Salim v Republic (Criminal Appeal E012 of 2023)
[2025] KECA 811 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 811 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E012 OF 2023

KI LAIBUTA, GWN MACHARIA & WK KORIR, JJA

MAY 9, 2025

BETWEEN

MOHAMED SWALEH SALIM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Garsen (Githinji, J.) dated and delivered on 23rd May 2023 in Criminal Appeal No. E007 of 2021)

JUDGMENT

1. On 19th August 2021, Mohamed Swaleh Salim (the appellant) was arraigned before the Principal Magistrate's Court at Lamu to answer charges of the offence 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 diverse dates in the months of May and July 2021, within Lamu Central Sub-County in Lamu County, the appellant intentionally caused his penis to penetrate the vagina of ZBC, a child aged 16 years (the complainant).

2. The alternative charge was that the appellant committed an indecent act to a child contrary to section 11(1) of the *Sexual Offences Act* in that he intentionally and unlawfully caused his penis to touch the vagina of the complainant.

3. In summary, the prosecution's case was that, on 11th August 2021, FAF (PW2), the headteacher of [Particulars Withheld] Primary School where the complainant (PW1) attended classes, called the complainant's mother, RAK (PW3) and informed her that, upon doing routine pregnancy tests at the school, the complainant was among girls found to be pregnant; that he then convened the School Committee and the parents of the respective girls alongside the area chief and the Children's Officer whom he informed what had transpired; that the parents took the girls to hospital for a repeat test, and the results were the same-positive; that the girls, including the complainant, disclosed who were

responsible for the respective pregnancies; and that he had taught the complainant between the years 2013 and 2014 when she was a class 7 student. He identified in court the list of the alleged culprits as disclosed by the respective girls.

4. On her part, the complainant testified that she told the teacher that it is the appellant who made her pregnant since they had sexual intercourse on three different occasions in the bush. In cross examination, she insisted that it was the appellant who made her pregnant; that she knew the appellant since they lived in the same village; that they first met on the road and got to know each other; and that, in one of the occasions, they had sex in her mother's house.

5. PW3, RAH, the complainant's mother, testified that she received a call from PW2 who informed her that her daughter was pregnant; that, after interrogating the complainant, she revealed that the appellant was responsible; and that she suspected that the complainant met the appellant in June 2021 after she had fled from home to seek refuge at her grandmother's house after a disagreement with her brother over a domestic issue. PW4, KAH, the complainant's aunt, was in the company of her sister, PW3, when they received the news from the complainant's school that the complainant had tested positive for pregnancy.

6. PW5, PC John Mbogo of Hindi Police Station, was the investigating officer. He testified that the incident was reported to the station by the Chief of Hindi Magogoni Location; that, in the company of CPL Munene and CPL George, they took the five minors, amongst them the complainant, to hospital for a second pregnancy test; that each of the minors named a specific person responsible for the pregnancy; and that the complainant named the appellant. He adduced in evidence the list of the names of the persons named by the five girls as being responsible for their pregnancy and the complainant's birth certificate.

7. PW6, Benson Osete, the Clinical Officer at Hindi Magogoni Dispensary, produced the complainant's P3 form dated 12th August 2021 on behalf of his colleague, Joseph Njeru, who had filled it. He testified that, at the time of the treatment, the complainant exhibited mental instability; that the external genitalia were normal with no injuries or visible discharges; and that the hymen was not freshly torn, but it looked like a recent tear since the greater part of it was still visible; pregnancy test was positive; and that, antenatal clinic follow up was recommended. He also produced in evidence the complainant's treatment notes and the Post Rape Care Form.

8. PW7, Jamal Keya Hamisi, the chief of Hindi Location, confirmed that he received information from PW2 that 5 girls in the school had tested positive for pregnancy; that he followed the girls at the Hindi Magogoni Dispensary where they had been taken for a second pregnancy test; that he took the girls to the police station where another report was filed; that the complainant named the appellant as the person responsible for the pregnancy; and that he mobilised for the arrest of the appellant.

9. After the close of the prosecution case, the trial court ruled that the appellant had a case to answer, and was accordingly put on his defence. He gave a very brief sworn statement of defence in which he denied committing the offence and impregnating the complainant. He also stated that he wanted a DNA test to be done so that he could be sure.

10. After the trial, the learned Magistrate (A. T. Sitati, PM) held that the complainant's evidence was supported by the medical evidence that there was repeated sexual intercourse, which resulted in pregnancy; that the complainant made the disclosure as soon as the pregnancy test turned positive; that, by dint of the proviso to section 124 of the *Evidence Act*, the court could rely on the evidence of only the minor complainant as long as it believes in such evidence; that the court was convinced that the complainant was truthful; that there was no need for a DNA test as the child was yet to be born;

and that the prosecution had proved the main charge beyond reasonable doubt. The appellant was convicted accordingly and sentenced to 15 years imprisonment.

11. Dissatisfied with the judgement of the trial court, the appellant appealed to the High Court at Garsen. The appellant raised nine grounds of appeal in his petition of appeal dated 25th January 2022. In dismissing the appeal, the learned Judge held: that all the ingredients of the offence of defilement, namely the age of the victim, penetration and positive identification of the perpetrator were proved; that DNA test was not necessary since all that the court was concerned with was whether there was penetration and not impregnation; that a DNA test would only have been conducted if it was the only way by which penetration would have been established; that, in any case, although the complainant was said to be mentally unstable, she was forthright and firm that it was the appellant who impregnated her, thus leaving no room that anyone else would have done it; and that the conviction by the trial court was proper. The learned Judge accordingly upheld both the conviction and sentence.

12. Further dissatisfied, the appellant is now before this Court on a second and perhaps the last appeal. He contends, inter alia: that Article 50 of *the Constitution* was violated; that section 67 of the *Evidence Act* was not fully utilized and implemented; and that the medical evidence adduced was erroneous, incomplete and unreliable contrary to section 36

    (2) of the *Sexual Offences Act*.

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

14. We heard this appeal on 19th November 2024. Learned counsel Ms. Adoyo appeared for the appellant while learned counsel Mr. Mwangi Kamanu appeared for the respondent. Both parties filed their respective submissions and relied entirely on them without any highlighting. Those of the appellant are dated 9th August 2024 while the respondent's are dated 16th September 2024.

15. The appellant submitted that his right to a fair hearing under Article 50 of *the Constitution* was violated, particularly Article 50(2) (c) which provides that an accused person is to be allowed adequate time and facilities to prepare for his/her defence, including requesting that a DNA test be conducted; that the appellant's persistence on requesting for the DNA test was material to investigation, preparation and presentation of a defence, which was denied by the trial court; and that failure to honour his request to conduct a DNA test amounted to limitation of his right to a fair trial, which contravened Article 25(c) of *the Constitution*. Reliance was placed on the Supreme Court decision of Waswa vs. Repub*lic (Petition 23 of 2019*) [2020] KESC 23 (KLR) (4 September 2020) (Judgment) for the proposition that: there must be fairness to all parties in a criminal case; that the court should consider a triangulation of interests; and that this involves taking into account the position of the accused, the victim and his or her family, and the public; and that, in this case, the appellant's right to a fair trial was denied.

16. As regards the medical evidence relied upon by the prosecution, the appellant submitted that the medical documents adduced were erroneous, incomplete and unreliable contrary to section 36(1) of the *Sexual Offences Act*; that his request for a DNA test was with a view to assist the court in determining if he committed the offence or not; that the determination by the trial court that DNA samples were not available was unfair to him; that it was unfair to convict him without the DNA test being conducted; that scientific evidence would have offered adequate material to enable him prepare for his defence; that, therefore, lack of the DNA evidence meant that he was not granted a fair trial; and that the victim's oral and medical evidence was not sufficient to warrant his conviction. He relied on the decisions of the Supreme Court of India in Natasha Singh vs. CBI (2013) 5 SCC 741 where it was held that "Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner...Thus, under no circumstances can a person's right to fair trial be jeopardized". (Emphasis added); and Rattiram - vs- State of M. P.

(2012) 4 SCC 516 for the principle that a fair and impartial trial has a sacrosanct purpose, being that the accused should not be prejudiced.

17. As regards the question as to whether section 67 of the *Evidence Act* was violated, it was submitted that documents must be proved by way of primary evidence, being the document itself produced for the inspection of the court; that, in this case, the appellant was not accorded a chance to get a DNA test whose results he would have used to mount a defence; that this amounted to an injustice to him, yet he was charged with a serious offence; and that it ultimately amounted to an unjust and unfair trial. We were accordingly urged to allow the appeal.

18. On the part of the respondent, it was submitted that it was not factual that the appellant was not accorded a fair hearing under Article 50 of *the Constitution*; that, to the contrary, the record shows that the proper procedure of undertaking a criminal trial was followed, being that the charges were read to him in a language he understood; that he pleaded not guilty; that he was informed of his right to appoint an advocate; that he was granted bond; that he was supplied with the charge sheet, witness statements and all documentary evidence that he required; that he was given ample time to prepare for the trial; that he cross-examined all the witnesses; that he tendered his defense. To the respondent, this ground of appeal was an afterthought and should be dismissed.

19. On the ground of appeal that the learned Judge failed to note that section 67 of the *Evidence Act* was not utilized, it was submitted that the law provides that proof of primary documents should be through primary evidence except in cases stated thereunder; that the appellant failed to disclose which documents he was referring to that were not properly adduced; that, in the event that any document may have been produced in contravention of section 67, the appellant never raised an objection; and that this ground of appeal comes too late in the day and should be dismissed.

20. On the ground that the medical evidence did not comply with section 36(1) of the *Sexual Offences Act*, the respondent submitted that a DNA test is not a mandatory requirement in a charge of defilement; that DNA test in this case could not have been conducted since the complainant had not given birth as at the time the appellant was charged; that the appellant did not deny that he defiled the complainant; and, his only contention was that he did not impregnate her; and that, equally, this ground of appeal should also fail.

21. This is a second appeal and, as a second appellate court, our mandate is spelt out in section 361(1)(a) of the *Criminal Procedure Code*, and is limited to consideration of matters of law only. This Court has underpinned its mandate in this regard in several decisions. For instance, in David Njoroge Macharia vs. Republic (2011) KECA 406 (KLR) it stated thus:

> " As 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 Chemagong vs. R [1984] KLR 611."

22. We have considered the record of appeal, the respective written submissions, the authorities relied upon and the law. In our considered view, the issues which fall for determination are: whether the offence of defilement was proved beyond reasonable doubt; and whether DNA evidence was necessary to prove the appellant's guilt or innocence.

23. The appellant was charged and convicted under section 8(1) as read with section 8(4) of the *Sexual Offences Act*, Cap 63A which provide that:

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

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

24. In order to prove the offence of defilement, the prosecution has to establish three key ingredients, namely the age of the complainant, penetration of the complainant's genital organs, and identification and/or recognition of the perpetrator. In this case, the complainant's Birth Certificate adduced as an exhibit indicates that he was born on 9th June 2005 while the offence was alleged to have been committed in the year 2021.

This placed the complainant's age at 16 as at the time of the commission of the offence. Therefore, the prosecution proved the complainant's age.

25. As to whether penetration was established, the medical report (P3 form) showed that there were no visible injuries in the vagina and cervix, and no discharge from the genitalia. The treatment notes further indicated that the hymen was torn at 12 o'clock, and that it was partially missing, as an indication that there was some sexual activity which took place. It was concluded that the complainant was defiled.

26. As to whether the appellant was identified as the perpetrator of the offence, the complainant repeatedly told almost all the prosecution witnesses, namely PW2, 4, 5 and 7 that the appellant was the perpetrator and was indeed responsible for her pregnancy. It cannot be said that she confused him with any other person in the circumstances. In her evidence-in- chief, she stated that she knew the appellant since she used to see him in the village, which means that she knew him by way of acquaintance, which, in our view, stands out as one of the best modes of identification. Ultimately, the identification of the appellant was by way of recognition, which is more satisfactory and assuring as was held by this Court in the case of Anjononi and Others vs. Republic [1980] KLR thus:

> " .....this, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

27. In view of the foregoing, we find and hold that the offence of defilement was proved beyond reasonable doubt.

28. The appellant's defence was that he needed a DNA test to be conducted so that it could be established that he was the one who impregnated the complainant. He did not attempt to refute that he defiled the complainant. In this appeal, the appellant's main contention is themed around the failure to conduct a DNA test which he translated to a violation of his right to a fair hearing under Article 50(2) (c) of *the Constitution*.

29. The requirement to order for a DNA test is an exercise of discretion by the trial court. Section 36(1) of the *Sexual Offences Act* provides 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.

30. From the foregoing provision, it is trite that a DNA test is not a mandatory requirement prior to charging an accused person with an offence of sexual assault, which includes defilement. The use of the word 'may' under the section implies that it is only on a need basis that a DNA test can be ordered. An investigator or prosecution can subject a person to a DNA test based on the nature of the case. Equally, it is also on a need basis that a court can order that a DNA test be conducted. Furthermore, as glanced from section 8(1) of the *Sexual Offences Act*, a DNA test or results do not comprise one of the ingredients requiring proof in a case of defilement. The section reads:

> 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

31. All that the prosecution was required to prove was the act of penetration which was proved to the required standard.

32. This Court, addressing its mind on the failure of the trial court to order DNA test contrary to section 36 of the *Sexual Offences Act*, in Evans Wamalwa Simiyu vs. Republic (2016) KECA 555 (KLR), observed 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.'"

33. The Court summed it up thus:

> " Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanour of the witnesses believed the complainant that it was the appellant who violated her. Moreover, the trial court found material corroboration of the complainant's evidence

in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa."

34. We likewise find that the ground of appeal raised by the appellant that he was not accorded a fair trial merely because no DNA evidence, as primary evidence, was tendered cannot hold. We hasten to add that it matters not whether the complainant may have been impregnated by someone else. The fact that the appellant purports to have had sexual intercourse with the minor complainant amounts to defilement, which is punishable under the law. And, in this case, the prosecution discharged the burden of proving that the appellant had sexual intercourse with the complainant, which amounted to penetration.

35. In the end, we cannot fault the concurrent findings of the two courts below that the appellant defiled the complainant. We also cannot fault the learned Judge for finding that a DNA test was not a prerequisite to charging the appellant with the offence of defilement, and that his finding was based on sound evidence.

36. In conclusion, we find that the prosecution proved its case beyond reasonable doubt and hereby uphold the judgment of the High Court of Kenya at Garsen (Githinji, J.) delivered on 23rd May 2023.

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

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR