Suleiman v Republic (Criminal Appeal 22A of 2022)
[2025] KECA 1189 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1189 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 22A OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 4, 2025

BETWEEN

ZUWA SULEIMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (A. Mabeya, J.) delivered on 6th September 2019 in HCCRA No. 84 of 2016)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Mombasa (A. Mabeya, J.) delivered on 6th September 2019 in which the learned Judge upheld the appellant's conviction by the Chief Magistrate's Court at Kwale (P. K. Mutai, RM) in Sexual Offences Case No. 30 of 2017.

2. The genesis of the appeal before us is that the Appellant, Zuwa Suleiman, was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 (the Act). The particulars of the offence were that, between the 28th day of March 2017 and 30th day of March 2017 at [particulars withheld] Village within Kwale County in the Coastal Region, he unlawfully and intentionally caused his penis to penetrate the vagina of MM, a girl aged 14 years.

3. In addition, the appellant was also charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Act, the particulars being that between the dates and at the place aforesaid, he unlawfully and intentionally touched the vagina of MM, a girl aged 14 years with his penis.

4. The appellant pleaded not guilty to the charges whereupon the case proceeded to hearing. The prosecution called five (5) witnesses, including the complainant, M.M., who testified as PW4.

5. PW4 testified that she was 14 years old and a class four pupil at [particulars withheld] Primary School; that she knew the appellant and would occasionally see him in the neighbourhood; that on 27th March 2017, she met the appellant while on her way to her step mother's house; that the appellant requested her to accompany him to his house "as his wife", and that she agreed; that she had not informed her parents about this detour; that the appellant took her to his homestead, asked her to undress and had sex with her that evening after supper; that the appellant repeated that act three times that night; that this was the first time she had engaged in sexual intercourse; that she resided with the appellant for the next three days, during which, they engaged in sexual intercourse; that, on 31st March 2017, her grandfather, OAB (PW1), came looking for her at the appellant's house; that PW1 found her in the appellant's company and demanded that they accompany him to the Chief's Office after which they were referred to Msambweni Police Station, whereupon, they were subsequently escorted to Msambweni Hospital for medical examination.

6. PW1 testified that, sometime in March 2017, PW4 escaped from home during the school holidays; that he, in the company of his brother, AAB (PW2), managed to trace her to the appellant's house after searching for her for four days; that when he found PW4, the appellant explained to him that PW4 was only at his house because she wanted to know where he resided; that PW4 disputed the appellant's account and insisted that the appellant had misled her; and that he thereafter escorted them to the local Chief's Office, then to Msambweni Police Station to record their statements; and, thereafter, to Msambweni Hospital for PW4's medical examination.

7. PW2 testified and gave an account similar to that of PW1, only adding that he had known the appellant for approximately one month before the incident.

8. PW3, PC Erick Kimanthi Muirigi attached to Msambweni Police Station, testified that, on 30th March 2017, PW4 was presented at the station by PW1 and PW2 – alleging that the appellant had stayed with PW4 in his house for two days; that he interrogated PW4, who confirmed the allegation; that he later escorted PW4 to Msambweni Police Station for medical examination; and that he thereafter preferred the defilement charges against the appellant. PW3 produced PW4's Child Health Card, which indicated that she was born on 26th June 2002.

9. PW5, Philemon Kibet Chebii, a Clinical Officer at Msambweni Hospital, testified that he examined PW4 on 1st April 2017 and prepared a P3 form (exhibit No. 1); that, upon examination, PW4 was found to be in fair condition; that she had a normal vagina; that her hymen was absent; that she had a white discharge; that tests for HIV, Syphilis, Hepatitis B and C and pregnancy turned negative; and that his conclusion was that PW4 had experienced sexual penetration.

10. When found to have a case to answer, the appellant gave an unsworn statement in his defence. He stated that while at his house, his neighbour came to pick him; that he was suddenly attacked and arrested; that he was booked at Msambweni Police Station and charged with the offence; and that the allegations of defilement were false.

11. In his judgment dated 5th January 2018, the trial Magistrate found that the prosecution had proved the three ingredients of defilement beyond any reasonable doubt, and that the appellant's defence was a mere denial. The trial court convicted the appellant and sentenced him to 20 years' imprisonment.

12. Dissatisfied with the learned Magistrate's decision, the appellant lodged Criminal Appeal No. 84 of 2018 in the High Court of Kenya at Mombasa on the grounds that the trial Magistrate erred in law and facts by: finding that the prosecution had proved its case beyond any reasonable doubt; failing to find that he was convicted under the wrong provision of law and sentenced to serve 20 years in prison; and by failing to consider his reasonable defence.

13. In its judgment dated 6th September 2019, the High Court found that the complainant's age was established by production of her health card indicating that she was born on 26th June 2002; that PW5's finding that the hymen was absent and the conclusion that there was sexual penetration were not challenged; that the appellant was well known to the complainant; that PW1 and PW2's testimonies that they found the complainant in the appellant's house were also not challenged; and that the appellant's defence was a mere denial, that could not have displaced the prosecution's evidence.

14. On the issue as to whether the appellant was convicted under the wrong provision of the law, the court found that the trial court convicted the appellant under section 215 of the CPC instead of section 8(3) of the *Sexual Offences Act*. However, the court found that the error did not occasion any prejudice to the appellant as the trial court properly set out the offence and the particulars thereof in its judgment. Accordingly, the High Court dismissed the appellant's appeal.

15. Aggrieved by the decision of A. Mabeya, J., the appellant lodged the instant appeal challenging the High Court decision on the grounds set out in his undated Grounds of Appeal, namely that the learned Magistrate and learned Judge erred by not considering: that the offence was not proved beyond any reasonable doubt; that the prosecution evidence did not link the appellant with the offence; that the prosecution witnesses (testimonies) were incredible and that, therefore, the conviction was unsafe; and the appellant's reasonable defence was not considered.

16. In addition to the grounds aforesaid, the appellant filed undated "Supplementary Grounds of Appeal" containing 3 grounds, namely that the 1st appellate court erred in law by: failing to find that the "nature of the amendment done" to the charge sheet was not recorded; failing to find that PW4 presented herself as a person of the age of consent and that, therefore, the defence under section 8(5) of the Act avails; and by failing to find that the trial court misconstrued the relevant penal law as a minimum mandatory provision.

17. In support of the appeal, the appellant filed undated written submissions citing the cases of Joseph Amos Owino v Republic Court of Appeal Criminal Appeal No. 450 of 2007 (Unreported) submitting on the need for the trial court to have ensured that his constitutional rights were fully complied with, notwithstanding that the appellant did not raise the same at trial; David Jairo & Another v Republic [2012] KEHC 1584 (KLR), arguing that, judging from her conduct, it was very difficult for him to tell that PW4 was under the age of consent; Eliud Mueke Maingi & 5 Others v Republic [2019] eKLR, where Odunga, J. (as he then was) called for legislative reform regarding the age of consent to align with international norms and standards; George Ngodhe Juma & 2 Others v Attorney- General [2003] eKLR, submitting on the role of the prosecution in criminal matters; Swabir Bukhet Labhed v Republic [2019] eKLR; Arthur Muya Muriuki v Republic [2015] eKLR; and DWM v Republic [2016] eKLR, submitting that where a penal law is couched with the prefix 'is liable to' the prescribed sentence is discretional and the maximum, "leaving the concerned court with the discretion to depart from it and impose a lesser one." The appellant urged us to contemplate reducing his sentence in the unlikely event that we uphold his conviction.

18. In reply, the respondent filed written submissions dated 16th January 2025 and prepared by Mr. Jethron Okumu, Principal Prosecution Counsel. We take note that counsel for the respondent only submitted on the initial grounds of appeal advanced by the appellant. Counsel cited the cases of Miller v Minister of Pensions (1947) 2 ALL ER 372 on the need for the prosecution to prove its case beyond reasonable doubt; GOA v Republic [2018] eKLR, highlighting the three key ingredients that the prosecution needs to prove in a defilement charge; Edwin Nyambaso Onsongo v Republic [2016] eKLR for the proposition that it is now settled that age can be proved by documents, and that PW4's age was proved by the production of her Child Health Card; Bassita Hussein v Uganda,

Supreme Court of Uganda Criminal Appeal No. 35 of 1995 (Unreported) where the Court held that penetration may be proved by direct or circumstantial evidence; Reuben Taabu Anjononi & 2 Others v Republic [1980] eKLR; James Murigu Karumba v Republic [2016] eKLR; Julius Kiunga M'birithia v Republic [2013] eKLR ; and Cleophas Otieno Wamunga v Republic (1989) KLR 424, submitting that the 1st appellate court was correct in affirming the appellant's conviction based on recognition evidence from PW4; Adan Muraguri Mungara v Republic [2010] eKLR; and Joseph Kariuki Ndungu & Another v Republic [2010] eKLR, submitting that the assessment made by the trial court and affirmed by the 1st appellate court on the credibility of the witnesses was reasonable and should not be interfered with by an appellate court; Jesse Onyimbo Ochieng v Republic [2019] KECA 562 (KLR); and Mumbe Musau v Republic [2004] eKLR, submitting that the 1st appellate court did not just consider the appellant's defence, but also re-evaluated the defence evidence notably at paragraph 17 of the impugned High Court judgment. Counsel urged us not to interfere with both conviction and sentence.

19. Our mandate on a second appeal, as is the one before us, is confined to matters of law by dint of section 361 of the *Criminal Procedure Code*. In Karingo vs. Republic [1982] KLR 213, the Court stated:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

20. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on two main issues on points of law, namely whether the prosecution proved the charge against the appellant to the required threshold; and whether the appellant's "reasonable" defence was considered.

21. In our considered view, the remaining four grounds of appeal on points of law are raised for the first time before us and, as we will shortly demonstrate, do not, for good reason, fall to be determined. Neither do we have the jurisdiction to re-open and re-consider the impugned judgment on any of the four points of law not raised before, or considered by the court below. For the avoidance of doubt, these points of law, which were not raised on appeal to the High Court are that the learned Judge erred by failing to find: that the prosecution witnesses (testimonies) were incredible and that, therefore, the conviction was unsafe; that the "nature of the amendment done" to the charge sheet was not recorded; that PW4 presented herself as of the age of consent and that, therefore, the defence under section 8(5) of the Act avails; and that the trial court misconstrued the relevant penal law as a minimum mandatory provision.

22. Addressing himself to the prejudicial effect of new points of law or issues raised for the first time on 2nd appeal, Forbes VP had this to say in Alwi A Saggaf v Abed A Algeredi 1961 EA 767 CA 610:

> "But these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.
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> In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it."

23. This Court in Alfayo Gombe Okello v Republic [2010] eKLR underscored the importance of raising all issues in contention at the earliest opportunity at the trial and had this to say on the issue:

> " ... 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."

24. We need not overemphasise the general principle that trial by instalments militate against the discretionary powers of this Court in the administration of justice. That this principle continues to hold sway was demonstrated in Wachira v Ndanjeru (1987) KLR 252 where this Court spoke to the bar with Platt, JA. observing that:

> " ...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."

25. In view of the foregoing, the 4 grounds raised by the appellant for the first time on 2nd appeal before us fail and are hereby dismissed.

26. Turning to the 1st issue as to whether the prosecution established its case beyond reasonable doubt, we hasten to observe that the offence of defilement is rooted on three main ingredients, namely: (i) the age of the victim, who must be a minor; (ii) penetration; and (ii) the proper identification of the perpetrator, all of which must be established to secure a conviction (see: George Opondo Olunga vs. Republic [2016] eKLR; and GOA v Republic [2018] eKLR).

27. With regard to proof of the 1st ingredient of defilement, to wit, the age of the victim, this Court in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR had this to say:

> " ... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." [Emphasis added].

28. Addressing itself to the importance of establishing the victim's age to sustain a conviction and sentence for defilement, this Court in Eliud Waweru Wambui v Republic [2019] eKLR observed:

> " 4. The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence could not be gainsaid. It was not in doubt that the age of the victim was an essential ingredient of the offence of defilement and formed an important part of the charge because the prescribed sentence was dependent on the age of the victim."

29. In her testimony, PW4, whose intelligence was not put to question, stated that she was 14 years old and a class four pupil at [particulars withheld] Primary School. To confirm her age of minority, PW3 produced PW4's Child Health Card, which indicated that she was born on 26th June 2002. We take to

mind the fact that the evidence of PW4's age of minority remained uncontroverted and, accordingly, we agree with the two courts below that the prosecution proved that she was 14 years of age at the time of the incident.

30. We form this view cognizant of section 8(5) of the *Sexual Offences Act*, which provides that it is a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years, and the accused reasonably believed that she was over 18 years. However, no such deception was alluded to by the appellant in his defence. Consequently, the appellant's submission (albeit on a new ground on 2nd appeal) that PW4 appeared to be of sexual age of consent does not hold as submitted on the authority of David Jairo & Another v Republic [2012] KEHC 1584 (KLR) (see also Eliud Waweru Wambui v Republic (ibid)).

31. On the 2nd ingredient of defilement, section 2 of the *Sexual Offences Act* defines penetration as "the partial or complete insertion of the genital organ of a person into the genital organs of another person".

32. The decision of the High Court of Kenya at Bomet in Sigei v Republic [2022] KEHC 3161 (KLR), citing the Supreme Court of Uganda in Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995, cannot elude our attention. As the High Court correctly observed:

> "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."

33. In addition to PW4's testimony that she had lodged in the appellant's house for several days and nights, and that they had sexual intercourse several times, PW5, the Clinical Officer who examined PW4 and prepared a P3 form found, inter alia: that her hymen was broken; that she had a white discharge; and that she had experienced sexual penetration. Accordingly, we find nothing to suggest that the two courts below were at fault in holding that the prosecution had proved penetration.

34. On the 3rd ingredient of defilement, the appellant made no submissions thereon, save to contend albeit generally that the prosecution did not prove its case beyond reasonable doubt.

35. On their part, counsel for the respondent cited the cases of Reuben Taabu Anjononi & 2 Others v Republic [1980] eKLR; James Murigu Karumba v Republic [2016] eKLR; Julius Kiunga M'birithia v Republic [2013] eKLR; and Cleophas Otieno Wamunga v Republic (1989) KLR 424, submitting that the 1st appellate court was correct in affirming the appellant's conviction based on recognition evidence from PW4.

36. On the issue of recognition, Madan J.A in Anjononi and Others vs. The Republic [1980] KLR 59 had this to say:

> ... 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."

37. In the same vein, this Court in Peter Musau Mwanza vs. Republic [2008] eKLR expressed itself thus:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time,

is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

38. PW4's recognition of the appellant as a person well known to her and to her grandfather (PW1) and their neighbour (PW2) with whom they embarked on a search for her was equally unchallenged. The three recognised the appellant as the person with whom she was found, and in whose house she was had stayed for a number of days. This evidence was not in any way challenged. Accordingly, we find no fault in the findings of the two courts below that the appellant was properly identified as the perpetrator of the offence charged, and as did the two courts below we are satisfied that the prosecution evidence of recognition remained unshaken in proof of the 3rd ingredient of defilement.

39. Turning to the 2nd Issue as to whether the appellant's defence was considered, pages 3 and 5 of the trial court's judgment demonstrate the depth to which the trial court went in analysing the appellant's defense. The same holds for the impugned judgment of the 1st appellate court where the learned Judge re-examined and analysed the same evidence at paragraphs *8*, *16* and, more specifically, at paragraph *17* which reads as follows:

> "…. I have noted the appellant's defence. He stated that he was arrested and taken to Msambweni Police Station. That the allegations were false. In my view, this was a mere denial. Even if the trial court had considered the appellant's defence, the same would not have displaced the prosecution's case."

40. We borrow a leaf from the pronouncement of the High Court of Zimbabwe at Harare sitting on appeal in Effort Mutanda v S [2015] ZAFSHC 13 while addressing itself on the issue as to whether defence evidence was considered and noted that:

> "I must, however, make it clear that by requiring the trial court to consider and weigh all evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.
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> … ….
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> In other words, this court must consider whether the magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the convictions and sentences. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence."

41. In our considered view, the appellant's contention that his "reasonable defence" was not considered does not hold. Moreover, the appellant made no substantive submissions on this ground, which remains a general averment with no substance worthy of our scrutiny.

42. Having examined the record of appeal, the grounds on which it is anchored, the appellant's submissions and those of the Principal Prosecution Counsel, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed in its entirety. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR