DKK v Republc (Criminal Appeal E042 of 2023)
[2025] KEHC 2629 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2629 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E042 OF 2023

MW MUIGAI, J

FEBRUARY 28, 2025

BETWEEN

DKK .... APPELLANT

AND

REPUBLIC .... PROSECUTION

JUDGMENT

1. The appellant was 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 sheet were that : On 18/9/2021 in Mwala subcounty within Machakos county the appellant intentionally caused his penis to penetrate the vagina of MMN aged 9 years.

2. The appellant was further charged with the alternative offence of Indecent Act with a minor and on particulars that :

   On the said date at [Particulars ithheld] village Ikalaasa location the appellant intentionally touched the vagina of MMN a child aged 9 years . He was convicted on the main charge and sentenced to serve 30 years imprisonment.

The Trial Proceedings

3. The prosecution called 7 witnesses in proof of the charges.

4. Pw1, MMN the victim gave unsworn evidence and testified that she was 10 years old and that she attended [Particulars Withheld] primary school. The appellant is her uncle from her father's side. That in the evening hours of 18/9/2021, she had gone to get milk from the appellant's house and the appellant showed "her the bed and removed her panty". He also removed his trouser and he slept on her. The appellant warned her not to tell anybody and also threatened to kill her. She went home and

slept, she was later woken up by her mother to take porridge. That she later told her shosho who she also called aunty about the rape. Her mother took her to hospital and to the police station.

5. She stated that the appellant was alone, she also described how the accused slept on her as she pointed her vagina to the court. That the accused slept on her using his front part which he used for peeing, see page 5 of the proceedings. That she felt pain in her vagina as he slept on her .She also pointed out the accused in court.

6. She was cross examined by the accused in person , she confirmed that she had been going to his place to get milk she also used to collect milk from shosho but she did not get shosho on that day . That the accused took her to his home which was a single room with a bed. That her panty had blood though she had washed it .

7. Pw2, MNN , the victim's relative testified the minor was the first born and that the accused is her cousin . That she sent the child to the accused place on 18/9/2021, it was about 6:00am and the returned at 12:00pm. She went to bed .That she noticed that the minor had dirt and had diarrhea on herself .The minor was feeling pain on her stomach , she also noticed she had blood on her panty when she bathed her .The minor said she had been burnt . She took her to hospital and was told that the child had a skin problem. The child became unwell and was taken to hospital, she also managed to go to school.

8. She told the doctor what had happened .That the chief escorted her to the police station and later accompanied them to the hospital when he gave her 100/= .He told her not to tell anyone and that the money was to buy lunch for the child. She testified that the minor identified the appellant as the perpetrator.

9. She stated during cross examination that the child had stomach problems but did not have them before the offence. That her grandmother was present when she returned from the accused place.Pw2 had also sent the grandmother to get herbs. The minor was taken to hospital after 2 days, she was not able to sit down and was walking in a funny manner. She told her teacher, the child had never told her about the defilement.

10. Pw3, SMM testified that she was the minor's aunty. She had returned from a ceremony on 18/9/2021 when she was informed by pw2 how the minor had been sent to the appellant's house to get milk at 6:00am but she returned at 12:00pm felling unwell and she had diarrhea. Pw2 informed her the next day which was a Sunday that the condition persisted and the minor had not woken up, she had not recovered on Monday.Pw3 advised her mother to take the minor to hospital . She went to see the minor about 2 days later and managed to examine her when she found that the minor's vaginal opening was almost touching her anus.

11. That she inquired what happened and the minor told her that she had gone to get milk at the accused house, she did not find her grandmother .She asked him for milk but the accused took him to his home and to his bed when he defiled her after removing her panty .The accused threatened to kill her. Pw3 called PN who is sister to Accused person's fatherand informed her of the incident .That PW2's mother wanted to resolve the matter with the victim's mother but PW3 stopped them and informed the community health worker.

12. She was cross examined and she stated that she informed the child's grandmother , her husband and pw2 about the child's statements .That shosho was protecting the accused and did not want the case to go forward .She denied asking the accused mother for Ksh 50,000/= .

13. Pw4, Pauline Nyambura Kuria a community health volunteer at Ikalaasa stated that Pw3 informed her about the defilement on 27/9/2021 .She went to the hospital on 29/9/2021 and was advised by

the doctor to inform the chief to bring the child to the hospital .She went to see Esther Ndunge on 30/9/2021 who promised to take up the matter. She stated during cross examination that the complainant f was not with her when she went to the doctor for.

14. That she knew Kasyoki who was a village elder, she denied giving the appellant 500/= so that he does not reveal her relationship with Kasyoki .That the appellant found her having sex with the village elder and it was her business and matter not related to the case.

15. Pw5, Esther Ndunge Mutua the chief of Ikalaasa location testified that Pw4 informed her about the defilement on 30/9/2021.That Pw3 had reported to her about the minor being defiled by the appellant. She called Mr. Mbithi who was the child's school teacher who confirmed that the child attended school. Pw5 went to the school on 1/10/2021 and she had called Pw2. She took the minor to Ikalaasa dispensary, the clinical officer said that there was no evidence of defilement and that records showed that pw1 was suffering from diahorrea. The matter was reported at the police post.

16. She stated during cross examination that he accused had not been involved in any defilement incidences, that Pw1 was okay when she saw her and that she did not have any issues with walking.

17. Pw6, Dr John Mutunga referred court to the p3 form which had been filled on 11/11/2021 .He stated that the child was 9 years old and had been brought to hospital on allegations of being defiled on 18/9/2021. He examined her and found that her private parts were painful on touch, her hymen was also broken and that she was bleeding. The sperm was found, she had incontinence and could not pass stool. She also could not hold stool. He referred to the Post rape care form from MLSH filled by his colleague. The p3 form and the post rape care form were produced as PExhibits 5 and 6.

18. He stated during cross examination that he examined the child on 11/11/2021 and the incident allegedly happened on 18/9/2021.That the minor was treated and discharged, the records do not indicate that she was treated elsewhere. Further that the pain could stay for 2 months.

19. Pw8, No xxxxx Corporal Joseph Kamau from Masii Police station was the investigating officer. He stated that matter was reported on 1/11/2021 at Ikalaasa Police post . The case was that the complainant's mother had sent her to but milk at a neighbouring kiosk that belonged to the accused. The minor did not return immediately and that the accused had grabbed her and taken her behind the kiosk where he defiled her .That the minor did not disclose the incidence to her mother .That the mother was somewhat mentally challenged.

20. The minor complained of abdominal pains and she was taken to hospital in the evening. On 21/9/2021 she was treated at Ikalaasa Health centre but diarrhrea did not stop, that the child's aunt interrogated her on 29/9/2021 when she informed her that the accused defiled her .The area chief also took interest and reported the matter to Masii Police station. She was taken to Machakos Level 5 hospital for special treatment and the matter was brought to the police station. That the doctor confirmed that the minor was defiled. Pw 7 produced the minors birth certificate as Pexhibit 4.

21. He stated during cross examination that the matter was brought to Masii Police station after 1 month. That the Ikaalasa dispensary did not have a laboratory and she had to be treated at Machakos Level 5 hospital.

22. Vide ruling dated 7/11/2022 the trial court found that the accused had a case to answer , he was placed on his defence on 4/7/2023 when directions were taken under Section 211 of the *Criminal Procedure Code*.

The Appellant’s Defence

23. The appellant opted to give sworn evidence. The charges were read afresh on his request, he stated that from the charges he could not know if the offence happened in the morning or at night. That the child testified that the offence occurred at night and pw2 stated that it was at 8:00 am. He contended that a nurse from Ikalaasa dispensary did not testify and that the arresting officer was not called to give evidence. That the occurrence book indicated that the report was made 16/9/2021 while the charge sheet read that it was on 18/9/2021. Further that the investigating officer said that the offence happened at the accused kiosk while other witnesses testified that other witnesses said it was at his mother’s home. He did not have a kiosk.

24. He did not know whether he was to defend himself for an offence that occurred in the morning or evening hours or whether it was at his kiosk or mother’s house.

25. His case was that the case was a family dispute between his mother and his aunty who were not in good terms . That his paternal aunty formulated the case after her request for some money was declined. That the family had received his sister’s dowry payment and the appellant said that the aunt (pw3) should pay 10,000/= which had been given to her husband to relocate to Ikalaasa from Nairobi before she could be given money .

26. That his aunty used to claim that he was stealing from them whenever he tried to follow up the debt.

27. That he learnt of the charges on 10/10121 through village head man , that he passed by the police station and he also brought himself to court . That the investigating officer was not aware of the case and the child had diarohorrea instead of bleeding which ought to have been seen after defilement. He said that the case confused him and that he did not commit the offence and could not think of it.

The Trial Court Judgment.

28. The judgement was delivered on 28/8/2023 when the court found that the prosecution had proved its case against the appellant. That the minor’s evidence was corroborated by pw2 and pw6 who examined her and noted that her private parts were painful on touch. That she was bleeding and the hymen was broken. The court also considered the inconsistencies pointed out by the accused but found that the material ingredients had been proved.

29. The appellant was heard on mitigation when he state that emphasized that he did not commit the offence. The trial court sentenced him to serve 30 years on 11/9/2023.

The Appeal

30. Aggrieved, the appellant filed the instant appeal vide the petition of appeal dated 18/9/2023 and on grounds that:

    1. The trial magistrate erred in law and in fact by convicting him despite inconsistent, insufficient and contradictory evidence in the prosecution’s case.

    2. The credibility of the complainant’s evidence was questionable and doubtful.

    3. The magistrate erred in law and fact in not considering the sworn defence

31. Parties took directions before this court on 19/9/2024 when they were allowed to file and serve written submissions. The appellant had not complied at the time of the court’s judgement.

Submissions.

32. The prosecution filed rival submissions and urge that the witnesses gave direct and circumstantial evidence. The prosecution relied on the case of Alfred Gombe Okello -Vs- Republic (2010) eKLR , Bassita Vs Uganda , Smart Charo Kirao -Vs- Republic (2020) eklr and submits that the ingredients of the offence were proved . That the minor testified how the appellant called her and showed her to bed, he removed her panty and slept on her. That penetration can be proved through direct or circumstantial evidence.

33. On the inconsistencies pointed out, the prosecution referred court to the case of Richard Munene –Vs- R (2018) eKLR where the court held that not every contradiction or inconsistency would be fatal. That the minor's evidence was positive and reliable and the court carried out voire dire examination under Section 19 of the Statutory Oaths and Declaration's Act.

34. On 19/1/2024 when the Lower Court file was availed to this Court Parties were to file and exchange written submissions. On 16/10/2024 the Appellant applied virtually from Prison to be supplied with copies of proceedings and Trial Court judgment to enable him prepare written submissions. This Court granted the request and issued the order. On 29/10/2024 written submissions were not availed and on 12/11/2024 the Court gave judgment date and the Appellant to file and serve submissions to the Court & ODPP through the Deputy Registrar Machakos High Court.The appellant had not complied at the time of the court's judgement

Analysis & Determination.

35. This being the first appellate court, the court is required to reevaluate and reassess the entire evidence and arrive at independent conclusions. The court is however warned that it did not see or hear the evidence of parties which is the privilege of the trial .The court will therefore give due allowance for such discretion .

36. In the case of Okeno -Vs- Republic 1972 EA 32 the East Africa Court of Appeal.The principle was reiterated in Kiilu & Another -Vs- Republic [2005]1 KLR 174 where the Court of Appeal stated thus:

> " 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

37. The Trial Court proceedings and evidence has been considered, the grounds of appeal and the submissions filed in contest have also been considered by the court

38. The following issues are framed for determination of the appeal.

    i. Whether the prosecution proved the ingredients of the offence

    ii. Whether the prosecution's case was contradictory

    iii. The veracity of the appellant's defence .

iv. The trial court’s sentence.

39. Section 8 of the *Sexual Offences Act* provides that:

> “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

40. In Charles Wamukoya Karani -Vs- Republic, (Criminal Appeal No. 72 of 2013), the court stated that:

> “The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.”.

41. The birth certificate was produced as proof of age. The appellant was also identified by the victim as her uncle .These facts are not contested and were corroborated by pw2 who also stated that the appellant was a cousin and that she often sent the victim to his place to get milk.

42. On proof of penetration, the minor gave unsworn evidence and testified that she had gone to get milk from the appellant’s house when he showed her the bed. That the appellant slept on her, she described penetration stating that the appellant removed his trouser and her panty. He used the thing he used for peeing. The proceedings are also instructive that the minor pointed her vagina as she testified about the rape.

43. Pw 4 also testified that she was told that child had been sick and that she visited her after about 2 days. The child gave her the same account she testified in court. Pw4 also examined the child and observed that her vaginal opening almost touched her anus. While pw 2, the minor’s mother stated that apart from diarrhea and stomach complains which she did not have before the offence the child had some blood on panty as she bathed her .The child became sick and had been in and out of hospital .

44. It is trite law that the unsworn evidence must be corroborated and that the court must warn itself before it convicts the accused person. On the other hand. Court are no longer hamstrung by corroboration.

45. In the case of Mohamed -Vs- Republic [2006] 2 KLR 138 where the court stated that :-

> “It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

46. In Sahali Omar vs. Republic [2017] eKLR , the court of appeal explained that:

> “On the first issue, the appellant took issue with lack of corroboration of the complainants’ evidence, which he said ran afoul of section 124 of the *Evidence Act*...The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the *Oaths and Statutory Declarations Act*. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful...It is a well-established rule of law that

the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)...In addition, the proviso to section 124 of the *Evidence Act* affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus."

47. The appellant's contention is that the complainant's evidence was questionable thus calling upon this court to consider the credibility of her evidence. The Court finds that the evidence of PW1 on record though unsworn was corroborated by PW4 Doctor's evidence after examination the private parts of PW1 were painful, the hymen was broken and she was bleeding. These findings are consistent with defilement.

48. On identification of the Accused person, the Accused was her Uncle who lived nearby, although there are insinuation of bad blood among family members there is no reason advanced to make PW1 concoct such graphic details against her Uncle.This Court finds evidence on record sufficient to prove the offence.

49. The appellant did not file submissions to demonstrate how the evidence can be impugned . The prosecution has submitted that the trial court carried out voire dire and that the minor testified on all ingredients of the offence. I find that the evidence of penetration was corroborated by medical evidence and the testimony of PW6 Dr Mutunga who on examining the victim/child her private parts were painful upon touch her hymen was broken and she was bleeding from her private parts. The child/victim could not pass or hold stool she had incontinence. He produced PRC Form.

50. The doctor produced the P3 form and the Post rape care form proving that the hymen was broken and that some vaginal bleeding was noticed. The post rape care was filled on 1/10/2021 and indicated old perforation, abdominal pain and that the child had challenge in passing urine and stool.

51. However, the history of the report reflects verbatim narration of the minor's testimony on how she was defiled. Pw8's evidence proved that the child was defiled. The appellant also contended during trial that a nurse from Ikalaasa dispensary was not called. Section 143 of the *Evidence Act* provides that no particular number of witnesses shall in the absence of any provisions of the law to the contrary be required for proof of any fact.

52. In the case of Julius Kalewa Mutungu -vs- Republic (Criminal Appeal No. 31 of 2005) the court explained that the prosecution is granted a discretion whether or not to call specific witness and courts would not interfere with that discretion "....unless it is shown that the prosecution had an ulterior motive in which event it will be presumed that the witness not called would have given adverse evidence. The trial court found that the prosecution had called witnesses who had given adequate evidence to sustain the charge facing the Appellant and to that extent it cannot be faulted." The court relied on the case of Keter v Republic 2007 EA 135 where the court also held that:-

> " That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses are sufficient to establish the charge beyond reasonable doubt."

53. The appellant insisted on evidence from a doctor from Ikalaasa dispensary and the court issued summons to the incharge of the dispensary. However, the examining doctor or representative from the

dispensary did not testify. The Post rape care form which was filled at the dispensary was also produced by Pw6 who was also cross examined by the appellant. The appellant did not contest its production.

54. Section 77 of the *Evidence Act* provides that reports from government analyst or medical practitioners are admissible in evidence without the need to call the makers .However, the court has discretion to call and to cross examination the makers depending on the circumstances. It provides that :-

> "(1) in criminal proceedings any document purporting to be report under the hand of Government analyst; medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and then the person signing it held the office and qualification which he processed to hold at the time he signed it".
>
> (3) When any report is so used the court may if it thinks fit summon the analyst ballistic expert document examiner, medical practitioner of geologist as the case may be and examine him as to the subject matter thereon."

55. I find that failure to call a medical officer from Ikalaasa dispensary was not fatal and that pw6 evidence was sufficient to prove defilement. That there is no adverse inference to be drawn from the prosecution's omission or choice of witnesses.

56. I also find that the investigating officer's evidence was sufficient and that the arresting officer was not a necessary witness in proving the offence. The appellant testified in his defence that he took himself to the police station after he was informed about the allegations against him.

57. The appellant contends that the evidence was contradictory and had inconsistencies. He pointed out these consistencies which were also reflected on by the trial court. The case of Twehangane Alfred – Vs- Uganda Cr. Appeal No. 139 of 2001(2003) UGCA-6 the court held that :

> "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 case.".

58. The appellant's case is that the dates are contradictory and also that the evidence contradicted the charges. If such contradiction is proved, it could be fatal to the prosecution's case and ultimately lead to dismissal of charges.

59. In Peter Ngure Mwangi v Republic [2014] eKLR, the court of appeal held that:-"A charge can also be defective if it is in variance with the evidence adduced in its support...."

60. This was earlier explained in the case of Yongo v R, [198] eKLR where the court reffered to Archbold, Criminal Pleading, Evidence and Practice (40th Edn), stating that:-

> "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the

indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,”

61. Pw1 testified at page 6 of the proceedings that she was sent to the appellant’s home in the evening hours that on reaching the appellant showed her to bed where she was raped. She returned home. Pw2 testified that she sent the minor to get milk at 6:00am and that she returned at 12:00 noon when she was sickly.

62. Another contradiction is that the investigating officer testified that the offence occurred at his kiosk while the others testified that it was at his mother’s home. The appellant stated during his defence that he was confused .

63. I note that the charge sheet did not indicate the time of the offence. I also find that the date of the offence set out on the particulars of the charges was corroborated by oral and documentary evidence. The minor was defiled on 18/9/2021, pw1 and pw2 testified that the child had visited the appellant on this day when she came back feeling unwell. The minor’s evidence was firm that the appellant defiled her at the house where he led her to his bed. She described the appellant’s house as a single room with a bed.

64. There was no confusion on the date and the appellant was also able to cross examine witness on the charges and statements served on him.

65. The evidence also went in to prove positive identification of the assailant. Whether it occurred in the morning or evening is a non-issue since the child was able to see the appellant and the sexual perversions described in her testimony. The appellant did not challenge this part of the evidence

66. Lastly, the appellant’s defence was that the charges were fuelled by family disagreement between his paternal aunty who he called S and the family. Pw3 SMM was the appellant’s aunt and she explained how took steps to ensure that the offence was reported. That the minor’s grandmother wanted to settle the case and was defending the appellant. The witness denied asking for money, the appellant did not cross examine the witness on the alleged family dispute caused by the debt. Pw2 was also part of the family and had to be cross examined.

67. The appellant’s case did not shake the prosecution’s case. If the matter was as a result of family feud why have PW1 report and incident of defilement and on examination medical evidence proves that she was defiled? The Defense of frame up is far fetched and an after thought in the circumstances.

Sentence

68. On the sentence, in the case of Wanjema -Vs- Republic [1971] EA 493 , the East Africa court of appeal set the principle that : -

> “The Appellate court should not interfere with the discretion which atrial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

69. The court sentenced the appellant to 30 years imprisonment instead of the mandatory statutory sentence provided under Section 8(2) of the *Sexual Offences Act*. The appellant was also in custody for 6 months before he raised bond which had to be considered in the aggregate sentence.

70. The sentence has been considered together with the applicable law. The appellant did not challenge the sentence in his grounds and further this court and /or the prosecution had not issued notice of

enhancement. The sentence is upheld save that 6months period served shall be deducted from the sentence in line with Section 333 (2)of the Criminal Procedure code.

71. In the upshot, the appeal on conviction is dismissed. The appellant's sentence is also upheld with further provision that the period served in remand will be reduced from the sentence.

JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT AT MACHAKOS HIGH COURT VIRTUALLY/PHYSICALLY AT MACHAKOS THIS 28/2/2025

M.W.MUIGAI

JUDGE