Kafudia v Republic (Criminal Appeal E040 of 2024)
[2026] KEHC 2312 (KLR) (24 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2312 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E040 OF 2024

JN KAMAU, J

FEBRUARY 24, 2026

BETWEEN

REAGAN KAFUDIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (SPM) delivered at Hamisi in the Senior Principal Magistrate's Court in Sexual Offence Case No 31 of 2022 on 12th April 2024)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (sic).

2. The Learned Trial Magistrate, Hon M. Ochieng (SPM) convicted him of the main charge and sentenced him to fifteen (15) years imprisonment.

3. Being dissatisfied with the said Judgement, on 4th December 2024, he lodged an appeal herein. His Petition of Appeal was dated 28th November 2024. He set out six (6) grounds of appeal. On 19th May 2025, he filed Amended Grounds of Appeal dated 21st March 2025. He set out four (4) Amended Grounds of Appeal.

4. His Written Submissions were dated 21st March 2025 and filed on 19th May 2025 while those of the Respondent were dated 27th June 2025 and filed on 30th June 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, Amended Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Amended Ground of Appeal No (1), (2) and (3) were dealt with under this head.

10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Appellant did not submit on the issue of age. On the other hand, the Respondent submitted that the Charge Sheet indicated that the Complainant, FA (hereinafter referred to as "PW 1") was sixteen (16) years of age at the time of the commission of the offence. It relied on the case of Musyoki Mwakavi vs Republic[2014]eKLR where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim's parents and/or guardians, observation or common sense.

13. It pointed out that PW 1's grandmother, MS (hereinafter referred to as "PW 2") testified that PW 1 was sixteen (16) years old and produced her Birth Certificate which indicated that she was born on 11th June 2006 and, therefore, a minor at the time of the commission of the offence.

14. Notably, No 56659 Sgt Consolata Lugonzo produced the said Birth Certificate as evidence in this case. A perusal of the same showed PW 1 was born on 11th September 2006. The incident took place on diverse dates between 3rd June 2022 and 11th June 2022. This meant that she was about fifteen (15) years nine (9) months old at the material time of the incident.

15. As the Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut the said evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven beyond reasonable doubt and that she was a child at all material times.

B. Identification

16. The Appellant placed reliance on the case of Ndingu Kimanyi vs Republic (1979) KLR 283, where it was held that the witnesses in a criminal case upon whose evidence its proposed to rely should not create an impression in the mind of the court that he is not a straight forward person. He submitted that the evidence of the Prosecution witnesses did not corroborate each other in that it was impossible to tell who was telling the truth and who was telling lies.

17. To buttress his point, he relied on the case of Richard Aspella vs Republic Appeal No 45 of 1981 (eKLR citation not given) where it was held that two (2) contradictory statements could not be admitted in a court of law as evidence of truth. He further relied on the case of Martin Charo vs Republic [2016]eKLR where it was held that the offence of defilement should not be limited to age and penetration and that the conduct of the complainant should play a fundamental role.

18. He argued that several questions arose as to the conduct of PW 1 who visited his house without any influence from anyone. He added that she did so as he was her boyfriend and that no one had known until she slept in his house for about eight (8) days. In this regard, he relied on the case of Gillicks vs West Norfolk and Wis Beach Area Authority (1985) 3 ACK ER 402 where it was held that it was unrealistic to assume that teenagers and maturing adults did not engage in often sexual activity.

19. On its part, the Respondent averred that PW 1 testified that she had sexual intercourse with the Appellant who was her friend and added that she had stayed at his house for eight (8) days. It argued that, therefore, there was no contention that the Appellant was well known to her and she could not have been mistaken as to his identity.

20. It submitted that that was the evidence of recognition which was held by courts to be more reliable and weightier than that of identification of a stranger as was held in the case of Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568.

21. It asserted that the inconsistencies and contradictions did not go into the core of the case and that the variance in itself did not in any manner distort or dislodge the commission of the offense as was held in the case of S.O.O vs Republic[2018]eKLR which cited the Tanzanian case of Dickson Elia Nsamba Shapwata & Another vs The Republic Criminal App No 92 of 2007.

22. A perusal of the proceedings showed that PW 1 testified that on 3rd June 2022 at around 6pm, she left school to home. She removed her uniform and left alone. She went for a walk until she reached the Appellant's house who was her friend. She knocked and entered the house. She told him that she wanted to stay with him and that they cooked, eat and slept.

23. It was her further testimony that when they slept in the bedroom, she removed her clothes and they had sexual intercourse. She stated that she stayed in his house until 11th June 2022 when they had sex again. She was rescued on the said dated at around 6.30a.m by her grandmother, father, Village Elder and one Victor.

24. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

25. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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 material 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 (emphasis)."

26. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence such as proof of penetration could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.

27. PW 1 positively identified the Appellant as the perpetrator of the offence. She testified that he was her friend and that it was him who defiled her as she stayed in his house on diverse dates. PW 2 and Joseph Kate Matubachi (hereinafter referred to as "PW 3") confirmed that they found PW 1 in the Appellant's house. Although the Appellant denied knowing PW 1, in his Written Submissions he indicated that he was her boyfriend.

28. There could not, therefore, have been any possibility of a mistaken identity of the Appellant. His assertions that the Prosecution witnesses' evidence was full of contradictions and inconsistencies was not proved, therefore, fell on the wayside. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

29. The Appellant submitted that PW 1's testimony on penetration was flawed and contradicted with that of the Clinical Officer, Anthony Erick Otieno (hereinafter referred to as "PW 4"). He noted that a missing hymen was not conclusive proof of penetration. He relied on Canadian Case of Queen vs Manual Vincent Quintalla 190 ABQB 769 where it was held that there were other ways where a female could lose her hymen such as horse riding and vigorous sports. He argued that the Prosecution evidence on penetration was not watertight.

30. On its part, the Respondent invoked Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed vs Republic[2020]eKLR where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of PW 1 corroborated that of PW 4 and that penetration was, therefore, proved.

31. Notably, PW 4 testified that on examination of PW 1, she admitted that she had sexual intercourse and that her hymen was not intact, had no bleeding, had no discharge and no laceration. On cross-examination, he opined that the fact that the hymen was not intact meant that there was likelihood that she had been defiled. He produced the P3 Form, Post Rape Care (PRC) Form and treatment notes as exhibits during trial.

32. In his defence, the Appellant testified that he had leased land to PW 2 and they had conflicted on refund of funds when his mother removed PW 2 from ploughing their land. He stated that he was arrested but was charged for defilement.

33. Notably, PW 1's evidence was corroborated by the scientific evidence of PW 4. The Appellant's defence was simply a denial. His evidence was not watertight enough to have displaced the Prosecution's inference of guilt on his part. His argument that the case was full of contradictions or that he was framed thus fell by the wayside.

34. As had been stated hereinabove, any contradictions or inconsistencies were insignificant and did not affect the inference of guilt on his part. The witnesses who were called by Prosecution adduced sufficient evidence to establish the charge.

35. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material diverse dates as there was proof of defilement as PW 4 testified.

36. In the premises foregoing, Amended Ground of Appeal No (1), (2) and (3) were therefore not merited and the same be and are hereby dismissed.

II. Sentence

37. Amended Ground of Appeal No (4) was dealt with under this head.

38. The Appellant submitted that he was arrested on 11th June 2022 and was sentenced on 24th May 2024, thus, prayed that the said period he spent in custody during trial be taken into account while computing his sentence. In this regard, he relied on the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR where it was held that courts were obliged to take into account the period the accused spent in custody during trial before they were sentenced.

39. On its part, the Respondent invoked Section 8(3) of the *Sexual Offences Act* (sic) and Section 329 of the Criminal Procedure Code and placed reliance on the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that it was parliament and not judiciary that set the parameters of sentencing for each crime.

40. It argued that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at appropriate sentence. It added that the Appellant's sentence was lawful.

41. The Appellant herein was sentenced under Section 8(4) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). The same provides as follows: -

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years"

42. This court could not therefore fault the Trial Court for having sentenced him to fifteen (15) years imprisonment as that was lawful.

43. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the

discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

44. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

45. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

46. Going further, this court was mandated to consider the period he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

47. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that:-

> " Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

48. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

> " The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...
>
> Time already spent in prison by the convict..."

49. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic(Supra).

50. A perusal of the Charge Sheet indicated that the Appellant was arrested on 11th June 2022. Although he was granted bond, he did not seem to have posted the same. He was convicted on 12th April 2024 and sentenced on 24th May 2024. This was a period that ought to be taken into account while computing his sentence. A perusal of the court proceedings indicated that the Trial Court had indicated that it had considered the period he had spent in custody during trial before sentencing him.

51. However, there was no justification why it ought to have meted upon him a higher sentence than the minimum that was prescribed. As the Trial Court did not explain which aggravating factors it considered, it was the view of this court that it ought to have given credit to the period that the Appellant had remained in prison as his trial was ongoing.

52. In the premises, Amended Ground of Appeal No (4) on the Appellant's prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was merited and the same be and is hereby allowed.

Disposition

53. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Amended Grounds of Appeal dated 21st March 2025 and filed on 19th May 2025 were not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

54. It is hereby directed that the period between 11th June 2022 and 23rd May 2024 be and is hereby taken into account while computing his sentence pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

55. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF FEBRUARY 2026

J. KAMAU

JUDGE