RGM v Republic (Criminal Appeal E014 of 2025)
[2025] KEHC 18490 (KLR) (16 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18490 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E014 OF 2025

JN ONYIEGO, J

DECEMBER 16, 2025

BETWEEN

RGM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon. Otuke S. – SRM delivered on 12.05.2025 in Garissa CM's Court in Criminal Case No. E042 of 2022)

JUDGMENT

1. The appellant was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on diverse dates between 10.07.2022 and 14.07.2022 at [Particulars Withheld] in Garissa Township within Garissa County, he caused his genital organ namely penis to penetrate the genital organ namely vagina of Y.A.M., a girl child aged 14 years old.

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. The particulars were that on diverse dates between 10.07.2022 and 14.07.2022 at [Particulars Withheld] in Garissa Township within Garissa County, he willfully and intentionally touched the genital organ namely vagina of Y.A.M., a girl child aged 14 years old with his genital organ namely penis.

3. The appellant was convicted on the main charge and sentenced to serve 20 years and Six months' imprisonment.

4. Being dissatisfied with the said determination, he lodged an appeal via his undated petition of appeal citing grounds as follows:

i. That the learned trial magistrate erred in law and fact by failing to take into account the result of the DNA test on the paternity of the complainant's child when the same was material.

ii. That the learned magistrate erred in law and fact by convicting and sentencing the appellant to 23 years' imprisonment without observing that the prosecution failed to prove its case.

iii. That the learned trial magistrate erred in law and fact by failing to consider the appellant's plausible defence that was not shaken by the prosecution.

iv. That the learned trial magistrate erred in law and fact by failing to consider that the sentence meted out was manifestly harsh.

5. The appeal was canvassed by way of written submissions.

6. The appellant in his submissions dated 03.11.2025 submitted that the trial court erred in its determination by failing to consider the results of the DNA report. He relied on the case of Eliud Agwara vs Republic, High Court Criminal Case No. 16 of 2016 where the court acquitted the appellant after finding that the only evidence that implicated the appellant was that of the complainant while on the other hand, the DNA test excluded him noting that the said test was carried out after a year and 5 months after the incident.

7. That the trial magistrate erred by convicting and sentencing him yet the prosecution failed to prove its case to the required standard. He contended that the P3 Form did not indicate the date of the injury. That PW1 stated that she was defiled by him and after one month, she was taken to the hospital where it was confirmed that she was 5 months pregnant. According to him, the difference of between one month and 5 months created a doubt in the complainant's evidence regarding the material date when he supposedly defiled her.

8. It was contended that his identification was not proper noting that the DNA test confirmed that he was not the father of the complainant's baby. He urged that the learned trial magistrate relied on section 124 of the *Evidence Act* in convicting him and yet the evidence of the complainant was not reliable. He relied on the case of R vs Liftus Paragraph (5) 1997 3 SCR 320 where the court held that:

> "even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances, you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilt of the accused beyond reasonable doubt."

9. Equally, the learned trial magistrate was faulted in sentencing the appellant to serve 23 years without observing that the minimum sentence prescribed under section 8(3) of the *Sexual Offences Act* is 20 years. To support the foregoing, he relied on the case of Jared Ouma Abuto vs Republic, Criminal Appeal No. E010 of 2022 at Kisumu Court of Appeal (2023) eKLR where the court held as follows:

> "15. in the appellant's case, no reasons were stated as to why he was sentenced to 20 years' imprisonment instead of the minimum sentence of 10 years. We find the sentence of 20 years' imprisonment that was meted to the appellant in count 1 of rape to be excessive. We set it aside and substitute it with 10 years' imprisonment."

10. In the end, the appellant urged this court to quash his conviction and set aside his sentence as the same did not have a sound legal leaning.

11. Mr. Owuor, counsel for the respondent opposed the appeal by urging this court to uphold the finding of the trial court. He relied on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013, where the court was of the view that the prosecution was expected to prove three things namely; that there was penetration; the complainant was a child and; the accused was indeed properly identified.

12. That the court properly convicted the appellant after satisfying itself that the complainant was a child whose evidence was reliable. It was submitted that the prosecution established the elements of the offence charged to the required standard and therefore, the appeal as lodged was destitute of any merit.

13. On sentence, the prosecution counsel relied on the case of R vs Ruth Wanjiku Kamande, Criminal Appeal No. 102 of 2018, where the Court of Appeal confirmed the mandatory death penalty as had been meted out by the High Court. Counsel contended that there are circumstances where the court is at liberty to mete out the mandatory sentences and the same is not illegal. This court was urged not to interfere with the finding of the trial court and further, be guided by the collective resolve and aspirations of the citizenry through their representatives at the legislature that saw it fit to have offenders who defile minors aged between 12 – 15 years to be kept away from the society for a minimum of 20 years.

14. I have considered the grounds of appeal and submissions by the respective parties. I have also read the record of the trial court and the impugned judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. [See Okeno vs Republic [1972] E.A 32].

15. Therefore, issues that arise for determination in this appeal are:

    i. Whether the prosecution proved its case to the desired threshold

    ii. Whether the sentence meted out is excessive.

16. Under Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 the elements that the prosecution must prove beyond reasonable doubt are: Age of the complainant; Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and Positive identification of the assailant.

17. PW1, Y.A.M., a fourteen-year-old girl who was living in[Particulars Withheld] with her mother, three sisters, and two brothers, testified that she had known the appellant as her grandfather, who was an uncle to her mother and lived with them in the same household. That on 10.07.2022, while at home around 4 p.m., the appellant allegedly called her into the kitchen where he was chewing miraa. He allegedly offered her a drink from a bottle, which he said was juice. After drinking it, she began to feel dizzy and subsequently lost consciousness. When she regained consciousness, she realized her clothing had been disturbed. That she was partially undressed and blood was coming from her private parts. It was her evidence that the appellant threatened her with a knife and warned her not to tell her parents lest he killed her. That out of fear, she kept silent.

18. She further stated that on 14.07.2022, the appellant again approached her when they were alone. She claimed that the appellant held her by the throat and covered her mouth as she screamed. He ordered her to undress under threat of a knife and assaulted her in the bedroom. She described experiencing pain and fear throughout the incident. Afterwards, she went to shower but did not disclose the matter to anyone, fearing for her life.

19. About a month later, she fell ill and was taken to a pharmacy in[Particulars Withheld], where she was informed that she was five months pregnant. She was referred to Garissa County and Referral Hospital, where the pregnancy was confirmed. She then disclosed to her parents that the appellant was responsible. Upon hearing this, the appellant fled. The matter was reported to the police, and later recorded her statement. She was examined at Garissa County and Referral Hospital and later gave birth to a baby boy named Fahim. During her testimony in court, she identified the appellant as the person responsible and carried her baby while testifying.

20. On cross-examination, she stated that the incidents had taken place at their home and that she had not screamed because the appellant had placed a knife on her neck. She confirmed that although there were neighbours nearby, none were present at the time. On re-examination, she clarified that the appellant had assaulted her on two separate occasions.

21. PW2, Adheyi Isaack, mother to PW1 and a businesswoman at[Particulars Withheld] testified that the complainant was fourteen years old at the time of the offence. That, at that time, the complainant used to attend Kasuku Primary School but she later, gave birth while still in class three. That the appellant is the complainant's grandfather, being PW2's maternal uncle.

22. She stated that on or about 10.07.2022, she had left for the market to sell samosas when PW1 during her absence, fell ill and was taken to the hospital by neighbours, where it was discovered that she was pregnant. That she later took her daughter to the hospital where she was shocked to find that PW1 was pregnant. She stated that her daughter had missed her menses, which prompted her to seek medical attention and the test results were positive. When she asked her daughter who was responsible, the girl named the appellant. Upon learning this, the appellant fled.

23. It was her evidence that one of her neighbours, a police officer named Cpl. Rahma, was informed of the incident. That she then reported the matter to Garissa Police Station where they recorded their statements. Thereafter, they proceeded to Garissa County and Referral Hospital for examination and treatment. Several medical tests were given out, including the P3 form, treatment notes, ultrasound image and report, laboratory receipts and results, and the birth certificate. That she returned these documents to Cpl. Rahma and later on, she was informed that the appellant had been arrested. She went further to state that together with her children, they used to live in the same house with the appellant who used to provide them with food. On cross-examination, she stated that PW1 told her that the appellant was the one who impregnated her.

24. PW3, Shaffi Omar Ahmed, a clinician at Garissa County and Referral Hospital, testified that he had worked in the Sexual Gender Based Violence (SGBV) department for about ten years, having previously served in other institutions for eight years before joining the hospital. On 30.11.2022, while on duty at the SGBV department, he received a minor identified as Y.A., aged fourteen, who had been brought in by a police officer. The minor had a history of being defiled by a man well known to her, who was a relative of her mother.

25. He carried out a general physical examination and found the victim's body largely stable, with no visible injuries on her general physique. However, she was pregnant. That an ultrasound was performed, which confirmed a single viable intrauterine pregnancy at twenty weeks and two days, in cephalic presentation. The victim was fourteen years old and had a history of repeated defilement. The findings confirmed that there had been penile-vaginal penetration.

26. He stated that he filled out the P3 form which he produced as PEX 1(a), together with treatment notes as PEX 1(b), the ultrasound tests as PEX 1(c), and the laboratory results and pregnancy test as PEX

1(d). On cross-examination, he stated that the pregnancy test was positive and that the ultrasound indicated the victim was twenty weeks and two days pregnant on the day of examination.

27. PW4, No. 89383 Cpl. Rahma Adan Ibrahim, attached to Garissa Police Station, testified that she was the investigating officer in the case. She recalled that on 29.11.2022 at about 9:25 a.m., while at the crime office, she received information that a defilement case had been reported in the occurrence book. The complainant was a fourteen-year-old girl, Y.A.M., who had arrived at the station accompanied by her mother. The girl stated that she had been defiled by a person she referred to as her grandfather, who was equally a relative. It was her evidence that she recorded their statements and thereafter escorted them for medical examination. She stated that the examination revealed that PW1 was twenty weeks pregnant.

28. On 6.12.2022, she arrested the appellant and on 07.12.2022, she charged him with the offence herein. She confirmed that the victim was fourteen years old as she produced her birth certificate, serial number 8966812, which indicated that her date of birth was 4.02.2008. She produced the same as PEX 2.

29. DW1, RGM, a plumber by trade denied committing the offence herein. He stated that between 10.07.2022 and 14.07.2022, he spent the whole day at his place of work and later reported for the night shift as a security guard at Naivas Supermarket. That at night, he was approached by the mother of the complainant together with four other people, who asked him to accompany them to Garissa Police Station. At the station, he was informed that he had impregnated the complainant. The police arrested him and detained him in the cells. The following morning, a police officer named Rahma interrogated him and subsequently, he was charged and arraigned in court.

30. According to him, there existed a grudge between him and the mother of the complainant. That when the allegation was made, he requested that a DNA test be conducted. The test was carried out twice and in both instances, he was excluded as the father. He produced the DNA report as Dex 1 and the exhibit memo as Dex 2. During cross-examination, he stated that he could not remember the exact date of arrest as he had gone to the police station voluntarily.

31. As already mentioned, in order to attain a conviction, the prosecution must prove beyond reasonable doubt the following: Age of the complainant; Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and Positive identification of the assailant.

32. In the case of Charles Wamukoya Karani vs Republic(supra) the court stated that:

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

33. According to section 2 of the Children's Act, a child is defined as an individual who has not attained the age of eighteen years.In the instant case, the complainant stated that she was 14 years old; PW4 also confirmed that PW1 was fourteen years old as she produced PW1's birth certificate, serial number 8966812, which indicated that her date of birth was 4.02.2008. Noting that the offence herein was allegedly committed between 10.07.2022 and 14.07.2022, it is not in doubt that the complainant was aged 14 years at the time in question. Therefore, there is no doubt that the complainant was a child at the time the alleged offence was perpetrated.

34. On the issue of "penetration", Section 2(1) of the *Sexual Offences Act* defines the term as:

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

35. Additionally, I am fortified in the finding of Mutuku J. in Wayu Omar Dololo v Republic [2014] eKLR where she held as follows;

> " The trial magistrate took judicial notice that a pregnancy results from a sexual activity and as such found penetration proved. On my part, I have examined the evidence carefully...A pregnancy is a biological condition that results from a sexual activity unless there is evidence that there was artificial implanting of fertilized ova into the uterus of a female human being... I am satisfied that evidence of pregnancy of the complainant is sufficient proof beyond reasonable doubt that penetration, whether partial or complete, took place".

36. In the instant case, PW3, testified that on 30.11.2022, he received a minor identified as Y.A., aged fourteen, who had been brought in by a police officer. The minor had a history of being defiled by a man well known to her, a relative of her mother. That upon carrying out a general physical examination, he found the victim's body largely stable with no visible injuries on her general physique. However, she was pregnant. An ultrasound was performed, which confirmed a single viable intrauterine pregnancy at twenty weeks and two days, in cephalic presentation. The victim was fourteen years old and had a history of repeated defilement. The findings confirmed that there had been penile-vaginal penetration. As such, it is this court's finding that indeed, the complainant was penetrated vaginally hence the pregnancy.

37. On identity, the Court of Appeal, in the case of Cleophas Wamunga vs Republic [1989] eKLR cautioned as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

38. From the record, PW1 narrated how while at home, the appellant offered her a drink which made her feel dizzy after drinking and consequently lost consciousness. That when she regained awareness, she realized her clothing had been disturbed, partially undressed and blood coming from her private parts. The appellant threatened her with a knife and warned her not to tell her parents, saying he would kill her if she did. Out of fear, she kept silent. Additionally, that on 14.07.2022, the appellant approached her when they were alone, held her by the throat, covered her mouth and forced himself on her. That upon undergoing a pregnancy test, it was found that she was pregnant. She then disclosed to her parents that the appellant was responsible for her pregnancy and that upon hearing, the appellant fled.

39. Having read the judgment by the trial court, this court is alive to the fact that the law does require corroboration of testimony by a minor as a sole or single witness. [See Section 124 of the *Evidence Act*]. However, there is the proviso to that section to the effect that, in cases of sexual offences, there need not be such corroboration if the trial Court believed that the minor-victim told the truth and recorded its reasons. The section and the proviso provide as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the 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 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."

40. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful.

41. The foregoing notwithstanding, the appellant urged that he was not the father to PW1's child. As such, he contended that he could not be responsible for the offence herein. To further urge his case, he requested for DNA to be carried out in order to substantiate his claim.

42. At this juncture, I must restate a determination by the Court of Appeal in the case of AML vs Republic [2012] eKLR that: -

> " The fact of rape or defilement is not proved by way of DNA test but by way of evidence." A DNA test would at most determine whether the accused is the father of the child".

43. From the evidence of PW1, it was her sworn evidence that the appellant was the father of her child. According to her, the appellant defiled her on two occasions specifically, on 10.07.2022 and 14.07.2022. PW3 in his testimony stated that his examination revealed that the complainant was pregnant and that an ultrasound test indicated the complainant was twenty weeks and two days pregnant on the day of examination.

44. I do not refute the fact that a pregnant woman cannot necessarily be sexually assaulted but what I grapple to understand is why the complainant stated that the appellant was the father of her child noting the various specific dates that she stated that the appellant defiled her vis a vis the age of the pregnancy. My grappling is further compounded by the fact that the appellant in his defence stated that there existed a grudge between him and PW2.

45. From the record, this court was not favoured an opportunity to appreciate more about the alleged grudge, despite the same arising during the exam in chief. It is my conviction that had the respondent properly cross examined on the same, this court would not be at cross roads as it currently is. In my view, a deeper dig out on the alleged grudge could have helped bring out more evidence which in the end could clear the hanging doubts in the mind of this court.

46. What is the purpose of forensic evidence? The complainant insisted on having been defiled by the appellant. she further insisted that the appellant was the father to her baby. The appellant demanded for DNA which turned out negative vindicating him that he was not the father to pw1's baby. That implies that pw1 was not truthful as somebody else was responsible. The DNA results is a clear indicator that penetration was done by somebody else and that the appellant was most likely being victimized because of the alleged grudge within the family.

47. Given the circumstances above, a doubt has been created in my mind as to whether the respondent proved its case to the required standard. I say this for the reason that the investigation was not only not thorough but also the prosecution's star witness, being the complainant herein was untruthful. It is trite that suspicion, however strong is not a basis for conviction and having weighed the entire evidence, I return a finding that the prosecution failed to prove its case against the appellant beyond reasonable doubt. The appellant's conviction is therefore quashed and his sentence set aside. He is hereby set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2025

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J. N. ONYIEGO

JUDGE