



**Amos v Republic (Criminal Appeal 90 of 2020)
[2025] KECA 341 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 341 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 90 OF 2020
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 21, 2025**

BETWEEN

ALEX KIMUTAI AMOS APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment Judgment of the High Court of Kenya at Bungoma (Ali Aroni, J.) dated 21st day of May, 2015 in HCCRA. No. 40 of 2013)

JUDGMENT

1. Alex Kimutai Amos, the appellant herein was charged, tried, and convicted for defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars were that on diverse dates between 2nd November 2011 and 6th November 2021, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of CNB ¹ a girl aged between 12 and 15 years.
2. The appellant pleaded not guilty and the prosecution called 6 witnesses. Upon considering the evidence, the trial magistrate found the appellant guilty convicted him of the offence of defilement and sentenced him to 20 years imprisonment.
3. Dissatisfied with the conviction and the sentence, he appealed to the High Court which dismissed the appeal and upheld both the conviction and the sentence.
4. The appellant is now before this Court in this second appeal in which he has appealed against both conviction and sentence faulting the learned judge for failing to consider the evidence and overlooking the provisions of Section 36[1] of the Sexual Offences Act.

¹ Initials used to protect her identity



5. Briefly, the prosecution case was that initially, CNB was a pupil at [particulars withheld] Academy before joining [particulars withheld] Secondary School where she was a student at the time of testifying. Testifying as PW1, she informed the trial court that ¹ Initials used to protect her identity the appellant was her teacher in standard eight. On 2nd November 2011, she went into the appellants' house to get books but the appellant locked her inside the house and defiled her. She thereafter escaped and went to her aunt's place where she stayed up to 6th November 2011 then left for her parents' home, although did not inform any of them what had happened to her. On the same date, her mother took her to Lugulu where she sat for her KCPE examination. After the results were out, she joined [particulars withheld] secondary school and studied for 1 term. At the beginning of the 2nd term, she refused to go to school as she was pregnant. Upon informing her parents of the pregnancy they took her for medical examination and the same was confirmed and she later gave birth to a son. It was her evidence that the appellant was her teacher and that he defiled her 3 times.
6. BNM , the complainant's mother, testifying as PW2, confirmed that the complainant attended [particulars withheld] Academy at the time of the alleged offence. It was her evidence that sometime in November 2011, the complainant disappeared from school and home. Later the girl was found, and she took her to undertake her KCPE examination; eventually, CNB was admitted to [particulars withheld] Secondary School where she attended the first term and part of 2nd term for a week, then refused to go back as she was pregnant. CNB named the appellant as the person responsible. PW2 took the complainant for a test which confirmed the allegation as true. She gave the girl's age as 15, and her year of birth as 1997. In cross-examination, BNM stated that the complainant disappeared from school, and had been expelled at some point because of the appellant.
7. JMB, PW3, the complainants' father stated that in November 2011 his child disappeared from home for 3 days. He reported the incident at Sirisia Ap Camp after he learned of the same from his wife. On learning that the complainant was pregnant, he reported the matter to Kipsigon police station where a P3 form was issued. Upon receiving the complaint, APC Samuel Museba proceeded and arrested the appellant.
8. PW4, John Kea, a Clinical Officer at Kopsiro Health Center examined the complainant on 1st June 2011 and found her 32 weeks pregnant. He also assessed her age as 15 years.
9. Placed on his defence, the appellant gave unsworn evidence and called one witness. The appellant recalled being sent by his head teacher on 27th September 2012 to listen to a case at the chief's Office where the complainant had reported the school for refusing to allow her to take her belongings after she was expelled from school. That on 6th November 2011, he attended prayers for standard 8 pupils in the company of colleagues. Later he was taken to Chebelion AP Camp in connection with the complainant who had disappeared and resurfaced on 6th November 2011. He was later charged with this offence which he denied either having defiled the complainant or having disappeared from the village.
10. Kipkorir Mark, a brother to the appellant, and who testified as his defence witness, recalled the police looking for the appellant on 6th November 2011, but they did not find him as he had gone to school for a prayer day. On 10th November 2011 they went to Cheboi to meet PW3 to resolve the issue involving the complainant, but this did not happen as the complainant was found loitering elsewhere. On 2nd July 2012, the police came for the appellant as PW3 had declined to have the matter resolved at home. The trial court found the appellant guilty of the offence charged and sentenced him to serve 20 years imprisonment.



11. Aggrieved by the outcome, he appealed to the High Court on both conviction and sentence; and in dismissing his appeal, the learned judge (Ali-Aroni, J.) held that:

“The appellant did not displace the cogent prosecution case in fact his evidence is clear that he did attempt to resolve the matter elsewhere in a bid to avoid the law.

I see no error in the finding of the trial court as regards consistency and truthfulness of the complainant’s evidence that led to the conviction of the appellant. Having found concurrence with the trial court on the issue of defilement, I being of the view that the complainant was 15 years and not 12 as held by the trial court and the question therefore is whether the sentence meted out will therefore hold.

Section 8 (1) provides:

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

Section 8 (3):

“A person who commits an offence of defilement with a child between the age of sixteen and fifteen years is liable upon conviction to imprisonment for a term not less than 20 years.” From the above provision of the law the sentence was lawful. From the reasons above therefore, the court upholds both the conviction and sentence. The appeal is dismissed.”

12. The appellant is dissatisfied with the decision, and has filed this appeal on conviction and sentence, setting out the grounds which we reproduce verbatim as follows:

- i. I did not defile the child as it was alleged.
- ii. The minor was a liar.
- iii. The court overlooked the provision of section 36(1)

In his written submissions, the appellant maintained that he did not commit the offence, insisting that CNB was a liar who gave a wrong description of his home; and erroneous dates which would not add up to full gestation period; and the date she claimed to have been taken away from school by the appellant, found when she had already been expelled from school. He also lamented that failure to carry out a DNA profiling to establish the true paternity of the resultant child, was prejudicial to him.

13. At the plenary hearing, the appellant appeared in person and relied on his written submissions to argue that the learned judge erred when he failed to find that no DNA examination was conducted to determine the paternity. He also points out that the evidence relied on was full of inconsistencies and was uncorroborated.
14. The appellant submits further that the prosecution did not prove the offence of defilement; reiterating that it is only the DNA examination that could have determined whether he was the author of the offence.
15. In opposing the appeal, Ms. Mwaniki, learned prosecution counsel appeared for the respondent. Relying on the written submission, she contended that the prosecution proved their case to the required standards as all the ingredients of defilement were established.
16. Regarding the failure to comply with Section 36[1] of the Sexual Offences Act, the respondent submitted that there is no legal requirement for DNA to prove penetration and relied on the case of



AML vs. Republic (2012) eKLR, where it was stated that the fact of rape or defilement is not proved by D.N.A. test but by way of evidence.

17. The respondent submitted that both the trial court and the 1st appellate court reviewed the evidence tendered, and established that there was penetration; and that the victim was 32 weeks pregnant at the time of examination. Regarding paternity, the respondent relied on the case of Williamson Sowa Mbwanga vs. Republic (2016) eKLR where the Court stated that:

"...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence, does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See Twehangane Alfred vs. Uganda, CR. APP. No. 139 of 2001)."

18. On sentence, the respondent contended that Section 8(3) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child aged between 12 and 15 years shall upon conviction be sentenced to not less than twenty years imprisonment. The trial court considered his mitigation and rightfully convicted and sentenced the appellant to 20 years imprisonment.

19. This being a second appeal, the mandate of the Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. See Section 361(1) of the Criminal Procedure Code (CPC). In the case of Kaingo vs. Republic [1982] KLR 213, this Court stated thus:

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did. See (Reuben Karoti S/O Karanja vs. Republic [1956 17EACA 146]."

20. Having considered the record, the grounds of appeal, and the rival submissions set out above and in light of this Court's mandate, the issues of law that fall for determination are whether the prosecution proved its case to the required standards and whether the sentence was proper.

21. As to whether the offence was proved, it is trite that to reach a finding of defilement, the prosecution must establish three main ingredients which are; the age of the victim, penetration and the proper identification of the perpetrator.

22. These ingredients are provided for under sections 8(1) and (3) of the Sexual Offences Act which stipulates;

- i. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- ii. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.



23. Regarding the first element of age, this Court in the case of *Justin Kubasu vs. Republic* [2020] eKLR cited *Edwin Nyambogo Onsongo vs. Republic* [2016] eKLR in which the Court cited with approval *Mwolongo Chichoro Mwanyembe vs. Republic*, Mombasa Criminal Appeal No. 24 of 2015, that;

“... 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.”

24. Similarly, in the case of *Eliud Waweru Wambui vs. Republic* (2019) eKLR, the Court of Appeal reiterated that:

“There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt.”

25. In the instant case, the complainant’s mother stated that she was born in 1997 and was 15 years old at the time of the offence. Dr Kea produced a report on the age assessment which indicated that she was 15 years old. This was sufficient and credible evidence that proved the age of the minor complainant as 15 years.

26. In analysing the evidence above, a mother’s evidence regarding the daughter’s age is sufficient to prove age. In the case of *Richard Wahome vs. Republic* (2014)eKLR, the Court of Appeal remarked:

“What better evidence can one get than that of the mother who gave birth”.

By simple calculation, by the time the alleged offence occurred, the complainant was aged 15 years old.

27. Regarding penetration, Section 2 of the Sexual Offences Act defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of *Bassita vs. Uganda S. C Criminal Appeal Number 35 of 1995*, the Supreme Court of Uganda held that:-

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt”.

28. In the instant appeal, the medical officer who examined the complainant noted on physical examination that she was 32 weeks pregnant. It is an uncontested fact that the complainant became pregnant. It is significant, however, to note that pregnancy was not required to prove penetration as was stated by the Court of Appeal in *Evans Wanjala Wanyonyi vs. Republic* [2019] eKLR, that:

“An essential ingredient in the offence of defilement is penetration and not impregnation.”



29. The appellant contended that a DNA test had not been conducted to establish a link between him and PW2 and whether he was the biological father of the new born baby. The Appellant further contended that the trial court ought to have applied section 36 of the Sexual Offences Act to ascertain the truth. Section 36(1) of the Sexual Offences Act provides that:

Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

30. While discussing section 36(1) of the Sexual Offences Act, the Court of Appeal in the case of Robert Mutungi Mumbi vs. Republic (2015) eKLR, held that:

“Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

31. Similarly, this Court in Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR cited with approval Geoffrey Kionji vs. Republic Cr. Appeal No 270 of 2010 where it was held that:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

32. From the record, in her evidence, the complainant testified that on the fateful day, she went to the appellant’s house to get books for her revision but the appellant locked her inside and defiled her and as a result she became pregnant. Based on the testimony of the complainant and Dr. Kea it is evident that there was penetration.

33. With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga vs. Republic (1989) eKLR expressed itself 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 wholly depends or to a great extent on the correctness of 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 the identification”.



34. And in *R. vs Turnbull* (1977) QB 224 it was stated thus:

“If the quality is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution”.

35. CNB testified that the appellant was her teacher at [Particulars Withheld]. That on the material date, she went to the appellant’s place to get some books but the appellant locked her in the house and defiled her. This testimony was not challenged by the appellant in cross-examination. There is no way CNB would not fail to recognize a person with whom she had sexual intercourse 3 times. The appellant was positively identified as the one who had sexual intercourse with the complainant between 2nd November, 2011 and 6th November 2021.

36. The three ingredients of defilement having been proved, there is nothing on record to fault the conclusion that the prosecution had proved its case against the appellant, beyond reasonable doubt in discharge of its burden of proof; neither is anything on record to suggest that the learned Judge was at fault in upholding the appellant’s conviction.

37. Finally, on sentence, section 361 of the Criminal Procedure Code provides as follows with regard to second appeals

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;

38. The appellant was sentenced to 20 years’ imprisonment under Section 8(3) of the Sexual Offences Act, which provides that:

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

39. In *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) the Supreme Court was emphatic that:

Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two word.

40. The sentence of twenty (20) years imposed upon the appellant was the minimum sentence provided under section 8(3) of the Sexual Offences Act. As stated by the Supreme Court in *Republic vs Mwangi* (supra), the only discretion that the trial magistrate had was to impose a higher sentence if he found it appropriate. In this case, the complainant, who was 15 years old, had conceived from the



defilement incident. The sentence was, therefore, neither excessive nor illegal. Also, the appellant has not demonstrated in any way that the trial court acted on wrong principles or overlooked some material factors as to justify this Court's interference. The appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

JUDGE OF APPEAL

H. A. OMONDI

JUDGE OF APPEAL

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Deputy Registrar

