Munene v Republic (Criminal Appeal E001 of 2021)
[2025] KECA 1375 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1375 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E001 OF 2021

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JULY 25, 2025

BETWEEN

BENSON KEEN MUNENE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Narok (J.M. Bwonwonga, J.) dated 23rd November 2017inHCCRA No. 26 of 2016)

JUDGMENT

1. The appellant, Benson Keen Munene, was in the main count charged with the offence of defilement contrary to section 8[1] as read with section 8[2] of the *Sexual Offences Act*. The particulars of the charge stated on diverse dates between December 2013 and November 2014 at Narok North Sub-County within Narok County the appellant caused his penis to penetrate the vagina of E.K., a girl aged 12 years. Arising from the particulars in the main charge, the appellant was charged with an alternative charge of indecent act with a minor contrary to section 11[1] of the *Sexual Offences Act*. At the conclusion of the trial, he was found guilty of the main charge and sentenced to twenty years' imprisonment.

2. Dissatisfied with the judgment of the trial court, the appellant unsuccessfully moved the High Court to reconsider the finding. Undeterred, he is now before us raising five grounds of appeal, which basically contend that the offence of defilement was not proved.

3. The trial was framed on the evidence of four prosecution witnesses and the appellant's defence testimony. In brief, E.K. [PW1] testified that she was fifteen years old and in class seven. She recalled that she met the appellant sometime in 2012. The appellant was at that time a primary school teacher. They became friends, and in 2013, while at a night vigil at [particulars withheld] Free Pentecostal Church, she had a sexual encounter with the appellant in the bush. Again, in November and December 2014,

they had sex at her home while her mother was away at work. She stated that she would communicate with the appellant through her mother's phone when it was being charged. She further stated that she had informed the appellant that she was a student at the time. Fast forward to April 2015, the secret escapades came to light when her pregnancy became obvious. Upon interrogation, the appellant informed her mother that the appellant was responsible for her pregnancy. She was escorted to Narok District Hospital and examined. She later gave birth on 4th August 2015 but the child died three weeks later.

4. C.N.K. [PW2] testified that PW1 who was her second born was born on 23rd August 2002. She also stated that she knew the appellant as he was a brother to her pastor. She recalled that in April 2015, she realized that PW1 was with child. Upon interrogating her, she disclosed that it was the appellant who had put her in the family way. PW2 escorted her to Narok District Hospital, where the pregnancy was confirmed, and PW1 registered for antenatal clinics. The appellant was then summoned and arrested at the hospital. She stated that PW1 later gave birth on 4th August 2015, but the child died shortly thereafter.

5. Hillary Kiptoo [PW3] was a clinical officer at Narok Referral Hospital. He attended to the complainant at the time and filled her P3 form. He concluded that she had been defiled and was with child at 32 weeks of gestation. He produced the P3 form as an exhibit in the trial. PC Lydia Wanja [PW4] gave an account of her investigations. She produced the complainant's birth certificate and antenatal clinic book as exhibits.

6. In his defence, the appellant, who denied committing the offence, narrated what transpired on the day he was arrested. He also testified that he had been promised a DNA test at the Children's Office and that even PW2 had intended to withdraw the case.

7. When the appeal came up for hearing, the appellant virtually appeared in person from Narok Main Prison. Senior Assistant Director of Public Prosecutions Mr. Omutelema represented the respondent. Both parties relied on their respective written submissions.

8. Through his undated submissions, the appellant referred to *Hadson Ali Mwachongo v Republic* [2016] eKLR to emphasize the necessity of proving the victim's age in a defilement charge. The appellant adverted to discrepancies in the complainant's age, pointing out that whereas the birth certificate indicated that she was twelve years old, it was stated in the charge sheet that she was fourteen years old. He bemoaned the absence of an age assessment report, arguing that the evidence regarding the complainant's age was inconsistent and did not establish her age beyond reasonable doubt. The appellant relied on *Edwin Nyambogo Onsongo v Republic* [2016] eKLR to assert that there was need to adduce credible evidence on the complainant's age.

9. Regarding the element of penetration, the appellant contended that the prosecution failed to prove an act of penetration with a child as required by section 8[1] of the *Sexual Offences Act*. He criticised the High Court's conclusion that penetration had been proved, referencing *Joseph Wambu Mwangi v Republic* [2023] KECA 1362 [KLR], where it was emphasized that medical evidence should be evaluated alongside testimonies. Still pursuing the argument that the penetration was not linked to him, the appellant referred to *Mbogo v Republic* [2025] KECA 374 [KLR] and *William Ochieng v Republic* [2024] KECA 78 [KLR] for the submission that where a defilement results in a pregnancy, DNA evidence becomes particularly important in order to link the pregnancy to the accused person. According to the appellant, the failure to procure DNA evidence and adduce it at the trial created a significant gap in the prosecution's case.

10. The appellant insisted that PW1 was not a credible witness and challenged the first appellate court's reliance on section 124 of the *Evidence Act*, asserting that although the provision does indeed allow a

court to convict on the uncorroborated evidence of the complainant in sexual offences, the court must provide cogent and compelling reasons for believing the complainant's testimony.

11. The appellant referred to *Simon Nyaga Njeru v Republic* [2023] KECA 985 [KLR], among other cases, to argue that the unexplained delay in reporting the offence raised concerns about the complainant's credibility, more so when the making of the report was tied to the discovery of the pregnancy. He therefore urged that both the trial court and the first appellate court erred in finding that the defilement was proved and beseeched us to set aside the conviction. Concerning the sentence, the appellant submitted that it was illegal due to its minimum mandatory terms.

12. In opposition to the appeal, learned prosecution counsel Mr. Omutelema started by urging us to appreciate the Court's restricted role in a second appeal. Turning to the appeal proper, counsel submitted that the offence of defilement was established against the appellant. Starting with the element of age, counsel referred to the case of *Maripett Loonkomok v Republic* [2016] eKLR, to urge that the question of age is a matter of fact which can only be interfered with if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were perverse in nature. According to counsel, the fact that the complainant was aged 12 years was based on the concrete evidence of the complainant's mother as supported by the birth certificate, and that this Court should not interfere with that conclusion but affirm it.

13. Regarding penetration, learned counsel Mr. Omutelema argued that the trial court and the High Court properly appreciated the evidence before them and rightly concluded that this aspect of the charge was proved through the evidence of the complainant and that of the medical officer who testified about the complainant's broken hymen and pregnancy.

14. As for the third element of the offence being the identity of the appellant, counsel referred us to holding in Anjonini & others v Republic [1980] KLR 59 that evidence of identification by way of recognition is more satisfactory and more reliable than the identification of a stranger, and urged that in this case, the appellant was well-known to the complainant and her mother and the issue of mistaken identity does not arise.

15. Responding to the appellant's challenge to the credibility of PW1, learned counsel Mr. Omutelema submitted that the trial court was convinced that the witness was truthful and credible, and section 124 of the *Evidence Act* was therefore properly invoked.

16. Regarding the appellant's argument that a DNA test was crucial in the circumstances of this case, learned counsel, Mr. Omutelema, argued that the failure to conduct DNA analysis was not fatal as the provisions of section 36[1] of the *Sexual Offences Act*, which provide for such an analysis, do not make a DNA test mandatory. To buttress this submission, counsel referred to *Williamson Sowa Mbwanga v Republic* [2016] KECA 147 [KLR], where the Court, dealing with circumstances similar to those in this appeal, held that a DNA test was not necessary in proving defilement. Counsel also referred to *Kalewa Mutunga v Republic* [2006] eKLR to urge that the prosecution is required to only call the witnesses necessary to prove its case, and that in this case, the availed witnesses sufficiently proved the prosecution's case. All in all, learned counsel, Mr. Omutelema, urged us to dismiss the appeal.

17. This being a second appeal, our mandate as delineated by section 361[1][a] of the *Criminal Procedure Code* concerns matters of law, as issues of fact are deemed to have been settled in the two courts below. Thus, in *Dzombo Mataza v Republic* [2014] KECA 831 [KLR] it was held that:

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno v Republic* [1972] E.A. 32. By

dint of the provisions of section 361[1][a] of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. We do not discern such misgivings in this appeal."

18. We have addressed our minds to the record and submissions by the parties within the parameters of our mandate as captured above. The two issues arising for our determination are whether the offence was proved and whether the sentence was legal.

19. The appellant faults the trial court and the first appellate court on the grounds that the elements of defilement were not established. In respect to the element of age, the appellant contends that the age of the complainant was not established beyond reasonable doubt. He also argued that the evidence of the complainant's age as disclosed in the certificate of birth, the charge sheet, and the witnesses' testimonies was contradictory. Addressing a similar argument, the Court in *Maripett Loonkomok v Republic* [2016] KECA 520 [KLR] pointed out that:

> " The question of age, as we have stated earlier is a question of law under the *Sexual Offences Act*, at least to prove that the victim was a child at the time of defilement and also for purposes of sentence. However the question whether the complainant was 9, 10 or 13 is a question of fact with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were perverse in nature. It follows that to constitute a question of law the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises."

20. And in *Peter v Republic* [2024] KECA 1124 [KLR], the Court highlighted the methods of proving age as follows:

> " 28. From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians.
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> 29. ...
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> 30. There cannot be any better way to prove the age of PW1 than by the Birth Certificate, which is an official document issued by the Registrar of Births. The appellant did not challenge the authenticity of the Birth Certificate. To this end, we will not belabour much but conclude that PW1's age was proved beyond reasonable doubt."

21. The above pronouncement resonates with us insofar as proof of age is concerned. We can only stress that the evidence adduced to prove the victim's age must be credible and reliable. Here, we have the evidence of a mother who bore the labour pain and a birth certificate issued by the government confirming the complainant's age. We would think of no other evidence as credible as this evidence. Thus, in *Richard Wahome Chege v Republic* [2014] KECA 453 [KLR], the Court juxtaposed that:

> " ...What better evidence can one get than that of the mother who gave birth?"

22. In this case, PW1 stated that she was 15 years old. Her mother, PW2, stated that PW1 was 12 years old and produced her birth certificate, which gave the complainant's date of birth as 23rd August 2002. PW3, a medical practitioner, estimated the complainant's age as 14 years old. We therefore have no reason to depart from the finding of fact by the trial court and the first appellate court that the evidence established the complainant's age as 12 years. This was based on the evidence in the birth certificate as corroborated by PW2. We must also point out that the appellant neither contested the production of the birth certificate nor did he challenge its authenticity. Once this was admitted and corroborated, no other evidence could have ousted this evidence. In any event, the alleged contradictory ages being 12, or 14 or 15 years all fell within the net of section 8[3] of the *Sexual Offences Act* which provides that a person who commits an 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.

23. As regards the alleged contradiction between the age of the complainant in the birth certificate and in the charge sheet, we only need to point the appellant to the proceedings of 21st January 2016 when the original charge sheet which had indicated the age of the complainant as fourteen years was substituted with one that stated that the age of the complainant was twelve years. After the substitution, he was informed that he could ask for the recall of the witnesses who had testified for further questioning, and he informed the trial court that he was not interested in having any witnesses recalled. He cannot now turn around and claim that the age of the complainant, as indicated in the birth certificate, does not align with the age stated in the charge sheet.

24. Next, the appellant contended that penetration was not proved. On this, we need not say more, save to mention that the fact that the complainant gave birth is proof enough that there had been a sexual encounter between her and a male person. We must add that defilment occurs when partial or full penetration is proved. It doesn't matter whether a pregnancy results from the encounter or not.

25. The most contentious issue was on the identity of the appellant as the perpetrator. On this ground, the appellant took issue with the reliance on the sole evidence of PW1 to link him to the offence and the absence of the DNA results to prove his relationship with the baby. We have considered the case of Mbogo v Republic [supra], cited to us by the appellant to urge that DNA analysis is necessary in instances where the complainant is impregnated. In order to get the true picture of the decision in the cited case, we refer him to the following passage in the judgment:

> "In our view, nothing would have been easier than for the prosecution to establish beyond reasonable doubt who the father of the child was and therefore arraign the perpetrator with proof of DNA. As we say this, we are aware that DNA is not a mandatory requirement to prove the ingredients of the offence under the *Sexual Offences Act* and we are not in any way saying that it must be done, but this was a case that had so many gaps and it is not a safe conviction." [Emphasis ours]

26. The above pronouncement captures the applicability of section 36[1] of the *Sexual Offences Act*. As held in Mbogo v Republic [supra], DNA evidence is not mandatory but can be called upon to seal loopholes whenever the available evidence has glaring gaps. We also add that since the production of DNA evidence is optional, it is upon the prosecution to decide whether to adduce it or not. The court can, according to the facts of the case before it point to the gaps that could have been filled by a DNA test. That was not the case in the appeal before us. We therefore find that a DNA was not necessary to connect the appellant to the offence, as what was in dispute was not the question as to "who fathered the child", but the inquiry was "who defiled the complainant". Additionally, we note that the facts in the appeal before us are closer to those in *Williamson Sowa Mbwanga v Republic* [supra], where the

appellant's argument that he was not linked to the defilement because a DNA test was not conducted, yet the victim had been impregnated, was answered thus:

> " As regards the first ground of appeal, 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."

27. In the appeal before us, we note that the trial magistrate not only found the complainant to be a credible witness but also established that her evidence was corroborated by that of PW2. The trial court and the first appellate court, therefore, properly invoked section 124 of the *Evidence Act* in finding that the appellant was the perpetrator of the offence. In his defence, the appellant opted to give an account of his arrest. He also seemed to be concerned about the DNA test. He did not speak about his encounter with the complainant prior to the case. The appellant did not even distance himself from being a teacher at the named primary school. He did not even speak to the allegation that he was a brother to a pastor at Mashariani Free Pentecostal Church and that he presented himself as a missionary in order to gain the confidence of the complainant.

28. In the circumstances, we find that the evidence on record shows that the appellant was known to the complainant and PW2. As pointed out by the trial court, the evidence of PW1 was credible, and there was no plausible reason why she would frame the appellant. We therefore find that the High Court did not err in affirming the decision of the trial court by finding that the appellant was the defiler.

29. Another issue raised by the appellant was the alleged delay in reporting the incident. On this issue, we appreciate as was submitted by the appellant that without a satisfactory explanation, unreasonable delay in reporting a sexual offence may undermine the credibility of the complainant. Having said so, we appreciate that a good number of defilements go undiscovered due to the failure by the victims to report the crimes, and if such crimes are discovered later, it cannot be said that the victims are not credible because they did not disclose the violations as soon as they occurred. Turning to the facts of this case, as we have already pointed out, the trial court found the complainant to be a credible witness. As the second appellate court, we are not better placed to speak to a witness's credibility, as that is within the remit of the trier of fact, being the trial court or the first appellate court. Furthermore, the evidence shows that it was only upon the discovery of the complainant's pregnancy by PW2 that the complainant opened up about her illicit liaison with the appellant. The question, perhaps, is whether there exist circumstances on record that would lead us to question the concurrent findings by the two courts. Unfortunately, in this case, no such circumstances were brought forth. The question of delay in reporting the incident did not arise during the trial. Additionally, from the evidence on record, it appears that the complainant was mistaken that she was in a "girlfriend-boyfriend" affair. Even if that was the case, it did not absolve the appellant who, being a teacher, ought to have known better than to defile a school child. As such, this ground of appeal fails.

30. Finally, the appellant in his submissions challenged the sentence of 20 years imprisonment. Although the issue was not raised in the grounds of appeal, we only wish to point out that the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 Others [Amicus Curiae]* [2024] KESC 34 [KLR] and *Republic v Ayako* [2025] KESC 20 [KLR] has affirmed the constitutionality of the sentences as framed in the *Sexual Offences Act*. The sentence meted upon

the appellant was the mandatory minimum sentence legislated by the provision under which he was charged. The appellant's challenge to the sentence is therefore without merit.

31. Flowing from the foregoing discussion, we find that this appeal lacks merit and is for dismissal in its entirety, which we hereby do.

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY, 2025.

J. MATIVO

JUDGE OF APPEAL

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M. GACHOKA C.Arb, FCIArb.

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR