date was given of the 5 times the appellant was alleged to have defiled the complainant. That the case was reported to the police 3 months after the occurrence of the incident. That the evidence of the complainant was riddled with inconsistencies and contradictions which pointed to the case being fabricated and the complainant being couched. That the evidence of the clinical officer, PW4 did not link the appellant with the offence and no DNA samples were taken to prove penetration by the appellant or link him with the pregnancy. That the trial court wrongly concluded that the prosecution proved penetration. The appellant urged the court to allow the appeal.

Analysis and determination

9. This court being the first appellate court in this matter is alive to and is cognizant of the principles laid down in the case of Okeno vs. Republic (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination 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. 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."

10. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *akn ke act 2006 3 Sexual Offences Act* No3 of 2006 which is defined in Section 8 of the *akn ke act 2006 3 Sexual Offences Act* No. 3 of 2006 states as follows: -

    8. Defilement

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

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

11. Thus, for the Offence of defilement to stand, three ingredients must be proven. These ingredients were outlined in the case of George Opondo Olunga v Republic [2016] eKLR as the age of the victim, positive identification or recognition of the offender, and penetration.

12. There was no argument raised on the age of the complainant. A birth certificate was produced as exhibit in the case that showed that the complainant was born on 3 5 2007. This proves that the complainant was aged 15 years in August 2022.

13. The appellant was an uncle to the complainant. His identity is not in dispute. The question is whether he penetrated the complainant.

14. Penetration is defined under section 2 of the *akn ke act 2006 3 Sexual Offences Act* as the "partial or complete insertion of the genital organs of a person into the genital organs of another person".

15. The trial court in convicting the appellant of the offence stated that the evidence adduced against the appellant was cogent enough as to sustain a conviction. That his defence that the case was a fabrication was a mere denial as he did not raise the issue when cross-examining the prosecution witnesses.

16. It was the evidence of the complainant that the appellant for a period of time in the month of August 2022 was making sexual advances on her but she declined on two occasions. That on the third time she was on her way to school at 5am when she passed outside his home and found him outside his home. He asked her to accompany him into an incomplete house. She did so. On getting there he asked her to remove her clothes. She did so and he also removed his. He then inserted his penis into her vagina and had sexual intercourse with her. He gave her Ksh.500 =. Thereafter he had sex with her at the same place on 4 other occasions. That in the month of October she developed symptoms of pregnancy. She was taken to hospital and found to be pregnant.

17. Counsel for the appellant submitted that there was no medical evidence to support the defilement or that that the appellant is the one who impregnated the complainant.

18. Upon examination at Malindi sub county hospital the complainant was found with a missing hymen and an ultra sound scan showed that she was pregnant. The medical evidence however did not connect the appellant with the offence. The mere act of the complainant being found with a missing hymen did not prove that the appellant is the one who broke her virginity as this could not be proved by medical evidence. More so no test was done that connected the appellant with the complainant`s pregnancy. The medical evidence adduced before the trial court did not prove penetration on the complainant by the appellant.

19. The law is however that lack of medical evidence to support a charge of defilement is not fatal to the case as defilement and rape can be proved by the oral evidence of the complainant or by circumstantial evidence. This proposition finds support in the case of Kassim Ali v Republic Criminal, Appeal No. 84 of 2005, where the Court of Appeal held that:-

> " The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence".

11. The complainant herein gave evidence that the appellant engaged in sexual intercourse with her on 5 occasions at an incomplete house at his home. The question was whether this true.

12. Section 124 of the *akn ke act 1963 46 Evidence Act* allows a court in sexual offences involving child victims to convict on the sole evidence of the child victim if the court is satisfied that the child is telling the truth and the court gives reasons for believing the evidence of the child. The section provides as follows:

> " Notwithstanding the provisions of section 19 of the *akn ke act 1926 29 Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

11. The trial court in this case believed the evidence of the complainant and found the evidence cogent. I have on my part re-evaluated the evidence of the complainant. The appellant was an uncle to the complainant. No questions were put to the complainant by the defence during cross-examination to indicate that there were any differences between her and the appellant. The appellant was at the time represented by an advocate. If there were any differences between the complainant and the appellant counsel for the appellant would have brought out the issue when cross examining the complainant. The fact that this was not done leads to the conclusion that there were no differences between the complainant and the appellant. There was thereby no reason for the complainant to fabricate such serious charges against the appellant.

12. Similarly, the defence did not question the complainant`s father PW3 during cross-examination on whether there was a land dispute between the family of PW3 and the appellant. There is no way that the defence would have forgotten to ask PW3 such an important part of their defence if there was such an issue. That they did not do so leads to the conclusion that the defence was an afterthought. Consequently, I am in agreement with the finding of the trial court that the defence that the case was a fabrication due to shamba wrangles was not true. The trial court rightly dismissed the defence.

13. The defence counsel submitted that there were inconsistencies and contradictions in the evidence of the complainant in that she at first told the court that she first reported the pregnancy to her grandmother before changing her evidence to that she first reported it to her father.

14. The way to treat contradictions in a criminal case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> "with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

11. On my analysis of the evidence of the complainant, the contradiction on whether she first reported the pregnancy to her grandmother or her father was not a material contraction in the case. The same does not point to deliberate untruthfulness and does not affect the substance of the charge. The same can be ignored. In fact, the same appeared more or less of a clarification than a contradiction.

12. Having re-examined the evidence in its entirety I find that the evidence of the complainant that the appellant penetrated her was truthful and credible. The charge of defilement was thereby proved beyond reasonable doubt. The conviction and the sentence are thereby upheld.

11. The upshot is that I do not find merit in the appeal and the same is dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 21 ST DAY OF NOVEMBER 2025.

J. N. NJAGI

JUDGE

Ms Ochola for Respondent

Appellant present

Court Assistant: Ms Rahma