Salim v Republic (Criminal Appeal E078 of 2023)
[2025] KECA 1338 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1338 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E078 OF 2023

SG KAIRU, AK MURGOR & KI LAIBUTA, JJA

JULY 18, 2025

BETWEEN

JAMAL AHMED SALIM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garsen (Korir J.) delivered on 30th April, 2020.) in High Court Criminal Appeal No. 31 of 2018)

JUDGMENT

1. The Appellant, Jamal Ahmed Salim, was charged with defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that, on 15th March 2018 in Lamu West Sub- County in Lamu County, the Appellant intentionally caused his penis to penetrate the vagina of BAMN, the complainant, a child of 7 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day in the same place, he intentionally touched the vagina of BAMN a child of 7 years.

3. The Appellant denied the charges and the case proceeded to trial where the prosecution called five witnesses.

4. PW1, the complainant's mother, told the court that, on 15th March 2018, she was washing clothes when the Appellant, who is her cousin, came and asked to take her two children to go and buy juice for them. She refused and told him to buy the juice and bring it to the children. When she went to hang the clothes, the Appellant took the complainant and her sibling without her knowledge. When she came back and noticed that the children were not there, she informed her sisters and relatives and they started searching for her.

5. PW1's sister, PW3, then called her and told her that she had seen the Appellant defiling "...doing bad thing" to the complainant in an abandoned construction site. She rushed to the site where she found the complainant. On examining her, she saw blood in her private parts, whereupon, PW1's sisters took her to Mokowe Hospital where she was treated.

6. PW1 told the court that the complainant was 7 years old as she was born on 15th November 2010. She produced the complainant's birth certificate. She stated that she had a good relationship with the Appellant and did not know that he could harm the complainant.

7. PW2 was the Complainant. Prior to her testimony, the trial magistrate conducted a voire dire examination and found that the Complainant did not understand the nature of an oath. In her rulings dated 3rd April 2018, the trial magistrate held that the complainant should give her evidence through an intermediary. On the basis of this decision, the trial magistrate appointed PW1 to testify as an intermediary in accordance with Section 31 of the *Sexual Offences Act*.

8. According to the complainant, the Appellant was her uncle and that he told her that he wanted to buy juice for her and her sister; that the Appellant chased her sister away and took her to an incomplete abandoned house, where he removed her panty, threatened to kill her by stabbing her if she shouted, covered her mouth, and "did bad things" to her at her private parts (to which she pointed). She further said that Mama Nunu saw them through the window.

9. It must be noted that the trial Magistrate observed the complainant's demeanor and noted that the child was scared, talked in hushed tones, and avoided eye contact with the Appellant.

10. RA, PW3, was the complainant's aunt. She told the court that on 15th March 2018 at around 11.00 a.m, she received a call from OM, her uncle, who asked her if she had seen the complainant who had gone with the Appellant to buy juice but had not returned. She went back home where she met with PW1 and other relatives looking for the complainant. They split up in order to broaden their search in different directions. As she was walking PW3 came across an abandoned house where she saw the Appellant through an opening. When the Appellant saw her, he escaped through a window. She tried calling him, but he did not stop. When she looked through the window, she saw the complainant lying on her back with her dress lifted up above the waist and without her panty, and was crying. She also had soil and leaves in her hair and that her private parts were swollen and had blood spots around.

11. PW3 also saw that the complainant's white flowered panty was ripped and the Appellant's red t-shirt was left at the scene. PW3 called her relatives and, when they arrived, the complainant told them that the Appellant had done "bad things" to her and that he threatened to kill her if she spoke about it. They took

12. her to Mokowe Police Post and were later accompanied by a police officer to hospital where she was examined.

13. Ahmed Hassan, PW4, was the doctor at Mokowe Hospital who filled the P3 form. He stated that the complainant's genitalia were red and bruised, and that the vaginal canal was unusually red. It was his opinion that there was forced penetration by a penis and not fingers. He produced the treatment notes which he initially filled before carrying out further investigations. He also produced the post rape care form where it was noted that the complainant had sand particles on her back and genitalia.

14. PC Daniel Kibet Kipchumba, PW5, from Mokowe Police Post, was the investigating officer. He stated that the complainant was taken to the station on 15th March 2018 by her mother, PW1, and that PC Dorothy recorded their complaint in the Occurrence Book (O.B). Thereafter, accompanied by PW1, PC Dorothy, PW5 escorted the complainant to hospital where she was examined. They returned to the

police post to record the witness statements and found that the Appellant had been arrested. PW5 told the court that they then proceeded to the scene of the crime which was an abandoned derelict house near a forested area. The complainant showed them where the incident happened and they found a red T-shirt which the complainant said belonged to the Appellant. They also found a child's torn panty which the complainant identified as belonging to her.

15. When placed on his defence, the Appellant chose to give a sworn statement in his defence. He stated that, on the day of the offence, he was in a different area fixing his boat. He stated that he had not been examined medically, and that he was framed. In cross-examination, he stated that he had never met with the complainant, and that he had never bought her juice. He told the court that he had fallen out with PW3 after they exchanged insults, and that that was why he was framed.

16. At the end of the trial, the learned magistrate found the Appellant guilty, convicted and sentenced him to imprisonment for life.

17. Aggrieved, the Appellant filed an appeal to the High Court on the grounds that the learned trial magistrate was in error in failing to consider that Section 8(1)(2) of the *Sexual Offences Act* was prejudicial and denied the Appellant his rights in violation of Section 216 and 329 of the *Criminal Procedure Code*; that the prosecution did not prove its case to the required legal standard; and that there were massive contradictions and variances in the prosecution case.

18. The 1st appellate court, upon considering the appeal, dismissed it and upheld both the sentence and conviction.

19. Aggrieved, the Appellant is now before this Court on 2nd appeal on the grounds that the learned Judge failed to appreciate that the learned trial magistrate failed to take into account Sections 110 and 111 of the *Evidence Act*; that the learned Judge failed to appreciate that Article 49 (i) (f) of *the Constitution* was not adhered to, leading to violation of his rights; and in failing to find that the sentence was harsh, unfair and unconstitutional.

20. When the appeal came up for hearing on a virtual platform, the appellant was in person while learned Prosecution counsel Mr. Kariuki appeared for the Respondent.

21. In his written submissions, the Appellant began by submitting that the offence of defilement was not proved as penetration was not established. It was submitted that the medical evidence could not be relied upon as, on the one hand, the treatment notes and the P3 form were contradictory as they indicated that there was 'attempted penetration' while, on the other hand, PW4 stated that there was penetration; that, further, although the treatment notes specified that the vaginal canal was stressed and there was slight swelling of the vaginal walls, the hymen was intact, and that the presence of the hymen totally erased the element of penetration, meaning that defilement was not proved.

22. On the issue as to the alleged violation of Article 49 (i)(f) of *the Constitution*, the Appellant submitted that he was arrested on 15th March 2018 and taken to court on 19th March 2018, which meant that he spent four days in police custody before being arraigned in court; that the period in custody was beyond what is stipulated in the *Criminal Procedure Code*. The Appellant urged that he be acquitted for the reason that his rights had been violated.

23. Finally, the Appellant submitted that the sentence imposed on him was harsh, excessive, and unconstitutional since he had been sentenced to life imprisonment without his mitigation being considered by either the trial court or the High Court.

24. In their written submissions, learned Prosecution counsel submitted that the trial magistrate observed that the complainant was a vulnerable witness and, in so finding, appointed an intermediary.

25. Counsel submitted that there was no contradiction in the medical evidence since, on the basis of an examination of the complainant, the medical report concluded that she was defiled. Counsel further submitted that the Appellant was placed on his defence and Section 211 of the *Criminal Procedure Code* was explained to him, and that he opted to give a sworn statement and intended to call 3 witnesses; that, after presenting his defence, the Appellant did not call any witness as he stated that he was unable to trace them. Therefore, the appellant was given an opportunity to present his defence and was afforded his right to fair hearing.

26. On the sentence, counsel submitted that Section 8(1) as read with Section 8(2) of the Sexual Offence Act prescribes a life sentence for the offence of defilement of a child below 11 years of age; and that the complainant was 7 years old at the time the offence was committed. Counsel submitted that, on these premises, the Appellant was rightly sentenced.

27. The role of this court as the 2nd appellate court is that its jurisdiction is limited to matters of law as defined in Section 361 of the *Criminal Procedure Code*. This was affirmed by this Court in the case of David Njoroge Macharia vs. Republic [2011] eKLR where it was stated:

> " That being so only matters of law fall for consideration –see section 361 of the *Criminal Procedure Code*. 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 v. R [1984] KLR 611."

See also Adan Muraguri Mungara vs Republic [2010] eKLR.

28. Having appreciated the scope of this Court's mandate, and given due consideration to the record of appeal, the amended memorandum of appeal and submissions, we find the issues for determination are:

i) Whether the requirements of Article 49 (i) (f) of *the Constitution* were not adhered to leading to a violation of the Appellant's rights;

ii) whether penetration was proved; and

iii) whether the mandatory sentence imposed is unconstitutional and violates the provisions of Sections 216 and 329 of the *Criminal Procedure Code*.

29. On whether there was a violation of Article 49 (i) (f) of *the Constitution*, the Appellant alleged that the period he was held in custody before being arraigned in court exceeded the 24-hour period prescribed by law. However, when we consider the record, it becomes apparent that this issue was neither raised in the trial court nor the High Court. It is being raised in this Court for the first time. The matters to which this issue pertains are matters of fact. As a 2nd appellate court, we are limited to addressing matters of law only. It is therefore too late in the day to consider the matters of fact raised in this regard.

As stated in the case of Alfayo Gombe Okello vs Republic [2010] eKLR:

> " ... 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."

30. Now turning to the question as to whether the offence was established. For the prosecution to prove its case to the required standard, three key ingredients for the offence of defilement are necessary. These are, the

31. complainant's age, the appellant's identity and relationship to the complainant and whether there was penetration. See GMM vs Republic [2019] eKLR.

32. Beginning with the complainant's age. PW1, the complainant's mother stated that the complainant was 7 years old at the time of the offense and produced her birth certificate, which indicated her date of birth as 15th November 2010. Based on this evidence, the complainant's age was sufficiently proved.

33. On the next element, which is whether penetration was proved, the Appellant's contention is that the medical report was contradictory as it specified that there was 'attempted penetration' and that there was also penetration; that, further, since the report specified that her hymen was intact, penetration was not proved.

34. Turning to the issue that the medical reports were contradictory and ought not to be relied upon, it is true that the treatment notes on the one hand indicated that there was attempted penetration and, on the other hand, PW4, the doctor stated that there was injury to the complainant caused by a blunt object.

35. The Supreme Court of Uganda in the case of Bassita vs Uganda S. C. Criminal Appeal No. 35 of 1995 held that:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.
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> As concerns the contradictions, this Court in the case of Jackson Mwanzia Musembi vs Republic [2017] eKLR cited with approval the Ugandan case of Twahangane Alfred vs Uganda CR. Appeal No. 139 of 2002 [2003] UGCA,6 where it was held that:
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> > " ...with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

36. PW4, Dr. Ahmed Hassan, testified that he noted an 'attempted defilement" on the treatment notes and P3 form based on the history given by the family before examination of the minor. Thereafter he clarified in his evidence that, it was after he had examined the minor that he confirmed that she had been defiled, based on the observations that her genitalia was red and bruised. He concluded that there was evidence of forced penetration. Given the explanation by PW4, as were the courts below, we too are satisfied that any contradiction in the medical reports was sufficiently explained and demonstrated that penetration was proved.

37. But that is not all, the Appellant further argues that there was no penetration since the findings on the medical report were that the complainant's hymen was intact.

38. Section 2 of the *Sexual Offences Act* defines 'penetration' as

> "... the partial or complete insertion of the male genital organ into the genital organ of a female."

In the case of Lucas Masa Hura vs Republic [2019] eKLR, this Court categorically stated:

> " Furthermore, since partial insertion is considered as penetration, the fact that hymen is not broken does not in itself disprove penetration of genital organs."

39. The prosecution's evidence showed that the Appellant, PW1's cousin, and a person known to the complainant, snatched her away from her mother when she was not looking, took her to an abandoned house and defiled her. It was he who was found fleeing the scene, leaving the complainant with her dress hoisted above her waist and without her panties on. When asked, she clearly stated that the Appellant had done bad things to her. The medical evidence showed that there was penetration, all of which would lead to the conclusion that the Appellant defiled the complainant. Whether or not her hymen was intact, the treatment notes and P3 form were unequivocal that there was, "...hyper erthematous state of the vagina and swelling..." which pointed to the fact of penetration. The record discloses that both the trial Magistrates court and the High Court found that penetration was established. Given the concurrent findings of the evidence in its totality, in that, the age of the complainant, the identity of the appellant and penetration were all proved as were the two courts below, we too are satisfied that the conviction was safe, and we have no basis on which to interfere with it.

40. Finally, regarding the Appellant's complaint against the life sentence, the complainant was a vulnerable child of tender years. Going by the demeanor and conduct observed by the learned trial Magistrate, she has suffered immense trauma from the ordeal that she will have to live with for the rest of her life.

41. The Supreme Court, in the case of Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 KLR affirmed the lawfulness of the penalties prescribed by the *Sexual Offences Act*.

42. Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* prescribes a life sentence for the offence of defilement of a child below 11 years of age. The complainant was 7 years old at the time the offence was committed. The sentence is therefore lawful and constitutional. This ground is also without merit.

43. In sum, the appeal against conviction and sentence lacks merit and is dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2025

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, F.CIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR