Were v Republic (Criminal Appeal E001 of 2024)
[2025] KEHC 17181 (KLR) (25 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17181 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E001 OF 2024

PN GICHOHI, J

NOVEMBER 25, 2025

BETWEEN

VINCENT AKAKA WERE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgement of Nakuru Chief Magistrate Sexual Offense case No. 84 of 2018 delivered by Hon. Y.I Khatambi (SRM) on 20th May, 2020)

JUDGMENT

1. The Appellant, Vincent Akaka Were, had been charged with the offense of defilement contrary to section 8(1) as read with section 8(2) of the *sexual offences Act* No. 3 of 2006. The particulars of the charge were that on the 2nd day of June, 2017 within Nakuru County, intentionally and unlawfully caused his male organ namely penis to penetrate the anus of IMN, a child of 9 years.

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

3. After hearing the seven (7) prosecution witnesses and the Appellant's defence, the trial court rendered it's judgment on 20th May, 2020 convicting he Appellant on the main charge of defilement and sentenced him to serve Forty-Five (45) years imprisonment.

4. Being aggrieved by both his conviction and sentence , the Appellant preferred this Appeal dated 19th May, 2023 based on Eight grounds as follows :-

    1. The learned trial magistrate erred in law and in fact by failing to conclusively analyse all the evidence on record in order to form a balanced view of the case.

2. The learned trial Magistrate erred in law and in fact by failing to note the obvious discrepancies, contradictions and inconsistencies in the prosecution case.

3. The learned trial magistrate erred in law and in fact by failing to note that the medical evidence adduced did not create a nexus between him and the alleged offense.

4. The learned trial magistrate erred in law and in fact by failing to note that the prosecution case was not proved beyond any reasonable doubt.

5. The learned trial magistrate erred in law and in fact by failing to note that the documentary evidence adduced in court in form of PRC and P3 was not credible and contained grave anomalies that disqualified them as admissible.

6. The learned trial magistrate erred in law and in fact by failing to note that the sheet on which the charges were preferred was fatally defective and incurable.

7. The learned trial magistrate erred in law and in fact by failing to appreciate that their existed a grudge between the appellant and the complainant's mother.

8. The learned trial magistrate erred in law and in fact by failing to consider the plausible and unrebutted defence and dismissing it thereof without offering any cogent reason.

5. This appeal was canvassed by way of written submissions filed by both parties.

Appellant's Submissions

6. In his submissions dated 21st May 2025, the Appellant challenged the procedural conduct of the trial including the court's failure to ensure the timely availability of a witness leading to a delay in commencement of the trial.

7. He was aggrieved that the Complainant testified as PW2 having preceded by his father as PW1, which arrangement he termed erroneous. Furthermore, the Appellant faulted the prosecution for its failure to call the arresting officer to testify.

8. He was also aggrieved that while Dr. William Miser and Teacher Jane who were reportedly summoned failed to attend court necessitated the court to proceed with a different medical witness Edwin Peter Wambui (PW3) who testified on behalf of both Dr. William Miser and Dr. Dickson Njoroge Thuku, a substitution the Appellant opposed.

9. The Appellant therefore contested the validity of the medical evidence by Dr. William Miser (PW5) who ultimately testified on behalf of Dr. Dickson Thuku, who had completed the P3 Form, a situation he opposed. He further argued that the doctor's testimony regarding the Police Reference Form (PRC), which mentioned an anal splinter, was contradicted by his inability to state the cause of the injury yet no spermatozoa was detected.

10. The Appellant submitted that the Complainant first disclosed the incident to his teachers rather than his parents, who in the Appellant's view, should have been the primary recipients of such information. He submitted that said the teachers did not testify and therefore, evidence of all subsequent witnesses as to what they were informed by the said teachers, was hearsay.

11. He further submitted that the Complainant's testimony was marred with material contradiction. He argued that in cross-examination, the Complainant stated he had been subjected to the act five times, came alone, and only experienced pain on one occasion yet in re-examination, he was unable to recall

the date and reiterated experiencing pain only once, and alleged that on other occasions, he was merely made to sit on the Appellant.

12. Further, he submitted that whereas the complainant claimed he came alone, PW4 stated he saw the Appellant defiling the Complainant and further, PW6 (E) failed to mention the Complainant but focused entirely on what transpired regarding himself, despite not being the Complainant in the instant matter.

13. The Appellant further submitted that while PW4 claimed have reported the matter to the teachers, PW6 asserted it was the Complainant who did so.

14. He also challenged the three-month disparity between the date on the PRC Form 8th June, 2017 and the date on the P3 Form 14th September, 2017, noting that the PRC was filled one day after his arrest.

15. Lastly , he submitted that the charge sheet was defective regarding the date of arrest and the OB Number.

16. On sentence meted against him, the Appellant submitted that the learned Magistrate treated him as a second offender and erroneously based the sentence on the alleged defilement of three minors, E, I, and J, assigning 15 years for each boy, despite the fact that the matters concerning the other two boys were the subject of a separate court case.

Respondent's Submissions

17. Opposing the Appeal and inviting this Court to affirm both the conviction and the sentence imposed by the Trial Court, the Respondent submitted that the charge of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 was proved beyond reasonable doubt and therefore, the conviction was proper.

18. The Respondent submitted it called a total of eight (8) witnesses which evidence established the essential ingredients of the offence, namely: the age of the victim, the identity of the Accused, and penetration.

19. The Respondent argued that the age of the victim and the identity of the Appellant were not in doubt or contention. Regarding the victim's age, the Respondent submitted that this was proved by a Birth Certificate produced by his father (PW1).

20. On penetration and the identity of the offender, the Respondent submitted that the Victims father recounted being informed by the teacher on 8th June, 2017, that his son had been taken to Bondeni Police Station. That PW1 learned his son was experiencing anal pain, which led the Head Teacher to lodge a formal complaint. PW1 was subsequently informed by the victim that the Appellant had defiled him at least five (5) times after providing him with powdered snacks.

21. The Respondent submitted that the Victim confirmed having been defiled by the Appellant on several occasions, giving him Kshs. 10/- each time; felt pain only during the first encounter and that he was fearful that his mother would beat him, which is why he first disclosed the abuse to his father (PW1).

22. Further, it was submitted that JM (PW3) corroborated this evidence when he testified of his contact with the Appellant, seeing and hearing the Appellant request the complainant (PW2) to lower his trousers for the act. PW3 recounted how that the Appellant had requested him to do the same, but he felt pain and told the Appellant to stop.

23. The Respondent further submitted that this evidence was corroborated by EG (PW6), who also recalled being with the victim and J, accepting a ride on the Appellant's bicycle. That the Appellant

took him (PW6) to his house, gave him a phone to play games, and then removed his "dudu" and pulled PW6's clothes. He confirmed that the victim had previously warned him about the Appellant.

24. The Respondent also recounted the evidence of the Teacher Catherine Khikayi (PW7) who confirmed that the three minors were her students and had reported being sodomized by the Appellant and how she noted that PW6 was walking in pain, and pursuant to the advice from the Education office, PW7 reported the matter to the police.

25. It was submitted that the act of defilement was corroborated by Dr. William Mosser (PW5), who produced the P3 Form and PRC Form on behalf of his colleague who confirmed that the victim was assessed on 8th June, 2017 and the forms indicated that the act was sodomy. The physical examination revealed that the anal orifice had been torn, indicating a loose or reduced anal sphincter with a tear, which medically confirmed anal penetration.

26. Regarding the Appellant's defence that he was at work or having travelled for a burial and his his assertion of a grudge held by the victim's mother due to a past relationship and that the minors had been coached, the Respondent termed that these assertions as baseless and that they did not undermined the cogent evidence tendered by the Prosecution.

27. The Respondent emphasised that the conviction and subsequent sentence were based on a single count of defilement and therefore, conviction was safe and sentence not excessive. The Respondent therefore urged the Court not to interfere with both the conviction and the sentence imposed by the Trial Court.

Analysis and Determination

28. After considering the grounds of appeal and the submissions by parties the broad issues for determination are :-

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

    2. Whether or not the sentence was excessive.

29. As this Court embarks on determination of the same, its duty as the first appellate court remains as set out by the Court of Appeal in Okeno v Republic [1972] EA 32 at 36 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."

30. In this case, the Court also bears in mind that the Appellant's conviction and sentence were under Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* 2003 which provides that;-

> " 8(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 aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

31. From the above provision, the prosecution had the burden to prove elements in order to secure a conviction for an offence of defilement. These are :-

    i. Age of the complainant.

    ii. Penetration.

    iii. Positive identification of the assailant.

32. In respect to age, the complainant (PW2) testified that he was 10 years old as at 9th August 2018. His father, FM (PW1), stated that his son, IM, was born on 6th June, 2008 and produced a Birth Certificate No. 35xxx (PEXH. 3) to that effect. That exhibit provides irrefutable proof of the person's date of birth and therefore age. On that basis, this Court is satisfied that the victim was 9 years at the time of the alleged offense. Hence, the issue of age of the victim was proved beyond reasonable doubt.

33. As regards penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean;- "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

34. In this case, the Victim (PW2) was subjected to a voire dire examination and found competent gave a sworn statement describing how the Appellant inserting his "dudu" into his (Victim's) anus. He told the trial court:- " I got to his house, he removed my short and boxer and pulled them to my knees and inserted his 'dudu',that for urinating into my Anus. He was behind me when he inserted his 'dudu'. I felt pain, I did not scream. He gave me Kshs. 10 after."

35. The above was corroborated by Dr. William Mosser (PW5), who examined the minor on 8th June, 2017 and noted that the anal orifice was torn and the same was indicated in the PRC form (PEXH.2) and also by the P3 form (PEX3) filled by his colleague Dr. Njoroge on 14th September, 2017 indicating that that the rectal anal sphincter was reduced, loose and relaxed. Based on the observation of the document, the doctor concluded that the victim was sodomised and thus, there was penetration.

36. The Appellant's contention regarding the production of the documents by PW5 does not affect this case. PW5 had worked with Dr. Njoroge for 14 years. Considering the evidence adduced before the trial court, this Court is satisfied that penetration was proved as required by law. The Appellants grievance on the validity of the documents is not sound.

37. Further, the Appellant is aggrieved that the complainant testified after the father. The number of prosecution witnesses and the sequence with which they are called is within the discretion in the circumstances herein . Further, he has not shown how such a sequence affected this case.

38. The Appellant further contends that there was contradiction in evidence by prosecution witnesses. He submits that whereas the complainant claimed he came alone, PW4 stated he saw the Appellant defiling the Complainant and further, PW6 (Erick) failed to mention the Complainant but focused entirely on what transpired regarding himself, despite not being the Complainant in the instant matter. Further, that while PW4 claimed have reported the matter to the teachers, PW6 asserted it was the Complainant who did so.

39. As regards contradictions in the prosecution case, the Court of Appeal in Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 855 (KLR) quoted its decision in John Nyaga Njuki & 4 Others v. Republic, Cr. App. No. 160 of 2000, where it had expressed itself as follows:-

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

40. In the instant appeal, this court is satisfied that the alleged contradictions or discrepancies raised by the Appellant herein are not of the nature that would have created doubt and vitiated the prosecution case. In short, they have no effect on the prosecution case.

41. As to failure to call the arresting officer, the law is settled. Courts have over the years held that whereas it is important to call the investigation officer or arresting officers, failure to call them is not fatal to the prosecution case but it depends on the circumstances of each case. Indeed, in Kiriungi v Republic [2009] KLR 638, the Court said:-

> " ..... the effect of failure to call police officers involved a criminal trial including the investigation officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrated. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."

42. Further, in Julius Kelewe Mutunga v Republic Criminal Appeal No. 31 of 2005, the Court of Appeal held as follows:-

> " ....As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

43. In this case, the arrest of the Appellant in this case is not in dispute. He is before the court pursuant to that arrest. He has not shown failure to call the arresting officer has prejudiced his case.

44. As to the issue by the Appellant herein that the Prosecution's failed to call the arresting officer, the law is settled. Courts have over the years held that whereas it is important to call the investigation officer or arresting officers, failure to call them is not fatal to the prosecution case.

45. However, effect of that failure depends on the circumstances of each case. In the case of Kiriungi v Republic [2009] KLR 638, the Court had this to say:-

> " ...the effect of failure to call police officers involved a criminal trial including the investigation officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrated. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial

to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."

46. In this case, there is no doubt that the Appellant was indeed arrested as that is why he is before the court. In the circumstances of this case, failure to call the arresting officer was not fatal.

47. Regarding the identity of the perpetrator, the Complainant (PW2), unequivocally asserted that he knew the Appellant as he was a neighbour and that he was the one who defiled him. He gave specific details of the Appellant's residence described as a one-roomed house, furnished with chairs, a television, and a bed. He further informed the Court that the incidents occurred approximately five (5) times, always during daylight.

48. Upon receipt of the report by the complainant as to how the appellant defiled him, the Complainant's father realised that he had encountered the Appellant prior to the incident. Further, both minors JM (PW3) and EG (PW6) who testified about their own defilement, identified the Appellant in court as the assailant.

49. From this evidence, there was no chance of mistaken identity. The incident occurred during the day and the perpetrator was a person well known to the Complainant, being their neighbour, this Court is satisfied that the Appellant was positively identified as the perpetrator in this case.

50. In his defence, the Appellant admitted to have known the Complainant and his mother since 2008 when the Complainant was a toddler. He even claimed to have been in a romantic relationship with the Complainant's mother. In regard to this case, he claimed that the Complainant's mother harboured a grudge against him and was retaliating after he had severed their romantic relationship upon realising that she was married. That allegation is nothing to support that argument. It lacks substance and is of no effect to the prosecution case.

51. He also told the trial court that he was at his workplace until midnight on the material date and time and later travelled upcountry for a funeral. That is an alibi defence and in regard to such a defence, the Court of Appeal in Erick Otieno Meda v Republic [2019] eKLR had this to say:-

> " In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt."

52. The Court of Appeal then went on to say: -

> " In considering an alibi, we observe that:-
>
> (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

53. In this case, the alibi defence was only introduced in his sworn statement in defence. It did not dislodge evidence presented by the prosecution that the Appellant defiled the complainant. The evidence on record was that the complainant was defiled on distinct dates. The trial court's dismissal of the said defence was justified. The Appellant's conviction for the offence of defilement was therefore sound and is hereby upheld.

54. The last issue is on whether the sentence herein was too harsh and therefore warranting interference by this Court. The record shows that after conviction, the prosecution sought one week to the Appellant's previous records. Upon hearing this, the Appellant told the trial court in mitigation:-

> "I have another case. I am currently serving a sentence. I have reformed . I have been in custody. I have learnt a lot. I gained knowledge and education. I am the sole bread winner. I pray that I be allowed to deal with present case."

55. Nevertheless, the trial court allowed the Prosecution time to get records and ultimately, it was confirmed that the Accused had a previous record in SOA Case No. 85 of 2018 where he was sentenced to serve 30 years imprisonment.

56. In sentencing , the trial court had this to say:-

> "I have considered the evidence on record., the accused person's mitigation and the report by the prosecution. I note that the accused is a repeat offender. I further note that the offence in question is rampant in this court's area of jurisdiction. Taking note of the principles in Muruatetu case, I am inclined to impose a deterrent sentence . Accused is hereby sentenced to serve imprisonment for a period of 45 years."

57. From that reasoning, there is nothing on record to show that trial court gave the sentence of 45 years imprisonment taking into account the tree complainants thus translating to 15 years' imprisonment for each of the three minors as alleged by the Appellant. What was before the trial court was a distinct case with one complainant. The other two minors were witnesses and not complainants in this case.

58. Further, Section 8 (2) of the *Sexual Offences Act* provides for life imprisonment for defilement of a child below the age of 11 years. In this case, the victim was 9 years at time of the incident.

59. It is therefore apparent that the trial court exercised its discretion when it gave the determinate sentence. Regarding this court's interference with such discretion, the Court of Appeal in Bernard Kimani Gacheru vs Republic [2002] eKLR held:-

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not

sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

60. In the circumstances herein, there is no reason for this Court to interfere with this sentence.

61. Lastly, the Appellant has been in custody since his arrest on 22nd May 2018 and remained in custody until he was convicted and sentenced on 27th May 2020. In line with Section 333 (2) of the Criminal Procedure Code, the period spent in custody should be taken into account when computing the sentence.

62. In conclusion the Court makes the following orders:-

    1. The Appeal be and is hereby dismissed in its entirety.

    2. The period the Appellant spent in custody from 22nd May 2018 being the date of his arrest be taken into account in computation of the said sentence of 45 years imprisonment issued by the trial court.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF NOVEMBER, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Vincent Akaka Were - Appellant

Mr. Kihara for Respondent

Kamau, Court Assistant