Ndwiga v Republic (Criminal Appeal 69 of 2023)
[2025] KEHC 18913 (KLR) (18 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 69 OF 2023

FN MUCHEMI, J

DECEMBER 18, 2025

BETWEEN

HOSEA NJUKI NDWIGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Senior Principal Magistrate Court in Ruiru by Honourable C. K. Kisiangani (SRM), in Criminal (S.O) Case No. 4 of 2020 on 14th September 2021)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Gatundu where he was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to serve life imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 6 grounds of appeal which can be summarised as follows:-

    a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant without the prosecution having proved its case to the standards required in criminal cases.

    b. The learned trial magistrate erred both in law and in fact by convicting and sentencing the appellant and failed to find that the entire prosecution case was impeachable under Section 163(1) of the *Evidence Act* thus unworthy to be relied upon.

    c. The learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the prosecution failed to call two crucial witnesses who ascertain whether he was with the complainant on the fateful day. The absence of their testimony creates a gap in the prosecution's case as to whether the complainant was in his house and thus the said doubt ought to have been resolved to his favour especially as he raised an alibi defence.

5. The appellant further submits that PW2, the complainant's mother did not notice any limping on the victim or any foul smell yet she was his mother and was with him every day and prepared him for school. The appellant argues that her testimony was influenced by the teachers, especially by PW4 whom he had a love relationship with. The appellant said he had discontinued the intimate relationship after discovering that PW4 was married. PW5 gave contradictory testimony to that of the victim as he stated that the victim told him that the appellant visited his house numerous times and defiled him. Further, PW6 gave contradictory testimony as he stated that the complainant took a bath before leaving the appellant's house which is inconsistent with PW1's testimony.

6. The appellant argues that penetration was not proved as PW7 testified that nothing was found conclusively after doing a lab test and anal swab on the victim. PW7 only concluded that the victim was defiled based on examining the victim and finding that his anus was bigger than usual. The appellant argues that many other factors can cause the anus being unusually big and further that the said findings are vague and subjective.

7. The appellant refers to the cases of Nalkona vs Republic (Criminal Appeal E013 of 2023) (2024) KEHC 4019 (KLR) (23 April 2024) (Judgment) and Kiarie vs Republic (1984) KLR and submits that he raised his defence of alibi during investigations which the investigating officer, PW6 confirmed during cross examination. The appellant submits that DW2 and DW3 testified that he spent time with them from 17th to 22nd. Thus it was upon the prosecution to investigate and interrogate DW2 and DW3 to dislodge it. It was not enough for the investigating officer to say that she did not believe him. Furthermore, the appellant argues that the learned magistrate erred in finding that he raised the defense of alibi late.

8. The appellant relies on the cases of Bernard Kebiba vs Republic (2000) eKLR and Moses Mutahi Mugo vs Republic (2022) eKLR and submits that PW1's testimony ought to have been corroborated to establish his identity and if he was the perpetrator of the crime.

The Respondent's Submissions

9. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent refers to Section 8(1) and 8(2) of the *Sexual Offences Act* and the case of Kyalo Kioko vs Republic (2016) eKLR and submits that it proved the ingredients of the offence of defilement. The respondent submits that PW1 testified clearly that the appellant penetrated his anus using his penis when he went to his house to visit him. The victim narrated how the appellant undressed him and committed the said offence, a fact that was well corroborated by the evidence of the state witnesses and the medical evidence which was adduced by the doctor who examined the victim. The teachers at school who were witnesses, stated that they noted that the victim walked with a limp and smelt of faeces and the doctor stated that even though no injuries were noted at the time of the examination, the victim's anal opening was rather too wide, an indication of penetration. Thus, the respondent submits that the element of penetration was proven

10. On the issue of age of the victim, the prosecution produced the victim's birth certificate and the victim himself testified that he was ten years old at the time of the incident and therefore in the bracket defined by Section 8(2) of the *Sexual Offences Act*. The respondent relies on the cases of Francis Omuroni vs Uganda, Criminal Appeal No. 2 of 2000 and Martin Okello Alogo vs Republic [2018] eKLR and submits that the prosecution proved the age of the complainant.

11. The respondent submits that proof of participation of an accused person is crucial as it enables one to determine who to attach criminal responsibility to. The respondent submits that the evidence on record is that the perpetrator was the school bus driver and had on some occasions ferried the victim from home to school. Prior to the incident, the victim had visited the appellant's home which he described as a one roomed house. The victim testified that he was shown the appellant's home by his other school mates and that they would play with bottle tops with the appellant. He further testified that on one occasion the appellant prepared a meal which they ate and the appellant would sometimes assist him with his school work during such visits. The respondent further stated that it is the victim who directed the officers from Ruiru police station to the house of the appellant at the time of arrest. The respondent thus submits that this was a case of recognition which is more satisfactory, assuring and reliable than identification. To support its contentions, the respondent relies on the case of Anjononi & Others vs The Republic [1980] KLR.

12. The respondent submits that from the evidence that was adduced at trial, it is clear that the appellant is the person who defiled the victim and there was no possibility of mistaken identity.

13. The respondent submits that all the prosecution witnesses were consistent and corroborated each other. Even the unsworn testimony of the appellant and that of his witnesses did not controvert the prosecution evidence.

14. The respondent submits that the report of the defilement against the appellant was not engineered by PW4. PW4, a teacher at the school where the victim was a pupil, was the first to note some behavioural changes in the victim and when she tried to inquire from the victim what the problem was, the victim did not open up. She therefore requested another teacher, PW5, Wilson Mulimo who was new in the school to talk to the victim. The victim opened up to PW5 and the matter was reported to the school administration and the victim's mother was duly notified. A report of the incidents was filed at Ruiru police station. The respondent further submits that PW4 denied the allegations by the appellant that she framed him with charges due to their love relationship gone sour.

15. The respondent submits that the trial court held that the defence of alibi raised by the appellant was deemed an afterthought and a mere denial of the said charges. The respondent argues that it is trite law that even though it is the duty of the prosecution to discredit alibi evidence, the same must be raised at the earliest instance so as to allow the prosecution interrogate the alibi defence. The appellant herein raised the same at the end of the prosecution case when the investigating officer was testifying but the prosecution was still able to discredit the alibi defence. Further, the defence was never raised when all the other prosecution witnesses testified. The appellant called two witnesses who contradicted each other on the whereabouts of the appellant at the material time.

Issues for determination

16. The appellant has cited 6 grounds of appeal which can be compressed into two main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the sentence meted out against the appellant was justified.

The Law

17. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

18. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " 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 vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 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 finding and 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 vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

19. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:

    a. Whether there was conclusive evidence of all the ingredients of defilement;

    b. Whether the prosecution case had contradictions and inconsistencies;

    c. Whether the trial court considered the defence evidence.

Whether there was conclusive evidence of all the ingredients of defilement

20. Relying on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013 where it was stated that:- "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

21. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

> " ....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think

that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

22. PW1 testified that he was 10 years old and PW2, the complainant's mother testified that PW1 was born on 18th March 2010 and was 10 years old. PW6, the investigating officer testified that the minor was born on 18th March 2010 and was ten years old at the time of the offence. The investigating officer produced the minor's birth certificate as an exhibit. I have perused the said birth certificate which indicated that the minor was born on 18th March 2010. At the time of the offence, the minor was approximately ten years. It is therefore, my considered view that the prosecution proved the age of the minor.

23. Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

24. On the element of penetration, PW1 testified that on 18th January 2010 he went to visit the appellant at his house after attending teaching sessions at St. Monica church. The witness testified that on his arrival, he found the appellant was alone and the two began playing bottle top games until PW1 got tired. After taking a rest, the appellant showed him some mathematics and then he went home. The witness further testified that he went back to the appellant's house the next day, the appellant cooked rice and beans and they ate the food and then played the bottle tops game. The appellant then left with the witness and along the way they met one Rowe and went back to the appellant's house where they played bottle tops game once more. The witness stated that after the game, the appellant told him to remove his clothes. The appellant forcefully removed his trousers and the victim remained with his shirt on. He further testified that he resisted the sexual assault but the appellant pushed him and inserted the thing he uses to urinate into his anus. The appellant then told him he was done and told him to go home. The witness stated that he dressed up and went home and he did not take a bath that evening. PW1 further testified that he did not scream during the assault as there was no one outside. He said that he felt pain in his buttocks and when he went to school, his home science teacher, Mildred saw him limping and told him to see her in the staffroom after the lesson. The witness stated that his teacher was with other teachers when she asked why he was limping and he told them that he was feeling pain in his buttock. The minor testified that he told teachers Mildred, Carol and Wilson that he went to the appellant's house and that he was sexually assaulted.

25. Rose Waruguru, a clinical officer at Ruiru Hospital, PW7 testified that the minor was examined on 22nd January 2020 and the Post Care Rape Form and P3 Form filled. The witness testified that the minor was accompanied by his mother and teacher PW5 in this case. The teacher said that she noticed that the minor had changed his walking style and was emotional. He isolated himself from the other children and was found to be smelling faeces. Upon inquiry, the minor told him that the appellant had slept with him from the back. PW7 testified that she examined the minor and did not find any injuries on his anus but found that his anus hole was bigger than normal and then concluded that the minor's anus had been penetrated. The witness further classified the minor's injuries as grievous harm and concluded that he had been sexually penetrated in his anus. The doctor testified that the injuries were classified as grievous harm. PW7 produced the Post Rape Care Form, the P3 Form and treatment notes as exhibits.

26. To prove penetration, the complainant's evidence ought to be corroborated by the medical evidence produced by the medical officer. Thus the evidence of PW1 is corroborated by the medical evidence produced by PW7 who pointed out that the examination done on PW1 revealed that his anus hole was

larger than normal which indicated penetration of the penile. The evidence of PWP1 was corroborated by the medical evidence. The inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration did occurred.

27. On the issue of identification, PW1 testified that the appellant was a bus driver at their school known as Vine Academy and that the appellant drove him from home to school on some occasions. PW1 further testified that the appellant was his friend and he visited him on two occasions at his home which was a walking distance from appellant's home. The minor testified that the appellant used to help him with his mathematics homework and even on one occasion he cooked for them lunch of rice and beans and they ate. He further testified that they used to play the bottle tops game with the appellant and he was showed the appellant's house for the first time by Xavier, Alex and Rowie. Furthermore, PW6 testified that the minor is the one who led the police to the appellant's house. Thus the appellant was well known to the complainant. This was a case of recognition and not simple identification. The appellant did not deny knowing the complainant. He stated that he was with DW2 and DW3 on the fateful day and that the charges were framed against him by PW4. Thus, the testimony of PW1 identifies the appellant as the perpetrator pf the sexual assault. It is thus my considered view that the appellant was positively identified as the perpetrator. It was identification by recognition for PW1 knew him well. As such, I find that the prosecution proved the element of identification.

28. The appellant has complained that the minor's evidence ought to have been corroborated. It is trite law that in sexual offences cases, pursuant to Section 124 of the *Evidence Act*, corroboration of evidence by the victim is not a mandatory requirement as long as the court believes the victim is telling the truth and records the reasons for believing the victim. On perusal of the record, the trial magistrate conducted a voir dire examination on the complainant and noted that the minor was intelligent enough to answer the questions put to him but he did not understand the nature of oath. Thus, the trial magistrate directed that the minor gives unsworn evidence. The learned magistrate further observed that the minor was consistent, clear and truthful as he narrated his account of what transpired on the material day. I have perused the trial court's proceedings and noted that PW1's evidence was precise and consistent and unshaken on cross examination. It is trite law that PW1's evidence does not require corroboration by any other evidence save for medical evidence as provided for under Section 124 of the *Evidence Act*. The medical evidence of PW7 was to the effect that there was forceful penetration. It is my considered view, this corroboration by PW7 was sufficient. It is therefore my considered view that the complainant's evidence was cogent, consistent and well corroborated by that of the medical evidence.

29. The appellant argues that the prosecution did not call crucial witnesses to prove its case, in particular, the appellant states that the prosecution ought to have called the complainant's friend Rowe and the lady who used to guard his gate where he lives to prove the allegations that PW1 was seen with the appellant and therefore defiled.

30. It is trite law that the prosecution is required to avail to the court all relevant evidence to enable the court make an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact. Section 143 of the *Evidence Act* (Cap 80) Laws of Kenya provides:-

> No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.

31. In the case of Bukenya & Others vs Uganda [1972]EA 549 the court addressed itself thus:-

    a. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

b. That the Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

32. Similarly in Keter vs Republic [2007] 1 EA 135 the court held inter alia thus:-

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

33. It is evident here that the prosecution did in fact call the material witnesses whose evidence as a whole is sufficient in this case. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available. In the instant case, PW1 gave a consistent account of how the appellant defiled him. He told the court that at the time he and the appellant had finished playing the bottle top game when he told him to remove his clothes. Furthermore, on cross examination, the complainant's evidence was not shaken as he maintained that the appellant defiled him. The trial court found that the complainant's evidence was consistent and clear and was not shaken on cross examination by the appellant as he maintained that the appellant defiled him. The trial court further observed that even though PW1's friends were not called as witnesses, the appellant was well known to the complainant as he is the one who led the police officers to the appellant's house when he was arrested. The record, shows that the complainant's friend one Rowe or the guard at the gate of the appellant's house did not witness the commission of the offence and thus by not calling them no prejudice was occasioned to the appellant. The prosecution will call only the witnesses they choose to call in support of their case. It is therefore my considered opinion that the prosecution is an independent entity and ought not to consult any one as to who to summon as a witness. Accordingly, it is my considered view that PW1's testimony was cogent, consistent and not shaken during cross examination.

34. The appellant argues that the prosecution's case was filled with material inconsistencies and contradictions thus causing doubt on the alleged offence. Relying on the case in the Court of Appeal Tanzania of Dickson Elia Nsamba Shapwata & Another vs The Republic Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

35. The appellant argues that the testimony of PW5 and PW6 contradicts that of PW1. PW5 testified that PW1 told him that he visited the appellant many times and was defiled many times. Further, PW6 testified that PW1 took a bath before leaving the appellant's house whereas PW1 testified that he did not take a bath after the incident. From the evidence of PW1, he was very consistent and testified that the appellant defiled him in his house and when the appellant finished he told the minor to go home. The witness further testified that he dressed up and went home and did not take a bath at the appellant's house. The issues raised by the appellant are not material discrepancies. Furthermore, they do not relate to the actual defilement. PW1 gave a consistent and cogent account of how the appellant defiled her and her testimony remained unshaken by the appellant during cross examination. It is thus my considered view that there were no material inconsistencies or contradictions that went to the root of the matter.

36. The appellant further submits that the trial court did not consider his defence of alibi. On perusal of the trial court record, the appellant testified that he left his house on 17th January 2020 and went to

Drumvale estate in Ruai to DW2 and DW3's house to build their garage and chicken shed. He further testified that on the fateful day he went to church with DW2 and DW3's family and they left church on 19th January 2020. He then continued working until 22nd January 2020 when he went back home. The appellant testified that PW4 framed him with the instant charges as he was in a relationship with PW4 and it turned sour when he found out that PW4 had a husband who lived in Qatar. The witness further testified that he left the school where he was employed as a driver because PW4 kept following him and threatening him. The appellant called two witnesses to support his case. DW2 and DW3 both testified that the appellant went to their house on 18th January 2020 and they went to church on Sunday until evening. They went back to the house where they worked on building the garage and chicken house until 22nd January 2020.

37. On perusal of the record, the appellant raised the defence of alibi during cross examination of PW6, the investigating officer who informed the court that she knew that the appellant was lying when he said he was in church on 18th January 2020. It is trite law that an alibi defence ought to be raised at the earliest opportunity to give prosecution time to investigate it. The appellant raised the defence a bit late in the day. That notwithstanding, the trial court considered the appellant's defence and concluded that it was not substantiated. The prosecution's evidence placed the appellant squarely at the scene and there was no possibility of mistaken identity. On perusal of the record, the minor's testimony was not shaken during cross examination and he gave a clear account of his ordeal linking the appellant to the commission of the offence. Thus the trial court was inclined to believe the evidence of the prosecution witnesses as opposed to the appellant's defence. Furthermore, there was no evidence showing that PW4 set the appellant up by telling PW1 to frame him. PW1 gave a comprehensive testimony of the incident in a consistent manner. All the elements of the offence were proved, in my view. I am of the considered view that the prosecution proved its case against the appellant beyond any reasonable doubt.

38. It is therefore my considered view that the conviction was based on cogent evidence and should be upheld.

Whether the sentence is harsh and excessive

39. The Court of Appeal, on its part in Bernard Kimani Gacheru vs Republic [2002] eKLR restated that:-

> " 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."

40. Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 provides that:-

> 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.

41. The Supreme Court decision in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) held that:-

> Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regards to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence.
>
> The judgment of the Court of Appeal delivered on October 7, 2022 was one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remained lawful as long as Section 8 of the *Sexual Offences Act* remained valid. The Court of Appeal had no jurisdiction to interfere with that sentence.

42. Taking into consideration the nature and circumstances of the offence, the mitigation given by the appellant and the ramifications of the appellant's actions on the child's future, it is my considered opinion that the sentence of life imprisonment is lawful, reasonable and not excessive I find no reason to interfere with the sentence.

43. Consequently, I find no merit in the appeal and hereby dismiss it accordingly.

44. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 18TH DAY OF DECEMBER 2025.

F. MUCHEMI

JUDGE