



REPUBLIC OF KENYA



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**Kahindi v Republic (Criminal Appeal E029 of 2024)
[2025] KEHC 8274 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 8274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E029 OF 2024**

JN NJAGI, J

MAY 28, 2025

BETWEEN

RONALD MASHA KAHINDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from original conviction and sentence by Hon.
L.N Wasige, SPM, in Garsen Senior Principal Magistrate's Court
Kipini Sexual Offence Case No. E002 of 2022 delivered on 27/9/2023)*

JUDGMENT

1. The Appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the 13th and 14th day of October, 2022 at an unknown time at [Particulars Withheld], Kipini Location, Tana Delta Sub-County, Tana River County, he intentionally caused his penis to penetrate the anus of PA (herein referred to as the complainant), a child aged 8 years.
2. The appellant was sentenced to serve 30 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:
 1. The learned trial magistrate erred in law and fact by failing to note that the charge sheet was defective.
 2. That the trial magistrate erred in law by imposing an unlawful sentence.
 3. That the learned trial magistrate erred in law and fact by failing to consider that the prosecution did not discharge the burden of proof to the legal required standard threshold.



4. That the learned trial magistrate erred in law and fact by ignoring the contradictions and inconsistencies by the prosecution witnesses thereby making the appellant's conviction unsafe.
 5. That the trial magistrate failed to take into consideration the defense of the appellant.
 6. The learned trial magistrate erred in both matters of law and fact by failing to take into consideration the appellant's mitigation.
3. The prosecution called 4 witnesses in the case at the close of which the court found the appellant to have a case to answer and placed him to his defence. The appellant defended himself and called 2 witnesses. The trial court considered the evidence adduced before it and found the appellant guilty as charged and sentenced him accordingly.

Case for the prosecution

4. The complainant who testified as PW2 in the case gave evidence that she was at the material time aged 8 years and a grade 2 primary school pupil. That she was living with her mother (PW2) and her father, the appellant. That on the material day, she was at home when her mother left to attend a 'chama' meeting. That the appellant got hold of her and inserted his penis into her anus. After finishing with her, he instructed her to take a birth. She did so. She said that the appellant had done the same thing to her on the preceding two days and on each occasion, he would instruct her to take a birth. When her mother returned, she told her what the appellant had been doing to her. They reported to the police. She was taken to hospital where she was examined. Later the appellant was arrested.
5. The complainant's mother PW1 told the trial court that on 15/10/2022 she left her home to attend a chama meeting at Tosi area in Kipini. She left the complainant at home. That upon getting back home she noticed that the complainant was unwell as she could not sit properly. She questioned her and she informed her that her buttocks were hurting as her father, the appellant, had inserted his penis into her anus. She said that the appellant had done the same thing to her on the 13th and 14th October 2022. She, PW1, reported the matter at Kipini police station. The girl was escorted to hospital where she was examined and the defilement confirmed. PW 1 said that the appellant is not the biological father to the complainant.
6. Kassim Mohamed PW3, a Clinical Officer at Kipini Health Centre testified that he examined the victim on 15th October, 2022 whereupon he found her with bruises and bleeding on her anus. The bruises were fresh. He formed the opinion that she had been penetrated through her anus. He gave her painkillers and antibiotics. He filled her P3 form. During the hearing he produced the treatment notes and the P3 form as exhibits, P.Exh. 1 and 2 respectively.
7. The investigating officer, PC Michael Ewoi PW4 of Kipini Police Station told the court that he was on 15th October, 2022 at the police station when PW1 reported at the station that her daughter had been defiled by her father. Police officers from Kipini accompanied her and her daughter to Kipini Health Center where she was examined and her P 3 form filled. He interrogated the victim who informed him that the appellant had had sex with her through her buttocks. He had her age assessed at the hospital and the same was assessed at 8 years. He produced the age assessment report in court as exhibit, P.Exh. 3.

Defence Case

8. When placed to his defence, the appellant told the trial court that the complainant is his step daughter. That on 13th October, 2022 the complainant came home late from school. He reprimanded her and canned her for coming home late. He sent her to the well to fetch water. That on the 14th day of October, 2022, PW1 said that the victim should not go to school. He left the house to go look for work



in a boat. On 15th October, 2022 he went with his wife to a chama meeting leaving the complainant at home but she later followed them to the meeting. He later returned home and left the complainant and her mother at the meeting. That in the evening, his neighbour Mama Kadzo informed him that he should escape because the complainant's mother had reported to the police that he had defiled the complainant. He declined to do so as he had not committed any wrong.

9. It was the evidence of the appellant that the case was fabricated by the complainant's mother due to a grudge after he discovered that the complainant is not his biological daughter. That he told PW1 that he wanted a DNA test to be done on the child to confirm paternity. She then reported this case to the police. He said that it is PW1 who coached the girl on what to tell the court.
10. The appellant's mother, DW2, testified that when the appellant married PW1 she already had the child, the complainant herein. That on 13th October, 2022, she was attending a chama meeting with the appellant and PW1. That the meeting ended at 2:00 p.m and the appellant went to town to buy vegetables. She denied that the appellant defiled the complainant on that day as he was with him at the chama meeting.
11. A neighbour to the complainant, DW3, told the court that on 13th October, 2022 she was at their meeting (chama) at Tosi. That she was in the company of the appellant, his wife and the complainant.
12. The court record indicates that before the defence case was closed, the complainant's mother came to court in the company of the complainant on 5/4/2023 and told the court that the complainant had confessed to her that she had lied to the court when she testified that the appellant had defiled her. That the complainant had said that she lied against the appellant because he used to beat her when she arrived home late from school.
13. The court recalled the complainant wherein she told the court that she would go to school and later after school pass by her grandmother's house to play and go home late. That on getting home, the appellant would beat her up for coming home late. That since he used to beat her often, she decided to lie that he had defiled her. That it was not true that the appellant defiled her as she had earlier told the court.
14. The prosecutor at that juncture sought for adjournment for further investigations to be conducted on the matter. The complainant was reported to have undergone counselling at a children rescue centre.
15. The complainant was recalled to court again on the 5th July, 2023 wherein she reiterated her initial evidence that the appellant had indeed defiled her. The reason she gave to the court for recanting her evidence that the appellant had defiled her was that she feared her father's family members as his brothers had threatened to kill her mother if she (the complainant) insisted on telling the truth.
16. The appeal proceeded by way of written submissions.

Appellant's submissions.

17. The appellant submitted that he was charged with a defective charge, that he was charged with the offence of defilement contrary to section 8(1) as read with Section 8 (2) of the *Sexual offences act* No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, an act said to have been committed on his child. He submitted that the charge was defective as the prosecution ought to have charged him with committing incest.
18. The appellant submitted that the court erred in relying on the evidence of PW1, PW2 and PW4 whose evidence was marred with contradictions, discrepancies and inconsistencies. It was his submission that the victim had been coached by PW1 on what to say. That based on the number of times the victim



was recalled, it was clear that her testimony could not be relied upon. He relied on the cases of Chilla & Another vs Rep (1962) eKLR and Wamuyu vs Rep (1984) eKLR.

19. The appellant further submitted that the trial court failed to analyze the evidence tendered to determine his criminal culpability; that there was no direct, cogent, convincing and compelling evidence to warrant his conviction and that the evidence tendered fell short of the standard required in a criminal trial. He prayed that this appeal be allowed and that he be set free.

Respondent's submissions

20. The Respondent on the other hand submitted that the three ingredients of the offence of defilement of proof of the age of the complainant, penetration and positive identification of the perpetrator were proved. That the age was established by the evidence of the complainant herself that she was of the age of 8 years. That the age assessment form indicated her age as 8 years. It was submitted that the complainant was attended to by a doctor after defilement who found that she had suffered bruises and bleeding on her anus. The respondent urged the court to dismiss the appeal.

Analysis and determination

21. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that: -

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

22. The burden of proof rests with the prosecution to prove its case against the Appellant beyond reasonable doubt. In Stephen Nguli Mulili vs Republic [2014] eKLR, it was held that: -

“[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP v Woolmington, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa vs. R, [2013] eKLR.”

23. I have considered the grounds of appeal, the record of the trial court and its judgment and submissions by the parties herein. The issue for determination is whether the prosecution proved its case beyond reasonable doubt.
24. Section 8(1) of the *Sexual Offences Act* provides that “a person who commits an act which causes penetration with a child is guilty of an offence termed defilement”, while Section 8(2) states: “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”.
25. In the case of George Opondo Olunga v Republic [2016] eKLR the ingredients for the offence of defilement were set out as: Proof of the age of the victim, penetration and identification of the perpetrator.



26. On the element of age, the Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect of proving the age of a 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.”

27. The complainant herein and her mother PW1 told the trial court that the complainant was at the material time aged 8 years. The investigating officer PW 4 produced an age assessment report that indicates that the minor was 8 years old. The trial magistrate in her judgment said that she had observed the complainant and was convinced that she was aged 8 years. I have no reason to doubt the age assessment report, the evidence of the mother to the complainant and the observation of the trial magistrate on the age of the complainant. The age of the complainant was thereby proved at 8 years.

28. Moving on to the issue of penetration, the same is defined under section 2 of the *Sexual Offences Act* to mean:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

29. Section 2 of the Act defines “genital organs” to include

“the whole or part of male or female genital organs and for the purposes of this Act includes the anus.”

30. Penetration can be proved by oral evidence of witnesses or by circumstantial evidence, which evidence may be corroborated by medical evidence. However, the court may in sexual offence cases involving children, convict on the evidence of the child victim where the court is satisfied that the victim is telling the truth. This is pursuant to the provisions of section 124 of the *Evidence Act* which provides that:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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.

31. In this case, it is to be noted that the complainant’s initial testimony as narrated in court on 23/11/2022 was that the appellant inserted his penis into her anus. She recounted that this had happened on three occasions. However, on 5/4/2023 the complainant recanted this evidence and said that she had in fact lied that the appellant had defiled her as earlier stated. On 5/7/2023 she appeared in court again and purported to stick to her initial evidence that the appellant had indeed defiled her.



32. The proviso to section 124 of the *Evidence Act* requires a court convicting an accused person on the sole evidence of the child victim to give reasons for believing that the child is telling the truth.
33. The trial magistrate in convicting the appellant in this case stated that she was convinced that the complainant was telling the truth when she testified on the first and third occasions. That when she recanted her evidence on the second occasion she seemed timid and scared and testified while looking down and was reluctant to answer questions unlike the first and third time when she gave her evidence calmly. That it was highly possible that she and her mother might have been threatened by the accused's family. That her evidence that she had been defiled was corroborated by the clinical officer PW3 who found her with fresh bruises and bleeding in her anus.
34. The question is whether the trial court was correct in finding that the complainant was telling the truth that the appellant defiled her.
35. The explanation the complainant gave for recanting her initial evidence that the appellant defiled her is that the brothers to the appellant had threatened to kill her mother if she stuck to her evidence that the appellant defiled her. However, when the complainant's mother appeared in court and asked the court to recall the complainant to re-testify in the case, the reason she gave for the request is that the complainant had told her that she had lied to the court because the appellant used to beat her for arriving home late from school. She did not make mention of any threats to her by her brothers-in-law as the reason the complainant lied to the court. Attempts by the prosecution to avail the complainant's mother to re-testify on that issue were not successful. The question then remains unanswered as to whether the complainant fabricated the evidence because of beatings by the appellant or because of threats to her mother by her uncles.
36. Credibility of a witness is very important in a criminal trial. The court of Appeal in the case of *Ndung'u Kimanyi v Republic* [1979] KLR 283, (Madan, Miller and Potter JJA) held as follows on credibility of a witness:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which makes it unsafe to accept his evidence.
37. In recanting her evidence that the appellant defiled her and thereafter going back to the same court and try to adopt her initial evidence that the appellant defiled her, the complainant was portraying herself as a very unreliable and untrustworthy witness. Considering that the complainant was only aged 8 years, it was unsafe for the trial court to rely on her evidence to convict the appellant. Children can easily be swayed by adults. The counselling by an officer from the children rescue centre may just have been an attempt to cajole her to recant her evidence in court that the appellant did not defile her. The truth may never be known as to whether the appellant defiled her or not.
38. The trial magistrate found that there were contradictions between the evidence of the appellant and his witnesses. That his mother (DW2) and DW3 said that the chama meeting was on 13/10/2022 while the evidence adduced before the court indicated the same to have been on 15/10/2022. The court said that the appellant's defence that the charges were fabricated by the complainant's mother after he raised issue with the paternity of the complainant was an afterthought as he did not raise the issue with the complainant's mother when she gave her evidence in court. Whereas I accept these findings, that does not make the complainant more trustworthy as to warrant her evidence being believed.



39. The burden of proof lies on the prosecution to prove the charge against an accused person beyond reasonable doubt. The same does not shift to the accused person (unless the law states otherwise). In view of the self-discredited evidence of the complainant that the appellant did not defile her, the fact that the complainant was found with bruises and bleeding in her anus cannot in itself connote defilement. There are other factors that can cause bruises in the anus such as infection. I therefore do not agree with the finding of the trial magistrate that the complainant was a credible witness. The appellant was in the circumstances of this case entitled to the benefit of doubt.
40. In the final end, it is my finding that the charge against the appellant was not proved beyond reasonable doubt. Consequently, the conviction entered on him by the trial court is quashed and the sentence imposed thereto set aside. I order the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 28TH DAY OF MAY 2025.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Nyakundi for Respondent

Appellant – present in person at G.K.Prison Manyani

Court Assistant - Kambi

