Suleiman v Republic (Criminal Appeal E143 of 2023)
[2025] KECA 1108 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1108 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E143 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

JUNE 20, 2025

BETWEEN

ABDALLAH KUTO SULEIMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Machakos (D. K. Kemei, J.) dated 27th January 2020 in HCCRA No. 121 of 2018)

JUDGMENT

1. This is a second appeal by Abdallah Kuto Suleiman. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*, 2006. The particulars were that on 30th July 2017 at Portland Farm opposite Green Park Area in Athi River Sub- County within Machakos County, the appellant intentionally and unlawfully caused his penis to penetrate the genital organ of P.W.W., a child aged 10 years. Arising from the same facts, the appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, 2006. The appellant pleaded not guilty, but at the conclusion of the trial, he was convicted of the main charge and sentenced to life imprisonment. His appeal to the High Court was unsuccessful against conviction, but the life sentence was substituted with a term of 30 years' imprisonment.

2. In this second appeal, the appellant contends that the offence was not proved beyond reasonable doubt because discrepancies marred the evidence of identification and that there was a failure by the prosecution to call a critical witness. He also contends that the complainant's age was not proved. In his submissions, the appellant raises another ground that his rights under Article 49(1)(f), (i) and (g) of the *Constitution* were infringed and that he was not linked to the offence. It is his prayer that we allow his appeal by quashing the conviction and setting aside the sentence.

3. To do justice to this appeal, we will briefly rehash the evidence adduced at trial. The prosecution called six witnesses. P.W.W. (PW1) testified that she was born on 1st February 2007 and was in class 4. She stated that on 30th July 2017, she accompanied her mother to church. After church, her mother gave her 5 shillings to buy chocolates. On her way to the shop, she decided to pass by her cousin's home. While playing at the gate, the appellant called her and asked her to take him to Star Sheikh Stage near Athi River. She obliged, and along the way, at a forest within Green Park along Mombasa Road, the appellant forced her to remove her clothes and proceeded to defile her. When she informed the appellant that she was feeling pain, the appellant hit her on the forehead. After the ordeal, the appellant gave her 20 shillings for transport from Green Park back home. She then met a woman who helped her cross the road, after which she boarded a motorcycle to her aunt's place. Her aunt then called her mother, who checked her and realised that she was bleeding. She was then taken to Nairobi Women's Hospital, where she was admitted, operated on and later discharged. After her discharge, while playing with a friend by the name S., she saw the appellant and identified him, leading to his arrest.

4. R.N.N. (PW2) testified that the complainant, who was her firstborn, was born on 1st February 2007. She recalled that on 30th July 2017, she went to church with her. At about midday, she gave her 20 shillings to go buy a sweet, as she was to stay back at the church. Later that evening, her sister P.N.N.N. (PW3) escorted PW1 home and upon interrogating her, PW1 informed her that she had been defiled by "uncle". She checked her and realised she was bleeding. She then took her to the police station and later to the hospital, where she was admitted.

5. (PW3) testified that on 30th July 2017, while she was at her place of work, the complainant was dropped by a motorcycle rider who informed her that he had picked her from Green Park area. She then escorted the girl home, where the complainant's father and mother were waiting. While interrogating her, they realised she was bleeding. They escorted her to the hospital. On 10th August 2017, while in the company of the complainant's father, the complainant led them to the appellant's house where they apprehended and escorted him to the police station.

6. W.W.W., the complainant's father, testified as PW4 and recalled that on the material day his daughter was taken home at about 6.00 pm by PW3. After his wife noticed that the child was bleeding, they made a report at the police station and took her to the hospital. Later, on 10th August 2017, the complainant informed him that she had seen her assailant. While with PW3, the complainant led them to the appellant's house, where they apprehended him and handed him over to the police.

7. Everlyne Njambi Kahiru (PW5), a clinical officer at the Kitengela Branch of Nairobi Women's Hospital, testified that when the complainant was taken to the hospital on 30th July 2017 at about 6.50 pm, her clothes were soaked in blood. Upon examination, she established that the complainant had a 3 cm tear below the clitoris and a bleeding perineal tear measuring 3 cm. Both labia majora and labia minora were bruised, and the hymen was not intact. The complainant was taken to the theatre for stitching and admitted for three days. She produced the Post Rape Care (PRC) form, the P3 form, and the discharge summary as exhibits.

8. PC Florence Ngomoli (PW6), on her part, gave an account of her investigation into the matter leading to the arrest and prosecution of the appellant. She also produced the complainant's birth certificate as an exhibit.

9. In his defence, the appellant, who testified as DW1, stated that on 28th July 2017, he went to Mombasa to visit his ailing mother. His testimony was that he had travelled in the company of Mukdhar Hussein Omar (DW2), who was also his Imam. He returned to Athi River on 5th August 2017 together

with DW2 and his wife. On 10th August 2017, he was in the house when he was accosted by the complainant's father and PW3, and accused of an offence he didn't commit.

10. Mukdhar Hussein Omar (DW2) stated he was an Imam at Star Sheikh Mosque in Athi River. His evidence was that he went to Mombasa with the appellant on 28th July 2017 and returned with him on 5th August 2017.

11. When the matter came up for hearing on 11th March 2025, the appellant was virtually present from Shimo La Tewa Prison, while the respondent was represented by the Senior Assistant Director of Public Prosecutions (SADPP), Mr. O. J. Omondi, who held brief for Mr. Jeremiah Maroro, Senior Assistant Director of Public Prosecutions. The parties opted to wholly rely on their written submissions.

12. In his submissions, the appellant contended that the courts below did not appreciate the principles regarding identification, including the need for an identification parade. In his view, while a single witness may prove a fact, the court must carefully investigate such evidence, especially when conditions favouring correct identification were difficult. The appellant asserted that the courts below failed to undertake a careful inquiry into the identification evidence, arguing that the evidence adduced could not support his conviction. He raised concerns about the reliability of recognising a stranger, the issue of witnesses not being summoned to shed light on the case, and the potential for mistaken identity.

13. Regarding his alibi defence, the appellant argued that the court acted in disregard of section 309 of the *Criminal Procedure Code* (CPC), which required the prosecution to rebut the defence, which it did not.

14. In urging that the case was not proved beyond reasonable doubt, the appellant submitted that the medical report was inconclusive as it did not link him to the alleged penetration. Finally, the appellant argued that his constitutional rights and fundamental freedoms under Article 49 (1) (f), (i) and (g) of the *Constitution* were violated. The appellant stated that he was presented in court on 14th August 2017 following his arrest on 11th August 2017, hence violating his right to be taken to court within twenty-four (24) hours of arrest. The appellant submitted that the prosecution failed to offer a valid and satisfactory explanation for this delay. The appellant argued that violating the mandatory twenty-four- hour limit renders the subsequent criminal proceedings illegal, and therefore, the conviction should be nullified and quashed. He consequently urged us to allow his appeal.

15. In opposition to the appeal, learned counsel Mr. O.J. Omondi submitted that the offence was proved beyond reasonable doubt. Counsel argued that the evidence of PW1 was cogent, credible and believable and that the High Court correctly invoked section 143 of the *Evidence Act*, which provides that no particular number of witnesses shall be required for the proof of any fact. Counsel rehashed the evidence on record and urged us to find that all the elements of the offence were established. In a nutshell, the respondent urged that the appeal be dismissed in its entirety.

16. This being a second appeal, the scope of our mandate is limited to addressing questions of law and not facts. Matters of fact are deemed to have been settled by the concurrent findings by the trial court and the first appellate court. Our intervention on issues of fact is only permitted where it is demonstrated that, based on the evidence on record, the courts below were plainly wrong as a result of misapprehension of the evidence or the consideration of a factor they ought not to have considered. (See section 361(1)(a) of the *Criminal Procedure Code*, and Dzombo Mataza vs. Republic [2014] KECA 831 (KLR)). Additionally, issues not raised before the first appellate court do not fall for our determination - see Republic vs. Ayako [2025] KESC 20 (KLR); and Republic vs. Manyeso [2025] KESC 16 (KLR).

17. Upon considering the record and submissions in light of the above- mentioned ground rules, the only issue arising for our determination is whether the offence of defilement was established against the appellant. We must also state from the outset that the questions of violation of the appellant's constitutional rights and failure to call essential witnesses are not properly before us as they are being raised for the first time in this Court.

18. For the prosecution to secure a conviction on a charge of defilement, it must prove the age of the complainant, that there was penetration, and the identity of the perpetrator.

19. In this case, the evidence of the complainant's age was established through the oral evidence of PW1, her mother R.N.N. (PW2) and the birth certificate produced by Corporal Florence Ngomoli (PW6). The evidence established the complainant's date of birth as 1st February 2007. It would then follow that as at the date of the commission of the offence on 30th July 2017, the complainant was 10 years and six months. She was, as per the provision of section 8(2) of the *Sexual Offences Act*, "aged eleven years or less".

20. As was held by the Court in Mwalango Chichoro Mwanjembe vs. Republic [2016] KECA 183 (KLR):

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

21. The next issue is whether there was proof of penetration. The complainant narrated how she was defiled in a forest within the Green Park area. She vividly described how the ordeal took place. According to her mother, when she checked the complainant, she was bleeding from her private part. Her evidence on this bleeding was confirmed by her husband and P.N.N.N. (PW3), who were present when PW2 received and inspected the child. To put the aspect of penetration to rest, one need not look further than the evidence of the medical officer, Everlyne Njambi Kahiru (PW5), who established that the complainant had a 3 cm tear below the clitoris and a bleeding perineal tear of 3 cm. Both labia majora and labia minora were bruised, and the hymen was not intact. The witness further testified that the complainant was taken to the theatre for stitching and admitted for three days. In our view, the stated evidence leaves no doubt that there was penetration of the complainant's vagina, occasioning her the injuries described by PW5.

22. Regarding the appellant's identity as the perpetrator, the appellant advances two arguments. First, he submitted that he was not medically linked to the offence, and second, that his alibi defence was not discounted. The appellant's assertion of an inconclusive medical report perhaps arises out of a misapprehension of section 36(1) of the *Sexual Offences Act*, which 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."

23. A reading of the foregoing provision shows that it is couched in discretionary terms and is thus not mandatory. When this provision is read together with section 124 of the *Evidence Act*, it becomes

apparent that a conviction can ensue absent medical evidence unless the court is not satisfied that the victim is telling the truth and there is need for medical evidence to erase such doubt. Thus, in Williamson Sowa Mbwanga vs. Republic [2016] KECA 147 (KLR) it was held that:

> " 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 vs. Republic, Cr. App. No. 270 of 2012 (Nyeri)..."

24. It, therefore, follows that the ground relating to insufficient medical evidence must fall by the wayside. Both the High Court and the trial court considered the evidence on record and ruled that there was sufficient evidence to link the appellant to the offence. We do not find it necessary to rehash the evidence.

25. Regarding the appellant's claim that his alibi defence was not considered, we have reviewed the record and the judgments of the courts below. On this issue, the first appellate court held:

> " 25. The appellant has raised the defence of alibi. The law on alibi is now well settled. It is that a prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see Leonard Aniseth vs. Republic (1963) EA 206).
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> 26. To counter this defence, the prosecution was required to adduce direct or circumstantial evidence proving that the appellant was the perpetrator of the unlawful actions. This was proved by the testimony of the prosecution evidence as analyzed above and in light of that evidence, I reject the appellant's alibi. I am satisfied that there was ample evidence which put him at the scene of crime.
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> ...
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> 28. The circumstantial evidence that is available is that the appellant was not in Mombasa and if he was then he must have dashed there to hide as he waited for the coast to clear. He was promptly pointed out by the complainant and was arrested. The appellant's alibi did not manage to shake the evidence of the prosecution. It also transpired that there had been no differences between the appellant and the complainant's parents so as to suggest a frame up.
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> 29. In the instant case, I find that there is direct and cogent evidence pointing irresistibly to or showing that it is the appellant that caused the victim the absent hymen. The evidence available has proven the ingredient of penetration occasioned by the appellant, his participation and that the complainant was the victim and a child beyond reasonable doubt."

26. We agree with the analysis and conclusion by the learned Judge. He appreciated the gravamen of an alibi defence and correctly applied the law to the evidence on record before concluding as he did. On our part, we only add that the alibi defence was not believable. This is because the record shows that although PW1 to PW5 were recalled at the appellant's behest for extensive cross- examination, the appellant failed to bring up the issue of his alibi defence. The evidence of the complainant on record

leaves no doubt that the appellant was not a stranger to the complainant but was a person she had previously seen. In our view, the alleged alibi was an afterthought crafted in a last-ditch effort to throw the prosecution's case off balance, but it failed to achieve that purpose.

27. We also find that the evidence of identification was considered within the relevant parameters pertaining to the evidence of a single identifying witness. In that regard, the learned Judge found as follows:

> " 24. With regard to the length of time, PW1 told the court that she was taken to Green Park from the church and this is adequate time to observe a person. The distance between the two is relatively small as she walked with him, saw him remove his trousers and saw him lay on her and also saw him give the motorcycle rider Kshs 20/-. The evidence is to the effect that it was day time hence she was able to see him well. She was not familiar with him but told the court that she used to see him. I have examined closely the identification evidence of the complainant and found it to be free from the possibility of mistake or error since before, during and after the ordeal she was in close proximity to him, the events she narrated enabled her to correctly identify the appellant. The complainant stated clearly that the appellant was an uncle to one of her friends with whom she regularly plays and that upon her discharge from hospital led her parents to his house from where the appellant was arrested."

28. We are therefore satisfied that the appellant was correctly linked to the offence. His alibi defence was considered and it failed to shake the foundational evidence put in place by the prosecution. In conclusion, we find that the offence of defilement was proved against the appellant.

29. Although the appellant is serving an unlawful sentence, none of the parties took up the issue of the sentence in this appeal. It would therefore be unfair to the parties to make any decision on the sentence. We will, therefore, leave the sentence as is.

30. Consequently, this appeal lacks merit, and we, accordingly, dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.