Narumbe v Republic (Criminal Appeal E002 of 2025)
[2025] KEHC 18136 (KLR) (Crim) (3 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18136 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CRIMINAL

CRIMINAL APPEAL E002 OF 2025

SC CHIRCHIR, J

DECEMBER 3, 2025

BETWEEN

PETRO NARUMBE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being and appeal from the judgment of Hon. M A Odhiambo SRM delivered on 12.2.25. in Isiolo Sexual Offences Case Number E004 of 2024)

JUDGMENT

1. The Appellant herein was charged, tried and convicted by the trial court of the offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offence Act number 3 of 2006 (The Act). The particulars of the charge were that on the 28th of February, 2024 at [Particulars withheld] in Isiolo Sub-county within Isiolo County caused his penis to penetrate the vagina of E. L a child aged 11 years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Act. He was convicted of the main charge and sentenced to life imprisonment.

2. He was dissatisfied with the outcome and filed the present appeal.

Petition of Appeal

3. In his amended petition of Appeal, he has listed the following grounds:

    a. That the trial magistrate erred by ignoring a fundamental issue which was the fact the appellant was never examined by a doctor to ascertain if the appellant had an infection which was alleged to have been transmitted by the Appellant to the Complainant.

    b. That there was no evidence of penetration.

c. That the prosecution failed to prove their case beyond reasonable doubt.

d. That the trial magistrate erred in law and fact by failing to note that the charges was a fabrication owing to the vendetta between relatives of the complainant.

e. That the trial court failed to consider his defence.

f. That the sentence is unconstitutional and excessive.

4. The appeal proceeded by way of written submissions.

Appellant's submissions

5. It is the Appellant's first submission that there was no evidence to convict him for the offence ,because, although it was alleged that the complainant suffered an infection, the appellant was not examined to ascertain if he had the same infection. In this regard,he had relied on the decision of the court in the case of Ocharo Obiagwa Vs. Republic CR. A No. 92 of 2003 where the court held that for failure to examine the accused of the then unnamed sexually transmitted disease, there was no evidence linking the accused to the sexual offence of defilement . The decision of Andrew Cauri Ndungu Vs. Republic NAI CA Criminal Appeal No. 132 of 2008 (2013) eKLR was also relied on .

6. The appellant further submits that the penetration was not proved, there was no blood or severe bruises found in the victim's genitalia yet the victim was just 11 years old.

7. It is finally submitted that the prosecution's case was not proved beyond reasonable doubt, the threshold of which was expounded in the case of Miller Vs. Minister of Pensions (1947) ALL E R 373 and the Nigerian Supreme Court decision of Bakare Vs. State 1985 (2NWLR).

Respondent's submissions

8. On whether the case was proved beyond reasonable doubt, the Respondents submits while there was no challenge on the victim's age, nevertheless her birth certificate was produced ,showing that the complainant was 11 years at the time of the incident .

9. On penetration, it is submitted that the testimony of the complainant and the doctor (PW4), plus the exhibits produced ,proved that penetration took place.

10. On whether the Appellant is the one who caused the penetration, the Respondent submits that the Appellant admitted that he met the complainant on that day and that the complainant's testimony place the Appellant on the scene of crime.

Analysis & Determination

11. An appeal to the High Court from the Magistrate' s Court is by way of a retrial and mandate of this court is therefore is to review the evidence, carry out its own evaluation and arrive at its own findings (see: OKeno Vs. Republic, (1972) E.A 32)

12. I have considered the trial court's record, the grounds of appeal and the parties submissions and I have identified the following issues for determination:

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

b. Whether the Appellant's defence was considered.

c. Whether the sentence was excessive and unconstitutional.

Whether the offence was proved

13. Section (8) (1) of the Act defines defilement as follows: a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". And section 8(2) states: "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"

14. Thus for the prosecution to secure a conviction for the offence of defilement, they must prove that penetration took place; that the victim was a particular age, and the perpetrator must be identified.

15. The age of the child was not disputed. However, it suffices to state that the birth certificate was produced, which indicated that the child was 11 years at the time of defilement

16. On the element of penetration, section 2 of the Act describes penetration to mean " The partial or complete insertion of the genital organs of a person into the genital organs of another person". The testimony of the complainant and PW4 are relevant in this regard. The relevant portion of the complainant's testimony went as follows: "....I got to his house, he then carried me to his bed and did tabia mbaya to me. He removed his clothes and did tabia mbaya ..... I had a trouser, shirt and panty ..... he removed my trouser and panty. The accused had a kikoi, shirt and sweater , his kikoi looked and resembled a skirt...He removed his kikoi and his inner wear". The count then records: pointing at her vagina. (That where he did tabia mbaya) He used his dudu which is on (Points on the area around the vagina) he put his dudu in my susu".

17. PW4 on the other hand testified that he examined the complainant 8 days after the incident. He found no semen, but there was an infection. He concluded that the child has been defiled due to the presence of epithelial cells and a broken hymen. In the P3 form he did recorded "old broken hymen"

18. The Appellant has cast doubt on penetration due the absence of blood or bruises on the victim's vagina. He has stated that if indeed the complainant was found to have an infection then he too should have been examined to establish if he had the same infection. That would then have proved that he was the defiler, he submits.

19. However , it is trite law that rape or defilement can be proved by the testimony of the victim , not just medical evidence. In this regard, I find reliance on the case of Kassim ali v Republic [2006] KECA 156 (KLR) where the court of Appeal held: " The absence of medical examination to support the fact of rape is not decisive, as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.

20. On the testimony of the Minors such as the complainant's in this case, section 19 of the Oaths and Statutory Act provides as follows ; "where, in any proceeding before any Court... any child of tender years called as a witness does not, in the opinion of the Court understand the nature of an oath, his evidence may be received, though not given on oath if, in the opinion of the Court...he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth..."

21. The record shows that the trial court complied with the aforesaid section of the Act by conducting the voir dire examination on the minor. She concluded that though the minor did not understand the significance of an oath, she was intelligent enough to testify. She further made a finding that the clinical officers testimony corroborated that of the minor witness.

22. On the issue of corroboration, I have read the judgment of the trial magistrate in this this regard. Her positive finding on corroboration of the minor's testimony was based on the testimony of the

clinical officer where he stated that hymen was broken. However, the mere absence a hymen or the presence of epithelial cells is not necessarily a sign of penetration. Further the clinical officer's testimony was that the breakage of the hymen was old. In the circumstances, I find the trial's court finding on corroboration to have been erroneous.

23. Nevertheless, did the uncorroborated testimony of the minor sufficed? Section 124 of the *Evidence Act* qualifies the provisions of section 19 of the *Oaths and statutory declarations Act*. The *Evidence Act* provides:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, (Cap. 15), where the evidence of the alleged victim is 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."

24. I have carefully considered the relevant portion of the minor 's testimony as reproduced in paragraph 16 of this judgment. The account is detailed , and presented in an innocent 'child's language'('.tabia Mbaya '; 'susu' 'dudu'). If she had been coached on what to say she would have likely used the language of the 'Adult coach' (i.e 'sex '; 'vagina'; ' penis', respectively). she also pointed to the genital area as she testified. Court have long accepted that the above are the synonyms that children often use to describe sexual acts. She also gave a vivid description of the perpetrator' clothes and what he did before penetrating her. For instance, she stated: The accused had a kikoi, shirt and sweater, his kikoi looked and resembled a skirt .... He removed his kikoi and his inner wear". I find that the complainant was not only candid but her testimony also remained on cross- examination. For the above reason, I have no reason to disbelief her testimony. I am satisfied that the complainant was telling the truth

25. On identification the Appellant has argued that a medical exam would have gone to confirm any connection between him and the offence. This submission is tied to identity. However, it emerged that the complainant and the accused knew each other well. The child identified him. The line of his defence also showed that he knew her relatives well. His defence was that the motive behind the charge was a pre-existing feud between the Appellant and the complainant's relatives. The fact that he knew the relatives meant that he also knew the child. This was therefore a case of identification through recognition which mode of identification has been described as more assuring .(see: Reuben Taabu Anjononi ,Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR)

26. On whether his defence was considered, under paragraph 18(e) of the judgment the record shows that the trial court addressed the appellants defence quite extensively . It is just that the trial court found it implausible. The appellant argument in this regard is without merit. On the merit of the said defence, I observe the appellant gave unsworn statement. Whereas that was his constitutional entitlement, the weight of such evidence is less than the evidence that has been subjected to the weight of cross -examination.

27. In view of all the aforegoing , am satisfied that the Appellant's conviction was safe and I uphold the same.

Sentence.

28. Section 8(2) (supra) prescribes a life sentence where the victim of defilement is 11 years and below. The sentence is minimum and mandatory, and hence, there was nothing illegal about it. Further to the extent that the law prescribes it as the minimum for the particular offence, then it cannot be said to have been excessive.

29. In conclusion, the entire appeal fails, and the conviction and sentence of the court below is upheld.

DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 3RD DAY OF DECEMBER 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Roba Katelo- Court Assistant .

The Appellant

Mr. Ngetich for the Respondent.