Lunyamu v Republic (Criminal Appeal E013 of 2022)
[2025] KEHC 1245 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1245 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E013 OF 2022

JN KAMAU, J

FEBRUARY 27, 2025

BETWEEN

DAVID LUNYAMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. K. Manyura (RM) delivered at Hamisi in Principal Magistrate's Court in Sexual Offence Case No 57 of 2021 on 23rd September 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was convicted by the Learned Trial Magistrate, Hon S. K. Manyura (RM), on the charge of defilement and sentenced to twenty (20) years imprisonment.

3. Being dissatisfied with the said Judgment, on 14th October 2022, he lodged the Appeal herein. His Petition of Appeal was dated 12th October 2022. He set out six (6) grounds of appeal.

4. His Written Submissions were dated 13th May 2024 and filed on 21st May 2024 while those of the Respondent were dated 25th September 2024 and filed on 26th September 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal herein and parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Petition of Appeal were dealt with under this head as they were all related.

10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga v Republic* [2016] eKLR.

12. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

13. The Appellant did not submit on this issue. On its part, the Respondent submitted that the Complainant, BJ, (hereinafter referred to as "PW 1") testified that she was fourteen (14) years old. It pointed out that her evidence was corroborated by that of No 60473 PC Reuben Naebei (hereinafter referred to as "PW 6"), who produced an Age Assessment Report which proved that PW 1 was a minor at the material time. It asserted that the Appellant did not dispute the said evidence.

14. This court had due regard to the case of *Fappyton Mutuku Ngui v Republic* [2012]eKLR where it was held that conclusive proof of age in cases under sexual offences Act did not necessarily require a birth certificate but that other modes of proof of age could be used.

15. Further, in the case of *Kaingu Elias Kasomo v Republic* Criminal Case No 504 of 2010 (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of *Musyoki Mwakavi v Republic* [2014] eKLR.

16. PW 1 testified that she was fourteen (14) years of age at the time of trial. The offence was said to have been committed on diverse dates between 29th August 2021 and 5th September 2021. A perusal of the Age Assessment Report dated 13th June 2022 indicated that she was approximately fourteen (14) years old. The Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary.

17. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about fourteen (14) years old and was therefore a child at the material time.

B. Identification

18. The Respondent submitted that the Appellant was well known to PW 1 and that she could not have been mistaken as to his identity as she had prior knowledge of who he was.

19. To buttress its argument, it relied on the case of *Anjononi & Others v Republic* [1976-80] 1 KLR 1566, 1568 where it was found that recognition was more reliable and weightier than that of identification of a stranger. It also placed reliance on the case of *MTG v Republic* (eKLR citation not given) where it was held that minor or trivial contradictions did not affect the credibility of a witness and could not vitiate a trial.

20. The Appellant did not deny having known PW 1. He admitted that she was his grandfather by virtue of her having been his brother's son's daughter. It was evident that since they were both family members, they were not strangers to each other. Although the incident happened at night, there would ordinarily not have been any possibility of mistaken identity. The question of whether the Appellant committed the offence was a different matter altogether.

C. Penetration

21. The Appellant submitted that this was a family matter that was brought about by family differences. It was his case that PW 1 was framed to testify against him based on ill motives.

22. He asserted that her evidence was unreliable, untrustworthy and full of false accusations to convict him. He questioned the allegation that he could bring another woman in a house where he lived with his wife and grandchildren.

23. He asserted that the Prosecution had failed to prove its case beyond reasonable doubt as the evidence tendered by its witnesses was insufficient, inadequate, distorted and far-fetched. It was his submission that the Prosecution failed to call two (2) key and/or crucial witnesses to testify in court. These were namely Mama Faith and Purity. He asserted that it could then be assumed that their evidence would have been adverse to the Prosecution.

24. In this regard, he relied on the case of *Bukenya v Uganda* [1972] EA 549 where it was held that failure to call witnesses by the prosecution entitled the court to make an adverse conclusion against the prosecution case and acquit the accused person. He also relied on the cases of *Busiku Thomas v Uganda* [2015] UGSC and *David Okiros v Republic* [2014]eKLR but did not highlight the holdings that he relied upon.

25. He further argued that he was not subjected to any tests to prove that he was the one that infected PW 1 with the STI disease that she had. He asserted that although she was a minor, she might have had been meeting several male friends for sexual relationships. He was emphatic that had the doctor examined him together with PW 1, he would have been exonerated from this case. He submitted that in the premises, he ought to have been given the benefit of doubt.

26. He argued was his case that a missing hymen was not only caused by penetration but that it could be caused by extreme exercise, bicycle riding, swimming, or horse riding.

27. He further submitted that the Trial Court failed to observe the provisions of Article 27(1) and (2) and 28 of the *Constitution* of Kenya, 2010 which resulted to a degrading and demeaning treatment on his part. He submitted that although a child below the age of eighteen (18) years of age could not give consent to sexual intercourse under the *Sexual Offences Act*, where the child behaved like an adult and willingly sneaked into men's houses for purposes of having sex, courts needed to treat such a child as a grown-up who knew what she was doing and enjoying.

28. He further invoked Section 8(6) sub-section 5(b) of the *Sexual Offences Act* and submitted that a conviction of an alleged defiler should be based on the actual circumstances and proof that the complainant was defiled. He faulted PW 1's evidence against him as he claimed he was an eighty-six (86) years old man with an erectile dysfunction and it was not possible that he could engage in sex. He reiterated that he was only framed by PW 1 who did not want to disclose her real boyfriends.

29. On the other hand, the Respondent invoked Section 2 of the Sexual Offences Act and submitted that PW 1's evidence was without doubt understood to mean that the Appellant penetrated her vagina which proved the ingredient of penetration. It added that her evidence was corroborated by that of the Clinical Officer, No 6905 Kisaka Maureen (hereinafter referred to as "PW 5").

30. It submitted that the Trial Court relied on Section 124 (sic) which gives exception to corroboration in sexual offences cases of a minor and found PW 1's evidence to have been credible and consistent. It asserted that the Trial Court correctly noted that although she was a minor, the fact that she had previous sexual encounters did not discredit her as a witness as no other person was mentioned to have engaged in sexual encounters with her. It was therefore emphatic that the Trial Court addressed the issues that he had raised.

31. PW 1 testified that on diverse dates between 21st August 2021 and 5th September 2021, together with one Purity, they went to the house of one Okello to watch television. Her evidence was that the Appellant lived there (sic).

32. She told the Trial Court that the Appellant called her to go for airtime but she refused because it was at night. He then told her to go to Okello's house to fetch money for airtime. When she did, he followed her to Okello's house, touched her and said he wanted to show her something on her body. This was at about 7.00 pm.

33. He touched her by force, removed her dress and panty, took her to the bed and slept on top of her. He then warned her not to tell anyone that they had had sex. She screamed and Mama Faith came. He told her that nothing had happened and she left. PW 1 testified that although she wanted to leave at 8.00pm, the Appellant took her to the room and defiled her and released her at midnight.

34. She reported the incident to teacher JO (hereinafter referred to as "PW 3") and RAO (hereinafter referred to as "PW 4") when she went to school on Monday (sic).

35. PW 3 told the Trial Court that on 6th September 2021, she approached PW 1 as she had been coming to school on an off. When she asked her why she was not coming to school, she said that there an old man by the name of Daudi Lunyama who was disturbing her and they had been having sex since 2020 on the promise that she would be given Kshs 20/= to Kshs 50/=.

36. PW 4 corroborated PW 3's evidence and added that the old man used to make her get late after having sex with her.

37. KS (hereinafter referred to as "PW 2") was PW 1's father. He testified that he was informed by her teachers on 6th September 2021 that she had been defiled by the Appellant.

38. PW 5 stated that according to PW 1, she knew that it was the Appellant who defiled PW 1. He pointed out that she would stay in her defiler's house for two (2) to three (3) days. Her evidence was that when she examined PW 1, she observed that she had a broken hymen with a bacterial infection in her urine and the presence of a foul-smelling discharge. She pointed out she had no laceration swelling and/or tenderness. She concluded that she had been defiled. She produced the Post Rape Care (PRC) Form and P3 Form as exhibits in this case.

39. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

40. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

41. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

42. This court carefully analysed the evidence of the Prosecution witnesses and noted that it had gaps and inconsistencies that were substantive. As the Appellant correctly submitted, the said Mama F and Purity were crucial witnesses. Failure to call them was fatal to the Prosecution's case. It was not clear from the evidence that was adduced how far the Appellant's house was from Okello's house for the Appellant to have called PW 1 to go and collect airtime. The evidence was also silent as to where PW 1 was to go for airtime. It was also unclear if P was there or not.

43. From PW 1's evidence, the Appellant sent her to Okello's house to get money for airtime where he followed her, touched her by force, covered her mouth, removed her clothes and defiled her. It was not clear why when she screamed and Mama F came, Mama F did not raise any alarm of the Appellant being in Okello's house with her.

44. If the incident happened in the Appellant's house, there was a gap in the sequence of how he took her to his house from Okello's house and defiled her that night until midnight yet he had a wife who she had alluded to in her testimony. It was also not clear from her evidence if the Appellant's wife was in the house on the diverse days that she had sex with him.

45. Notably, PW 1 had told the Trial Court that the Appellant had told his wife that he had been told at the hospital that he should have sex with a child to improve his eye sight and that he said this in the

presence of PW 3 and PW 4. However, PW 3 and PW 4 never mentioned this incident in their evidence yet it was very relevant and material to the Prosecution's case.

46. If the incident occurred at the Appellant's house as PW 6 stated, there was a contradiction in PW 1's evidence. The question that arose in the mind of this court was whether the incident occurred at Okello's house or the Appellant's house. If it was at the Appellant's house, this court was puzzled as to why PW 1 said that she used to go and watch TV at Okello's house.

47. Further, if she stayed at the Appellant's home for two (2) – three (3) days as she told PW 5, the question that arose in the mind of this court was why PW 2 never mentioned it in his evidence yet it was very material and relevant in the circumstances of this case. PW 2 only testified that her teachers told her that she was being defiled by the Appellant herein. As a father, PW 2 ought to have been concerned that PW 1 used to go missing from home. This raised some apprehension to this court.

48. Although the Trial Court dismissed the Appellant's defence on account that he did not provide documents to show that he was not at home on the material dates, there was nothing in the proceedings to show that the Appellant said that he was away. In fact, in his testimony he said that he was at home with his wife and grandchildren.

49. Going further, the Post Rape Care Form dated 9th September 2021 that PW 5 adduced in evidence showed that the defilement was alleged to have taken place for over a year. Under the part for recording genital examination of the survivor, it was indicated that "The victim confirms to have had sex with the alleged person since last year September". This contradicted PW 1's own evidence that the incident occurred between 29th August 2021 and 5th September 2021.

50. In addition, it was apparent from PW 5's evidence that she was non-committal as to whether PW 1 was defiled. There were no lacerations, swelling or tenderness in her vagina. She seemed to rely on the history that PW 1 gave her. She stated that "According to the Complainant, I knew you are the one who defiled her."

51. Further, although PW 1 was found to have had a Sexually Transmitted Infection (STI), the Appellant was not tested to connect him to her. If indeed, the sexual encounters were frequent with him only, it was expected that he would have been infected as well. Indeed, this court took judicial notice that STIs manifest much faster in males than females. This was critical evidence that would have assisted this court in ascertaining if indeed cogent evidence had been adduced to place pin the Appellant as the perpetrator.

52. The Appellant adduced sworn evidence and denied having defiled PW 1. He stated that he stayed with his elderly wife and older grandchildren. The Prosecution did not controvert and/or rebut this evidence. He was emphatic that PW 1 had been coached to spoil his name. He explained that he did not bring witnesses to testify because they would look biased.

53. While this court could rely on the evidence of a single witness as provided in Section 124 of the *Evidence Act*, there were several material inconsistencies, gaps and contradictions that made it very uneasy as they created doubt in its mind of this court as to what really transpired on the material dates complained of.

54. It is worthy of note that sentences meted out in defilement cases are lengthy and deprive a person his liberty. Indeed Article 29(2)(a) of the *Constitution* of Kenya, 2010 provides as follows:-

> " Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause."

55. Weighing the evidence that was adduced by the Prosecution and that of the Appellant herein, this court was hesitant to deprive the Appellant his freedom based on investigations and prosecution that were conducted so casually. There was no factual or scientific evidence to corroborate PW 1's evidence. The Appellant's defence was not simply a denial. The Prosecution's evidence was not watertight enough to lead this court to affirm the conviction of the Trial Court.

56. It was this court's considered opinion that the Trial Court erred in having convicted the Appellant yet the existing gaps, inconsistencies and contradictions were clear that the Prosecution had not proved its case to the required standard, which in criminal cases, was proof beyond reasonable doubt. If indeed he defiled PW 1, this court could only blame the manner the prosecution and investigations were done in this case for the turn that this matter had taken on appeal.

57. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Petition of Appeal were merited and the same be and are hereby allowed.

II. Sentencing

58. Ground of Appeal No (6) was dealt with under this head.

59. In view of the court's finding hereinabove, it did not find it necessary to analyse the parties' submissions on whether the sentence was excessive warranting the interference of this court or not.

60. Suffice it to state that had this court found that the Prosecution had proved its case against the Appellant beyond reasonable doubt, it would have affirmed the sentence of twenty (20) years imprisonment that the Trial Court meted against him as that is what was provided by the law.

61. Notably, Section 8(3) of the *Sexual Offences Act* provides as follows: -

> " 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"

62. This court would also have directed that the period the Appellant had spent in custody as his trial was ongoing be taken into account while computing his sentence as is provided under Section 333(2) of the *Criminal Procedure Code* and as was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.

Disposition

63. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 12th October 2022 and lodged on 14th October 2022 was merited and the same be and is hereby allowed. His conviction and sentence be and are hereby set aside and/or vacated as they were both unsafe.

64. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be otherwise held for any other lawful cause.

65. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF FEBRUARY 2025

J. KAMAU

JUDGE