



**Were v Republic (Criminal Appeal E113 of 2023)
[2025] KECA 46 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 46 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E113 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JANUARY 24, 2025**

BETWEEN

BOOKER ANYANGO WERE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement of the High Court at Malindi
(Thande, J.) dated 16th November 2023 in HCCRA No. E035 of 2022)*

JUDGMENT

1. One of the most horrendous and invasive criminal actions is one involving any form or type of sexual violence. It is even more difficult and humiliating for the victim to be a child of whichever sexual orientation to undergo any form of sexual violence.
2. In this appeal, Booker Anyango Were (the appellant) was charged before the Chief Magistrate's Court at Malindi (Hon. Dr. Julie Oseko, CM) with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (the Act). The particulars of the offence were that, on 18th March 2021 at Malindi sub- county within Kilifi County, the appellant intentionally caused his penis to penetrate the vagina of MM, a girl aged 3 years.
3. In the alternative, the appellant was charged with committing an indecent act contrary to section 11(1) of the Act in that, on the same date and place, the appellant indecently touched the vagina of MM, a child aged 3 years, using his penis.
4. After the conclusion of the trial, the appellant was found guilty of the main count, he was convicted accordingly and sentenced to life imprisonment.
5. We shall, as is required of us, summarise the evidence that was adduced before the trial court. In total, the prosecution called 4 witnesses. ASS testified as PW1. She lived in the same plot as the complainant's



- family where the appellant was a night watchman. Her evidence was that, on the material date at about 8.00pm as she was going to work, she saw the appellant naked and on his knees at the foot of the staircase of the building where there is some space underneath; that, on a closer look, she saw MM's (the complainant) legs as she lay down; that she questioned the appellant on what he was doing and, when he stood up, she saw the complainant lying down naked, facing up, with her legs lifted and propped on a pillow. After the appellant dressed up, the complainant, who was naked stood up.
6. It was PW1's evidence that she recorded the ordeal in a video using her mobile phone; that the appellant told her that the complainant was a bad girl whom he kept chasing away, but that she kept returning to where he was; that the complainant's clothes were on the ground; that she told her (the complainant) to dress up; that she had no personal knowledge of the child nor her parents although she used to see her playing in the compound with other children; that she also examined the child's vagina which she noted was wet; and that, she thereafter went to the police station where she reported what she had witnessed and shared the video recording with the police.
 7. When the turn for the complainant to testify came, the court saw it fit that she testifies through an intermediary, her sister, FS (PW2). The complainant positively identified the appellant as 'soldier' and stated that he removed her clothes. On being given an opportunity to cross-examine the complainant, the appellant simply asked the court to send her away. The appellant then stated that he did not have a problem with the complainant.
 8. Moses Rimba, PW3, a Clinical Officer at Malindi sub-county Hospital, produced the medical treatment notes and P3 form of the complainant on behalf of Dr. Ibrahim, who examined the complainant, but who could not be secured to attend court. According to PW3, the medical examination revealed that the complainant's vulva, the outer part of the vagina, was swollen; redness on labia majora and minora; bruises on the lower part of the vagina; the hymen was not intact; and the HIV and syphilis tests were found to be negative. The conclusion thereon was that the complainant was defiled. PW3 testified that the complainant was referred to the Gender Based Department of the hospital for trauma and counselling. In addition, PW3 adduced in evidence the treatment notes, the P3 form and the complainant's birth notification as exhibits.
 9. The investigation officer, CPL Marian Hussein attached to Malindi Police Station Gender Desk testified as PW4 albeit that she is recorded as PW3. Her testimony was that, on the material day at 5.00 p.m., she received a phone call from PW1 that she had seen an old man defiling a child; that she immediately proceeded to the scene together with her colleague where they found the complainant, and that they thereafter traced her mother; that she escorted the minor to the hospital for medical examination; that later, a report came that the appellant was at the scene, and she rushed back and, on arrival, arrested him; and that she subsequently charged him accordingly.
 10. In cross examination, PW4 stated that they (police) did not conduct any test on the appellant to confirm whether he had the ability to erect his penis or not.
 11. At the close of the prosecution case, the learned trial Magistrate ruled that the appellant had a case to answer and was accordingly put on his defence. He opted to give an unsworn statement of defence and called no other witness. His defence was that he was a security guard employed by Damax Security Company; that, on 16th March 2021, he was at the company's offices to collect his salary; that he then proceeded to have a drink up to 11.30 a.m.; and that, he lost his memory and could not recount what transpired until the following day when he came to and found himself in the police cell.
 12. The appellant went on to state that there was love lost between him and PW1 since they used to be in a relationship; and that he believed that it had a bearing on the case. The appellant then requested the trial court to have him examined to establish the state of his sexuality since his libido was weak, and



that, as at that time, he last had had sex 3 years earlier; that he was not certain that at the time of the commission of the offence he was sexually functioning properly; and that, therefore, it is unlikely that he committed the offence.

13. After considering the entire evidence, the learned Magistrate reached the conclusion that the appellant was found red-handed defiling the complainant. Convinced by the findings of the medical examination, she held that the prosecution proved that there was penetration owing to the injuries inflicted on the complainant's vagina; and that, furthermore, the graphic account that PW1 gave having stumbled upon the appellant in the act cemented the fact that the appellant indeed defiled the complainant.
14. The learned Magistrate also held that the appellant's defence did not cast doubt on the prosecution's case; that the allegations by the appellant that he was sexually inactive could not be confirmed; and that, even after the appellant subjected himself to a medical test, the medical report was inconclusive to corroborate the low or non-libido defence. Consequently, the appellant's defence was dismissed.
15. Dissatisfied with the judgment of the trial court, the appellant appealed to the High Court. He filed grounds of appeal dated 18th May 2022, which were later amended. The amended grounds of appeal are not on record but we have had a glimpse of them from the High Court's judgment. The appellant complained that the charge of defilement was not proved beyond reasonable doubt and that, the life sentence was harsh and excessive in the circumstances.
16. The learned Judge (Thande, J.) found that the ingredients of the offence of defilement were all proved. In this regard, she held that the medical reports confirmed that the complainant was 2½ years old then, and that, her vulva was swollen and reddened in the labia majora and minora; and that the fact that the appellant was caught in the act, there was no doubt that penetration did in fact take place. In totality, the first appellate court held that the learned Magistrate could not be faulted for returning a guilty verdict; and that the evidence on record was overwhelming to support the offence of defilement.
17. On sentence, the learned Judge held that life imprisonment was befitting, more so because the offence was committed against a 3-year old child who trusted the appellant. The appeal was found to be devoid of merit and dismissed on both conviction and sentence.
18. Further dissatisfied, the appellant is now before this Court on a second appeal against the decision of the High Court on the grounds that: the conviction contravened Articles 49(1)(f) and 50(2) (c) and (i) of *the Constitution* and section 110 of the Criminal Procedure Code; and that the sentence imposed was harsh and excessive in the circumstances.
19. This being a second appeal, by dint of section 361(1)(a) of the Criminal Procedure Code, this Court concerns itself only with matters of law, the issues of fact having been settled in the two courts below. This Court would only consider matters of fact if it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered, or that, looking at the evidence, they were plainly wrong. This was aptly enunciated by the Court in *Dzombo Mataza vs. Republic* (2014) KECA 831 (KLR) as follows:

“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 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.”

20. Highlighting his undated submissions, the appellant, appearing in person, submitted that his rights were not explained to him at the time of arrest; and that, he suffered from memory loss and, as a consequence, he did not know how to defend himself. He lamented that, even after the trial court directed that he be subjected to a medical check-up so as to ascertain the level of his sexual libido, the doctor did not actually examine him and that, therefore, the doctor could not ascertain the level of his libido, which was his main line of defence.
21. The appellant further submitted that he had been consulting herbalists to treat his low libido, which was the cause of his fall out with PW1; and that it is for this reason that PW1 instigated the complaint against him. He wondered how PW1, who resided on the 4th floor of the building where she lived, was able to witness what was happening on the ground floor; and that, since she (PW1) knew his state of losing memory after getting drunk, she took advantage by fixing him.
22. On behalf of the respondent, Ms. Vallerie Ongeti, learned Principal Prosecution Counsel, submitted that, in this instance, PW1 caught the appellant in the act; and that, even though under section 124 of the *Evidence Act*, the evidence of the minor complainant needed not be corroborated, this case is one where PW1 as an eye witness and saw what happened, that penetration was established from the medical reports adduced by PW3, and which left no shred of doubt that the complainant was defiled.
23. On the issue of the production of the P3 form, counsel submitted that the trial court correctly applied the provisions of section 77 of the *Evidence Act*, which state that a court may presume a signature in an expert document to be genuine if the person who signed it cannot be procured to produce it; and that, in this case, the P3 form was produced by a doctor who knew its maker, was conversant with his signature, but who was unavailable to produce it at the trial.
24. Whilst orally highlighting the submissions on the alleged appellant’s sexual dysfunction, counsel submitted that it is not a factor of consideration in an offence of defilement; and that all the court needed to consider was whether penetration was proved, which in this case was established beyond reasonable doubt.
25. On sentence, Ms. Ongeti submitted that the Supreme Court has settled on the threshold for application of mandatory minimum sentences under the *Sexual Offences Act*; and that, on this ground, the sentence that was imposed was proper and legal. She urged us to dismiss the appeal in its entirety.
26. We have considered the record of appeal, the respective oral and written submissions and the law. Our re-evaluation of the evidence in totality points towards the fact that, beyond any reasonable doubt, the appellant committed the offence. It is our finding that, just as did the two courts below, the prosecution established the key elements required for proof of the offence of defilement, namely the age of the victim, penetration and proper identification of the perpetrator. As regards the age of the victim, PW3, the Clinical Officer produced the complainant’s birth notification, which indicated her date of birth as 6th April 2017. Additionally, the P3 form also adduced by PW4 indicated that the complainant was at the time aged two and a half years. This then placed her aged below 11 years.
27. As regards penetration, apart from the complainant testifying that the appellant removed her clothes, he was also caught in the act by PW1. The evidence of these two witnesses was corroborated by the medical evidence of PW3 who produced the treatment notes and the P3 form. Without a doubt, the medical reports confirmed that the vulva area of the complainant was injured, there was redness on the labia majora and minora and the hymen was not intact. This was enough proof that indeed there was



penetration, thus sufficiently establishing the offence of defilement. As to whether the appellant was linked to this heinous crime is our next issue for determination.

28. It is noteworthy that the complainant in this case, a 3-year-old child, through an intermediary, recalled that the appellant removed her dress and was clearly able to identify him in court. The complainant was also acquainted with the appellant, and it is no wonder she referred to him as 'soldier'. In fact, we do note the fact that the appellant, when he was given an opportunity to cross-examine the complainant, much to his chagrin, perhaps from the guilt of his actions, asked the court to stand down the complainant.
29. The evidence of PW1, which we must say was a crucial witness, was that she caught the appellant red-handed defiling the complainant. PW1 was accurate in that she graphically narrated how she found the appellant in the act; and that it was through her intervention after asking the appellant what he was doing that the appellant stood up. At this time, the complainant lay on the ground stark naked with her clothes still on the floor when PW1 intervened. What broke the camel's back is the fact that PW1 took a video of what she saw before asking the appellant to rise up. She passed on this video to the police as a consequence of which police were convinced that the appellant was the culprit.
30. Additionally, PW1 knew the appellant too well as he was the watchman in the plot where she and the complainant's family lived. This is why the complainant referred to him as 'soldier'. The appellant, in admitting that he too was known to PW1 stated that he had a problem with her, which is why she instigated the case against him. This was therefore a case of identification by way of recognition, which is more satisfactory and assuring as was held in the case of *Anjononi & Others vs Republic* [1976-80] 1 KLR 1566. In the circumstances, we are convinced beyond peradventure that the appellant was positively identified, and that he is the one who defiled the complainant.
31. The appellant asserted that he could not have penetrated the complainant since he had a low libido. He contended that he used to consult a herbalist for treatment of his low libido problem. However, he did not call this herbalist as a witness so that the court could ascertain that he indeed suffered from low libido. This notwithstanding, it suffices to state that under section 2 of the Act, penetration can either be partial or complete insertion of the genital organ. Notably, no evidence, medical or otherwise was led to show that having a low libido has a direct correlation with one not being able to penetrate. But this notwithstanding, as stated by counsel for the respondent, this is irrelevant in a case of defilement such as this. And, as we have concluded, penetration was proved beyond reasonable doubt.
32. The appellant also contended that the two courts below erred in relying on medical documents as proof of penetration when the maker of the documents is not the one who adduced them in court. He was specifically referring to the treatment notes and the P3 form produced by PW3, a Clinical Officer, on behalf of a Doctor Ibrahim of Malindi sub-county Hospital, who treated the complainant and filled the P3 form. As rightly submitted by the learned prosecution counsel, section 77(1) and (2) of the *Evidence Act* allow expert documents to be adduced by another expert in the same field so long as the latter can attest as to authenticity of the signature of the maker of the document. In this case, PW3 did in fact testify that he had worked with Dr. Ibrahim and that he was conversant with his signature. Section 77(1) and (2) state:
 - “ 1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.



2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.”
33. From the foregoing, we find that the appellant’s conviction was based on good evidence. We find no error of law on the part of the learned Judge in upholding his conviction and, accordingly, dismiss the appeal on this score.
34. On sentence, section 8(2) of the Act provides that a person convicted for the offence of defilement of a child below 11 years of age is liable to life imprisonment. The Supreme Court of Kenya in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (2024) KESC 34 (KLR)* affirmed the mandatory minimum sentences subscribed by the Act.
35. This Court in *Ahamad Abolfathi Mohammed & another vs. Republic [2018] eKLR* stated:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.”
36. In applying the above principle, we are guided by section 361(1) of the Criminal Procedure Code which states:
 1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section- (a) on a matter of fact, and severity of sentence is a matter of fact;
37. Severity of a sentence as far as a second appeal is concerned is a matter of fact which this Court has no mandate to determine. The sentence imposed on the appellant was lawful, and we find no reason to interfere with it.
38. As we come to the end of our findings, we deem it fit to address the aspect which the appellant asked us to consider, namely that his rights under *the Constitution* were not explained to him at the time of arrest. This is an issue that is being raised for the first time in this appeal. The appellant did not give any justification for not raising it earlier, yet he had an opportunity of doing so. As a second appellate court, we only consider matters of law. Thus, we can only pen off by stating that it is too late in the day to consider a matter of fact. We follow in the footsteps of this Court in *Alfayo Gombe Okello v. Republic (2010) eKLR* which stated:

“... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”
39. In conclusion, we find and hold that this appeal lacks merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

A. K MURGOR

.....



JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

