



REPUBLIC OF KENYA



**Kazungu v Republic (Criminal Appeal E010 of 2023)
[2025] KECA 778 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 778 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E010 OF 2023
KI LAIBUTA, GWN MACHARIA & WK KORIR, JJA
MAY 9, 2025**

BETWEEN

GILBERT SHAURI KAZUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Malindi (Githinji, J.) dated and delivered on 21st December 2021 in Criminal Appeal No. E041 of 2021)

JUDGMENT

1. On 26th November 2019, the appellant, Gilbert Shauri Kazungu , was arraigned before the Senior Principal Magistrate’s Court at Kilifi to answer to the charge of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that, on an unknown date in the month of July 2019, at [Particulars Withheld] within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of KS, a child aged 16 years.
2. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 8(4) of the *Sexual Offences Act* in that he intentionally and willingly touched the vagina of KS, a child aged 10 years (sic) with his penis.
3. From the outset, we wish to point out to the fact that, we have noted a discrepancy in the age of the complainant as recorded in the main charge with that recorded in the alternative charge. Given that the date of her birth as per the Birth Certificate adduced by PW3 was 23rd March 2003, thus placing her age at 16 years as at July 2019, we opine that the error is in the alternative charge, and which we conclude was inadvertent. We therefore take it that the age in the alternative charge should have read as 16 years.
4. In proof of its case, the prosecution called a total of 4 witnesses, whose evidence we briefly revisit as follows: On 4th November 2019, KS (PW1) left home and headed to the farm to weed. Her mother,



- SSK(PW2) joined her in the farm. PW1 sought permission from PW2 to go to a place called Kwa Njora, which request was declined. Defiant and determined to proceed with her plans, at about 2.00p.m., PW1 proceeded to Kwa Njora at her eldest aunt's place, one Mama S and she stayed there until nightfall.
5. PW2 left the farm and went to look for PW1 at home when she was informed that she had left for Kwa Njora. PW2 proceeded to Mama S's home where she found PW1. A quarrel ensued between her and PW1 as she wanted to beat up PW1 but the appellant, Mama S's son who was present, threatened to beat her. Mama S was a sister to PW2. Fearing for her life, PW2 left for her home.
 6. In the meantime, PW1 and the appellant left Mama S's home for their friend's home, one K. They explained to K what had transpired. K advised them to go and spend the night at the appellant's home. While at the appellant's home, PW1 and the appellant had sex and spent the night together. The following day, PW1 and the appellant went to PW1's home to look for PW2, but found that she had gone to the village elder's home to report the matter. The appellant left PW1 at their home.
 7. PW1 then proceeded to one Pastor Emmanuel's home to make a call to her brother to whom she explained what took place the night she spent with the appellant. Shortly thereafter, PW2 arrived with the village elder at Pastor Emmanuel's home and they took PW1 to a Children's Officer. PW1 thereafter escaped from home once again, but PW2 was able to trace her at Pastor Emmanuel's home.
 8. PW1 was taken to Kilifi County Hospital where she was examined and found that she was 2 months' pregnant. She recorded a statement at the Kilifi Police Station whereupon the appellant was arrested and charged accordingly. PW1 testified that she first slept with the appellant in August 2019, and that she used to go to his house. At the time of testifying, she had a child, having delivered in June 2020. She testified that she was in a boyfriend-girlfriend relationship with the appellant.
 9. On cross-examination, PW1 stated that she only knew that the appellant was her cousin after they had had sex; that she had told the appellant that she was in class 8; that the appellant was responsible for her pregnancy; that he visited her at the Kilifi County Hospital and purchased some medicines; and that, after delivery, she went to the appellant's home. She denied that there were ever discussions about her marriage to the appellant, and that they were to only have sex and separate.
 10. PW3, PC Charity Kombe from Kilifi Police Station, G.B.V Department, was the investigating officer. She testified that the case was reported at the station on 6th November 2019; that she escorted PW1 to Kilifi County Hospital where it was discovered that she was pregnant; that she recorded relevant witness statements; and that it was reported to her that PW1 and the appellant were in a sexual relationship. She produced PW1's Birth Certificate as an exhibit, which indicated that she was born on 23rd March 2003.
 11. Kaingu Henderson (PW4), a health clinician at Kilifi County Referral Hospital, G.B.V. Department, produced the P3 Form dated 13th November 2019 which was filled by Dr. Zuma Bimba. He testified that, according to the P3 form, PW1's hymen was broken, and that her vagina had no physical injury, blood or discharge. Further tests revealed that PW1 was pregnant and had a sexually transmitted infection in the vaginal tract. PW4 further produced the Post Care Rape (PRC) form which had contents similar to those in the P3 form.
 12. After conclusion of the prosecution case, the learned Magistrate (Hon. S.D. Sitati, RM) ruled that the appellant had a case to answer and was accordingly put on his defence. He gave an unsworn testimony in which he stated that PW1 wrote in the PRC and P3 forms that she was in a sexual relationship with two different men, and that he was named as the second man. He denied having sex with PW1 and wondered why the other man was not sought after. He implored the court to look for the second man



since it was not established with certainty whether the pregnancy was his. He further stated that no samples were taken to prove that he had sex with PW1.

13. The appellant also called two other witnesses in support of his defence. His mother, Kadzo Nyundo (DW2) testified that PW1 was her niece; that, on a date she could not recall, PW2 went to her home and found PW1; that PW2 started beating PW1 and the appellant pleaded with her (PW2) to stop beating PW1; that PW1 declined to return home citing frustrations by her mother; that PW1 spent the night at DW2's home; that, the following day, PW2 returned to her home and asked for 'kajama', which DW2 did not have; that, later, DW2 got the 'kajama' consisting of two lessos and Kshs.10,000 for PW2 to be at peace with the appellant and PW1; that they set a date for the children to be blessed in order not to be attacked by 'majanga and mahoma.'; that instead, police went to her home and arrested the appellant; and that, when PW1 was about to deliver the baby, PW2 called her and she went to the hospital.
14. DW3, Changawa Simba Kanzuru, the appellant's uncle, testified that differences arose between PW2 and DW2 because the appellant intervened when PW2 wanted to beat up PW1; that PW2 was annoyed and left demanding for a 'sitting' since the appellant trespassed against her; that they looked for Kshs.5,000 but that, before they could give it to PW2, police arrested the appellant; and that they later learnt that the appellant had impregnated PW1.
15. The learned Magistrate held that the prosecution had proved the main charge against the appellant beyond reasonable doubt. On the issue as to who impregnated PW1, the learned Magistrate held that it was not relevant to the case as a DNA test is not a prerequisite to establishing the offence of defilement as was held by this Court in *Williamson Sowa Mbwanga vs. Republic* (2016) KECA 147 (KLR). The appellant was found guilty of the main charge and accordingly sentenced to serve 15 years imprisonment.
16. Dissatisfied with the trial court's judgment, the appellant appealed to the High Court at Malindi where he raised three main grounds of appeal, namely that the evidence of PW1 was unreliable and contrary to the provisions of Section 124 of the *Evidence Act*; that the medical evidence did not link him to the alleged offence; and that the case against him was not proved beyond reasonable doubt.
17. The learned Judge (Githinji. J.), termed the appeal before him as an open and shut case. He found that the trial court analysed the issues before it and reached the correct verdict;

that the age of PW1 was confirmed to be 16 years; that PW1 knew what sex was about and that, in her evidence, she confirmed having sex with the appellant; that the appellant did not deny the fact that he had had sex with PW1, but attempted to shift blame on some other person who may as well have had sex with the complainant; that, applying the proviso to section 124 of the *Evidence Act*, there was no doubt that the appellant had committed the offence; and that the sentence was within the law. The appeal was accordingly dismissed.
18. Dissatisfied with the learned Judge's Judgment, the appellant is before this Court on a second appeal in which he has raised three grounds of appeal, namely that:
 - i. The 1st appellate court erred in law by failing to find that the defence under Section 8 (5) of the *Sexual Offences Act* Cap 63A was available in the circumstances of this case;
 - ii. The 1st appellate court erred in law by failing to adopt the current jurisprudence with regard to sentencing; and



- ii. The 1st appellate court erred in law by failing to take into account his mitigation under Section 216 and 329 of the Criminal Procedure Code, Cap 75.”

19. We heard this appeal on 18th November 2024. The appellant appeared in person while the respondent was represented by learned State Counsel Ms. Mutua. Both parties confirmed filing their respective written submissions, which they briefly highlighted. The appellant’s submissions are contained in the undated ‘Supplementary Grounds of Appeal’ which basically support the grounds of appeal set out above, while those of the respondent are dated 7th November 2024
20. The appellant admitted that he had a relationship with PW1, but that PW1 behaved as an adult who knew what was going on between them; that the trial court ought to have acknowledged this fact; and that this was buttressed by her (PW1) own admission in testimony that she had sex with him twice, and that she used to go to his house. The appellant relied on the decision of this Court in J.N.N. vs. Republic- Criminal Appeal No. 71 of 2013 (UR) where the age difference between the parties was 4 years, and the Court observed that the complainant, although below the age of 18 years, having voluntarily taken herself to the appellant’s house, the defence under section 8(5) of the Sexual Offences Act was available to him.
21. The appellant also submitted that the fact that PW1 spent the night at Pastor Emmanuel’s home, and that she was in a sexual relationship with another man, was a testament that she was a promiscuous person; and that, as such, he (the appellant) could not be solely blamed for what befell her (PW1).
22. On sentence, whilst relying on this Court’s case of Swabir Bukhet Labhed vs. Republic [2019] eKLR, it was submitted that the use of the words ‘liable to’ under section 8(4) of the Sexual Offences Act means that the trial court had the discretion of imposing a lesser sentence than 15 years imprisonment. The appellant thus pleaded that, in the event that the conviction is upheld, we should set aside the 15 years’ jail term and substitute it for a lesser sentence.
23. On the part of the respondent, it was submitted that the requisite elements constituting the offence of defilement were sufficiently established, namely the age of the victim, penetration and the positive identification of the appellant as the perpetrator. As regards the age of the victim, it was submitted that it was proved by a Birth Certificate that was adduced in evidence which indicated that PW1 was born on 23rd March 2003; that penetration was proved by the victim’s own testimony, which was corroborated by the medical evidence adduced by PW4; and that the identification of the appellant was by way of recognition since both the appellant and PW1 were acquaintances, being cousins. Reliance was placed on the case of Anjononi & Others vs. Republic (1980) KLR 59 for the proposition that identification by recognition of an assailant is more reliable, assuring and satisfactory than identification of a stranger as it depends on the personal knowledge of the assailant in some form or another.
24. The respondent submitted that no constitutional right of fair trial of the appellant was breached under Article 50(2) (p) of the Constitution because the appellant exercised his constitutional right of preferring a first appeal in the High Court which was heard and determined, and is now before this Court on a second appeal.
25. As to whether the appellant’s defence was considered, it was submitted that the trial court analysed the evidence and correctly concluded that the same did not dislodge the prosecution’s evidence; that the first appellate court reconsidered the evidence afresh and arrived at the conclusion that the appellant’s defence was not plausible; that, since the appellant gave an unsworn defence, the same had no probative value, but that its weight was to be considered against the weight of the entire evidence; and that its potential value is merely persuasive. For this proposition, reliance was placed on this Court’s case of May vs. Republic (1981) KLR 129.



26. The respondent urged us to dismiss the appeal in its entirety.
27. This being a second appeal, our jurisdiction is only limited to matters of law as stipulated under Section 361 of the *Criminal Procedure Code*. This court in *Erick Onyango Ondeng' vs. Republic* (2014) KECA 523 (KLR) held that:
- “The essence of that provision is that in a second appeal, the issues of fact will have been settled by the trial and the first appellate courts and that this Court will, except in exceptional circumstances, concern itself only with the application of the law to the facts as settled by the two courts below...this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”
28. We have considered the record of appeal and the respective submissions. The issues that fall for our determination are: whether the prosecution proved the case beyond reasonable doubt; whether the appellant's defence under section 8(5) (b) of the *Sexual Offences Act* was considered; and whether the sentence meted out was lawful.
29. In this appeal, we are satisfied that the trial court considered the primary evidence before it, and that the first appellate court discharged its mandate of re-analysing and re- evaluating the evidence on record before concluding that the appellant was rightfully held culpable of the offence of defilement.
30. There is no doubt that PW1's age was proved to be 16 years as at the time of the offence. The Birth Certificate adduced in evidence by PW3 showed that PW1 was born on 23rd March 2003, which no doubt put her age at 16 years as at the time of the offence.
31. As to whether the appellant was identified as the perpetrator, PW1 was categorical in her testimony that she knew the appellant is her cousin after they had had sex. This evidence was corroborated by the testimony of PW2 who testified that “the accused is son to my sister”, DW2. DW2 further conceded in her testimony that PW1 was her niece. Even in the absence of any other corroborating evidence, the proviso to section 124 of the *Evidence Act* allows the court to receive a sexual assault victim's evidence and proceed to convict based on it, if it is satisfied that the victim is telling the truth. There is no doubt that PW1 knew the appellant as her perpetrator, which evidence the trial believed in and was upheld by the first appellate court.
32. Furthermore, the fact that PW1 and the appellant were well known to each other, ultimately implies that his (the appellant) identification was by way of recognition, which is more satisfactory, more reassuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another as was held in *Anjononi & Others vs. Republic* (1980) KLR 59.
33. The third and final ingredient of defilement is penetration. The appellant does not seem the fact that he had a sexual relationship with PW1. His argument is that, in the PRC and P3 forms, it is indicated that PW1 claimed to have been in a sexual relationship with two different boyfriends, him and another who allegedly was responsible for the pregnancy.



According to him, this fact alone afforded him the defence under section 8(5) (b) of the *Sexual Offences Act* which provides that:

5. It is a defence to a charge under this section if-
 - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - b. the accused reasonably believed that the child was over the age of eighteen years.

34. Unfortunately, the appellant did not raise this defence before the trial court to enable it to consider and make a finding thereon. We cannot overemphasize the fact that, at this stage on second appeal, the re-hearing of an appeal does not involve any re-tendering of the evidence, but is undertaken only on the basis of the record already in existence. In the event that an issue is raised for the first time in this Court while exercising its jurisdiction as a second appellate court, it is trite that we do not have the leeway to disturb the concurrent findings of facts of the two courts below. In *Alfayo Gombe Okello vs. Republic* (2010) KECA 319 (KLR), this Court had this to say on matters raised for the first time on appeal:

“Firstly, 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.”

35. In *Wachira vs. Ndanjeru* (1987) KLR 252, this Court frowned upon the raising of a point of law on appeal, unless its ultimate goal is to do justice as follows:

“...the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.”

36. In the present case, the appellant had the first chance to tender his defence at the trial. He had a second chance in the High Court on first appeal to challenge any findings of the trial court. In none of these courts did he find it fit to raise the defence under section 8(5) of the *Sexual Offences Act*. At this juncture, we are unable to disturb the concurrent findings of the two courts below that the appellant’s defence that the complainant may have had had sexual encounter with another man was outweighed by the strong prosecution case. In so holding, we find solace in this Court’s decision in *Adan Muraguri Mungara vs. Republic* (2010) eKLR where it was held thus:

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.” [Emphasis added]

37. The other issue which the appellant raised was the issue of DNA. He contended in his defence that a DNA test should have been conducted so that it is established who was responsible for PW1’s pregnancy. It is trite that a DNA test is not a prerequisite to establish a charge of defilement. The requirement for conduct of a DNA test is an exercise of discretion by the trial court as set out in section 36(1) of the *Sexual Offences Act* Cap 63A as follows:



- (1) 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.
38. Commenting on the place of DNA tests in sexual offences cases, this Court in *Evans Wamalwa Simiyu vs. Republic* (2016) KECA 555 (KLR) held as follows:
- “Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to Section 36 of the *Sexual Offences Act* which could have exonerated him. In *AML vs. Republic* (2012) eKLR (Mombasa), this Court upheld the view that:
- ‘The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.’
- This was further affirmed in *Kassim Ali vs. Republic* Cr Appeal No. 84 of 2005 (Mombasa) (unreported) where this Court stated that:
- ‘The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.’
- Moreover, Section 36 of the *Sexual Offences Act* that gives the trial court powers to order an Accused person to undergo DNA testing uses the word ‘may.’ ”
39. Similarly, in *Williamson Sowa Mbwanga vs. Republic* (2016) KECA 147 (KLR), this Court held 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.”
40. The question before the trial court was not who impregnated PW1, but who defiled her, which offence is partly established by proof of penetration as defined under section 8(1) of the *Sexual Offences Act* as follows:
- A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
41. For arguments’ sake, as at the time of the commission of the offence, PW1 was a minor. A minor, for all intent and purposes, even if he/she acts in a manner to suggest that they are interested in sexual interactions, cannot give consent. In our view, the assertion by the appellant that he thought that PW1 was interested in sex, is outrightly dishonest. This is because, being his cousin, he could not have failed to know that PW1 was underage. Ultimately, this ground of appeal fails.
42. On the sentence meted out, section 8(4) of the *Sexual Offences Act* provides that a person who commits the offence of defilement of a child between the age of 16 and 18 years is liable to imprisonment for a term of not less than 15 years. The Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (2024) KESC 34 (KLR) clarified that



mandatory minimum sentences under the Sexual Offences Act are legal. Accordingly, we find no fault in the sentence imposed upon the appellant merely because it is the mandatory minimum prescribed by the Act, and we have no reason to interfere therewith.

43. The upshot of the foregoing is that this appeal lacks merit and is hereby dismissed in its entirety. Consequently, we uphold the Judgment of the High Court at Malindi (Githinji, J.) delivered on December 21, 2021. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY, 2025.

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

