SKC v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 5670 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5670 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E008 OF 2024

FN MUCHEMI, J

APRIL 30, 2025

BETWEEN

SKC ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable M. W. Kurumbu (PM), in Criminal Sexual Offence Case No. 9 of 2020 on 11th July 2023.)

JUDGMENT

Brief Facts.

1. The appellant was initially charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* and with an alternative charge of committing an indecent Act with a child contrary to Section 20(1) of the same Act. In the judgment of the court, it was found that the ingredients of the offence of defilement contrary to Section 8(1) and 8(2) had been proved and that the charge of incest was not correct. The court relied on Section 179 of the *Criminal Procedure Code* that empowers the court to convict an accused with the offence whose ingredient have been proved. The appellant was therefore convicted of the offence of defilement. He was sentenced to 25 years imprisonment after the magistrate took into account decisions of the Court of Appeal which informed jurisprudence at that time.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 6 grounds of appeal which are summarised thus: -

   The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof;

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions.

4. The appellant relies on the cases of Johnson Muiruri vs Republic [1983] KLR 445 ; Ndegwa vs Republic (1985) KLR 535 and Patrick Kathurima vs Republic (no citation given) and submits that the voire dire evidence taken was unprocedural as required in law. The appellant argues that the trial magistrate did not test the demeanour of the complainant and assess her personal credibility by recording the questions as given before giving evidence in court.

5. The appellant argues that the prosecution did not prove the element of penetration against him as the minor testified that when the appellant defiled her she told her aunty who is not in good terms with the appellant and therefore he framed her. Further, the appellant argues that whereas the minor testified that some of the neighbours heard the incident taking place, the said neighbours were never called to testify. The appellant submits that the complainant is not a truthful witness as she testified that he burnt the clothes and the beddings he used to wipe himself but on cross examination she stated that she did not see him burn the clothes and the beddings.

6. The appellant submits that the medical evidence did not corroborate penetration as the medical doctor who examined the minor and filled the medical documents was not brought as a witness to testify. Furthermore, the person who produced the documents was not the author of the documents. The appellant further submits that the incident was alleged to have happened on diverse dates between 1st January 2020 and 12th January 2020 but the documents were dated 18th January 2020. Furthermore, it was unexplainable how the minor was still experiencing pain in her vagina on 18th January 2020. The appellant states that the P3 Form which was filled on 19th January 2020 indicated that there were injuries from the thighs and the minor was not walking well and that the hymen was broken but the doctor testified that a broken hymen could mean many things other than sexual intercourse. The appellant further submits that the said aunt was not called as a witness to testify as she found the minor was having a problem when she was washing her.

7. The appellant submits that the arresting officer who testified never arrested him or gave an account of how and why he was arrested. The appellant argues that he gave a cogent defence which remained unchallenged by the prosecution. Thus, the appellant submits that the prosecution did not prove the element of identification of the perpetrator. To support his contentions, the appellant relies on the cases of Akumu vs Republic (1954) 21 EACA and R vs Hanemaayer 2008 ONCA 580 and submits that the trial court did not evaluate his defence of an alibi but instead convicted him.

8. The appellant urges the court to quash the conviction and set aside the sentence or declare that the time he has spent in custody to be deemed as sufficient sentence.

The Respondent's Submissions.

9. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent refers to Section 20(1) of the *Sexual Offences Act* and the case of Kyalo Kioko vs Republic (2016) eKLR and submits that it proved the ingredients of the offence of defilement. The respondent submits that PW2, the minor's mother, testified that PW1 was twelve years old and the investigating officer produced the age assessment which confirmed that she was below 12 years old. To support her contentions, the respondent relies on the case of Mwalango Chichoro Mwanjembe vs Republic (2016) eKLR and submits that the appellant did not bring any evidence to dispute the age of the minor or challenge the age assessment report.

10. Relying on Section 2 of the *Sexual Offences Act* and the case of Mark Oiruri Mose vs Republic (2013) eKLR, the respondent submits that PW1 testified that the appellant went to where she was sleeping, removed her dress and panty and then inserted his penis into her vagina. PW4 testified and produced PRC Form Ex 4, lab request forms Ex 2 and P3 Form Ex 3. The respondent further submits that the witness testified that upon genital examination by the doctor, the minor's hymen was broken, she had pinch marks on her thighs and bruises thereby concluding that there was vaginal penetration. The respondent further submits that the trail court believed the evidence of PW1 in regard to penetration and concluded that all the ingredients had been proved. The respondent thus submits that the evidence produced during trial clearly proved the element of penetration to the required standards.

11. The respondent submits that proof of participation of an accused person is crucial as it enables one to determine who to attach criminal responsibility to. The respondent submits that PW1 testified that the appellant was her father which was confirmed by PW2 and the appellant.

12. Relying on the case of Michael Saa Wambua & another vs Republic (no citation given), the respondent submits that there were no contradictions or inconsistencies and even if they were, they are minor and did not go to the root of the prosecution case. The minor inconsistencies were satisfactorily explained and the evidence adduced reflects the prosecution witnesses were truthful.

Issues For Determination.

13. The appellant has cited 5 grounds of appeal which can be compressed into one main issue being whether the prosecution proved its case beyond any reasonable doubt;

The Law.

14. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

15. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding 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, see Peters vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt.

16. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:

    a. Whether there was conclusive evidence of all the ingredients of the offence of incest;

    b. Whether the trial court conducted a proper viore dire examination on the complainant;

    c. Whether the prosecution called all the crucial witnesses to prove its case;

    d. Whether the trial court considered the defence evidence.

    Whether there was conclusive evidence of all the ingredients of the offence of incest.

17. Section 8(1) of the *Sexual Offences Act* No. 3 of 2006 provides for the offence of defilement as follows:-

    A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

18. Thus the key ingredients of the offence of defilement include:-

    a. Penetration or indecent act;

    b. Age of the victim;

    c. Identification of the perpetrator.

19. The complainant, PW1 testified that the appellant was her step-father. The mother of the complainant PW2, testified that the appellant was her husband and father to PW1. PW3, a brother to PW2 testified that the appellant was the father of the minor while the investigating officer PW4 testified that PW2 andPW1 reported the incident on 18th January 2020 to the effect that the appellant, the step father of the minor had defiled her. The appellant in his defence confirmed that he married the minor's mother and they lived together with her children, including the minor as a family. He was therefore, a step-father to the victim and the victim was a step child having married the victim's mother.

20. Section 2(1) of the *Sexual Offences Act* defines penetration as:

    > " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

21. It was the testimony of PW1 that her mother went to her rural home leaving her home under the care of the appellant. She further testified that on the material day at night, she was sleeping on a mattress on the floor and the appellant was sleeping on his bed separated by a curtain in the same room. While she was sleeping, the minor testified that the appellant went to where she was, removed her dress and her panty and inserted his penis into her vagina. The minor testified that she felt pain but did not scream. She further testified that the appellant warned her not to scream or tell anyone what had happened. He threatened to harm her if she told anyone about the incident. The witness testified that she told her aunty three (3) days after the incident when she went to visit her.

22. PW5, the investigating officer produced the P3 Form as an exhibit and testified that PW2 took the minor to Thika Level 5 Hospital on 18th January 2020 where she was given treatment and counselling in respect of the incident. Pinch marks and bruises were noted and drawn the Post Rape Care Form on the

private parts from the thighs. The witness testified that the P3 Form was filled on 19th January 2020 and the doctor noted the injuries from the thighs. The child was not walking well due to the inflammation and she had discharge oozing from her vagina. The doctor classified the injuries as grievous harm. PW5 produced the P3 Form, Post Rape Care Form and the Lab request form. The witness on cross examination testified that the minor's hymen was broken and she had pinch marks indicating the use of force and resistance by the victim.

23. Thus the evidence of PW1 was corroborated by the medical evidence consisting of PRC form, treatment notes on behalf of the doctor who examined the victim. The minor's hymen had been broken as shown by the documents produced. From the analysis of the evidence, it is my considered view that there is ample evidence to prove that penetration occurred.

24. The appellant has contested the production of the medical records on the basis that the author of the documents is not the person who testified in court and produced the same. The record shows that on 7th November 2022, the matter was scheduled for hearing of the testimony by the doctor, who had been bonded severally but failed to attend court. The prosecution made an application to have the investigating officer produce the medical documents as the medical officer who filled the P3 Form had left the facility and he could not be reached on phone. The appellant did not object to the application and the court allowed it in the interests of justice and noted that the case involved a minor and the medical documents were very crucial. The trial magistrate further held that it was procedural for the author to produce documents but if the investigating officer could not be allowed to produce the documents, the interests of the minor would be in jeopardy. Thus, upon the appellant agreeing to have the investigating officer produce the documents, he cannot be allowed to contest that issue on appeal. The document was produced under Section 77 of the *Evidence Act* which was admissible in evidence.

25. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

> "....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.

26. PW2 testified that the complainant was born on 12th September 2012 the birth certificate was said to have been burnt and was therefore not available to be produced in evidence. PW1 testified that she was in Class 2 at the time of the offence. PW5 testified that as per the P3 Form, the child was said to be 11 years. It is therefore my considered view that the oral testimony by PW1, PW2 the mother, as well as PW5 was admissible and reliable in determining the child's age. As such, the prosecution proved the age of the minor.

27. The appellant further argued that the trial magistrate did conduct the voire dire test as required in case of a minor under Section 125 of the *Evidence Act*. The record shows that the magistrate before hearing the complainant who was aged 11 years conducted the voire dire test by way of putting questions to her and and recorded the answers to the questions. The court noted:

> "I find the witness possess sufficient intelligence to understand the nature of oath. Witness to give sworn evidence."
>
> In my view, he magistrate carried out his legal duty as required by the law.

28. On the evidence of identification, the appellant is the complainant's stepfather and she knew him well. On the material day, the appellant was home with the complainant her mother having travelled. PW1 explained that she was sleeping with the appellant in the same room which was portioned with a curtain. The appellant left his bed and went to where the complainant was sleeping and carried out his mission using threats to PW1. The identification was by recognition since she knew the appellant well and had lived in the same house with him, her mother and her siblings. In my considered view the said identification was positive and there was no possibility of a mistake.

29. The appellant argues that the prosecution did not call crucial witnesses to prove its case, in particular the auntie of PWP1 to testify on allegations made by that PW1.

30. It is trite law that the prosecution is required to avail to court all relevant evidence to enable it make an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact. Section 143 of the *Evidence Act* (Cap 80) Laws of Kenya provides:-

    No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.

31. In the case of Bukenya & Others vs Uganda [1972]EA 549 the court addressed itself thus:-

    a. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

    b. That the Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

32. Similarly in Keter vs Republic [2007] 1 EA 135 the court held inter alia thus:-

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

33. It is evident from the record that the prosecution did in fact call the material witnesses whose evidence as a whole was assessed to be sufficient to prove their case. It is noted the auntie of PW1 did not witness the commission of the offence and thus by not calling him no prejudice was occasioned to the appellant. What matters is the quality of the evidence but not the quantity. It is therefore my considered view that the prosecution is an independent entity and that it called all the witnesses hey found material to their case. The accused has the right to call his own defence witnesses even from amongst those left out by the prosecution.

34. The appellant further submits that the trial court did not consider his defence of alibi. The record shows that the appellant testified that he was married to PW2 who had separated from her husband. PW2 had two children and they lived for 1 ½ years when PW2 requested to bring her children to live with them. The appellant testified that when PW2's former husband learnt of the children living with them he called him and told him that he wanted his children back. The appellant further testified that one day, PW2 left without notice and returned after 2 weeks. The appellant was infuriated and slapped PW2. The appellant testified that he woke up early on the material day and met PW2's brother at the gate with the complainant who complained of having had a stomach ache the whole night. He stated that he gave PW2 money to take the minor to hospital and he went to work. He further stated that he went to PW2's place of work and found PW2 with a police officer who questioned him. It is noted that the defence of alibi was not raised during the trial and only raised it at the appellate stage. It is trite law that an alibi defence ought to be raised at the earliest opportunity, even during the trial to accord the [prosecution a chance to rebut it.

35. It is noted that the court considered the appellant's defence and concluded that it did not present a reasonable explanation. The trial court further noted that the appellant's defence did not shake PW1's testimony that the appellant defiled her at night while her mother was away and he threatened to harm her if she dared tell anyone. The judgment of the magistrate speaks for itself on this issue.

36. It is therefore my considered view that the trial court considered the defence but found that it did not displace the evidence by the prosecution witnesses.

37. The act of the magistrate relying on section 179 of the *Criminal Procedure Code* of an offence other than the one charged was within the law.

38. PW1 gave a comprehensive testimony of the incident in a consistent manner. After careful analysis of the evidence, I am of the considered view that the prosecution established all the ingredients of the offence of defilement. The offence was therefore proved beyond any reasonable doubt.

39. I come to a conclusion that the conviction was based on cogent evidence and is hereby upheld.

40. The appellant was sentenced to serve twenty-five (25) years imprisonment based on the prevailing jurisprudence of the Court of Appeal in the case of Evans Nyamari Ayako vs Republic where life imprisonment provided under Section 8 (1) and 8 (2) was interpreted by the court to mean thirty (30) years imprisonment. The decision was overturned by the Supreme Court in Petition No. E002 OF 2024 Republic vs Ayako where the sentence of the Court of Appeal was set aside. The Supreme Court reinstated the High Court judgment of life imprisonment.

41. The respondent did not file a Notice of Enhancement in this case. It is noted that the judgment of the Supreme Court relied on was delivered on 11th April 2025, just a few days after this appeal was fixed for judgment. Bearing in mind the provisions of Section 274 of the *Criminal Procedure Code* where the appellant is entitled to be served with a notice and to respond to it accordingly which was not done in this appeal. The sentence provided under Section 8 (2) of the *Sexual Offences Act* is life imprisonment. However, since the sentence of twenty five (25) years was imposed at the time jurisprudence of the Court of Appeal prevailed and bearing in mind that the appellant was not notified of the enhancement, this court shall not interfere with the sentence.

42. I find no merit in this appeal and it is hereby dismissed.

43. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE