Sibailo v Republic (Criminal Appeal E079 of 2022)
[2026] KECA 776 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 776 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E079 OF 2022

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

APRIL 24, 2026

BETWEEN

JORAM MAKANGA SIBAILO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (F.A. Ochieng, J.) dated 16th February, 2022 in HCCRA No. 58 of 2019)

JUDGMENT

1. Joram Makanga Sibailo (the appellant) was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 11th November, 2018, at (Particulars withheld) Estate within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of F.A.O., a child aged 8 years.

2. In the alternative, the appellant was accused of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on the same date and place, the appellant intentionally touched the vagina of F.A.O., a child aged 8 years.

3. The appellant pleaded not guilty to the charge. The prosecution called seven (7) witnesses to establish its case. The complainant (PW1) told the trial court that on 11th November, 2008, at about 11. 00 a.m., as she was outside playing with her brother, CO , and a neighbour RO(PW2), the appellant requested them to go and wash his bicycle. When they got to the appellant's house, her brother CO and RO took the bicycle. The appellant then pulled the complainant into his house. He placed her on his bed and removed her clothes. He unzipped his trouser and lay on top of her. He did not do anything further. At that point, Ryan (PW2) came to the house and informed the appellant that the complainant's father had asked to see him. PW2 then went back to the complainant's father and reported that the appellant was sleeping with the complainant. PW2 testified that he saw the appellant lying on top of

the complainant while his trousers were unzipped. The complainant stated that her father came into the room and beat the appellant.

4. The complainant's father (PW3), testified that when PW2 reported to him that he had seen the appellant and the complainant lying on the bed, he rushed to the appellant's house. He found the appellant and the complainant on the bed. The appellant's zip was undone and the complainant was not wearing her trouser. PW2 stated that he beat up the appellant and reported the matter to the assistant chief (PW4), who referred them to Kisumu Central Police Station. He produced the complainant's birth certificate and stated that she was born on 25th November, 2009.

5. PW6, Corren Opot, a clinical officer at Jaramogi Oginga Odinga Referral and Teaching Hospital, testified that she examined the complainant on 11th November, 2018. She noted that the complainant's hymen was missing. She had lacerations on her urethral opening. PW5, Dr. Macrine Adhiambo, from Jaramogi Oginga Odinga Referral and Teaching Hospital, produced the complainant's P3 form filled on 13th November, 2018. She stated that the complainant's external genitalia appeared normal; that she had a cut/laceration on the urethra opening, and that her hymen was absent.

6. PC Jack Otun (PW7), was the investigating officer. He stated that he interviewed the complainant, issued her with a P3 form and referred her to Jaramogi Oginga Odinga Referral and Teaching Hospital for medical examination. He also took the appellant to the said hospital for examination. It was his evidence that the appellant was brought to the police station by the area assistant chief. He testified that the medical evidence established that the complainant had been defiled. The appellant was subsequently arraigned and charged before the trial court.

7. The appellant was placed on his defence. It was his testimony that on the material date, he took his bicycle and went to Kibuye for work. He worked up to 9.30 a.m. He started his journey back home. When he got home, he parked his bicycle and left to fetch water. When he came back, his bicycle was missing. He was informed that the complainant, her brother and PW2 had taken it. When they later returned the bicycle, he took the three of them to his house. He wanted to reprimand them. He took out a cane. The two boys fled, leaving the complainant in the house. The complainant started crying. About thirty minutes later, the complainant's father (PW3) came to the house in a furious state and slapped him. The appellant denied sexually assaulting the complainant. PW3 left shortly thereafter and returned in the company of a village elder, whereupon they questioned the minors. Later that day, the assistant chief (PW4) went to the appellant's house and arrested him on allegations of attempted defilement, after which he was escorted to the police station. The appellant alleged that police officers demanded a bribe Kshs. 30,000/= from him to secure his release. He was unable to raise the sum. He was subsequently arraigned before the trial court and charged.

8. At the end of the trial, the appellant was found guilty with respect to the main count of defilement. He was accordingly convicted, and sentenced to serve life imprisonment.

9. The appellant was dissatisfied with the decision of the trial Court. He lodged an appeal before the High Court, challenging his conviction and sentence, on grounds that: his right to fair trial enshrined in Article 50(2) of *the Constitution* was violated as he was not supplied with witness statements before the commencement of the trial; the learned trial magistrate failed to appreciate that the prosecution's case was marred by contradictions; penetration was not proved beyond reasonable doubt and that the life sentence imposed by the trial court was not sound in law.

10. His appeal before the first appellate court was dismissed. The learned first appellate Judge found that the prosecution had sufficiently proved the main charge of defilement. His appeal on sentence was similarly dismissed.

11. The appellant, aggrieved by the decision of the first appellate Court, filed a second appeal before this Court. The appellant faulted the learned Judge for convicting him on the basis of a defective charge sheet. He contended that the elements of penetration and identification were not sufficiently established to the required standard of proof. He urged that the life sentence imposed upon him was illegal, as the prosecution failed to discharge its burden of proof, and that the mandatory nature of the said sentence fettered the court's discretion.

12. The appeal was heard by way of written submissions. The appellant appeared in person. It was his submission that the charge as drafted was fatally defective, as the particulars of the offence alleging that he penetrated the complainant's vagina were inconsistent with the evidence on record. He contended that according to the complainant's testimony, the appellant merely unzipped his trouser and lay on top of her. He submitted that this evidence did not constitute penetration as defined under Section 2 of the *Sexual Offences Act*. He was of the view that in the absence of direct evidence as to penile penetration, the proper charge under the *Sexual Offences Act* should have been sexual assault or committing an indecent act with a child.

13. It was the appellant's further submission that the evidence of PW2 and PW3 also failed to establish penetration, and was speculative at best. He urged that the absence of hymen does not, in itself, conclusively prove penetration, as the same could have been broken by other factors other than sexual penetration. He maintained that if there was indeed penile penetration, then it was not occasioned by the appellant, according to the complainant's evidence. On sentence, the appellant contended that the life sentence imposed on him was illegal, as the prosecution failed to establish the offence of defilement to the required standard of proof beyond reasonable doubt. He submitted that the mandatory nature of the said sentence fettered the court's discretion, and was therefore unconstitutional.

14. In rebuttal, learned Assistant Director of Public Prosecutions, Mr. Okango, argued that the question of whether the charge sheet was defective was being improperly raised for the first time in this appeal, as it was not canvassed before the courts below. It was his submission that penetration was sufficiently established by the medical evidence. He submitted that the evidence of PW5 and PW6 established that there was a laceration on the complainant's urethral opening, her hymen was absent, and that the presence of epithelial and pus cells was indicative of penetration. Mr. Okango reiterated that the appellant was positively identified by recognition by PW1, PW2 and PW3, all of whom knew the appellant very well before the incident.

15. On sentence, Mr. Okango, placing relying on the decision of the Supreme Court in R vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment), submitted that the apex court determined that the mandatory sentences prescribed under the Sexual Offences Act remained legal in so far as the same remained unchallenged before the High Court and cascaded through the proper appellate channels. He maintained that the appellant's appeal lacked merit and was for dismissal.

16. This is a second appeal. The mandate of this Court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this court expressed itself in the following terms;

> " As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of

fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

17. We have considered the record of appeal, the respective submissions made and the law. From his grounds of appeal and submissions filed before this Court, the appellant's appeal turns on the following issues of law:

    i. Whether the charge sheet as drafted was fatally defective;

    ii. Whether the element of penetration was sufficiently established by the prosecution;

    iii. Whether the appellant was positively identified as the perpetrator;

    iv. Whether the sentence imposed upon the appellant was sound in law.

18. On the question of whether the charge sheet was defective, we find that this issue was not raised by the appellant before the first appellate court. It has been raised for the first time on second appeal. No opinion has been formed by the two courts below relating to the said issue, and it is therefore improperly raised before us. This Court in AT v Republic (Criminal Appeal 63 of 2022) [2023] KECA 1393 (KLR) (24 November 2023) (Judgment) when faced with a similar situation had this to say:

> "The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant's grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof."

19. From the foregoing, where a matter was neither placed before the courts below nor determined by them, it would be improper to fault their decisions on that basis. Accordingly, we decline to consider the appellant's contention regarding the alleged defectiveness of the charge sheet, the same having been raised for the first time on second appeal.

20. As regards penetration, this, we believe, is the central issue in the appeal. Penetration is a key ingredient of the offence of defilement and must be proved beyond reasonable doubt. Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

21. The complainant (PW1) testified that the appellant placed her on the bed, removed her clothes, unzipped his trousers, and lay on top of her. Crucially, she stated that he did not do anything further, before PW2 interrupted them. PW2 corroborated that he found the appellant lying on top of the complainant with his trousers unzipped, while PW3 found the complainant without her trousers and the appellant in that compromising position.

22. It is our considered view that while medical evidence may be relied upon to corroborate the complainant's evidence on penetration, it cannot, in itself, establish penetration in the absence of clear and cogent testimony from the complainant. The medical evidence indicated that the complainant's hymen was absent and that there was a laceration on the urethral opening, as well as the presence

of epithelial and pus cells. However, these findings, without direct evidence establishing penetration, cannot substitute for the complainant's evidence. This Court has previously held that the absence of a hymen is not, in itself, conclusive proof of sexual intercourse or defilement (See P.K.W. v Republic [2012] eKLR (Criminal Appeal 186 of 2010).

23. In this case, the complainant's evidence does not clearly or specifically establish penetration. Notably, she stated that the appellant "did not do anything further" after lying on top of her. In the absence of such evidence, the conviction for the offence defilement is unsafe and cannot stand.

24. However, it is our finding that the same set of facts unmistakably discloses the commission of an indecent act. Section 11(1) of the *Sexual Offences Act* states as follows:

> " Any person who commits an indecent Act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

25. Under Section 2(1) indecent act is defined as:

> "Indecent act" means an unlawful intentional act which causes:
>
> (a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;"

26. According to the evidence on record, the appellant pulled the complainant into his house, removed her clothes, unzipped his trousers, and lay on top of her. This conduct constitutes unlawful and intentional contact of a sexual nature, falling squarely within the definition of an indecent act under section 11(1) of the *Sexual Offences Act*.

27. Accordingly, while the evidence falls short of establishing the offence of defilement, it sufficiently proves beyond reasonable doubt the alternative charge of committing an indecent act with a child.

28. In light of this conviction, the life sentence previously imposed by the trial court and affirmed by the first appellate court is hereby set aside. Taking into account the gravity of the offence, the age of the complainant, the need for deterrence, and the fact that the appellant is a first offender, we sentence him to ten (10) years imprisonment, with credit for the period spent in remand custody, such that the sentence shall run from the date of his arrest on 11th November 2018. Only to that extent does the appeal succeeds.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL,2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR .