



**Mohamed alias Mudhafar v Republic (Criminal Appeal
E046 of 2024) [2025] KEHC 8273 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 8273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E046 OF 2024**

JN NJAGI, J

MAY 28, 2025

BETWEEN

JAFAR MOHAMED ALIAS MUDHAFAR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by F.
M. Mulama, Resident Magistrate in Lamu Resident Magistrate's
Court Sexual Offence Case No. E002 of 2024 delivered on 8/8/2024)*

JUDGMENT

1. The Appellant was charged with 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 2nd day of January, 2024 at around 1800hr in Lamu Central Sub- County, within Lamu County, he intentionally and unlawfully caused his penis to penetrate the vagina of R.M.A. (herein referred to as the complainant), a child aged 15years.
2. The appellant was sentenced to serve 30 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal.
3. The grounds of appeal as amended supplementary grounds of appeal filed on 7/4/2025 are in summary that;
 1. That the Learned trial Magistrate erred in law and fact by failing to apprehend that the prosecution did not prove each of the ingredients of the offence of defilement beyond reasonable doubt.



2. That the Learned Trial Magistrate erred in law and fact when he failed to observe that the prosecution did not provide enough evidence to prove the offence alleged to have been committed.
 3. That the Learned trial Magistrate erred in law and fact in convicting the Appellant on the basis of contradictory and uncorroborated evidence.
 4. That the Learned trial Magistrate erred in law and fact by not analyzing the evidence adduced by the Defence witnesses hence the wrong finding that the prosecution case was proved beyond reasonable doubt.
 5. That the learned trial magistrate erred both in law and facts by failing to consider that there were no cogent reasons to link him to the commission of the alleged offence hence the conviction was against the merits of the entire case.
4. The prosecution called six witnesses in the case while the appellant called one witness in support of his case.

Prosecution Case.

5. The mother to the complainant, PW1, testified that on 2/1/2024 she was at her home at 6 pm when the complainant left her home to take a message to PW1's sister. That by 10 pm the complainant had not come back and she went out to look for her at her friend's house. She did not find her. She then sent the complainant's elder brother to look for her but he also did not come back. That on the following morning, the complainant's friend called Rayana informed her that she knew where the complainant was but was afraid of the family where the complainant was. They made a report of a missing person at the police. Rayana informed them that the complainant was at the home of the appellant. They went with the police to the house of the appellant. They found the complainant and the appellant in the house of the appellant. The appellant was arrested and they all went to King Fahad Hospital where the complainant was examined. They then went to the police station.
6. PW1 further told the court that her daughter was born on 24/4/2008. She identified her birth certificate in court.
7. A friend to the complainant, Rayan, PW2 then aged 14 years told the court that on 2/1/2024 the complainant went to see her and told her that she was on her way to the appellant's house. That the following morning the complainant's mother asked her on the whereabouts of the complainant and she told her that she had gone to the appellant's house. That later that day they went to the police station and she led them to the house of the appellant where they found the complainant and the appellant.
8. Another friend to the complainant, Mariam who was PW3 in the case, told the court that on 2/1/2024 she was in the company of PW2 when the complainant went and asked them to take her to the appellant's house. They declined and she proceeded on her own. That later the complainant's mother went to them and they went to the police station. They went to the house of the appellant where they found both the appellant and the complainant.
9. The complainant herself, PW4, testified that on 2/1/2024 she left home for Kashmir wherein she met the appellant on the way and went with him to his home. That at the home they shared a meal after which the appellant took her to his room. That on getting there the appellant undressed her. He removed all her clothes and inserted his penis into her vagina. They thereafter slept. On the following morning the appellant left briefly and brought her breakfast. Thereafter the police accompanied by her



mother arrived there and they were taken to King Fahad Hospital where she was examined. She was interrogated and she disclosed that the appellant had had sex with her on the previous night.

10. It was further evidence of the complainant that the appellant was her boyfriend since December 2022. That that was the third time they were engaging in sex.
11. The complainant stated in cross-examination that she left her home at 1800 hours. That her mother was not at home when she left. That she went to Sofaa where she met Rayan and Mariam and she told them that she was going to the appellant's house.
12. The Investigating officer, PC Mercy Katana PW5 attached to Lamu Police Station told the court that she was on the 3/1/2024 at the police station when the mother to the complainant made a report that her daughter was missing from home. That the mother to the complainant was in the company of two children, Rayan and Mariam, who informed her that the complainant had informed them that she was going at her boyfriend's house. That they left the station in the company of the complainant's mother and the two children took them to the house of the boyfriend of the complainant at Kashmir. That upon knocking the door, the appellant opened the door and they found the complainant inside the room. She was trying to wear her clothes. She, PW5, arrested the appellant. She escorted the appellant and the complainant to King Fahad Hospital where both of them were examined and their P3 forms filled. She charged the appellant with the offence. During the hearing PW5 produced the birth certificate of the complainant as exhibit, P.Exh. 1.
13. Dr. Mohamed Arif, PW6 of King Fahad Hospital told the court that the complainant was taken to their hospital and was examined by a doctor at their hospital who filled the complainant's P3 form. That the complainant gave a history to the examining doctor that she had slept at her boyfriend's house but that the boyfriend did not touch her. That it was the finding of the examining doctor that the vagina was okay with no scars or inflammation but the hymen was missing. There was no spermatozoa seen on examination. That the Post Rape Care form indicated that there were signs of penetration but not related to that incident. PW6 produced the treatment notes, the P3 form and Post Rape Care Form as exhibits, Exhibits 4a, 5 and 6 respectively.

Defence case.

14. When placed to his defence, the appellant stated in a sworn statement that on the material night he and a friend called Aboud Mohamed were attending a disco dance at Kijitoni. That they went there at 10 pm and went back to his house at 4am and slept. That at 1330 hours his colleague informed him that there was someone knocking the door. That upon checking he found the complainant at the door. He asked her what she wanted. Aboud then left. That as he tried to probe from her what she wanted, 3 police officers together with the girl's mother and 4 other children arrived. He was arrested and taken to hospital. They were all examined and nothing unusual was noted. He said that the case was a frame up.
15. The appellant's witness, Aboud Mohamed Omar DW2, told the court that on 2/1/2024 at 10 pm he and the appellant went for a disco dance until 6am when they went to the appellant's house and slept. That at 1330 hours he heard a knock on the door. He went to open the door and found a child/girl at the door. The appellant went to the door and started to have an exchange with the girl after which he decided to leave. That on the way he met with police officers heading to the appellant's house. He later heard that the appellant had been arrested. He said that he had never seen the girl before.



Analysis and determination.

16. This being a first appeal, this court is mandated to analyse 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.”
17. The ingredients of the offence of defilement are: proof of the the age of the victim, penetration and proper identification of the perpetrator, as was held in the case of *George Opondo Olunga vs. Republic [2016] eKLR*.
18. It is of utmost importance to prove the age of the victim in a case of defilement. In the case of *Hadson Ali Mwachongo v Republic (2016) eKLR*, the Court of Appeal held that:

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”
19. The age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic (2016) eKLR* that:

“... 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.”
20. The complainant’s mother told the court that the complainant was born on 24/4/2008. The investigating officer PW5 produced the complainant’s birth certificate as exhibit, Exhibit 1, which showed that the complainant was born on the day stated. I am thereby satisfied that it was proved that the complainant was at the material time aged 15 years.
21. On the element of penetration, Section 2 of the *Sexual Offences Act* defines the same as:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
22. The medical evidence adduced before the trial court did not support the complainant’s evidence on defilement as the complainant was found with a normal vagina with no scars or inflammation. There was thereby no medical evidence to corroborate the evidence of the complainant that the appellant defiled her on 2/1/2024.



23. However, lack of medical evidence in support of defilement is not fatal to the charge as the offence can be proved in other ways other than by way of medical evidence. In the case of *Kassim Ali v Republic*(2021) eKLR the Court of Appeal stated that;
- “....“....absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”
24. The question then is whether there was oral or circumstantial evidence proving the case against the appellant beyond reasonable doubt.
25. The complainant in this case narrated how the appellant took her to his house on the material night and defiled her. The complainant was found in the appellant’s house on the following day.
26. The proviso to section 124 of the *Evidence Act* allows a court hearing a sexual offence relating to children to convict on the sole evidence of the child victim if the court is satisfied that the child was speaking the truth. The section requires the court to record down the reasons for believing that the child was telling the truth. The same states as follows:
- 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.
27. The trial magistrate in convicting the appellant of the offence said that he was satisfied that the complainant was telling the truth. The court particularly considered the evidence of the complainant that the appellant was her boyfriend and had previously defiled her on two occasions before the date they were found together in his house.
28. I have considered the evidence adduced before the trial court. The history that the complainant gave at the hospital immediately after the appellant was arrested is that she had slept at the appellant’s house but that the appellant did not touch her. In her evidence in court the complainant said that on getting to the appellant’s home they had supper after which the appellant took her to his room. He unaddressed her and inserted his penis into her vagina.
29. There were therefore two versions of the evidence before the trial court: that the appellant did not touch the complainant when she slept at his house (meaning that he did not defile her) and that he defiled her. Which of these was the true version?
30. The complainant in her evidence in court was not asked to explain why she gave a history at the hospital that the appellant did not defile her when she slept at his house. She was not asked why she changed her story to that the appellant had in fact defiled her when she had stated at the hospital that he did not do so.
31. The court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283, (*Madan, Miller and Potter JJA*) held as follows:
- 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 indicates makes it unsafe to accept his evidence.
32. The trial magistrate in determining the credibility of the complainant did not consider the fact that the complainant told the medical personnel who examined her at the hospital that the appellant did not defile her. The magistrate instead made a finding that;



...she further stated that it was the 3rd time they were having sexual intercourse and finally she stated that she explained to the doctor how the accused had intercourse with her.

33. It is clear that the trial magistrate got it wrong as to what the complainant told the doctor who examined her. The complainant never told the doctor that the appellant had sexual intercourse with her but told him/her that the appellant did not touch her. The trial court therefore relied on some non-existent evidence to form the basis of the demeanor of the complainant. The Court of Appeal in the case of *Selle –v Associated Motor Boat Co.* [1968] EA 123 held that an appellate court is not bound by the finding of the trial court on demeanor where the finding is inconsistent with the evidence. The court held as follows:

“...in particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

34. The trial court failed to consider what the complainant told the doctor who examined her but instead distorted the evidence to state that she told the doctor that the appellant defiled her. In doing so the court failed to assess the credibility of the complainant from the basis of the evidence that was before the court.
35. In view of the fact that the complainant told the doctor who examined her that the appellant did not defile her on the material night and there being no explanation as to why she changed her evidence in court to state that the appellant defiled her, I am not satisfied that the complainant was a witness worthy of belief. A witness who changes evidence without any explanation cannot be described as credible. There was no medical evidence to support the subsequent story of the complainant that the appellant had defiled her. In view of the self-discredited evidence of the complainant, it was not safe to rely on her evidence to convict the appellant. The appellant should have been accorded the benefit of doubt.
36. In the final end, I am not satisfied that the case against the appellant was proved beyond reasonable doubt. The appeal is merited. Consequently, the conviction entered against the appellant by the trial court is quashed and the sentence thereof 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 Malindi GK Prison

Court Assistant - Kambi

