



**WO v Republic (Criminal Appeal E017 of 2024)
[2025] KECA 856 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 856 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E017 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 7, 2025**

BETWEEN

WO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence of the High Court of Kenya at Voi (G. Dulu, J.) delivered on 23rd November 2023 in H.C.CR.A No. E003 of 2022)

JUDGMENT

1. The appellant, WO, was charged with the offence of defilement contrary to section 8(2) of the Sexual Offence’s Act. The particulars of the offence were that, on 7th May 2021 in Voi Sub-County within Taita Taveta county, he intentionally caused his penis to penetrate the vagina of RA, PW3, the complainant, a girl aged 10 years.
2. He was also charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act. The particulars of the offence were that, on 7th May 2021 in Voi sub-county within Taita Taveta County, intentionally and unlawfully touched the vagina of RA, a child aged 10 years.
3. The appellant pleaded not guilty to the main count and the alternative charge, and the matter proceeded to a hearing where the prosecution called 8 witnesses.
4. The evidence before the trial court was that, at midday on 9th May 2021, EN (PW1) was making chapatis when the complainant came to where she was. She looked sick, and when she asked her what was wrong, the complainant replied that she had a back pain. PW1 gave her painkillers and she left to go home. The following Monday, when PW1 went to see how the complainant was getting on, she met her father who told her (PW1) that the complainant was not feeling well. On reaching the house,



- she saw that indeed the girl was unwell and was still asleep. The appellant, RA's father, told her that he had given RA some medicine.
5. PW1 decided to take RA to the hospital, whereupon the appellant told RA to take a shower and go to the hospital. PW1 took RA to Ndovu Hospital within Kaloleni in Voi Township. After treatment, the clinical officer stated that the minor had been defiled by her father and needed further medical examinations. She was not walking like a child of ten years. It was at this point that she came to learn that RA had been defiled by the appellant, whereafter, she went to the Police Station to lodge a report.
 6. On the same day at 2.00pm, Hope Anisa Shanguli (PW2) went to PW1's house and, while they were chatting, she stated that she saw a child at that place who was sleeping on the mattress. She reiterated to a large extent the evidence of PW1.
 7. PC Woman No. 106xxx Mercy Njoroge (PW3) based at Voi Police Station, and the investigating officer in this case, testified that on 11th May 2021 while in the office, a Good Samaritan brought a 10-year-old girl to the station, who had been taken to hospital and was found to have been defiled by her father. When she interviewed her, RA told her that she was living with the appellant who is her stepfather, and that he had defiled her during the months of April and May 2020 and on several other occasions. She received the treatment notes and took the statements of the witnesses. She later charged the appellant with this offence.
 8. RA (PW4), the complainant stated that she was 10 years old, and a pupil at [Particulars Withheld] in class 3. She had been living with her stepfather, the appellant since her mother had gone to the village in Kisumu; that she cooked and washed clothes for her young brother. One night in April 2021, her father returned home drunk and she opened the door for him and gave him food. She went to sleep, where they shared the same bed with him and her young brother. That night, he grabbed her, removed all her clothes, removed his penis and penetrated her vagina. She felt pain and started to cry. He then told her not to tell anybody otherwise he would chase her away from the house or kill her.
 9. Thereafter, he continued to defile her, until one day she felt severe pain on her back and stomach, and that is when she told PW1 that she was sick. She was taken to Ndovu Health Clinic where she told the nurse that her stepfather had been defiling her. She was treated and later referred to Moi Referral Hospital for further treatment. An age assessment examination was also conducted. She stated that the appellant, her step-father, had been providing for her since she was a child.
 10. Choto Nyaro (PW5), a medical doctor, produced the P3 Form for PW4, who was aged 12 years old, and which showed that she had been defiled on 7th February 2021. The examination showed she had a whitish discharge which was abnormal. A vaginal swab did not disclose any spermatozoa, but epithelial cells were present. There was no sexually transmitted disease (STD), but the hymen was absent and there was a scar and tenderness on the vaginal wall. He concluded that she had been defiled.
 11. Grace Wakesho (PW6), a clinical officer at Ndovu Health Center, treated PW4 who reported that she had been defiled by a person well known to her, and who was her step-father. From her observation, the notes were used to fill out the P3 Form. She produced the treatment notes that also showed that the hymen was absent. There were epithelial cells and she had bruises on the vaginal walls. She stated that the complainant told her that the appellant, her step-father had defiled her, and that he used to warn her not to tell anybody.
 12. Sammuel Bosire Magutu (PW8), a medical doctor, stated that, on 19th July 2021, he conducted an age assessment examination of the complainant and concluded that she was approximately 13 years old. He produced the assessment report.



13. When placed on his defence, the appellant stated that he was 37 years old and came from Kisumu County, but resided at [Particulars Withheld] Estate in Voi. He was a casual worker. He stated that he was a parent to two children, one of whom was the complainant, a pupil at [Particulars Withheld] Primary School in class three. He was married in 2019, and had quarreled with his wife. On 9th May 2021, he went to work and when he came back, the complainant told him that she was not feeling well as she had a headache and he bought her drugs. The following day, he went to sell sand and when he returned at 2.00 pm, he met PW1, his neighbour, who told him that RA was not feeling well and she wanted to assist and take the minor to hospital. He was told that the minor was treated and he also noted that she was wearing new clothes yet, he had not given anybody permission to take care of her on his behalf. He allowed the child to stay with PW1 and on 15th July 2021, the child was again taken to the hospital by PW2. He had a problem with PW2 as she was the one who made his wife run away. He was later arrested and charged. He denied committing the offence and alleged that PW 1 brought him to court as RA. had slept out; that she had ordered bricks from him, and after delivery, she refused to pay Kshs. 18000 being the value of the bricks; that she had tried on several occasions to kill herself and her husband. Regarding PW2, the appellant claimed that her husband had a relationship with his wife as he had bought her shoes which he burnt, amongst other allegations.
14. The trial Magistrate upon considering the evidence, convicted the appellant of the offence of defilement and sentenced him to serve 30 years' imprisonment.
15. Aggrieved, the appellant filed an appeal to the High Court which upheld the conviction and reduced the sentence from 30 years imprisonment to 20 years imprisonment.
16. Dissatisfied, the appellant has filed an appeal to this Court on the grounds that: the learned Judge was in error in law in holding that penetration was proved by the broken hymen yet failed to appreciate that this is not the criteria for proving penetration; in failing to appreciate that the charge sheet was defective since the appellant was charged with the offence of defilement instead of incest; in relying on section 124 of the *Evidence Act* to establish the complainant's truthfulness, yet he did not have the advantage of seeing her demeanor during the trial; that, section 124 of the *Evidence Act* is discriminatory and the proviso lowers the standard of proof in sexual offences to a balance of probabilities instead of proof beyond reasonable doubt, as required in criminal offences; that, the 20 year sentence imposed by the High Court was applied in mandatory terms as provided by statute and the court failed to consider the appellant's mitigation and the facts and circumstances of his case.
17. When the appeal came up for hearing on a virtual platform, the appellant who appeared in person informed the Court that he had filed written submissions. In his written submissions, the appellant submitted that the evidence adduced by the prosecution witnesses was contradictory, and that PW1 testified that the complainant has backpains and was given her pain killers, but that she did not tell her that she had been defiled.
18. He further submitted that he was charged with the offence of defilement and yet the particulars of the offence were more suited to the offence of incest and that, therefore, the charge sheet was defective.
19. It was also submitted that the evidence was contradictory as to whether the complainant's hymen was broken; that the prosecution relied on the evidence of the broken hymen, and that PW5 concluded that the broken hymen indicated that she was defiled, yet penetration was not established as the evidence of broken hymen was not sufficient to prove defilement.
20. The appellant also submitted that the complainant's brother who was sleeping on the same bed with the complainant was a crucial witness who was not called to testify.



21. On the sentence, the appellant submitted that the sentence was harsh and subject to the mandatory provisions which was unconstitutional as it denied the court the opportunity to consider his mitigation. He prayed that his time spent in custody be considered.
22. Learned prosecution counsel Ms. Ongeti appeared for the respondent. It was submitted that all the ingredients of the offence were established; that the appellant was RA's step-father and so he was well known to her; that penetration was proved by RA's evidence and was corroborated by PW2 who testified that the minor was walking as though in pain and that PW5, the clinical officer, confirmed that the complainant's vaginal wall was red and tender to touch; her hymen was broken; that there was a scar at 2 o'clock; and that the child was in pain. There was also an abnormal whitish discharge from the vagina.
23. Counsel further submitted that, although the appellant was charged with the offence of defilement instead of incest, the ingredients for the two charges are the same; that committing an act which causes penetration and the age of the complainant are the key ingredients in the charge of defilement and incest; and that the evidence tendered was sufficient to prove the ingredients of both offences. Consequently, the appellant did not suffer any prejudice.
24. On the sentence, counsel asserted that it was lenient in the circumstances and, as a consequence, ought to be upheld.
25. This being a second appeal, this Court's jurisdiction is limited to consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*.
26. In the case of Samuel Warui Karimi vs. Republic [2016] eKLR, it was held that:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611.”
27. The case of M'Riungu vs Republic [1983] KLR 455 sets out this Court's obligations as a second appellate court thus:

“Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached the same conclusion, which would be the same as holding the decision is bad in law.”
28. Having appreciated the aforementioned principles, the issues for determination are: i) whether the charge sheet was defective and whether the appellant was prejudiced; ii) whether the prosecution proved penetration; iii) whether crucial and essential witnesses failed to testify; iv) whether there were contradictions and discrepancies in the prosecution's case; and v) whether the sentence was harsh and excessive.



29. Beginning with the question as to whether the charge sheet was defective, Section 134 of the *Criminal Procedure Code* specifies the components of a charge sheet thus:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

30. Further the Supreme Court in the case of *Isaac Omambia vs R* [1995] eKLR explained the necessary particulars that a charge should disclose as:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

31. This Court in the case of *Yongo vs R* [1983] eKLR held that a defective charge sheet is one where the evidence adduced during the trial is at variance with the offence disclosed in the charge or its particulars.

32. In the case of *Nyamai Musyoka vs Republic* [2014] eKLR this Court expressed:

“The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect...”

34. The appellant contends that he ought to have been charged with the offence of incest rather than defilement as the particulars of the offence disclosed that he was the complainant’s stepfather. It is worthy of note that in the first appellate court, the appellant raised the issue that the charge sheet was defective on the grounds that it indicated a different age of the complainant compared to the evidence adduced. The issue now before us that he should have been charged with a different offence was never raised. Be it as it may, this Court while dealing with a similar allegation that the charge sheet was defective because a charge of incest instead of defilement should have been preferred in the case of *PW vs Republic* [2019] eKLR held that:

...The fact that the appellant was charged with defilement and not incest does not render the charge sheet defective. We are cognizant that a given set of facts may disclose more than one offence; in such cases, an accused person has no right to choose which offence he should be charged with. A charge sheet does not become defective merely because the prosecution has preferred to charge a person with one offence instead of another offence which is disclosed by the same set of facts.”

35. As stated above, the fact that the appellant was charged with defilement and not incest does not render the charge sheet defective. Considering that he did not express how the charge under defilement instead of incest was prejudicial to him, we find that this ground has no merit.



36. With regard to the appellant’s allegations that there were contradictions and discrepancies in the evidence of PW1 and PW2, and the medical reports, this Court in the case of John Nyaga Njuki & others vs Republic [2002] eKLR stated that:

In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.”

37. In the instant case, when the overwhelming facts of the prosecution’s case are considered against the inconsistencies in the evidence, we find them to be minor, inconsequential and curable by Section 382 of the *Criminal Procedure Code*. This issue is therefore unfounded and is dismissed.

38. On the complaint that the RA’s brother ought to have been called as a witness to testify, it is true that he did not testify. However, Section 143 of the *Evidence Act* is explicit that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

39. Failure to call the complainant’s brother to testify as a witness did not prejudice the appellant in any way since he did not witness the offence. His testimony would not therefore have added any value to the prosecution’s case. This ground is likewise without merit.

40. Turning to the issue as to whether penetration was proved, the appellant contended that the fact that RA’s hymen was ruptured was not conclusive evidence that there was penetration.

41. In establishing that there was penetration, the complainant recounted how the appellant did tabia mbaya to her by inserting his penis in her vagina. She gave a detailed description of the events as they transpired to PW2. The clinical officer, PW5’s evidence and the medical reports corroborated her evidence. They indicated that the complainant’s vaginal wall was red and tender to touch, and that the hymen was broken with a scar at 2 o’clock, and that she was in pain. There was also abnormal whitish discharge from the vagina, which was consistent with penetration. See *FMM vs Republic (Criminal Appeal 58 of 2020) [2023] KECA 673 (KLR)*.

42. Further, in relying on RA’s evidence of penetration, the trial Magistrate observed:

“I had no reason at all why I will not belief (sic) the testimony of pw3, pw4 and pw6. When the complainant was testifying before me, she was shedding tears all the time and her body language convinced me that she was telling court the truth. She looked sincere and truthful. She was categorical that accused person had been providing for her and her younger brother however the same person who has been defiling her in the absence of the mother and he does that at night while drunk.”

43. Additionally, the High Court concluded:

I am of the view that the evidence of PW4 the victim was believable and consistent and satisfied the requirements of the proviso to section 124 of the *Evidence Act (Cap. 80)*”



44. Indeed, under the proviso to Section 124 of the *Evidence Act*, a trial court can convict for a sexual offence under the *Sexual Offences Act* on the evidence of a complainant alone without corroboration. In the case of *William Sowa Mbwanga vs Republic* [2016] eKLR, this Court stated as follows:

The import of the proviso to section 124 of the *Evidence Act* is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in *George Kioji v Republic*, CR. APP. NO. 270 of 2012 (Nyeri):

“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.”

45. Undoubtedly, the two courts below tested RA’s evidence and, having found her to be credible witness, they believed her evidence that she was defiled, and concluded that the offence was established. Her evidence considered together with the medical report proves without doubt the occurrence of the act of penetration by the appellant and no other. In the result, we find that as against the prosecution evidence on penetration, the appellant’s complaint that the courts below solely relied on the evidence of the broken hymen to prove penetration is baseless and, as a result, this ground is without merit.

46. On the appeal against the sentence of 20 years’ imprisonment imposed, the appellant has argued that the mandatory sentence imposed upon him was harsh severe and excessive, and that it violated his constitutional rights.

47. Under section 361(1) of the *Criminal Procedure Code*, the severity of the sentence is a matter of fact, and therefore not a legal issue open for consideration by this Court on a second appeal. It follows, therefore, that this Court lacks jurisdiction to interfere with the sentence meted on the appellant on the ground that the sentence was harsh or excessive. On the sentence, Section 8(1) and read with Section 8(3) of the Act specifies a sentence of 20 years’ imprisonment, which would render the sentence imposed to be lawful.

48. Accordingly, there is no basis upon which we can interfere with the sentence. See the Supreme Court decision in the case of *Republic vs Joshua Gichuki Mwangi*, Petition No. E018 of 2023 (UR).

49. In the upshot, the appeal is without merit and is hereby dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

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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 the true copy of the original

Signed

DEPUTY REGISTRAR

