Nguma v Republic (Criminal Appeal E034 of 2021)
[2025] KEHC 18055 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18055 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E034 OF 2021

M THANDE, J

DECEMBER 5, 2025

BETWEEN

SHAURI KALAMA NGUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* (SOA) in Kilifi Sexual Offences Case No. E032 of 2021. The particulars of the offence are that on the night of 25.4.18 in Ganze District within Kilifi County, the Appellant intentionally caused his penis to penetrate the vagina of KCK (the Complainant) a child aged 10 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of this offence are that on the same day and in the same place, the Appellant intentionally committed an indecent act by touching the vagina of the Complainant with his penis. Following a full trial, the trial court found that the Complainant was 13 years old and the Appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *SOA*. He was sentenced to 13 years imprisonment.

2. Being aggrieved with both the conviction and sentence the Appellant filed the appeal herein. In his amended grounds of appeal, he faulted the trial Magistrate for:

    1. Convicting him yet the medical evidence was scanty and insufficient and violated his rights under Article 50(2)(b)(k) and (m) of the *Constitution*.

    2. Convicting him yet the age of the Complainant was not proved to the required standard.

3. The Appellant urged that the Court release him or reduce his sentence on account of his age and health.

4. Although the Respondent stated that its submissions had been filed, the same are not on record.

5. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.

6. To sustain a conviction for the offense of defilement, 3 ingredients must be established by the prosecution. This was set out in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where the Court stated:

> The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.

7. I have gone through the entire record and note some issues which are quite unsettling. The charge sheet indicated that the Complainant was 10 years old. The Complainant herself stated that she was 10 years old. When shown the age assessment report, she stated that it says she is 13 years old. The age assessment report was produced by PW4 No. 66XXX, Snr Sgt. Philip Dzombo who took over the matter from the former Investigating Officer. No. 10XXX PC Sawe.

8. In *Henry Kasiani v Republic* [2017] KEHC 8991 (KLR) Ngenye-Macharia, J. (as she then was) stated as follows regarding a properly done age assessment:

> Therefore, the evidence that the court needs to interrogate is whether the age assessment was properly done. The same was done by PW9, a Consultant Radiologist at Kenyatta National Hospital. The witness interpreted the X-ray images presented to him. He was therefore not required to physically see the patient. Moreover, he adequately expressed the methodology he used in arriving at PW1's age. He stated that the same was premised on the study of the skeletal structure of the patient on viewing the x-ray images. He was also candid that it was best that he did not see the patient because in his assessment, the images did not hinder his ability to act objectively. I accordingly hold and find that the age of PW1 was properly established.

9. In the present case, PW4 was not the maker of the age assessment report which he produced. Notably, he did not indicate who had prepared and signed the report. Further, neither he nor the report indicated the method used in determining the age of the Complainant. With this contradiction and inadequacy of evidence, I find that the age of the Complainant was not established. The trial Magistrate therefore misdirected herself in finding that the age of the Complainant was proved on the basis of the Age Assessment Report.

10. As regards penetration, the Complainant testified that on 25.4.18 at about 9pm, the Appellant told the Complainant's elder brother to awaken her and tell her to go to his house to get some food. On arrival at his house, she entered to pick the food from the table, he shut the door and told her to undress and lie on the bed which she did. He did *tabia mbaya* to her which she did not like. He removed his clothes and put his *kitu chake cha siri* (private part) and inserted it into her private part. This happened twice that night. In the morning, he carried her to her home as she could not walk and was bleeding from her private part. The Complainant reported the matter to her mother and grandmother PW3 and she was taken to Ganze Hospital. No evidence was adduced to show the date in which the Complainant was taken to hospital.

11. PW1, a Medical Officer produced the P3 form which had been completed by Dr. Mansukhi. She stated that she had worked with Dr. Mansukhi for 1½ years and was familiar with his handwriting. PW1 stated that the Complainant was in general good condition with normal external genitalia. Further that her hymen was partially broken and there was no vaginal discharge. Although PW1 stated that

the Complainant's hymen was partially broken, she did not state whether the doctor who examined her, concluded that there was vaginal penetration. Further, if indeed the Complainant had been defiled twice on the material night and had bled, surely the medical examination should have revealed this.

12. There is also a discrepancy in the dates. The Complainant stated that the incident took place on 25.4.18. Her grandmother PW3 stated that it happened on 2.5.18. PW1 stated that the P3 form is dated 11.5.18. She did not however state when the Complainant was examined and when the alleged defilement took place. Additionally, PW1 stated that the approximate age of the injuries was weeks. A look at the P3 form reveals that the matter was reported to the police on 2.5.18 and that the Complainant was examined on 3.5.18. Even assuming that the incident happened on 25.4.18, the age of the injuries would have been just 7 days and not weeks. The evidence raises doubts in the mind of the Court as to whether the Complainant was defiled on 25.4.18, on 2.5.18 or at all.

13. Additionally, PW1 gave her evidence in staccato. It would appear that she just read what was in the P3 form. Little wonder that the Appellant stated that he had not understood her testimony. The trial court then stated:

> The testimony read over and explained to the Accused by Court.

14. The testimony in question is that of PW1. The trial court ought to have directed PW1 to explain her testimony to the Appellant. It was not for the court to explain that evidence. Further, the explanation ought to have been recorded.

15. Notably, after the "explanation", the Appellant stated:

> I don't know how to read the P3 form and the PRC forms. I have heard the testimony.

16. This is a clear indication that even after having the testimony explained to him, the Appellant heard it but still did not understand the same.

17. Article 50(2) of the *Constitution* guarantees to every accused person the right to a fair trial. That right *inter alia* includes the right –

    (b) to be informed of the charge, with sufficient detail to answer it;

    (c) to have adequate time and facilities to prepare a defence;

18. The right to be informed of the charge with sufficient detail to answer it must of necessity include the production of evidence especially expert evidence in a manner that can enable an accused person to understand the same and prepare his defence. The circumstances herein are that the Appellant voiced his lack of understanding of the medical evidence. Even after explanation by the court, he still did not understand the same. The trial court ought to have ensured that PW1 explained the medical evidence in a manner that the Appellant could understand, with a view to enabling him prepare and mount his defence. I accordingly find that the Appellant was greatly prejudiced for proceeding with a matter, a critical component of which he did not understand. There was a clear violation of his right to a fair trial as guaranteed under Article 50(2)(b) and (c) of the *Constitution*.

19. In the end, taking all the foregoing factors together, the inescapable conclusion is that the conviction of the Appellant was not safe. I accordingly allow the appeal, quash the conviction and set aside the sentence. The Appellant is set at liberty unless otherwise lawfully held.

DATED SIGNED AND DELIVERED IN MALINDI THIS 5TH DAY OF DECEMBER, 2025

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M. THANDE

JUDGE