Irungu v Republic (Criminal Appeal E037 of 2024)
[2025] KEHC 6988 (KLR) (28 May 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E037 OF 2024

JK NG'ARNG'AR, J

MAY 28, 2025

BETWEEN

ANTONY MWANGI IRUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Grace Waithira (RM) at Kerugoya Law Court Sexual Offence Case No. E014 OF 2024 delivered on 12th September 2024)

JUDGMENT

A. Introduction

1. The Appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 30th day of April 2024 in Kirinyaga Central Sub County within Kirinyaga County in the Republic of Kenya intentionally and unlawfully caused his penis to penetrate the vagina of FKM a child aged 14 years old. The Appellant was sentenced to serve 20 years' imprisonment. He was aggrieved by the conviction and sentence and lodged this appeal.

2. The grounds of appeal are that:

    a. The learned magistrate grossly erred in law and in fact by basing her judgment on medical evidence that was not conclusive and unsupported by other medical evidence.

    b. The learned magistrate erred in law and in fact for not according the accused a fair trial.

    c. The learned magistrate erred in law and in fact by failing to note that the case was not proved beyond reasonable doubt.

d. The learned magistrate erred in law and in fact by failing to consider that there was no spermatozoa/blood linking the accused to the offence.

e. The learned magistrate erred in law and in fact by failing to accord the Appellant the benefit of doubt due to the prosecution's uncorroborated evidence.

f. The learned magistrate erred in law and in fact by failing to note that the evidence produced by the prosecution was inconsistent.

g. That I pray to be present during the hearing of this appeal in order to adduce more grounds and may this appeal be given the earliest date possible.

h. That I pray the appeal to succeed, sentence quashed and I be set at liberty.

It was only on 19th March 2025 that he filed amended grounds of appeal which he combined with his submissions and his new grounds of appeal were that:

a. The learned trial magistrate erred in law by upholding the Appellant's conviction and sentence of 20 years' imprisonment but failed to note that the ingredients of the charge of defilement were not proved to the required standards of the law.

b. The learned trial magistrate erred in law by upholding the Appellant's conviction and sentence of 20 years' imprisonment but failed to note that the Appellants defence was not considered.

B. Prosecution case

3. The prosecution called 5 witnesses stating with the minor complainant who testified as PW1. After voire dire was conducted, PW1 testified of how despite being born in Kitui County, she had moved in with Mary Mwangi who was her sponsor hence was living with her family including the Appellant herein who was her son. She went on to testify that on 30th April 2024 she was at home wherein between 1pm and 4pm, she was doing her studies at the dining area then went to bathe as usual. Thereafter she went to her bedroom where she locked herself in wanting to change her clothes and once she opened the wardrobe which had a mirror, she saw the Appellant standing behind her. She was alone in the house so she did not understand how he had gained access to her bedroom so she asked him what he was doing there.

4. He ordered her to shut up and since in one of the 2 beds she had kept her books she wanted to cover together with the cellotape, he took the latter as he struggled with her as he tried to gag her. Eventually he managed to tape her mouth round to the back with the said cellotape, pushed her on the bed and using one of his legs he spread her legs wide. He did not undress for he only pulled out his penis and inserted it in her vagina as he went on to defile her for one hour. She had struggled with him as much as she could but she lost for he was stronger than her and also she could not scream for there was no one else in the house.

5. After an hour, she gained strength so by use of her leg she pressed it on Appellant's stomach and managed to push him and he fell. Once she left the bedroom, he slept there as she took a dress, wore it and ran outside to see if she could find someone to help her. She returned to the house, took a pen and paper and wrote to Gerald whom she knew would return and stated what the Appellant had done to her in her bedroom. She returned outside when she met with Sammy who was a painter who told her Gerald was in the farm so she went there and handed him over the paper she had written. After reading it he returned it to her and told her to give Sammy to read it. As the latter was reading it, Wanjohi

and PW2 arrived and since she was just crying, they took her to hospital where she was examined from where they were referred to the police station.

6. Their report was booked though they were told to return the next day to record their statements as she explained she had written it down for she was unable to explain to the 2 men for them to understand. In cross examination she said Appellant never used to live in their home for he had broken Mary's tank so he was asked to leave and although she was the one who removed the cellotape that had gagged her, she could not recall where she had kept it. Hellen Waithira (PW2) testified of how PW1 was taken to their home by her sister Mary Wangari who used to live in Canada and so she would feed her. She had lived at her home for 2 years and on the material day, she had gone to supply milk at around 5pm when Samuel Mathenge told her that her son, the Appellant herein, was in PW1's room.

7. She went there and asked him what he was doing there as he ordered him to leave as he found him sleeping in PW1's room yet PW1 was outside crying. She had with her the note written by PW1 who had written of how he legs had been held and which she understood to mean she had been raped. They took her to hospital where it was confirmed that she had been defiled so they reported to the police and the next day they recorded their statements. She added that each of them had their own rooms in the house but this was the first time the Appellant had committed such an offence. In cross examination she confirmed she found Appellant sleeping I PW1's bed and the cellotape there was for covering her books but she did not see any blood on her bed and added that he was drunk.

8. Simon Wanjohi Mwangi (PW3) testimony was that on the material day at around 2pm he had askedPW1 to give him her list of books for he had already bought other books and uniform which were being marked. He returned home at around 4pm where he gave the books to her as he changed his clothes and went to mill the nappier grass. When his mother returned home he noted PW1 was crying but refused to tell him why she was crying though Samuel had told him the Appellant was in their house. PW1 then went to unhung her clothes and thereafter said she was leaving for their home but the he locked the door to the main house refusing to let her go until she told him what had happened.

9. Instead, she asked him to go read the letter she had given to Sammy and he called her aunt informing her what had transpired but she ordered she be beaten up until she goes to the hospital for she had refused. It was at the hospital when she told the doctor everything that had happened and after the results, the doctor informed them that she had been raped while the next day they recorded their statements. According to him, both PW1 and Appellant were not close and they would talk casually though they used to live together as a family. Appellant had however been kicked out of their house after he broke windows and would go there to see their mother but his room was outside. In cross examination he said what he hated about the Appellant was that once he was drunk his behaviours were bad but when sober he was okay.

10. He added that the accused was his brother and he would not have wished to see him go to jail but he used to drink too much and neighbours always used to call their mother to resolve issues to do with the Appellant. He denied he could be bribed by anyone and all he used to do was work hard for the children to get something and also their mother needed money for her treatment. He added the Appellant was found in PW1's room and when he left, he disappeared for 2 weeks only to return when he heard their mother was giving out Kshs.20,000/- which he wanted his mother to have. Hezron Macharia Maina (PW4) was the clinical officer who went to the hospital with a history of having been raped by someone known to her on the same day of 30th April 2024 at about 4pm.

11. Although she was in fair general condition, she was anxious and on examination, she had no external bodily injuries. However, on examining the genitalia, there was freshly broken hymen, perineum was also freshly broken, swollen genitalia, whitish discharge and there was an increase in epithelial cells and

pus cells. There was also a brown stain with increase of white blood cells though no spermatozoa were seen. They gave her PEP, emergency contraceptives and antibiotics with counselling sessions. Further, PW1 had carried her birth certificate which proves she was 4½ years old and in cross examination he confirmed he only filled the P3 form though at the first instance she had been seen by his colleague Mercy Gichuki.

12. She had been escorted to the hospital by PW3 and PW1 had explained her assailant was a brother to her guardian and knew him as uncle who was hiding under her bed. She had not bathed at the time of examination, the hymen was freshly broken, her underpant was wet but did not have blood stains. He had relied on the information in the PRC form to fill the P3 form which could have been filled at any time. PC Josephine Mwendwa (PW5) testified as the investigating officer herein and it was on 1st May 2024 when she got to the office she noted she had been minuted to investigate this case. She started by calling PW3 who had escorted PW1 to the station and luckily, he informed her they were already at the police station. This time they had been accompanied by PW3's mother so she interrogated them one by one as she corroborated PW1's evidence as to what she reported to her.

13. Appellant's mother confirmed that she found the Appellant sleeping in PW1's room and she kicked him out while P0W3 informed PW1's family immediately he got the same information before rushing her to hospital for treatment. She also went to the hospital to confirm if she had already been threatened there which was confirmed for her and was given her medical notes while she issued them with the P3 form which was duly filled. She then started searching for the Appellant who had gone into hiding and when he was arrested at their home, she went to rearrest him. She also visited the scene which was PW1's bedroom which had 2 beds and a wardrobe ad Appellant confirmed he escaped for he was told he would be taken to hospital.

14. PW1 had been studying before she went to take a bath and when she was undressed the Appellant appeared for he had hidden either under the bed or at a corner. She was treated immediately taken to hospital and thereafter reported the matter to the police as she added that the letter PW1 wrote was addressed to Baba Shine being PW3. In cross examination she said it was after she was treated they were referred to the police to report for they did not know they were to report first and after she was treated, it was her who went to the medical documents which were released to her and no one else. She denied having been paid to frame him up and since his mother and others got into the scene, they had tampered with it.

C. Defence case

15. The Appellant gave sworn defence wherein he denied having committed the offence he had been charged with and the clinician who examined PW1 was not the same one who came to testify. Since no sperms were found, he wondered how she was defiled and according to him, it was a grudge against him. In cross examination, he said he had a disagreement with his stepbrother PW3 hence the grudge though he never used to speak to PW1. He could also not remember he was at on the material day and could only remember where he was when he was arrested.

D. Appellant's submissions

16. The Appellant relied on the cases of Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, Kaingu Elias Kasomo v Republic, Malindi Criminal Appeal No. 504 of 2010, Alfayo Gombe Okello v Republic [2010] eKLR as he submitted that the age of the victim in his case was not proved to the required standard for the birth certificate was not produced by its maker and the one produced was only a copy, her age was not conclusively proved for also the victim's mother never came to testify. The court had also misdirected itself for it failed to note that the complainant upon

examination did not have bruises in her genitalia but discharge was noted. Further, the state of the urine was not disclosed and had the hymen been freshly broken, there could have been blood oozing from her vagina.

17. That the complainant was examined 2 days after the incidence and the opinion of the clinician that the complainant had been defiled did not flow form the examination findings which contradicted the history she had given. The trial magistrate had thus misdirected herself in finding that there was penetration yet there was no clear evidence supporting the same. For this he relied on the case of PKW v R in stating that the doctor's report did not support complainant's evidence hence penetration was not proved. He thus asked this Court to declare that his conviction and sentence were not founded on sound evidence and allow his appeal. He further relied in the cases of Victor Mwendwa Mulinge v Republic and Karanja v Republic [1983] (supra) for his defence was not considered that there was a grudge and alto the prosecution did not tell the court what he told them after his arrest.

E. Respondent's submissions

18. It submitted that PW4 had proved the complainant was examined and treated on the same material day she was sexually assaulted where her hymen and perineum was found to be freshly broken with swabs taken including the high vaginal swab revealing an increase of epithelia cells. Urinalysis also proved increase in white blood cells and pus cells and with fresh injuries, swelling of the genitalia and increase in epithelial cells were prove that penetration. That it had also established all the ingredients of the offence of defilement being the age of the complainant by production of her birth certificate which proved she was 14½ years old. The complainant had also testified in details of how the Appellant had defiled her and once taken to the hospital the clinician confirmed proof of penetration.

19. For his identification, the complainant had proved she used to live with Appellant's mother where the Appellant would visit his mother occasionally hence she did not mistake him with a stranger. For this, it relied on the cases of Peter Musau Mwanzia v Republic [2008] eKLR and Mark Oiruri Mose v Republic, CA No. 295 [2012] eKLR in adding that the law does not require presence of spermatozoa to prove penetration. Further, that if there were any contradictions or inconsistencies, the same were so minute and not fatal to its case. The charges against the Appellant were read out to him sufficiently in a language he understood, the prosecution disclosed the evidence it was to rely on hence he was given ample time to read them and prepare for the trial. He was also accorded the opportunity to cross examine the witnesses conclusively and he was also given a chance to defend himself with his defence containing mere denials. He raised the issue of grudge though the same was not substantiated hence he did not tender any evidence to prove the same. Since Appellant had been accorded a fair trial, it finally submitted that the trial court was right in convicting and sentencing the Appellant to 20 years' imprisonment.

F. Analysis and determination

20. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. For this see the case of Okeno v Republic [1972] EA 32. In that regard considered the evidence as recorded by the trial court, the grounds of appeal, submissions filed and case law cited. While reanalyzing the above evidence as adduced before the trial court, I am minded of the fact that unlike the trial court, I did not get the benefit of taking evidence from the witnesses first hand and observe their demeanor and for that reason I will give due allowance.

21. In view of the above, I have perused and considered record of appeal together with submissions filed by parties herein and find that following as issues for consideration:

    a. Whether ingredients for offence of defilement were proved beyond reasonable doubt.

    b. Whether there were inconsistencies and contradictions in prosecution case to warrant the Appellant being given the benefit of doubt.

22. 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(3) states that 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. 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; proof of penetration or indecent act and identification of the perpetrator.

23. On the issue of age, the record shows that the birth certificate marked as prosecution exhibit 6 was produced by the investigating officer who testified as PW5 and it confirms that the complainant was born on 22nd December 2009 and she was therefore 14 years old and 5 months at the time of the offence. From the record, the Appellant did not dispute the production of the birth certificate or challenge its veracity and he equally did not challenge the age of the complainant. However, in his submissions before this appellate court, the Appellant alleges that the issue of age was not determined since the complainant's mother was not called as a witness, a copy was produced and the birth certificate was not produced by its maker. This Court takes note that this is an appeal and a party is refrained from introducing new evidence and/or facts that were not before the trial court.

24. The trial court in finding that this ingredient was satisfied, relied on the birth certificate as evidence that the victim was aged 14½ years old at the time of the occurrence of the alleged offence. It is trite law that there is no one particular preferred means of proving age. In the case of Mwalango Chichoro Mwanjembe v Republic, Mombasa Criminal Appeal No. 24 of 2015 [2016] eKLR the Court of Appeal held as follows: "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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. Also see the cases of Denis Kinywa v R, Criminal Appeal No. 19 of 2014 and Omar Uche v R, Cr. App. No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

25. This Court therefore, finds that there is no better way of establishing age other than by way of a birth certificate. I therefore agree with the finding of the trial court that this ingredient was fully and sufficiently established. There was sufficient evidence to proof the age of the victim as being 14 years old and 5 months at the time the offence was committed. Hence, she was aged 14 years as she had not yet celebrated her 15th birthday.

26. On penetration, Section 2 of the *Sexual Offences Act* defines it as the partial or complete insertion of the genital organ of a person into the genital organs of another person. It was proved through the evidence of the victim corroborated by medical evidence. The trial court in its determination held that held that penetration had been proved through the medical evidence with the investigating officer having

testified she filled the first part of the P3 form and sent it to the hospital where it was completed for the complainant had been examined there before the filling of the P3 form. Further, that PW4 relied on the PRC form and treatment notes which had been filled by his colleague Mercy Gichuki and also relied on the lab results done on the same day.

27. Turning on to the evidence adduced, the complainant (PW1) was very clear in her evidence of how the Appellant got into her bedroom at unknown time and lay in wait for her to leave the bathroom where she was from taking a bath, gagged her mouth with the cellotape she was using in covering her books, pushed her on the bed where he removed his penis and inserted it in her vagina. She went on to testify of how the Appellant forcefully defiled her for one hour and even though she would have screamed, there was no one in the house to rescue her. It was immediately he finished she kicked him on the stomach and escaped outside. It was when she failed to find anyone outside she wrote the note produced as prosecution exhibit 1 explaining what had been done to her. The ones who read the said letter/note including PW3 that rushed her to the hospital where she was treated and examined. This evidence was not rebutted and the witness was not adjudged not credible.

28. Notably, PW1's evidence was further corroborated by the evidence of PW3 and PW2 as her guardian who not only read the same note but went to her bedroom and found the Appellant sleeping on her bed. Further corroboration was by the clinician PW4 who noted the history she gave once she got to the hospital of having been defiled by someone well known to her. A look at the PRC form, she narrated the same history as she gave in court as to the ordeal she went through in the hands of the Appellant.

29. The above definition of penetration clarifies that penetration does not have be complete for the defilement charge to stand as even partial insertion of the genitalia organs of a person into the genitals organs of another still amounts to penetration. Therefore, for the Appellant to submit that there was no proof of penetration for spermatozoa were not seen is farfetched and it is my finding is that even partial insertion of the Appellant's genitalia into the victim's genitalia was sufficient to prove penetration. For this see the case of Erick Onyango Ondeng v Republic [2014] eKLR. Appellant should also know that penetration can also be proved by the victim's sole testimony in accordance with Section 124 of the *Evidence Act* or the victim's testimony corroborated by the medical evidence.

30. On the question of identity or recognition, it is indubitable that the Appellant was a well-known as the complainant's uncle for he was the son to her guardian sister's son and she had lived with them for 2 years thus knew him very well. This also the Appellant confirmed in his cross examination during his defence hearing and with the offence having occurred in the evening with natural lighting, there was no evidence of mistaken identity. Addressing himself to the perennial and pivotal issue of identity or recognition of an accused, Madan JA. in Anjononi & Others v The Republic [1980] KLR 59 had this to say: "...This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

31. In the same vein, the High Court of Kenya at Voi in AHM v Republic [2022] KEHC 12773 (KLR) correctly observed that: "... the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before." Therefore, the Appellant was not a stranger to the complainant and to my mind, his identity is a non-issue and I need not say more.

32. As to the alleged contradictions and inconsistencies in the prosecution case, it is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) it was held:

> " On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in Joseph Maina Mwangi v Republic Criminal Appeal No. 73 of 1993, that:
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> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of Section 382 of the *Criminal Procedure Code* to determine whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences..."

33. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the Appellant. I thus wish to rely in a decision of the Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR where the appellate court cited with approval the Ugandan case of Twahangane Alfred v Uganda Cr. Appeal No. 139 of 2002 [2003] UGCA, 6, it was 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's case".

34. Guided by the above, this court has noted the above allegations of inconsistencies and contradictions do not go into the substratum of the matter and I also note that this is what the Appellant noted as one of his initial grounds of appeal but when he amended his grounds and filed it as a continuous document with his submissions, he never submitted on this ground thus abandoning the same. Looking at the evidence adduced holistically, against the alleged contradictions and inconsistencies, I find the contradictions remote and not prejudicial to the Appellant for they do not go to the substratum of the case. Consequently, this ground of Appeal fails.

35. As to whether the Appellant's defence was considered by the trial magistrate, I note from the judgment that the learned magistrate considered the accused defence in paragraph *28* at page 3 of the judgement where the learned trial magistrate stated that the Appellant's claim that he was framed up for the assault due to a grudge with his brother but he failed to explain how PW3 gained from framing him with the offence. At the same time, the Appellant had admitted that there was no disagreement between him and the complainant so even though there was bad blood between him and PW3 which he did not prove. That his said claim was untenable in light of the medical evidence which showed the complainant had sustained injuries in her genitalia which could only have been inflicted through sexual assault. It is therefore not true that his defence was not taken into consideration. I agree with the trial magistrate that the defence is a mere denial and the prosecution case was proved beyond reasonable doubt.

36. In the end, I uphold both the conviction and sentence. The appeal is thus dismissed for the same is unmerited.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant for the Appellant and Mamba for the Respondent. Siele/ Mark (Court Assistants).