Ponda v Republic (Criminal Appeal E091 of 2023)
[2025] KECA 777 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 777 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E091 OF 2023

KI LAIBUTA, FA OCHIENG & GWN MACHARIA, JJA

MAY 9, 2025

BETWEEN

NASIR PONDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement of the High Court of Kenya at Malindi (Githinji, J.) dated and delivered on 28th September 2023 in Criminal Appeal No. E032 of 2021)

JUDGMENT

1. The appellant, Nasir Ponda, was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that, on 27th January 2019 at Nyari area, Taru Location, Kinango sub-County within Kwale County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of N.C. (the complainant), a child of 13 years.

2. In the alternative, the appellant faced the charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* in that he intentionally and unlawfully touched the vagina of N.C., a child aged 13 years.

3. In proof if its case, the prosecution called 6 witnesses whose evidence we shall briefly revisit as follows: On 27th January 2019, the appellant paid a visit to the complainant's (PW1) home with a delicacy of ugali and fish. He sat outside the house to eat the food after warming it. Later, the complainant's mother, Sidi Chikobe (PW2), joined him to eat. The appellant requested the complainant to go to his house and eat from there, which request the complainant readily obliged. When the complainant reached his house, she found that the appellant was not in, and she waited for him.

4. The appellant later arrived and told the complainant that 'Nilikuwa nataka tufanye hivi na hivi", which, when directly translated means, "I wanted us to do this and that." The appellant then took PW1, removed her clothes and forcefully had sex with her. PW1 then left his house for home where she arrived at 12 mid-night. She entered through a small hole in one of the houses. She found that her mother, PW2, and uncle, Stephen Chondo (PW3), had been looking for her. After interrogation, followed up with some beating by her mother, she revealed where she had been and what had transpired.

5. The following day, the complainant was taken to Taru Police Station and put in the cell before being taken to Samburu Health Centre. The appellant was later arrested. PW1 testified that she knew the appellant as a neighbour since she had been seeing him; and that, she did not tell her mother where she went on the night of the incident.

6. In cross examination, she stated that the appellant used to ask her everyday to go to his place. She denied that her mother and the appellants' parents had any grudge against each other or that he was framed.

7. PW2 confirmed that the appellant went to her house with ugali and fish and ate the food from there; that she asked the appellant to leave after which she went to bed; that at 11.00 p.m., she woke up but did not see PW1; that that is when she went to PW3's home and informed him that she did not know where PW1 was; that it is PW3 who told her that PW1 had left with the appellant; that she knew that PW1 had returned to the house at 2.00 a.m. when she woke up and found her in the room next to her bedroom; that she woke PW1 up, started beating her until she disclosed where she had been; that it was her and PW3 who took PW1 to hospital; and that, PW1's headteacher directed them to where the appellant worked after which he was arrested.

8. Dr. Olive Wanyonyi (PW4), a dentist at Mariakani sub- County Hospital conducted the age assessment on PW1 and concluded that she was 14 years old. She adduced the age assessment report in evidence.

9. Rashid Omar Luvumbo (PW5), a Clinical Officer at Samburu Health Centre, who examined PW1, noted that her private parts had bruises and traces of blood on the vaginal walls; that there was a yellowish greenish discharge that had a foul smell; that laboratory analysis showed that HIV and pregnancy tests were negative; and that the conclusion thereon was that there was vaginal penetration.

10. PW6, Police Constable Winnie Mwaka of Taru Police Station, performing crime and gender, investigated the case. She basically summarised the prosecution case. In addition, she stated that the appellant started pursuing PW1 after his wife left; and that, she accompanied PW1 to hospital for examination.

11. When put to his defence, the appellant chose to give an unsworn defence and was the only witness in his case. He stated that, on 27th January 2019, he was on duty when he saw the headteacher of the school where he went to; that the latter asked him to accompany him to the hospital where he had a sick relative; that, instead, he was taken to the police station; that the charges against him are framed up because the complainant's family are his neighbours with whom they had quarrelled over his cows trespassing into their land for which he paid Kshs.18,000; that the complainant's family then warned him that he would regret; and that that is how he was framed up with the charges.

12. The learned Magistrate (Hon. N. C. Adalo, SRM) considered the ingredients of the offence of defilement, namely identification or recognition of the perpetrator, penetration and age of the victim, all of which he found had been proved. He rejected the appellant's defence that he was framed up after trespassing into the complainant's family farm, treating it as an afterthought. The trial court observed that the appellant did not shake or rebut the evidence tendered by any of the prosecution witnesses and that, from the complainant's demeanour, she was found to be a truthful witness. The court found

that the prosecution had proved the main charge against the appellant beyond reasonable doubt. He was convicted accordingly and sentenced to serve 20 years imprisonment.

13. Dissatisfied with the Judgment of the trial court, the appellant appealed to the High Court at Malindi. He raised two issues, namely that the evidence on record was not properly evaluated, and that the prosecution's case was incredible and unsafe to warrant a conviction. After re- evaluating the evidence, the learned Judge (Githinji, J.) held that all the ingredients of the offence of defilement had been established.

14. As regards the age of the complainant, he held that the same was proved by her own evidence when she testified that she was 13 years old. And so did her mother, PW2; and that, even though the age assessment placed the complainant at 14 years, that did not matter since both ages are within the range given under section 8(1) and (3) of the *Sexual Offences Act*.

15. In the same vein, the learned Judge held that penetration was also proved by the complainant's own evidence as she testified that the appellant forcefully had sexual intercourse with her; and that this was corroborated by the medical evidence adduced by PW5 to the effect that PW1 was defiled.

16. On the issue as to whether the appellant was identified, it was held that the appellant was well known to the complainant as a neighbour, and that he was a frequent

    visitor to their (complainant's) house; that it was after PW2 went to sleep that he invited the complainant as he went to his house; that when the complainant resurfaced, and after a beating by PW2, she revealed that she was with the appellant; and that she had no cause to frame the appellant.

17. The learned Judge found the appellant's evidence to be a sham and as an afterthought. He dismissed it and accordingly upheld both the conviction and sentence.

18. Further dissatisfied, the appellant proffered the instant appeal on the grounds that: (i) the learned Judge erred in failing to consider that penetration was not proved by the medical evidence in breach of Section 107 (1) of the *Evidence Act*, and that the steps taken by the dentist, PW4, to conclude that the complainant was 14 years old were not elaborated (ii) the learned Judge erred by failing to consider that the appellant had reasonably established a defence under section 8 (5) (b) of the *Sexual Offences Act*; and (iii) the learned Judge erred in failing to consider that the mandatory nature of section 8(3) of the *Sexual Offences Act* fetters the judicial discretion not to consider the appellant's mitigating circumstances in contravention of Articles 27(1) (2) (4) and (50)(2) (p) of *the Constitution*, hence the sentence imposed to the appellant by the trial court was unlawful and unconstitutional.

19. The appellant urged that the appeal be allowed, the conviction be quashed and the sentence set aside.

20. We heard this appeal on 26th November 2024. The appellant appeared in person while the learned State Counsel Miss.

    Ongeti appeared for the prosecution. In addition to his undated written submissions, the appellant asked that the period he was in remand custody prior to sentencing be taken to constitute part of his sentence. The respondent's submissions are dated 7th November 2024, which Miss Ongeti did not highlight save to request that we uphold the sentence meted out as it was within the law.

21. In his submissions, the appellant contended that the fact that the hymen was broken as noted in the P3 form was not conclusive proof of penetration; that a sexual intercourse is not the only activity that can break a hymen; that some girls are born without the hymen; and that the medical evidence did not established when the hymen was broken nor the approximate age of the injuries. In this regard, he referred to the decision of the High Court of Ben Mwangi Muteti vs. Republic (2020) KEHC 7367 (KLR) where it was held that there should be a connection between the injuries suffered

by a complainant with the time the offence was committed. It was the appellant's case that the complainant's evidence was not corroborated; and that, for this reason, section 124 of the *Evidence Act* was not applicable.

22. The appellant admitted that, since the complainant went to his house, it can be deduced that she willingly engaged in sexual intercourse; that the complainant was a person of promiscuous behaviour who knew right from wrong, and that there was every reason to believe that she was an adult; that his relationship with the complainant was one of 'Romeo' and 'Juliet'; and that, she only disclosed what had happened after she was beaten by her mother.

23. In view of the foregoing, the appellant contended that the defence under section 8(5) (b) of the *Sexual Offences Act* was available to him. He relied on the decision of Charo vs. Republic (2016) KEHC 5619 (KLR) where the High Court held that, defilement should not be limited to age and penetration as conclusive proof of the offence since young girls could freely engage in sex and opt to report to the police only when they disagree with their boyfriends.

24. As to proof of age of the complainant, the appellant submitted that the evidence of PW4 failed to explain the steps she took before arriving to the conclusion that the complainant was aged 14 years, hence the age of the complainant was not well established.

25. On the issue of sentence, it was submitted that the mandatory nature of the sentence under section 8(3) of the *Sexual Offences Act* is discriminatory as it deprives the trial court the discretion to impose an appropriate sentence based on circumstances of the case, thus violating the right to a fair trial under Articles 25(c) and 50(2) of *the Constitution*. The appellant termed the sentence under this provision as discriminatory and contrary to Article 27 of *the Constitution*. He referred to the decisions of this Court in Evans Wanjala Wanyonyi vs. Republic (2019) KECA 679 (KLR); and Julius Kitsao Manyeso vs. Republic (2023) KECA 827 (KLR) where the subject of minimum and maximum sentences under the *Sexual Offences Act* was discussed.

26. On the part of the prosecution, it was submitted that the age of the complainant was assessed by PW4 to be 14 years on 3rd June 2019; that, therefore, the complainant was a child as per the definition under section 2 of the *Sexual Offences Act* and within the meaning of Article 260 of *the Constitution*; that the appellant was identified by way of recognition as he was a frequent visitor to the home of the complainant; and that the case of Anjononi & Others vs. Republic (1980) eKLR is applicable to this case where it was held that recognition of an assailant was more satisfactory, assuring and reliable than identification of a stranger since it depends on the personal knowledge of the assailant in some form or other.

27. As to penetration, the respondent submitted that the complainant's own testimony was corroborated by the medical report presented by PW5. To the respondent, penetration can be proved by both direct and indirect/circumstantial evidence as was held by the Supreme Court of Uganda in the case of Basita vs. Uganda S.C Cr*iminal Appeal No. 35 of 1995*; and that, in this case, the medical evidence corroborated the complainant's direct evidence was sufficient in the circumstances as it confirmed that indeed there was penetration of the complainant's genital organ.

28. On sentence, it was submitted that the first appellate court should not interfere with the discretion of the trial court in sentencing unless the sentence is manifestly excessive, or the trial court overlooked some material factors, or took into account some wrong factors, or acted on a wrong principle as was held by this Court in Bernard Kimani Gacheru vs. Republic (2002) eKLR. It was the respondent's view that the appeal has no merit, and that we should accordingly dismiss it by upholding both the conviction and sentence.

29. This is a second appeal, and our mandate is restricted to addressing only matters of law. Section 361(1) of the *Criminal Procedure Code* provides as follows:

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: or

b. Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

30. In interpreting the said provision, in Hamisi Mbela Davis & Another vs. Republic (2012) KECA 147 (KLR), this Court held as follows:

> " This being a second appeal, this Court is mandated under Section 361(1) of the *Criminal Procedure Code* to consider only issues of law. As was held in M'Riungu vs. Republic (1983) KLR 445: -
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> '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 findings of fact as holding of law or mixed findings 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 that conclusion, which would be the same as holding that the decision is bad in law (Martin vs. Glyneed Distributors Ltd (t/a MBS Fastenings).'"

31. We have considered the record of appeal, the respective rival submissions and the law. In this appeal, the two courts below arrived at the concurrent findings of fact that the appellant committed the offence of defilement. This Court cannot interfere with those findings of fact unless such findings were founded on no evidence or unless, on the totality of the evidence relied upon, no reasonable tribunal would arrive at such findings. (See Adan Muraguri Mungara vs. Republic (2010) KECA 131 (KLR).

32. We have carefully examined the record of appeal and the respective submissions. In our view, the issues that fall for our determination are: whether the prosecution proved its case beyond reasonable doubt; whether the appellant's defence was considered, and whether the sentence meted out was appropriate.

33. To secure a conviction for the offence of defilement, the prosecution is obligated to prove the age of the complainant who should be a minor, penetration and identification of the perpetrator.

34. The complainant testified that she was 13 years old, and so did her mother, PW2. On the other hand, the age of the complainant was assessed to be 14 years by PW4 through dental examination. As was held by the learned Judge, whether the complainant's age was 13 or 14 years, the fact remained that she was a minor as at the time of the offence. We equally hold a similar view that it does not matter whether the complainant was 13 or 14 years old. What is paramount is whether she was a minor. As we shall shortly discuss, the issue is whether the appropriate sentence was meted out since sentence for the offence of defilement is determined by the age of the minor.

35. On the issue as to whether penetration was proved, the complainant was taken to the hospital for examination the following day after the incident. The medical examination confirmed bruises on her vaginal walls. There is no other explanation given on how the complainant would have sustained those injuries in her vaginal area otherwise than penetration by another sexual organ.

36. The evidence on record is that, after the complainant was interrogated by her mother (PW2) and her uncle (PW3), she revealed that she had been with the appellant during which time they had sex.

37. Turning to the issue as to whether the appellant was positively identified as the perpetrator, the appellant did not refute the fact that he visited the complainant's home on the night of 27th January 2019. PW2 testified that she asked the appellant to go and sleep in his house. She also went to sleep

but that, at around 11.00 p.m. when she woke up, she did not see her daughter. Together with PW3, they searched for the complainant until 1.00 a.m. but in vain.

38. At around 2.00 a.m., PW2 heard someone sleeping in the adjacent room who turned out to be the complainant. The complainant later disclosed where she had been. The complainant knew the appellant and he was at their home that night. It is ultimately clear, therefore, that the identification of the appellant was by 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.

39. We are satisfied that all the ingredients of the offence of defilement were established to the required standard. We find no reason to disturb the concurrent findings of the two courts below as they were based on credible evidence.

40. The appellant raised the issue that his defence was not considered. In particular, that he raised the defence under section 8(5) (b) of the *Sexual Offences Act* which provides as follows:

(5) It is a defence to a charge under this section if

(a) .....;

(b) the accused reasonably believed that the child was over the age of eighteen years.

41. We note that this is an issue raised for the first time in this appeal. The appellant did not raise this defence in the trial court, and neither was it a ground of appeal before the first appellate court. His defence was that he was framed up by the complainant's family on an alleged disagreement after his cows strayed into the complainant family's farm.

42. This Court in Alfayo Gombe Okello vs. Republic (2010) KECA 319 (KLR) had this to say on matters raised for the first time in an 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."

43. In Wachira vs. Ndanjeru (1987) KLR 252, this Court frowned upon the raising of a point of law for the first time on appeal unless it is intended for doing 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."

44. We also hold, just as did the two courts below, that the appellant's defence that he was framed by the complaint's family or that the complainant willingly engaged in sex, had no basis and was ousted by the strong prosecution evidence that established the offence of defilement. In any case, section 42 of the *Sexual Offences Act* provides that a person consents if he or she agrees by choice, has the freedom and capacity to make that choice. It is trite law that a minor, or a person who is below the age of the majority, that is 18 years, is deemed to be incapable of consenting.

45. Therefore, the conclusion arrived at by the two courts below that the appellant was culpable was based on sound and credible evidence, and we have no reason of departing from the concurrent findings of the two courts. In so holding, we find solace in this Court's case of 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]

46. Turning to the last issue as to the propriety of the sentence, section 8(3) of the *Sexual Offences Act* provides that a person who commits the 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.

47. In Wanjema vs. Republic (1971) EA 493, the predecessor of this Court stated that:

> "[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

48. The propriety of sentences under the *Sexual Offences Act* was upheld by the Supreme Court in the decision of Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (2024) KESC 34 (KLR) where the Court clarified that mandatory minimum sentences under the Act, are lawful. We find no reason for which we can interfere with the sentence imposed by the trial court and as confirmed by the High Court.

49. At the hearing of this appeal, the appellant asked us to consider the time he had spent in remand custody prior to sentencing. We have perused the record of appeal and the charge sheet indicates that he was arrested on 28th January 2019. He was granted bond but could not afford, and he therefore remained in remand custody throughout the trial.

50. Section 333(2) of the *Criminal Procedure Code* provides that, in passing the sentence, the court should consider the period the accused spent in custody. The appellant was arrested on 28th January 2019 and was convicted and

sentenced on 13th November 2019. He was therefore in remand custody for a period of 9 months and 15 days, which should be reduced from the jail term.

51. Ultimately, we reach the conclusion that the appeal is devoid of merit and is hereby dismissed. We uphold the Judgment of the High Court at Malindi (Githinji, J.) delivered on 28th September 2023 save that the term of imprisonment should be reduced by 9 months and 15 days. It is so ordered.

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

DR. K. I. LAIBUTA CARB, FCIARB.

JUDGE OF APPEAL

F. OCHIENG

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

JUDGE OF APPEAL