Mrimi v Republic (Criminal Appeal E101 of 2024)
[2026] KEHC 920 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KEHC 920 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E101 OF 2024

JN NJAGI, J

JANUARY 30, 2026

BETWEEN

JUMA CHENGO MRIMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. R. Amwayi, Principal Magistrate, in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E011 of 2024 delivered on 29/7/2024)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve life imprisonment. The particulars of the offence were that on the 19th day of February, 2024 at (name withheld) area within Kilifi County he unlawfully and intentionally caused his penis to penetrate the vagina of M.S.H. (herein referred as the complainant/victim), a child aged 11 years.

2. The Appellant was aggrieved by the conviction and the sentence of the trial court and lodged the instant appeal on the following amended grounds of appeal:

    1. That the learned magistrate erred in law and fact for not appreciating that the circumstances surrounding the crime scene were not conducive for a positive identification and recognition.

    2. That the learned magistrate erred in law and fact for not considering that the issue of penetration was governed by fragmentary evidence which created a great doubt to be of evidential value.

    3. That the learned trial magistrate erred in law and fact for failing to iron out the grave discrepancies and inconsistencies in the prosecution case.

4. That the learned trial magistrate failed to find that the exhibited documents for the prosecution were of no evidential value.

5. That the learned trial magistrate erred in law and fact for not providing penetrative analysis of the prosecution evidence.

6. That the learned trial magistrate erred in fact and law for disregarding the appellant`s defense evidence which was not vitiated by the prosecution evidence.

Prosecution Case at the trial court

3. The prosecution called 5 witnesses in the case. Their case was that the complainant who was PW2 in the case was a grade 6 primary school pupil then aged 11 years. She was living with her step father (the Appellant), her Mother PW1 and her siblings – a sister called K aged 7 years who was PW3 in the case and a brother called Ali aged 5 years who did not testify in the case.

4. That on the material day the complainant`s mother had travelled to Likoni in Mombasa and left the Appellant at home with the children.

5. It was the evidence of the complainant that on the evening of the material day, she and her two siblings ate supper and went to sleep in their room. That while asleep the Appellant went to the room, removed her panties together with a leso she had wrapped on her waist and then inserted his penis into her vagina. After doing so, he told her to lie on her stomach. She did so and he inserted his penis into her anus. He warned her not to tell anyone on what had happened. She woke up K who switched on the lights and they saw the appellant naked in the room. She told him that she will report him to her mother. That on the following morning the appellant called her and warned her not to tell their mother about the incident. She did not inform her mother immediately upon her returning home but she was thereafter in pain and she reported the incident to her mother. They reported the matter to the police and she was taken to Mariakani hospital where she was examined.

6. The complainant`s sister PW3 testified that she on that night woke up and found the Appellant having removed the complainant's panties. The complainant asked her to switch on the lights but there were lights in the toilet. She saw the appellant naked next to the complainant. The complainant was also naked. When the lights were switched on, the appellant left and went back to sleep.

7. The mother to the complainant PW1 told the trial court that she went to Likoni on 18/2/2024 and returned home on 20/2/2024. Later the complainant informed her that when she left for Likoni her father went to her bed at night, undressed her and had sex with her. She PW1 informed her brother Omar about the report who advised her to report the matter to the village elder who referred her to the area chief. The matter was thereafter reported at Rabai Police Station. She was referred to Mariakani Hospital where the complainant was examined and a P3 form filled. She said that the girl was at the time aged 11 years which she confirmed with a birth certificate that showed the complainant to have been born on 4/12/2012.

8. The clinical officer who examined the complainant at Mariakani Sub County hospital PW5, told the court that the complainant had a normal external genitalia and an absent hymen. He was of the view that there was penetration. He completed her P3 form and Post Rape Care form.

9. The case was investigated by PC Gertrude Ngoa PW4 who issued the complainant with a P3 form and escorted her to Mariakani sub county hospital where penetration was confirmed and a P3 form completed. She recorded statements of witnesses and arrested the Appellant. She charged him with the offence.

10. During the hearing of the case in court, the complainant`s mother PW1 produced the complainant`s birth certificate as exhibit, P.Exh.1. The clinical officer PW5 produced the P3 form, the Post Rape Care form, the treatment notes, GBV client referral form and the laboratory results as exhibits, P.Exh. 2 - 5 respectively.

Defence Case

11. When placed to his defence the Appellant stated in a sworn statement he is a stepfather to the complainant. She is aged 11 years. That on the evening of the material day he arrived home from evening prayers at 8:30pm. He found the complainant, her sister K and his son Ali at home. He ate supper and slept. He denied committing the offence. He said that all what the complainant told the court were lies. That she was told by her mother and her uncle Omari to lie against him as he had a land dispute with her said uncle. That he was told by his sister-in-law called Tatu that she overheard the complainant`s mother couching the complainant to lie that he had defiled her. He said that the clinical officer also lied.

12. The appellant did not call any witness in the case.

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

Appellant`s Submissions

14. The Appellant submitted that the incident was said to have happened at night. That the complainant said that the appellant removed her panties and leso. That she also said that he did not have a panty on. He wondered how she was able to see all these when there was no evidence of light in the room. That it is after seeing all this that she told K to switch on the light. That K on the other hand said that there was light from the toilet but there were no details given on the said light. He submitted that there was doubt on his identification.

15. The Appellant submitted that the complainant`s mother testified that she returned home on 20/2/2024. That she was told of the incident on the next Saturday but the complainant was not taken to hospital until 27/2/2024. The appellant wondered why there was such a long delay in taking the complainant to hospital.

16. The appellant submitted that the complainant was found with a missing hymen but that absence of the same is not prove of defilement.

Respondent`s submissions

17. The Respondent on the other hand submitted through the prosecution counsel that the case was proved beyond reasonable doubt. That all the ingredients of defilement being the age of the complainant, penetration and identification of the perpetrator were proved. That the age of the complainant was proved via the certificate of birth which indicated that the complainant was born on 4th December, 2012 making her 11 years at the time of the commission of the offence.

18. On penetration, the respondent submitted that the evidence of the complainant touching on the events of that fateful day were sufficient to sustain a conviction in view of the proviso to section 124 of the *Evidence Act* to the effect that the court can convict on the sole evidence of a child victim in sexual offences involving children as long as the court believes that the child is telling the truth and records reasons for so finding. Nevertheless, that in this case the evidence of the complainant was corroborated by her sister PW3 and the Clinical Officer PW5 wherein the latter confirmed that there was penetration. That PW3 saw both the Appellant and the complainant naked in the room.

19. On whether the appellant was positively identified, it was submitted that both the complainant and PW3 saw the Appellant in their room and he was someone well known to them.

20. As regards the Appellant`s defence the Respondent submitted that the Appellant did not call the woman he alleges overheard PW1 couching the complainant on false evidence against him. Neither did he disclose the information to the police upon his arrest. Further that the Appellant did not provide any evidence of his dispute with the complainant`s uncle. That there was no reason for the prosecution witnesses to lie against him.

21. It was the Respondent`s submission that the sentence issued by the trial court was proper and well within the law. Reliance in this respect was placed on the Supreme Court of Kenya Petition No. E018 of 2023, Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR).

22. The Respondent urged the court to dismiss the appeal.

Analysis and determination

23. 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."

24. 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, penetration and identity of the of the perpetrator, see the Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.

25. 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."

26. The complainant in this case and her mother said that she (the complainant) was aged 11 years at the time the offence was committed. This evidence was corroborated by the evidence contained in the complainant`s birth certificate that showed that she was born on the 4th December 2012. The offence was reported to have been committed on 19th February 2024, which placed the complainant`s age at

11 years and 2 months at the time of the commission of the offence. The age of the complainant was thus proved at 11 years.

27. 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."

28. The prosecution had the duty to establish that the complainant was partially or fully sexually penetrated by the Appellant.

29. Penetration can be proved by oral or by circumstantial evidence which can be corroborated by medical evidence. The medical evidence adduced against the appellant was that the complainant was found with a missing hymen but no spermatozoa was seen. The alleged offence took place on 19/2/2024 and the complainant was examined at the hospital on 28/2/2024, which was 9 days later after the date of the incident. The examination may not have elicited much due to the delay in going to hospital.

30. Though the trial magistrate stated in his judgement that the absence of hymen was proof of penetration on the complainant, there was no evidence that the hymen was freshly broken. The mere absence of hymen is not proof of penetration as the hymen can be broken by other activities such vigorous exercise. More so that some girls are born without it, see P.K.W v Republic [2012] KECA 103 (KLR). In view of this the trial magistrate erred in holding that absence of hymen proved penetration. There was in actual fact no medical evidence to support the evidence of the complainant that she was penetrated by the Appellant.

31. In the absence of medical evidence to support defilement, the appeal turns on whether there was sufficient oral or circumstantial evidence in proof of the offence.

32. The offence in this case was said to have been committed at night. The question then is whether the two prosecution witnesses, the complainant and her sister K, PW3, identified the Appellant as the person they saw in their room.

33. The trial magistrate in his judgment stated that there was no reason for the complainant and her sister PW3 to frame up the case against the appellant as he was their father. That the two witnesses, the complainant and her sister K, PW3, identified the Appellant as the perpetrator as there was light in the room. That his defence was an afterthought and incapable of being believed.

34. The law on evidence of identification at night or in difficult circumstances is that such evidence should be examined carefully for the court to satisfy itself that the circumstances of identification were favourable and free from the possibility of error before it can safely be made the basis of a conviction. This fact was recognized by the Court of Appeal in the case of Cleopas O. Wamunga v Republic, Criminal Appeal No. 20 of 1989 where the court stated 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 minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he (accused) alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification...."

35. The complainant narrated to the trial court that on the material day she went to sleep and when she woke up she found the appellant in her room. That he removed her panties together with a leso she had

wrapped around her waist. He then inserted his penis into her vagina and into her anus. He warned her not to tell anyone. Though the witness did not say as to what had enabled her to identify the Appellant by that time, she said that her sister K switched on the lights in the bedroom and she confirmed that the person who had defiled her was the Appellant.

36. The complainant`s sister PW3 corroborated the evidence of the complainant on the Appellant`s presence in the room and that she saw both the complainant and the Appellant were naked. PW3 also corroborated the evidence of the complainant that the lights in the room were switched on and they clearly saw the Appellant.

37. I have considered the evidence of the prosecution witnesses in its totality. I have no reason to differ with the finding of the trial court that the complainant and her sister PW3 identified the Appellant as the person they saw in their room on the material night. Though the complainant said that the lights in the bedroom were switched off when the Appellant entered into the bedroom, it is clear from the evidence of her sister K, PW3, that there was light emanating from the toilet when K woke up. K was able to see from the light emanating from the toilet that the person who was in the bedroom was the Appellant.

38. It is further clear from the evidence of both the complainant and K that the light in the bedroom was switched on and the two witnesses confirmed by aid of the said light that the person who was in their bedroom was the Appellant. Consequently, the circumstances on identification of the Appellant by the two witnesses were favourable for positive identification. The complainant and K were able to recognize the Appellant as he was a person well known to them as their father. There was no possibility of mistaken identity. It is clear that the Complainant upon recognizing the Appellant told him that she would report the incident to her mother. She would not have warned the Appellant if she had not recognized him.

39. The complainant said that the Appellant at first inserted his penis into her vagina after which he ordered her to lie on her belly and he inserted his penis into her anus. The evidence of penetration on the complainant by the Appellant was materially corroborated by PW3 who saw that both the complainant and the Appellant were naked. What would the Appellant have been doing in the children`s bedroom while naked if it were not that he defiled the complainant? It is highly unlikely that the two children would have fabricated such evidence against the Appellant, particularly considering that he was their father. The trial court was therefore correct in accepting their evidence that the Appellant was the person who was in their room. The evidence of the complainant that the Appellant penetrated her vagina was credible and truthful. The trial court was correct in finding that the Appellant penetrated the complainant into her vagina with his penis.

40. Undoubtedly, there was delay in reporting the matter to the police and taking the complainant to hospital. The complainant said that she did not report the incident to her mother immediately she returned from Likoni as she was in fear of the warning by the Appellant not to disclose the incident to her mother. I find this to be a reasonable explanation from an 11 year-old.

41. The Appellant raised a defence that the charge was fabricated by the complainant`s mother and complainant`s uncle due to a land dispute he had with the said uncle. I am inclined to agree with the finding of the trial court that the defence was an afterthought as the Appellant did not raise the issue with the complainant and her mother when he cross-examined them in court. Neither did he raise the issue with the investigation officer during cross-examination. He did not call the person he alleged to have overheard the complainant`s mother couching the complainant to lie against him. In the premises the trial court was right in dismissing the Appellant`s defence which was in actual fact a mere denial. I agree with the finding of the trial court that the Appellant penetrated the complainant with his penis

and he was identified by the complainant and her sister K, PW3, as the perpetrator. Penetration of the complainant by the Appellant was therefore proved.

42. The Appellant in his Amended Memorandum of appeal did not raise any issue on the sentence imposed on him and I thereby do not see any need for me delve into that.

43. The upshot is that I do not find any merit in the appeal and the same is dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 30TH SAY OF JANUARY 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochola for State

Appellant – present at GK Prison – Shimo la Tewa

Court Assistant: Rahma