



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA COUNTY

COURT NAME: MOMBASA HIGH COURT

CASE NUMBER: HCCRA/E018/2024

ABDALLAH MOHAMED ALI VS THE REPUBLIC

JUDGMENT

The Charges

1. The Appellant was charged with the following two counts:

i. Count 1-Sexual assault contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006

Particulars are that on diverse dates between 14th June 2022 and 18th June 2022 at Kadzandani area in Nyali Subcounty within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of JN a juvenile aged 4 ½ years.

ii. Alternative-Committing an indecent act with a child contrary to section 11 (i) of the Sexual Offences Act

Particulars are that on a diversedates between 14th June 2022 and 18th June 2022 at Kadzandani area in Nyali Subcounty within Mombasa County intentionally unlawfully touched the buttocks and vagina of JN a juvenile girl aged 4 ½ years using fingers.

2. The prosecution went on to call 4 witnesses leading to the closure of the prosecution's case on 15th August 2023. On the 8th September 2023 the court ruled that he has a case to answer on both counts and placed him on his defence according to section 211 of the CPC. Thereafter the appellant called two witnesses and closed his case on 27th February 2024 and judgment was



delivered on 12th April 2024 where the appellant was convicted for count 1 and discharged on the alternative count and sentenced to 30 years imprisonment to run from the date of plea taking.

3. The appellant having being aggrieved and dissatisfied by the conviction and sentencing of the trial court, the appeal has now preferred six grounds of appeal vide his petition dated 22nd April 2024.

THE LAW

4. Section 8 (1) of the Sexual Offences Act which provides for Count 1 that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

The sentencing provision is in section 8 (2) of the Sexual Offences Act 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.”

The duty of the court

5. The role of this court being the first appellant court is now settled as was held in *Okeno V Republic (1977) EA 32* that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it analyses it and come to its own conclusion on the matter but laws bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them giving evidence and give allowance for that.

In Peter vs Sunday Post 1978 E.A. 424

It is not the function of the Appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court findings and conclusions. It must make its own findings and draw its own conclusion. 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 witnesses.

The issues for determination is whether or not defilement was proved?

6. In Charles Wamukoya Karani v R CR Appeal No. 72 of 2013 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.”

7. In his submissions, the appellant challenged only the ingredient of identification



and penetration. He claims that the victim's witness's testimony was inconsistent to provide positive identification because PW 3, the mother stated:

“You then took them to your home where you did the act. You then told them not to tell anyone.”

However, PW 3 stated as follows:

“I was in the house until I went to pick her from school. I don't know whether you were there”

He further discredits the evidence of PW 2 as she stated:

“You then told them not to tell anyone”

Which he claims contradicts the victim's testimony when she said:

“Fundi did not tell me anything after putting his dudu on my susu.”

He also repeatedly relied on the victim's statement where she stated:

“I have never been with him alone. I have not gone anywhere with him”

8. The appellant further tried to persuade this court that the victim contradicted herself on who picked her from school and thereby inviting an inference that the victim is misleading the court. He also reiterated that the court did not consider his defence of alibi corroborated by DW 2. In [Kimotho Kiarie v Republic \[1984\] KECA 65 \(KLR\)](#) the court of appeal held as follows:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; *Said v Republic* [1963].”

9. The court of appeal in the Kiarie case further stated that the accused does not bear the onus of proving the alibi but rather it was the duty of the prosecution to discharge that alibi and it relied on the case of *Raphael v Republic*, [1973] E A 473. It is unfortunate that the prosecutor did not deem it fit to cross examine the appellant and hence the alibi introduced doubt. By the appellant's admission, the victim and her mother lived approximately between 2-3 feet from each other and have lived together for two years (2020-2022). It is only reasonable that the victim who was only 4 ½ years at the time must have known him. DW 2 claims that the appellant went to work for 4 days and came back on the 5th day but there was no mention of dates. How incredibly accurate considering that the offence lasted for 4 days starting from 14th June 2022 and ending on 18th June 2022? It appears to the court that this testimony carefully couched to cover the appellant but it lacked the pertinent details of dates. Furthermore, the appellant claims to have been working on 14th June 2022 and



stated that he would go for three days to work but he did not expressly state whether he spent the three days there.

10. The court relies on *Kariuki Njiru & 7 others v Republic, Criminal Appeal No. 6 of 2001 (unreported)*, the court stated:

“The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

Similarly, the Court of Appeal in *Wamunga v Republic [1989] KLR 424* held 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 depends wholly or to a great extent on the correctness of one or 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 identification.”

11. The evidence by the victim in the court’s opinion is sufficient to discharge the alibi as she identified the accused in court and even stated that she is fearful. She was not able to know how the accused was called a fundi but that is understandable being that she is a child of tender age. She was courageous to verify in cross-examination that what he had testified in examination in chief was the truth and the court is satisfied that she has positively identified the appellant under section 124 of the Evidence Act.

12. On penetration, section 2 of the Sexual Offences Act, defines it as means:

“the partial or competent insertion of the genital organs of a person into the genital organs of another person.”

In *Erick Onyango Ondeng Versus Republic (2014) eKLR*, the court of appeal held that;

“We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken, even partial penetration of the female genital by male genital will suffice to constitute the offence.”

13. Also, in *Alfred Twehangane vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UG CA 6* the Court stated thus:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless



satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

14. As earlier stated, the appellant was adamant that the victim contradicted herself in the statements but the court reiterates that those considerations are understandable considering her age and it was through an intermediary (her mother). The victim testified that the appellant 'put his dudu on my susu' and she was even producing blood which was wiped by her aunt. PW 1 testified that the hymen appeared broken but, in the PRC, form it was indicated that the hymen was intact. However, there were vaginal abrasions which the appellant argued in his submissions is not caused by sexual intercourse alone. He relied on an excerpt by Dr. Nagaraji Patel from a website www.iclinic.com. The court is convinced that it could not have been anything else apart from forceful partial penetration as the totality of the evidence of the prosecution witnesses leave no room but to infer the same. According to the said Dr. Patel who is commonly cited in criminal cases, abrasions are caused by:
 - a) Sexual Intercourse without lubrication
 - b) Use of sanitary pads
 - c) Vert tight inner wear & jeans
 - d) Intense scratching causing secondary infection.
15. The court quickly dispels use of sanitary pads as the victim was only 4 ½ years old at the time. The intense scratching was not captured in the diagnosis and treatment done on 18th June 2022.
16. The court therefore finds that the appeal fails and is hereby dismissed.
17. It is so ordered.

Dated, signed, and delivered in Open Court/Online through MS TEAMS, this
.....25TH... day of ...FEBRUARY..... 2026.

HON. LADY JUSTICE W. K. MICHENI

JUDGE



In the presence of:

...THE APPELLANT

.....MR SIRIMA For the State

Bebora Court Assistant

SIGNED BY/FOR:
HON. LADY JUSTICE WENDY MICHENI



THE JUDICIARY OF KENYA.
MOMBASA HIGH COURT
HIGH COURT CRIMINAL
DATE: 2026-03-05 17:39:26

