



REPUBLIC OF KENYA



KENYA LAW
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**Lukhale v Republic (Criminal Appeal E046 of 2023)
[2025] KEHC 764 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E046 OF 2023
REA OUGO, J
JANUARY 29, 2025**

BETWEEN

JACOB KENYATTA LUKHALE ALIAS DAUDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence of
Hon. P.K Langat dated 18.7.2023 in Sirisia SO No. E008 of 2021)*

JUDGMENT

1. The appellant Jacob Kenyatta Lukhale alias Daudi was charged and convicted of the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on the 16th night of January 2021 at about 8.00pm [particulars withheld] in [particulars withheld] location of Bungoma West Sub-county within Bungoma county he intentionally and lawfully caused his penis to penetrate the vagina of RN a child aged 17 years with mental disability. The accused was also charged with an alternative offence of committing an indecent act with the child contrary to section 11(1) of the [Sexual Offences Act](#) no. 3 of 2006. The particulars were that on the 16th night of January 2021 at about 8.00pm [particulars withheld] in Malakisi location of Bungoma West Sub-county within Bungoma county he intentionally and lawfully touched the vagina of RN a child aged 17 years with mental disability with his penis.
2. The appellant was sentenced to 15 years imprisonment and now appeals against the conviction and sentence. in his grounds of appeal, he contends that the learned magistrate erred in law and fact by convicting him on contradictory evidence, the learned magistrate failed to consider circumstantial evidence, and that there was no proper inquiry and investigations. The last ground is the forensic evidence did not meet the required standard.



3. As the first appeal court I am required to evaluate the evidence before the trial court and reach an independent decision as to whether or not this court should uphold the trial court's decision bearing in mind that I did not hear or see the witness testify.
4. The evidence against the appellant was that child RM, PW4 testified that she was sent to buy vegetables, and on the way she was called by Jacob, a person she knew. The appellant took her to a house appellant took off his clothes and asked her to remove her clothes then he defiled her. The appellant dropped her home. SSS Pw1, Pw4's father testified that on 16/1/2021 at 7.00 pm. He was called that his daughter had gotten lost. They looked for Pw4 but did not find her. A neighbour late called them and told him that Pw4 had been dropped home. Pw4 told them that she had been defiled, that she could identify the person even though she did not know his name. They reported the matter to the police and took Pw4 to a hospital at Malakisi health centre. Pw1 told court that their daughter is epileptic and that at times she lacks the medicine to suppress it. Pw2, MNW, recalled that on the 16/1/2021 at 7.00pm she was at her grandmother's home with Pw4. Pw4 was told to go get vegetables at the Kibanda. She did not return. Her father and her aunty went out to look for Pw4. At 10.00pm she heard a boda boda and saw the appellant holding Pw4's hand. She asked the appellant to leave Pw4. After he did so she asked Pw4 where they were coming from but she did not answer. There was electricity. Pw3 received the report on 16/1/2021 at Malakisi police station from Pw1 who had been accompanied by Pw4. Pw1 what had happened. On 20/1/2020 Pw1 took them to Malakisi boda boda shed and they arrested the appellant. He was given Pw4's birth certificate. She was born on 19.12.2003 and was 17 years old at the time of the offence. He established that Pw4 was epileptic and the condition affected her mental health but she was on treatment. Pw4 was not at the scene at the time of the appellant's arrest. Pw4 had identified the appellant who is their neighbour. Pw5 the clinical officer testified he attended to Pw4 on 17/1/2021. Pw4 claimed that she had been defiled. She had no injuries. Her clothes were fine. There was no blood. He examined her genitalia, there no hymen but no discharge. He was told she was epileptic.
5. The appellant when put on his defence, chose to remain silent and he did not call any witnesses.
6. The appellant and respondent filed written submissions. The appellant pointed out various sentences in the evidence of Pw1, Pw2 and Pw4. He argued that the contradictions were not analysed by the trial court. He submits further that no evidence was adduced to prove that Pw4 was mentally challenged and that Pw4 said she was 32 years old. Reliance was made on the following cases Absolom Amboka Okila vs R [2020] where the court indicated that the circumstance under which an offence was committed cannot be ignored and P.O.N vs R (2019) eKLR and Simon Musoke v. R where the court held that before drawing an inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. On the sentence the appellant submitted the trial magistrate erred sentencing him to 15 years the minimum sentence contrary to the declaration in the case of Philp Maingi and others in Petition No. E017 of 2021 where the court declared mandatory sentence under SOA as unconstitutional. The respondent submitted that the defilement charge was proved, evidence was adduced on age, Pw4 was 17 years old, the clinical officer gave evidence on the penetration and the accused was identified as the perpetrator. On sentence, it was submitted that the appellant defiled a child with mental disability.

Analysis And Determination

7. The appellant argues that there was contradictory evidence in the evidence of Pw1, Pw2, and Pw4 and the circumstances surrounding the case. The appellant argued Pw1, Pw2, and Pw4 evidence were full of contradictions. Pw1 testified that he was called by the neighbour and Pw4 said she was with Pw4 at the grandma's place. Pw4 testified that she was 32 years old and that she does not go to school, Pw1 testified she is epileptic and the daughter lacks attention. Pw3 testified that on 16/1/2020 he was at



the police station. I have analyzed the alleged contradictions and inconsistencies and circumstances as pointed out by the appellant and I find they did not water down the prosecution case. Pw1 and Pw2's evidence of how Pw4 returned is not a material contradiction. Pw2 testified that before Pw4 went missing she had been sent back to the Kibanda to get vegetables. There was no contradiction in this statement. Pw1 evidence on Pw4 schooling did not prejudice the appellants' case. On Pw3 evidence on the date. He did mention 16/1/2020 but he testified on the events that happened on 16/1/2021. He was at the police station when Pw1 and Pw4 went to Malakisi police station. He narrated how he received the report from Pw1 and the action he took. The P3 form issued indicates the date 16/1/2021. The court in *MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC* held as follows;

“Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The question to be addressed is whether PW1's testimony is contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge.

8. The contradiction of dates in my view will not result in the rejection of Pw3 evidence. Pw3's evidence was corroborated by Pw1's evidence on when the report was made, which was soon after the incident. The court in *Twehangane Alfred v Uganda Crim. App. No 139 of 2001, [2003] UGCA*, held that ;

“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.”

9. On Pw4's age. She did indicate in her evidence that she was 32 years old but when she was examined by the court she testified that she did not know when she was born. Under proof of age the trial court stated ;

“A Birth Certificate was produced as exhibit 1. The Complainant was born on 19/12/2003. Rule 4 of the Sexual Offences rules provides that when determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate , any school documents, or in a baptismal card or similar document. It is thus settled that she was 17 years as at the time of the commission of the alleged offence as per the birth certificate.”

10. The trial court dealt with the issue of Pw4's age her birth certificate was produced and it indicates she was 17 years old at the time of commission of the offence. I find no prejudice in the failure to the investigating officer. Pw3 evidence was sufficient being the officer who received the report and interacted with the witnesses and produced the document received during their investigations.

11. Next is the appellant's ground on sentence. The supreme court in the case of *The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)* explained the nature of minimum sentences as follows: “Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence.”

12. The appellant was sentenced to 15 years imprisonment which is the minimum sentence under section 8(1) as read with section 8 (4) of the *Sexual Offences Act*. This ground too fails.



13. The prosecution through their witnesses proved that the appellant defiled a 17-year-old child. Pw4 testified that the accused took her to a house and defiled her. Pw2 saw the accused drop off Pw4 at their home the same evening she went missing. Pw5 examined Pw4 and noted that her hymen was not broken. The trial court noted that the medical examination did not confirm penetration. He relied on the evidence of Pw4 who narrated how the appellant took her on his motorcycle to his home and undressed her and inserted his penis into her vagina. He also noted that she was firm and consistent on the events of the material night and that she even stated “ You took me to a home that was in town then you defiled me”. The appellant was a person known to her. The conviction was proper and the sentence lawful. The appeal has no merit and is dismissed.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 29TH DAY OF JANUARY 2025.

R. OUGO JUDGE

In the presence of:

Jacob Kenyatta Lukhale alias Daudi/ Appellant

Miss Matere For State

Wilkister C/A

