



REPUBLIC OF KENYA



**Issack v Republic (Criminal Appeal 1 of 2024)
[2025] KEHC 6925 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
CRIMINAL APPEAL 1 OF 2024**

JN ONYIEGO, J

MAY 28, 2025

BETWEEN

MOHAMED ABDULLAHI ISSACK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. Cornel Omondi (R.M). Mandera
Principal Magistrate's Court Criminal Case No. E015 of 2023 delivered on 14.10.2024)*

JUDGMENT

1. The appellant herein 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. The particulars of the offence were that on 23.10.2023 at around 1700hrs at Mandera East Sub County in Mandera County, he intentionally caused his penis to penetrate the vagina of M.A., a child aged 10 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 [1] of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 23.10.2022 at around 1700hrs at [particulars withheld] area at Mandera East Sub County in Mandera County, he intentionally touched the vagina of M.A., a child aged 10 years with his penis.
3. The appellant pleaded not guilty to the charges and a trial was conducted in which the prosecution called a total of 4 witnesses in support of its case.
4. A summary of the prosecution's case was that the victim M.A. on 23.10.2023, was at [particulars withheld] school together with her friend S. She told the court that after being taught by the appellant, the appellant informed them that they stay behind as they were to sit for an exam. That the said exam was to be conducted individually and therefore, Suheila remained outside as she stayed indoors with the appellant. It was her evidence that the appellant committed a bad act with her when he removed



his trouser and then penetrated her vagina with his penis. According to her, she felt a lot of pain as she struggled to escape from the appellant.

5. That when she finally arrived home, she told her mother of the ordeal she underwent while at the duksi school. On cross examination, she stated that the appellant taught her Quran for a period of 4 years. She stated that the appellant committed the act then left for the mosque.
6. PW2, NII, mother to the complainant stated that the complainant was 10 years at the time when she was allegedly defiled. It was her evidence that on the material day, she was at home breastfeeding her child when the victim arrived home crying. That PW1 narrated to her how the appellant penetrated her vagina with his penis.
7. She stated that upon being told what had happened, she proceeded to the duksi school but she did not find the appellant. She informed her sister and her mother about the incident. She then decided to report the same to Manderu Police station. The police referred her to Manderu County Referral Hospital where the complainant was examined and then treated.
8. On cross examination, she confirmed that she knew the appellant and further, that the duksi school is near her home. According to her, the appellant defiled her daughter together with another girl at 5.00p.m. That the appellant attempted an out of court settlement with the help of wazees but all in vain. She stated that she examined the complainant and noticed signs of penetration. On re-examination, she stated that the act was committed at 3.00 p.m. as prayer break was at 4.00 p.m.
9. The appellant's counsel who came in later made an application for PW1 and PW2 to be recalled for further cross-examination. The court allowed the same and upon testifying, they reiterated their previous evidence that it was the appellant who defiled the complainant.
10. PW3, Dr. Adan Ahmed testified that upon the complainant being presented to the hospital, vaginal blood work, vaginal swab and blood count were done. That pregnancy was found negative and at the same time, the complainant had no physical injuries. He further stated that the labia majora had no laceration and the hymen was partially penetrated. He further stated that there was no blood nor any discharge. According to him, the laceration was around 9.00 O'clock. In the end, he opined that the complainant was partially penetrated.
11. PW4, No. 112000 PC Duncan Wambui, the investigating officer testified that on 23.10.2023, he received the defilement report. According to him, the complainant was 10 years of age and as reported by her mother, she had been defiled by a [particulars withheld] teacher. He escorted the minor to Manderu County Referral Hospital at 19.17 hours where the complainant was examined and lab tests run.
12. That while at the hospital, the complainant's mother told him that the appellant was at her home together with other people. Upon rushing there, they did not find the appellant and so, he directed that they report the following day for statement recording. On 24.10.2023 at 6.36 hrs., PW2 called and informed him that the appellant was at the duksi school and therefore, he called the patrol team and gave directions for his arrest which they did.
13. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the appellant and therefore placed him on his defence. On his defence, the appellant elected to give a sworn statement and call 4 witnesses.
14. DW1, Mohamed Abdullahi Issack, a duksi teacher and imam in his sworn testimony denied committing the offence herein urging that he was framed. That on the material day, he went to the mosque at 3.30 p.m. but started leading prayers at 4.00 p.m. and thereafter, he met some elders at the



- mosque. He went further to state that the visitors had on their way to the mosque passed through Duksi school where they were told that he was at the mosque.
15. It was his evidence that it is not the victim that brought the case to court but her mother for the reason that she wanted him to marry her. That previously, he used to teach PW2 but upon demanding his dues, she [PW2] urged him to marry her but upon refusing, the matter herein was hatched to discredit him. He argued that he is a family man married with two wives and there has never been any complaints in relation to his character and therefore, he was simply framed.
 16. On cross examination, he stated that in his duksi, he dealt with young children of both gender. He also confirmed that on the material day, he taught the complainant. On re-examination, he stated that by the time that he left for the mosque, he had locked up the duksi and therefore there was no one left in the compound. That PW2 and the doctor were related hence the medical report could not be relied on as the same was biased.
 17. DW2, Abdikadir Adan Abdille, a teacher testified that on the material day, he had an issue that he had wished to discuss with the appellant and therefore he boarded a vehicle at 3.35 and proceeded to the duksi but unfortunately, he did not find him in as much as he found the students who told him that the appellant had gone to the mosque. It was his evidence that he went to the mosque where the prayers were led by the appellant and consequently, they discussed their issues and at 4.21 p.m., he left.
 18. He stated that at the duksi, students report at 6.00 a.m. – 9.00 a.m. then leave for lunch and thereafter resume at 2.00 p.m. – 5.30 p.m. That there are prayer sessions at 3.30 p.m.- 4.00 p.m. a time when everyone must leave for the mosque. That it was normal for some girls to stay behind and have their prayers at the mosque.
 19. DW3, Abdinassir Maalim Dinow, a taxi driver testified that on 23.10.2023, he dropped a customer to the appellant at the duksi where they did not get the appellant and therefore, travelled further to the mosque. That at the duksi, they found children playing and they were the ones who directed them where they could find the appellant. He stated that after prayers, they met the appellant at 4.15p.m. where they spoke for some time. That he left DW2 while the appellant returned to the duksi.
 20. DW4, Farhan Ali Issack testified that on the material day, at evening prayers at 6.10 p.m., he prayed with the appellant at the mosque. That they left each other at 6.30 p.m. On cross examination, he stated that he was with the appellant at 6.10 p.m. hence not at 4-5 p.m[sic]. That he was not aware of anything that happened before he met the appellant at 6.10 p.m.
 21. No. 112294 PC Josephat Kitar produced OB/39/2/11/23, subject of assault reported by Issack Mohamud of cell phone number 071XXXX. The case was in relation to the fact that Naima Ibrahim assaulted Issack Mohamud.
 22. At the close of the case, the court found that the prosecution had proved its case against the appellant who was consequently convicted and sentenced to serve life imprisonment.
 23. The conviction and sentence precipitated the filing of the present appeal via a petition of appeal dated 18.10.2024 citing the following grounds:
 - i. That the learned trial magistrate erred in law and fact by failing to consider the appellant's defence.
 - ii. That the learned trial magistrate erred in law and fact when he failed to note that the ingredients of the offence of defilement were not proved beyond reasonable doubt as required by the law on the burden of proof.



- iii. That the learned trial magistrate erred in law and fact by failing to interrogate the inconsistencies and contradictions in the prosecution's case.
 - iv. That the learned trial magistrate erred in law and fact by failing to recognize the fact that there existed bad blood between the parties.
 - v. That the learned trial magistrate erred in law and fact when the prosecution failed to call crucial witnesses in the case.
 - vi. That the learned trial magistrate erred in law and fact in meting out a harsh and unreasonable sentence.
24. The appeal was canvassed by way of written submissions wherein the appellant via submissions dated 26.11.2024 contended that there was a misapprehension and misapplication of the principles of the defence of alibi. That Islamic duksi program just like prayer sessions are formal and strict on time. It was argued that the trial magistrate concluded that the appellant defiled PW1 between 3pm and 4pm. That the undisputable fact is that the appellant had an afternoon teaching session that ran from 2.00 p.m. to 3.30 p.m. It was urged that the appellant went to the mosque immediately after the session to prepare for 4.00 p.m. prayers.
 25. That it was not disputed that the appellant led the 4.00 p.m., prayers at the mosque, which he must have prepared for. Counsel opined that DW2 and DW3 corroborated each other that they were at the duksi at exactly 3.35 p.m. only to find out that the appellant had already gone to the mosque.
 26. That the evidence of the defence witnesses corroborated the evidence of the appellant that he left for the mosque after the end of the teaching session at 3.30 p.m. The trial magistrate was faulted for rejecting the evidence of DW2 and DW3 on the basis that they both testified that they arrived at 4.35 p.m. at the duksi. The appellant relied on the case of Erick Otieno Meda v Republic [2019] KEHC 4959 [KLR] to express the position that the burden of proving the falsity if at all of an accused person rested on the prosecution.
 27. It was also urged that the prosecution's case was marred with inconsistencies that raised doubt on the perpetrator and the scene of crime. That there was inconsistency on account of events and how they happened. It was argued that there were doubts on the credibility of the prosecution's witnesses. The appellant submitted that there was a deliberate attempt to pick the time that would have placed him at the duksi. That there was also an attempt to place the appellant at the duksi when there were no witnesses at the duksi to tell a lie.
 28. That no reason was availed why S was not lined up as a witness yet she was older than the complainant. It was urged that the complainant's case was not corroborated and therefore, the same raised doubts. Touching on sentence, it was contended that the same was not only severe but also harsh. The court was referred to the case of Dismas Wafula Kilwake v Republic Kisumu Criminal Appeal No. 129 of 2014, where the Court of Appeal stated that the mandatory sentences were unconstitutional and illegal to the extent that they take away the discretion of trial court to impose a sentence based on mitigation.
 29. The respondent filed submissions dated 20.02.2024 urging in regards to three issues to wit that: whether there was a misapprehension and misapplication of the principles governing an alibi defense; whether there were material and fundamental grievous inconsistencies in the prosecution's case; whether there was failure to corroborate the complainant's evidence and whether the sentence meted out was harsh and excessive.
 30. On the first issue, it was urged that it was incumbent upon the prosecution to prove the case against the appellant and in so doing, proving the element of age, penetration and identity. Counsel relied



- on the case of Edwin Nyambaso Onsongo v Republic [2016] eKLR to buttress the position that the prosecution had a duty to prove that age can be proved by any document evidence such as birth certificate, baptism card or by oral evidence of the child if of sufficient knowledge. It was thus urged that the complainant was found to be a minor by dint of her birth certificate of serial number 390357.
31. On penetration, it was urged that the same was established to the required degree. That in this case, the evidence of the complainant was corroborated with the medical evidence that indeed penetration occurred. It was stated that the complainant vividly narrated the ordeal she underwent in the hands of her perpetrator leading to penetration. On identification, counsel urged this court do consider the fact that the perpetrator was a person known to the complainant as he was his duksi teacher.
 32. On sentencing, this court was urged that the appellant was charged under section 8[1][2] of the *Sexual Offences Act*, which section prescribes the punishment of the said crime. That the learned trial magistrate's hands were tied and therefore, he could not be faulted for sentencing the appellant to life imprisonment.
 33. In the same breadth, counsel referred this court to the Court of Appeal decision inter alia, the case of Evans Wanjala Wanyonyi v Republic [2019] eKLR thus urging that an offence carrying a life sentence denied the convict an opportunity to be heard in mitigation. That the same was not only unjustifiable but also discriminatory as the same offended articles 27 and 28 of *the constitution*. To that end, this court was urged to interfere with the sentence by the trial court and mete out a sentence that is not only mete but also fair in the circumstances herein.
 34. I have considered the record of appeal and the parties' respective submissions. The main issues that fall for my determination are as follows: -
 - i. Whether the offence was proven to the required standard.
 - ii. Whether there were material inconsistencies in the prosecution evidence
 - iii. Whether there was corroboration
 - iv. Whether the sentence was harsh and excessive.
 35. The duty of the first appellate court is to reconsider and re-analyse the evidence presented before the trial court with a view to arriving at its own independent conclusion while bearing in mind the fact that it neither heard nor saw the witnesses testify. [See Okeno v R {1972} EA 32].
 36. Section 8 of the *Sexual Offences Act* stipulates as follows: - [1]A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;[2]A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 37. The ingredients of the offence of defilement were outlined in the case of Dominic Kibet v R [2013] eKLR as follows: - "To prove defilement the critical elements remain to be proof of penetration, the age of the complainant and possible identification of the assailant."
 38. Age is a critical factor in defilement cases because it informs the nature of punishment to be passed on a convicted person. [See Hudson Ali Mwachongo v Republic [2016] eKLR]. The age of a victim may be proved through medical evidence or other cogent evidence. In Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, it was held thus: -

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in



the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ...”

39. In the present case, the complainant and her mother testified that the complainant was aged 10 years. To corroborate the same, the complainant's birth certificate showed that she was born on 27.04.2014 was produced. It therefore follows that at the time when the offence herein was allegedly perpetrated, the complainant was about 10 years hence a child.
40. On penetration, the appellant argued that the same was not proved while the respondent maintained that penetration was proved through both oral and documentary evidence presented at the trial.
41. Section 2 of the [Sexual Offences Act](#) defines penetration as: -‘penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
42. The above definition clarifies that penetration does not have to 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. The Court of Appeal in the case of *Erick Onyango Ondeng v Republic* [2014] eKLR held that: “In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”
43. Penetration can 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. In this case, the prosecution tendered the evidence of PW1, PW2 and PW3. PW1 testified that the appellant informed her together with one S that they were to individually sit for an exam and therefore, S remained outside as she stayed indoors with the appellant when he defiled her. It was her evidence that the appellant committed a bad act with her when he removed his trouser and then penetrated her vagina with his penis.
44. PW2 also testified that PW1 told her that the appellant had defiled her and further, that she examined the complainant and noted her a tear in her vagina. The evidence of PW1 and PW2 were corroborated by the evidence of the medical officer who testified that after examining the complainant, he noted that the complainant had a laceration and the same was around 9.00 O'clock.
45. Although there was laceration noted on the genitals of the victim, the question that begs an answer is whether the appellant was responsible for the said laceration or whether it may have occurred as a result of other causes.
46. It is apparent that, the only direct evidence relied on by the prosecution is that of the victim a child aged 10 years and reliance on Section 124 of the [Evidence Act](#) which does not mandatorily require corroboration in sex related offences. The trial court believed the testimony of the victim as being truthful.
47. However, one critical issue which is apparent from the proceedings is the question regarding the manner in which the trial court purported to conduct *voire dire* examination under Section 19 of the [Oaths and Statutory Declarations Act](#). The trial court recorded two questions with answers as follows; “where do you go to school jamii bora”.What do you have for breakfast . njere and tea”. “the court is satisfied that the victim understands basic questions and is fit to testify under oath”.
48. It is clear from the above statement that the trial court did not at all conduct any *voire dire* examination to ascertain whether the child understood the importance of telling the truth and the nature of an oath. No question was put to the child to ascertain her intelligence and appreciation of the importance of telling the truth nor the nature of an oath. It was therefore necessary to conduct *voire dire* examination to determine on whether to take sworn or unsworn testimony.



49. In the case of *Dismas Wafula Kilwake v Republic* [2019] KECA 5 [KLR] the court of appeal had this to say;

“In *Mohamed v. Republic* [2008] 1 KLR [G&F] 1175 and *Patrick Kathurima v. Republic* [supra], although this Court recommended verbatim recording of the questions put to the child in a voir dire examination and his or her answers thereto, it nevertheless states that it was not mandatory. There is no prescribed and rigid procedure for conducting a voir dire examination; the most important thing is that it must establish whether the child of tender years understands the nature of an oath and the duty to tell the truth. In *James Mwangi Muriithi v Republic* [2016] eKLR, after noting that section 19 of the *Oaths and Statutory Declarations Act* does not provide a format for voir dire examination and that the format has evolved through case law, this Court stated:

“In *Sula versus Uganda* [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then makes its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter.”

In this appeal, although the actual question put to the witness by the trial magistrate were not recorded, from the examination the trial magistrate elicited from PW2 that he was 13 years old and a standard 4 pupil at [particulars withheld] Primary School. He attended the [particulars withheld] Church near Elgon View and knew that it was important to tell the truth otherwise he would burn in hell. From the answers the trial magistrate recorded that PW2 was intelligent enough, understood the duty to tell the truth, and allowed him to give sworn evidence”.

50. The importance of conducting voire dire examination is to guarantee fair hearing which is a constitutional right. See *Karimi v Republic* [Criminal Appeal 16 of 2014] [2016] KECA 812 [KLR] [3 February 2016] [Judgment] where the court of appeal allowed the appeal on account of none compliance with the procedure in undertaking voire dire examination. The court had this to say;

“The purpose of undertaking voire dire examination in a criminal trial was to protect the guaranteed right of a fair trial. Where the witness as in the instant case was aged 12 years and that essential step was not taken in a criminal trial, that trial became problematic. The evidence by the complainant was not properly received thus, the conviction of the appellant became unsafe to sustain, as she was the complainant and not any other witness”.

51. In the absence of this voire dire examination, the admissibility and credibility of the testimony of the victim is in a limbo hence inadmissible as her competence was not tested. In the absence of any other independent witness, the testimony of pw1 alone under the guise of Section 124 of the *evidence Act* is not tenable.

52. The appellant heavily submitted on the question of contradictory evidence on the prosecution’s case. Whereas the complainant alleged that she was defiled at 3.35pm which was before prayer time at 4.00 pm, the mother pw2 on cross examination stated it took place at 5.00pm. In her testimony, pw1 stated that suheila her friend was outside while she was inside the classroom being defiled and that suheila was not defiled. However, pw2 said in her cross examination that pw1 told her that suheila was also defiled. Who is telling the truth.



53. The other aspect raised by the appellant was that the prosecution did not call a crucial witness one suheila who was allegedly outside the room where pw1 was defiled. It came out in evidence that Suheila was older than pw1 hence expected to have corroborated the testimony of the complainant. Failure to call suheila was questionable and would therefore be inferred adversely against the prosecution.

54. Indeed, the evidence of pw2 alone cannot be relied alone to find a safe conviction. In the case of Michael Mugo Musyoka v Republic [2015] eKLR the court of appeal observed as follows:

“We have looked at the evidence on record, there is no evidence or testimony to prove that there was any contact between the genital organs of the appellant with that of the minor. We are of the considered view that the evidence of PW1 was hearsay and did not carry much weight. We say so because she was not present at the house and did not witness what actually happened. She relied on what her daughter C had allegedly told her. Without the evidence of the said or eye witness we find that the prosecution did not prove that the appellant had intentionally and unlawfully indecently touched the child...”

55. In view of the above finding, there is insufficient evidence to connect the accused with the laceration which was allegedly caused through sexual intercourse. With the medical evidence, there was partial penetration. However, the person who caused the partial penetration and when is the question. The defence raised a strong defence with the defence witnesses[Dw1-Dw3] rebutting the evidence that defilement took place at 3.35pm which time they had gone to see the appellant and together proceeded for prayers at the mosque within the same vicinity and that there were many students at duksi. It was unlikely that the alleged incident would have occurred while there were other children within the compound.

56. Taking into account the contradictory statements made by the key witnesses and further considering the environment under which the alleged offence was committed and the uncorroborated evidence of pw1 whose competence is in question, the benefit of doubt must go to the appellant. See John Mutua Munyoki v Republic [2017] KECA 376 [KLR] where the court of appeal observed that;

“As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.”

57. In a nut shell, the evidence of the prosecution did not prove the offence of defilement beyond reasonable doubt. Accordingly, the appeal is allowed and the conviction quashed and the sentence set aside. The appellant is hence forth set free unless otherwise lawfully held.

ROA 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF MAY 2025.

J. N.ONYIEGO

JUDGE

