Muzungu v Rpublic (Criminal Appeal E065 of 2024)
[2026] KEHC 924 (KLR) (28 January 2026) (Judgment)

Neutral citation: [2026] KEHC 924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E065 OF 2024

JN NJAGI, J

JANUARY 28, 2026

BETWEEN

JUMA KAZUNGU MUZUNGU ..... APPELLANT

AND

RPUBLIC ..... RESPONDENT

((Being an appeal from the original conviction and sentence by Hon.S.D.Sitati, Resident Magistrate, in Kilifi Senior Principal Magistrate's Court Sexual Offence Case No. E001A of 2021 delivered on 23/2/2022))

JUDGMENT

1. The Appellant herein was tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 26th and 28th December 2020 at (name withheld) area in Kilifi South sub county within Kilifi county he intentionally and unlawfully caused his penis to penetrate the vagina of N.M. (herein referred to as the complainant), a child aged 15 years.

2. The Appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:

    1) That the trial magistrate erred in law and fact for not observing that the charge sheet was incurable, defective due to being in variance with the evidence on record.

    2) That the learned trial magistrate erred in law and fact for not considering that the circumstances of the case couldn't support the offence of defilement as required in Section 43 of the *Sexual Offences Act* No. 3 of 2006.

3) That the learned trial magistrate failed to note that the circumstances of the case revealed consent as provided under Section 42 of the *Sexual Offences Act* No. 3 of 2006 which rested on both implied and express consent.

4) That the learned trial magistrate erred in law and fact for not making a finding that the minor was not a witness worthy of belief.

5) That the learned trial magistrate erred in law and fact for not considering the case under Section 8(5) of the *Sexual Offences Act* No. 3 of 2006 even after realizing the minor was 16 years as stated in the clinical card.

6) That the learned trial magistrate erred in law and fact for not considering the appellant's defense.

Case for the prosecution

3. The case for the prosecution is that the complainant was a 15 year-old primary school pupil. She was living with her mother PW2 at T. village. That the Appellant was a person known to her and lived a distance away from her home.

4. It was the evidence of the complainant that on the 26th December 2022, she left home and went to the beach with her younger siblings. An aunt called Zawadi and a sister-in law called Kache followed them to the beach. The Appellant joined them at the beach. They stayed in the beach up to 8pm when Kache and Zawadi boarded a motor cycle and went home. The Appellant told them to wait for the motor cycle to come back for them. The motor cycle returned and picked them. The Appellant had a soda that he gave to the complainant and upon taking it she felt dizzy. She, her siblings and the Appellant boarded the motor cycle. The Appellant dropped her on the way and proceeded to take her siblings home. The Appellant went back and picked her where he had dropped her. He took her to his house. She found herself on his bed on the following day when she woke up at 10am. She did not have her pants on and she realized that she had been defiled. The Appellant was not there. She stayed in the house throughout the day. The Appellant returned to the house at 5pm. She was taken to hospital.

5. The mother to the complainant PW2 testified that the complainant had on the material day gone to the beach with Tabu and Kache. That the Appellant brought the other two home on a motor cycle. The Appellant told her that he had dropped the complainant on the way to answer a short call. That she PW2 went to the road and called the complainant but she did not answer. That she called the Appellant and he gave her the same story. That on the following day the Appellant called her sister Saumu and told her that he was bringing the complainant home. That at 5pm she was told by her children that the Appellant had brought the complainant home. She interrogated the complainant and she told her that the Appellant had given her a soda which she took and started to feel dizzy.

6. It was the evidence of the complainant`s mother that she at that stage sent for the Appellant and he went to her home. She questioned him but he denied. She sent for the village elder but the Appellant fled. She took the complainant to the police station and to Kilifi County Hospital. She was issued with a P3 form.

7. The complainant was examined at the hospital by a doctor, PW4, whose evidence was that he found her with a broken hymen but with no blood or lacerations in the vagina. The doctor completed her Post Rape Care form and the P3 form on 29/12/2020.

8. The case was investigated by PC Oketch of T. police station. It was his evidence that the report was made at the police station on 28/12/2020 and he recorded the statement of the complainant on

29/12/2020. He took her to hospital. He looked for the suspect and arrested him on 12/1/2021. He obtained the complainant`s hospital clinic card that indicated her date of birth as 10/11/2005 which placed her age at the material time at 15 years. He charged the Appellant with the offence.

9. During the hearing of the case in court, the doctor PW4 produced the Post Rape Care form and the P3 form as exhibits, P.Exh.2 and 3 respectively. The complainant`s mother PW2 produced the complainant`s clinic card as exhibit, P.Exh.1.

Defence case

10. When placed to his defence the Appellant stated in an unsworn statement that he was arrested by policemen on 12/1/2021 and taken to the police station. That at 4 pm a certain lady who owed him money and had threatened him when he demanded for his money spoke to the police. He did not get what was going on. He was charged. He did not call any witness in the case.

Submissions

11. The appeal was canvassed by way of written submissions. The Appellant submitted that the charge was defective in that the investigating officer told the trial court that complainant`s mother reported that the complainant was aged 16 years while the charge sheet indicated that she was 15 years. That this was not a minor disparity as it occasioned failure of justice in that it led the court into imposing a wrong sentence.

12. The Appellant submitted that the complainant alluded in her evidence that the appellant gave her a soda that was laced with drugs but her evidence showed that she was conscious as she had a vivid account of the events. That this showed that she was not a credible witness.

13. The appellant submitted that the case was not proved beyond reasonable doubt. He urged the court to allow the appeal.

14. The Respondent on the other hand submitted that he appeal lacks merit and ought to be dismissed. That the complainant testified that she was aged 15 ½ years at the time of the incident which was corroborated by the clinic health card that showed that she was born on 18/19/2005 thereby placing her age at the time of the incident at 15 years. That the age of the complainant was therefore proved.

15. That the element of penetration was proved by the complainant`s evidence that the Appellant took her to his house where he defiled her. That this was supported by the findings of the doctor, PW4. More so that the trial court found the complainant to be reliable, consistent and credible.

16. It was submitted that the appellant`s defence was a mere denial that did not challenge the evidence of the prosecution witnesses. That the Appellant failed to substantiate that the complainant`s mother owed him money. That the complainant in the case was PW1 and not her mother PW2. That the trial court considered the Appellant`s defence and dismissed it.

Analysis and determination

17. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of Kiilu & another v Republic [2005]1 KLR 174, thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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."

18. The appellant was facing a criminal charge. Proof in a criminal trial is that of beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows on the standard of proof in criminal cases:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

19. The elements of the offence of defilement that the prosecution is required to proof beyond reasonable doubt are: proof of the age of the victim, proof of penetration and identity of the of the perpetrator, see the Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.

20. Starting with the element of the age of the complainant, the law is that the age of a person can be proved in various ways. In the case of Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

> " ... 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."

21. The complainant in this case told the trial court that she was aged 15 ½ years at the time that she testified in court in June 2021. Her mother PW2 produced her hospital health clinic card, P.Exh.1, that showed that the complainant was born in the year 2005. Such a medical card is credible in proving the age of a person. The age of the complainant was therefore proved at 15 years at the material time.

22. On the element of penetration, Section 2 of the Sexual Offence Act defines the same as:

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

23. The prosecution had the duty to establish that the complainant was partially or fully sexually penetrated by the Appellant Penetration can be proved by way of medical evidence or by oral or circumstantial evidence. In AML v Republic (2012 eKLR the Court of Appeal held that:

> It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape

and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence.

24. The trial magistrate stated in his judgment that the doctor PW4 found the complainant with a broken hymen. That this proved defilement. I find this to have been a wrong presumption by the trial magistrate as a broken hymen is not proof of defilement. It has been recognized that the hymen can be broken by other ways such as vigorous exercise. More so it has been observed that some girls are not born with it. The trial court was therefore in error to make the above finding. There were no fresh wounds to indicate that there was medically proven penetration on the complainant. In view of this there was no medical evidence in support of defilement. That left the prosecution to prove the charge by way of either oral or circumstantial evidence.

25. The trial magistrate believed the evidence of the complainant that the Appellant penetrated her in his house. That this was given credence by the evidence of the complainant`s mother that the Appellant took the complainant`s siblings home on a motor cycle and told her that he had left the complainant on the way. That the Appellant took the complainant home on the following day.

26. There is no doubt from the evidence that the Appellant was a person well known to the complainant and her mother. It was the evidence of the complainant`s mother that the Appellant had at that time been contracted to build a house near their home. The complainant said in her evidence that she was in the beach with the Appellant until 8pm when he took her to his house on a motor cycle. She met him again on the following day when he returned to his house at 5pm and he took her home. From this evidence, the complainant had sufficient time to identify the Appellant. She cannot have mistaken him for somebody else. The question is whether the Appellant penetrated her when he took her to his house.

27. The complainant in her evidence on penetration stated as follows:

> " I found myself on the bed. I learnt that he had sex with me. I don`t know when it is that he had sex with me. But I noticed that my pants were not on. I had a dress on".

28. It is clear that the only reason the complainant was saying that the Appellant had sex with her is because she found herself without her pants on when she woke up in his house in the morning. Though she says that she learnt that he had sex with her, she did not explain what informed her that he had sex with her. She did not say that she felt the Appellant inserting his penis into her vagina. She cannot say whether he penetrated her by inserting his penis into her vagina or anything else. It would appear that the complainant was just assuming that the appellant had had sex with her because she did not have her pants on when she woke up. This by itself was not sufficient evidence to prove penetration. There was no evidence that the Appellant gave the complainant a stupefying drink as no examination was carried out at the hospital to that end. The examination done at the hospital did not indicate anything to show that she was penetrated in any way.

29. In view of the foregoing, it is my finding that the charge against the Appellant was not proved beyond reasonable doubt and the Appellant was entitled to the benefit of doubt. Consequently, the conviction entered by the trial court on the Appellant is quashed and the sentence set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 28TH DAY OF JANUARY, 2026

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochola for Respondent

Appellant – present virtually at G.K. Prison Shimo-la-Tewa

Court Assistant - Rahma