Wairimu v Republic (Criminal Appeal E004 of 2024)
[2025] KEHC 7354 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7354 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E004 OF 2024

JK NG'ARNG'AR, J

MAY 28, 2025

BETWEEN

COSMAS MWAURA WAIRIMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence judgment delivered on 28th September 2023 by Hon. G. Waithera (RM) in Sexual Offence Case No. E008 of 2023)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read together with section 8 (4) of the *Sexual Offences Act* Cap 63A has lodged this appeal. He seeks that his conviction be quashed and the life imprisonment sentence set aside.

2. The appeal is premised on 5 grounds being that : -

    1. The learned trial magistrate erred in both law and fact in failing to appreciate the fact that the alleged victim in this case clearly demonstrated an incredibly doubtful integrity and whose evidence was and remains doubtful occasioning a serious prejudice.

    2. The learned trial magistrate erred in law and fact by failing to appreciate that the critical elements in defilement were not proved to the required standards in law occasioning a serious miscarriage of justice.

    3. The learned trial magistrate erred in law and in facts in not considering that the whole prosecution case was riddled with material discrepancies which were capable of unsettling the verdict hence a prejudice.

4. The learned trial magistrate erred in law and fact by failing to consider the plausible appellant's statement in defence which was not contested and or unproved by the prosecution hence still clearly demonstrating that the instant matter was a framed up one to curtail my success for envious reasons.

5. That the instant matters proof was below the required standards of proof and therefore capable of impeaching the whole substance of the matter.

B. Background

3. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section (4) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 5/3/2023 and 9/3/2023 at Kirinyanga Central Subcounty within Kirinyanga County intentionally caused his penis to penetrate the vagina of S.M.M. a girl aged 16 years old. The appellant also had an alternative charge contrary to Section 11 (1) of the Sexual of Offences Act (herein The Act) with particulars that on the same dates and region, he intentionally caused his penis to come into contact with the vagina of S.M.M. a girl aged 16 years old.

4. The appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 4 witnesses whereas the appellant gave sworn evidence in his defence.

C. Prosecution case

5. The trial court conducted voire dire examination and found that the minor was old enough to give a sworn statement.

6. S.M.M. testified as PW1. In her statement, she stated that she was 16 years old and was in form one at [particulars withheld] Secondary School. That on 5/3/2023, she went to watch a football match at around 4:00pm at Karaini secondary and when there she met the accused who was called Edwin. That she did not know any other name. He was drunk at the time and he greeted her and complimented on her beauty. She stated that she had met his severally and they stayed together till 6:00pm. That she then left him as she needed to go home and instead went to stay in another girl's home, one Polly. That she stayed at Polly's home from Sunday and went back home on Thursday where she was been looked for by the police.

7. The prosecution declared her a hostile witness and proceeded to cross-examine her. She stated that she had written the statement at the police station under duress from one Madam Wairimu though she was not beating her. She confirmed that in her statement, she wrote that she was at the appellant's home and that he threatened to kill her if she went home. She added that she went to the hospital with Madam Wairimu and her mother and marked the P3 form, treatment notes, PRC form, birth certificate and the statement as MFI 1-5 respectively.

8. On cross-examination by the accused, she stated that she wished to rely on her testimony in court and not the statement. She maintained that the appellant was Edu and she did not know any other name as she only knew him as Edu being the name he gave her and that people knew him as Edu. On re-examination, she maintained that the appellant was called Edu and he was the one who gave her that name. She also maintained that they were together on the Sunday of 5/3/2023.

9. PW2 was EWK, the minor's mother (PW1). She testified that on 5/32023, the minor asked for 50/= to go blow-dry her hair and she left at 4:00pm and was away from that Sunday till Thursday. She reported the matter at Kagumo on Tuesday, and at her school on Wednesday. That the minor came back on Thursday at around 7:00pm alone though she had earlier called her father and requested him

to get her at the center but she was not there when the mother went. That the minor informed that she had fallen down and injured her knee and needed to go to hospital. That they went to Kagumo again where the officers took them to Kerugoya Referral Hospital where the minor was examined. She marked her statement as MFI 1.

10. PW2 also stated that the minor told her that she went to a young man on Sunday and then went to other girls and left on Monday. That she left the said man and went to the girl's home out of fear that PW2 would beat her. She added that many girls who went to [particulars withheld] Secondary would run away and almost 20 girls had run away. That it was not the first time that the minor had run away and she did not know where she goes though she would at times say she was at her grandmother's place. PW2 stated that she did not want to inquire whether the minor was with the grandmother. That the minor would lie that she would go to church and sometimes she would lie.

11. On cross-examination, PW2 stated that the appellant had come to her home prior to the incident at around 7:00pm and the minor had informed that he was a counsellor at school. That he gave the minor his number and he would talk and chat with the minor at times through her phone when she left it. She denied asking for Kshs. 50,000/= from the appellant. She testified that it was the first time the minor had slept outside and said that the aforementioned Polly was her daughter. She testified that the appellant was called Cosmas and he had lied to the minor about his name. That the minor was able to direct the police to the appellant's home which was a walking distance from the minor's home. That she had attempted to withdraw the case but the police declined as it involved a minor but the appellant's mother kept inducing her to forgive the appellant and withdraw the case at an offer of Kshs. 20,000/=.

12. PW2 again confirmed that she had met the accused and talked to him for around 20 minutes wherein he said he was a teacher. She stated that she would call the appellant but he would hung up. That the minor was not bad until she met the appellant. On re-exam, she testified that she first saw the appellant at her home in February but she never asked the name. That she saw him well as he stood at the door. That the minor was to later disappear from Sunday to Thursday and she was at the appellant's home according to what the minor said. She added that she knew the appellant's name through his mother but the minor and her father knew him as Edu.

13. PW3 was Hezron Macharia, a clinical officer at Kerugoya Referral Hospital. He stated that the minor informed that she had been defiled by someone she knew between 5/3/2023 and 9/3/2023 and showed her birth certificate to proof she was 16 years old. The her hymen was broken but it was an old breakage and there was no injury inside and outside the genitalia and there was also no discharge. That a high vaginal swab showed increased epithelial cells but she had no spermatozoa or pus cells. The HIV and syphilis tests were negative. He produced the P3 form, treatment notes and lab results, PRC form and birth certificate as PEXH 1-4.

14. On cross-examination, he testified that it was not possible to assess the time the hymen was broken after a day. That there was no discharge from the tests but the tests showed there was a likelihood of defilement as the epithelial cells were very many for a 16 year old and it showed she had friction in her vagina.

15. PW5 was CPL Anastacia Wairimu No. 22XX023 attached at Kagumo Police Station. That she was the IO in the matter wherein the minor visited the station with her mother. That the minor stated that she went to watch football on 6th when she met the appellant who told her that he loved her and he bought her cake and soda and took her to Ndundu village where he lived. That he knew the girl that day and he was a new person to her. That the minor said he was called Cosmas and that she did not say any other name. That they went to Ndundu and he touched her breasts and private parts and slept with her. That the appellant threatened to kill the minor she wanted to go home and they stayed together

till 9/3/2023 and all the while the appellant was sleeping with the minor. That he locked her in on the first day until he came back in the evening and she stayed out of fear and was further threatened not to mention a word when she went back home. She also said that the appellant advised her to fake a suicide if she was questioned to scare her parents and if they pushed further he would marry her. PW4 further stated that she escorted the minor to the hospital. She produced the statements of PW1 and PW2 as PEXH 5 and 6 respectively.

16. During cross-examination, the police officer testified that the minor identified Cosmas Mwaura in the statement. That she was not aware of Edu and only knew Cosmas. She denied asking the minor to write a false statement or that she was bribed. On re-examination, she stated that the appellant gave the minor a phone number which he saved as Edu but when she went to report she said it was Cosmas.

Defence case

17. DW1, the appellant, in his defence, gave sworn evidence and stated that he left for Nairobi for business on 1/3/2023 and went back home on 26/3/2023 to find that he had been blamed for the offence on 5/3/2023. That the minor's evidence was that she slept at Edu's yet his name was Cosmas Wairimu and he had no nickname. That the said Polly was not called to testify yet the minor said she was at Polly's place. That the minor's mother did not also call Edu through the number she had. That the minor testified that she was forced to write a false statement yet in court she said she was at Polly's. That he gave the police his number and that is how they learnt his name and the minor's mother never gave the name Cosmas anywhere. That there was no report to the village elders to confirm his name. He also added that the minor was not found with discharge or sperm and her hymen was old and broken meaning she was not defiled and he was been framed.

18. On cross-examination, he stated that he lived in Ndundu village but had been working in Nairobi as a hawker for three years and lived at Umoja. That his family lived separately and his mother would not know whether he was in Nairobi at the time and his grandfather was also sick in hospital. He testified that he was Cosmas and had no other name and never lied about having another name. That the minor never wrote his name at the police station and he also never wrote the name Edu. That he was the one who gave the police officers his number on the day of the arrest. That during arrest, they did not recognize him and arrested him as someone who had been framed. He denied ever giving the minor a different name.

19. On re-examination, the appellant stated that the minor's mother called him asking for the minor. That his name was not in the minor's statement.

20. In its judgment, the trial court identified three issues for determination; the age of the victim, whether there was penetration, whether there was proper identification of the minor.

21. On age, the trial court found that based on the birth certificate and evidence of the clinical officer, the age of the minor was proven to be 16 and ½ years at the material time.

22. On the issue of penetration, the trial court found that penetration had been proven through evidence of the clinical officer who testified that the increment of epithelial cells proved that there was friction in the minor's vagina.

23. On identification, the court noted that the minor had retracted the statement she recorded at the police station and due to the unreliability of a hostile witness, the court would have to look elsewhere for the truth. The court found that the minor's statement at the police station tallied with PW2's testimony that the appellant had met the minor before the incident and that it elaborated the details of what occurred between 5/3/2023 and 9/3/2023. That the fact that the minor knew the accused by a different

name did not detract from the fact that he was properly identified as the minor's assailant. That PW2 had interacted with the appellant prior to the incident and was not a stranger to her and that his identity as the perpetrator was further confirmed by the fact that the minor led her parents and the police to the appellant's home.

24. On the defense of alibi, the trial court found that the same was raised during cross-examination which was too late in the day and ought to have been revealed to the police or prosecution before the trial for verification. That the prosecution's evidence outweighed the defence. The trial court thus convicted the appellant as charged and sentenced him to 15 years imprisonment.

The Appeal

25. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and the sentence set aside.

26. The appellant relied on his written submissions filed on 4/10/2024 whereas the respondent relied on theirs dated 25/11/2024.

a. Appellant's Submissions

27. On the first ground, it was submitted that the name given by the minor and the name indicated in the charge sheet did not corroborate. That the appellant was Cosmas Mwaura Wairimu whereas the minor stated that he was Edu. That PW2's evidence was unreliable, doubtful and uncorroborated as she gave contradicting evidence and could not be relied on. That the documents relied on by the clinical officer were unreliable as they lacked the names of the maker contrary to Section 77 of the *Evidence Act* and further, he could not tell when the hymen was broken. That PW4's evidence was hearsay and did not corroborate with any other witness That she testified that the appellant new the minor that day and he was called Cosmas yet the minor's evidence was that the appellant was Edu thus PW4 induced the minor to make a false statement. That the case was surrounded with mystery, misinformation, incredible evidence and doubtful speculation and did not warrant a conviction.

28. On ground 2 and 3, the appellant submitted that the three ingredients for the charge being age, penetration and identification were not established. That for penetration, there was nothing in the medical report to proof there was penetration or to link the appellant to the offense and the doctor's evidence was only an opinion that was biased and unreliable. That there was no sufficient evidence of defilement and the minor was in good condition upon examination and she never complained of any defilement. That it was the mother who was complaining and not the minor and there was no evidence of penile penetration.

29. On ground 4, it was submitted that he gave sworn evidence and raised the defense of alibi in that he was in Nairobi at the time when the offence was allegedly committed. That a person called Edu had defiled the minor and the appellant was not the offender. That the minor's evidence is that she stayed with a girl called Polly from Sunday-Thursday and when she went home she complained of a knee injury, not defilement. That the minor even blamed PW4 for forcing her to record a false statement and denounced it. He maintained that the defense of alibi was not challenged by the prosecution. He thus urged this court to allow the appeal against both the conviction and sentence.

b) Respondent's Submissions

30. The respondent filed submissions dated 2/8/2024 and opposed the appeal.

31. It was submitted that the appellant raised the defense of alibi which he failed to prove and did not call any witness to confirm his whereabouts at the material time.

32. On whether there were discrepancies in the prosecution evidence, it was submitted that the minor recanted her evidence and declared a hostile witness but on cross-examination maintained that she was at the appellant's house between Sunday and Thursday when he defiled her and the same was corroborated by her statement PEXH 5. That the minor only lied to the appellant's threat to kill her. That PW4 also stated that the minor informed that she was at the appellant's house and was defiled from Sunday to Thursday and was instructed not to tell anyone or else she would be killed. That the witnesses were firm and consisted on what occurred between 5th -9th March, 2023.

33. That the prosecution established all the ingredients for defilement. That on age, a birth certificate was produced proving the minor was 16 and ½ at the material time. On penetration, it was submitted that the clinical officer established penetration on the basis of the epithelial cells which translated to mean a friction on the minor's vagina. On identification, it was submitted that PW2 told the court that the minor informed her that she was at the appellant's house and that PW2 knew the appellant before the incident as he used to communicate with the minor through her phone and the appellant had even gone to the minor's home where he was seen by PW2. That the minor's statement tallied with her testimony and Pw2'S testimony and the minor identified the appellant at the dock and maintained that he was the one that defiled her. That both the minor and PW2 illustrated that the appellant was not a stranger and the minor took her parents and the police to the appellant's home and was thus properly identified.

34. It was also submitted that though the minor was declared a hostile witness, her statement produced as PEXH 5 illustrated graphic details of what happened between 5-9th March, 2023 and the minor was clear that she was detained and defiled by the appellant during the time. That looking at the evidence in totality, there was no doubt that the minor was defiled by the appellant and this court was urged to uphold the decision of the trial court on both the conviction and sentence.

D. Analysis and determination

35. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that: -

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

36. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination: -

    a. Whether the offence of defilement was proved;

    b. Whether there were contradictions and inconsistencies; and

    c. Whether the sentence was harsh and excessive

a. Whether the offence of defilement was proved

37. Section 8(1) of the *Sexual Offences Act* (herein The Act) provides that: -

> " a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". While 8(4) states: "A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

38. In the case of George Opondo Olunga v Republic (2016) eKLR the ingredients for the offence of defilement were set out as: -

a. Proof of the age of the victim;

b. Proof of penetration or indecent act;

c. Identification of the perpetrator.

39. On the issue of age, the importance of proving age was underscored by the Court of Appeal in the case of Hadson Ali Mwachongo v Republic [2016] eKLR, as follows: -

> " The importance of proving the age of the 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. In Alfayo Gombe Okello v Republic Cr. App 203 of 2009 (Kisumu) this Court stated as follows: -
>
> In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)".

40. The charge sheet indicated that the minor was 16 years. The birth certificate produced before the trial court indicates that the minor was born on 10/3/2007 and was thus 16 years old at the material time. This proves the age ingredient. The Court of Appeal in Edwin Nyambogo Onsongo vs. 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."

41. On penetration, Section 2 of the *Sexual Offences Act* define penetration as follows: -

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

42. In the case of Bassita Hussein v Uganda, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus: -

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

43. The Court of Appeal in Chila v. Republic (1967) E.A 722 articulated this position and held that: -

> " The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

44. The trial court relied on the evidence of PW1, the minor, and PW3, the clinical officer to conclude that there was penetration. Was the complainant truthful and did the medical evidence corroborate and support the allegation of penetration?

45. The minor initially recorded her statement at the police station to the effect that she had met the appellant before and he was well known to her. That on 5/3/2023, she met him at Karaini Secondary where she had gone to watch a football match and following his enticing words and gifts, they went to his house where he touched her breasts and private parts and proceeded to have sex with her. She stated that the appellant was called Edu. That when she wanted to go home the appellant threatened to kill her and she stayed the night out of fear. That the following day, the appellant locked her in the house till evening and slept with her again. That she stayed there till Thursday under threats of being harmed and was warned not to speak a word and if she did she would get it rough. That the appellant then escorted her home on Thursday at around 8:00pm and advised her to stage a suicide attempt if questioned and if the pressure became too much, he promised to marry her.

46. On arrival, the minor told PW2, her mother, that she had a knee injury and needed to go to hospital and she was escorted by her brother as she feared her mother who was very angry with her. She was treated as Kagumo dispensary and went back home where she disclosed to her mother that she was with a boy at Ndundu village and that he slept with her. The next day, both the minor and her mother went to Kagumo Police Station and reported the incident and they were escorted to hospital where the minor was examined and issued with a P3 form and PRC form.

47. However, in an unexpected turn of events, the minor when testifying in court completely changed the narrative. Though she still maintained that she went to watch football at 4:00 pm on 5/3/2023, she now stated that she met the appellant called Edu and they stayed together till 6:00pm and left him. That she went to one Polly's home as she was scared to go home and she stayed at Polly's from Sunday to Thursday when she went back home to find that she was been looked for by the police. The minor was thus declared a hostile witness and on cross-examination, she admitted having written the statement at the police station but stated that it was under duress from PW4, the police officer. She also maintained on cross-examination that she wished to rely on her testimony and not her statement and maintained that she knew the appellant as Edu as he told her that name, and that people knew him as Edu.

48. How does the court treat the testimony of a hostile witness? In Daniel Odhiambo Koyo v Republic [2011] eKLR, the Court of Appeal stated the law on the probative value of the evidence of a refractory and hostile witness as follows: -

> " The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case."

49. In Maghenda v. Republic [1986] KLR 255 at P. 257, the Court remarked thus regarding the evidence of a hostile witness: -

> " The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court. There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them. Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify..."

50. The Court of Appeal also summarized the applicable law in Abel Monari Nyanamba & 4 others v Republic [1996] eKLR as follows: -

> " In Coles v Coles, (1866) L.R. 1P. &D. 70, 71, Sir J.P. Wilde said:-
>
> > " A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court."

51. In Alowo v Republic [1972] EA at page 324 the predecessor of the Court said: -

> " The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible."

52. Again in Batala v Uganda [1974] E.A. 402 the court at page 405 said: -

> " The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight."
>
> The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt...."

53. The trial court held that the minor's statement was so elaborate and tallied with the statement of PW2 and relied on the two to establish penetration in addition to the medical evidence on record. There are however glaring contradictions in the case that ought not to have been overlooked.

54. Though the minor stated both in her statement and in court that she had previously met the appellant 'Edu' prior to meeting him again on 5/3/2023, PW4, the police officer, testified that the minor informed that the appellant knew the girl on that fateful Sunday of 5/3/2023 and that he was new to her. Secondly, though the minor stated that the appellant's name was Edu both in the statement and in court, she told the police officer that he was called Cosmas and she did not say any other name.

55. Though PW2 insisted that the appellant had visited her home prior to the incident and would communicate to the minor on phone, the minor's statement stated otherwise. The minor stated at the police station that she had previously met the appellant at the market and he gave her his number which she wrote down on a piece of paper as she had no mobile phone. That when she met the appellant again on 5/3/2023, he inquired why she never called and she said she did not have a mobile phone. The minor's statement and the PW2's testimony contradicted themselves. It is not clear whether or not the minor was in previous telecommunication with the minor as alleged by PW2. It was not clear which version to belief.

56. Moreover, it is doubtful whether the minor can be regarded as truthful or integral. I say so noting her own mother's testimony wherein she stated that it was not the first time that the minor had run away and she was not aware where the minor goes. She further added that she would lie a lot and even say she had gone to church or to her grandmother. This, coupled with the different version she narrated to the court and to the police on whether or not she knew the appellant previously, and further giving two different names to her mother and to the police, taints her statement.

57. Further, though the evidence of a hostile witness is normally incredible, I do note that it in this case, the minor's testimony was interestingly collaborated by PW2 who testified that the minor told her that she met a young man on Sunday and then she went with other girls out of fear that PW2 would beat her. This collaborated what the minor testified in court and casts doubt on PW2's statement wherein she indicated that the minor informed that she was with a boy for the four days and he had been sleeping with her. Both PW1, the minor, and PW2, her mother, kept changing the narrative and made it unclear as to what was true. The Court of Appeal in Ndungu Kimanyi v Republic[1979] KLR 282 held that: -

> " 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 that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

58. Based on the foregoing, the statements and testimonies of PW1, PW2 and PW4 were inconsistent, contradicting and unreliable to prove penetration.

59. There was then the issue of the medical evidence before the trial court. PW3, the clinical officer produced the P3 form, treatment notes and laboratory report, PRC form and birth certificate. He similarly testified that the minor had informed him that she had been defiled by someone well known to her between 5th-9th March, 2023 on different occasions at night. He testified that she was in a fair general condition and had no injuries on her body. That the examination on her genitalia revealed that the hymen was broken but it was an old breakage. There was no injury inside and outside the genitalia and there was no discharge. The high vaginal swab and outer genitalia swab showed that she had an increment of epithelial cells but she was not found with any spermatozoa or pus cells. The HIV and syphilis test were both negative.

60. On cross-examination, he stated that he could not tell when the hymen was broken and though they could not see any discharge from the minor, the tests showed there was a likelihood of defilement. That the epithelial cells were very many for a 16-year old and it showed she had friction on her vagina.

61. Was the above conclusive proof of penetration as defined by The Act? Though PW3 concluded that the test showed a likelihood of defilement, there was no basis to reach that conclusion. This court carefully perused the medical record produced before the trial court and found that there was nothing to safely conclude a likelihood of defilement in a case where there was not a single injury inside and outside the

minor's genitalia, no discharge, no spermatozoa, and no puss cells, noting that she had allegedly been defiled for four consecutive days. It is trite that a broken hymen is not conclusive proof of penetration and even the clinical officer could not proof when the hymen was broken.

62. As regards the epithelial cells, PW3's opinion that the presence of numerous epithelial cells was proof that there was vaginal friction, though true, did not link the appellant as the perpetrator that caused the friction. I say this with the background of PW2's statement that the minor would often run away and lie about her whereabouts. It was not clear the specific timelines when she had disappeared. Is it possible that she was defiled in the course of such disappearance? In light of such doubt, the medical evidence combined with the contradictive and inconsistent statement and testimony of the minor coupled with PW2's shifty and contradicting testimony did not proof penetration beyond reasonable doubt. Worse still, PW4's testimony contradicted the minor's statement and it is not clear who is to be believed.

63. This Court finds that penetration was not proven to the required standard. Consequently, I find that neither the evidence of the victim PW1, her mother PW2, nor the clinical officer PW3 was sufficient to proof the ingredient of penetration. In the circumstances, it is justifiable to interfere with the trial court's decision. I say so guided by the principle discussed in Ogechi v Republic (Criminal Appeal E001 of 2022) [2023] KEHC 24673 (KLR) where the court held that penetration is established by the minor's evidence which is then corroborated by medical evidence. It also held that when such medical evidence is not conclusive, the court is called upon to thoroughly scrutinize the evidence of the minor with caution to determine penetration. In doing so, this court has found that the evidence of the minor is full of gaps, contradictions and inconsistency and is further weakened by the contradicting statements and testimonies PW1 and PW2 which further weaken the case such that a conviction of guilt based on the minor's evidence cannot be sustainable. In the said case, the court had this to say: -

> " Penetration is established through the evidence of the victim that is corroborated by medical evidence. This means that the testimony of the victim and the medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court is required to weigh, with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration. In other words, an accused person may be convicted on the sole evidence of the victim in sexual offences. This principle is premised on the provisions of Section 124 of the *Evidence Act*, Cap 80 which provides as follows: -"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 offense, 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."

64. The conclusion is that the ingredient of penetration was not proven to the required standard.

65. On identification, I note that what is to be proved is not whether the victim knows the appellant, but whether the victim can positively identify him as the person who defiled her. The trial court disregarded the confusion on the alleged offender's name and found that the appellant was properly accused by the assailant. Was that the case?

66. Though the court found that PW2 had interacted with the appellant prior to the incident and was not a stranger to her, this Court has already found that the fact was not ascertainable due to the contradicting

statements and testimonies of PW1, the minor, PW2, her mother, and PW4, the police officer. The minor already gave two contradicting statements. In her written statement, she said that she had met the appellant in the market and though he gave her his number on a piece of paper, she was unable to call him as she did not have a mobile phone. PW4 however testified that the minor informed that she had met the appellant for the first time on 5/3/2023.

67. Further, the minor's statement contradicts with PW2's statement on previous interactions with the appellant. Whereas she stated that she met the appellant at the market for the first time, PW2 testified that the appellant had come to her home together with her daughter previously at around 7:00pm and posed as teacher. I do take judicial notice that she omitted this crucial information from her statement and only raised it during her testimony. PW2 also testified that the appellant and her daughter would communicate on mobile phone, whereas the minor stated that the reason she never called the appellant was because she did not have a mobile phone to make the call on. Which version is true? This then strengthens the finding that though the minor's statement was elaborate, it was contradicted and uncorroborated by the prosecutions witnesses and even by the minor herself.

68. It appears that what could have directly linked the minor's and PW2's statement to the appellant was the phone number allegedly used for communication between the minor and the appellant. PW2 testified that she still had her daughter's airtel line. She also testified that she had the appellant's number. The appellant also testified that he gave the police officers his number. What stopped the prosecution from availing the two numbers to confirm a match? The allegation that the minor and appellant were in communication was not only contradicted by the minor's own statement on how she had met the appellant, but also remained just that, an allegation, due to the absence of proof.

69. This then brings me to the issue of the offender's name. The minor was clear to her mind when she wrote her statement and even when she testified that the person who defiled her was Edu and she only knew the appellant as Edu. However, PW4 testified that the minor informed her that the person who defiled her was Cosmas. PW4 testified that: -

> " He knew the girl that day. It was a new person. She said that he is called Cosmas. I was not told any other name."

70. Why did the minor give the name 'Cosmas' to the investigating officer whereas she testified that she had always known the appellant as Edu? I do note that it was PW2 who was very insistent that the appellant was known as Cosmas and not Edu. However, when both the minor and PW2 were recording their statements at the police station, they were together and PW2 was aware that the minor said her offender was called Edu. Why did she not raise the name concern then?

71. I have carefully read her statement and there is no point to she referred to the offender by any name, she only called him 'a boy'. If he was well known to her, it was expected that she would give the offender's name to the police officers when she was reporting the incident as this was crucial information. I say this taking into consideration her testimony wherein she stated that she knew the appellant's name through his mother but the minor and her father knew him as Edu. If PW2 knew the appellant as Cosmas as claimed, nothing would have been easier than to offer this information to the police officers.

72. This also leaves this court to wonder why PW4, the investigating officer, denied ever knowing any other name but 'Cosmas' whereas the minor had clearly recorded the name 'Edu' in her statement. This casts doubt on the credibility of PW4 and casts doubt on this court's mind as to PW4's intention, more so considering the accusation of duress by the minor who testified on cross-examination that PW4 induced her to write a false statement. She also testified that the minor informed that the said 'Cosmas' was knew to her, whereas the minor recorded that she had met 'Edu' before.

73. PW2's intention is also doubtful. It is interesting that she only testified at the trial stage that the appellant was known as Cosmas and that she apparently knew this name from his mother. Noting that she claimed that she knew the appellant, and further that she knew his mother who apparently told her that the appellant was known as Cosmas, and further noting that she was allegedly aware that the minor and her father knew the appellant as Edu, why did she not mention the name Cosmas to the police when her daughter said the offender was called 'Edu'? The respondent/prosecution itself submitted that PW2 shifted goal posts due to a promise of money if she withdrew the case. She had accepted the offer and attempted to withdraw the case but the police declined as child was involved. She confirmed having known the appellant's mother and that the appellant lived near their home. Is it possible that there was an ongoing vendetta or bad blood? This Court cannot tell. What it can tell is that PW2's testimony was full of gaps leading to more confusion.

74. On the flip side, there was the appellant's case wherein the appellant vehemently denied that he was Edu and testified that he was Cosmas Mwaura Wairimu. This was confirmed by the charge sheet which similarly captured that name as belonging to the accused/appellant. He testified that the police did not know who they were arresting on 26/3/2023 and only came to know of his name when he gave them his mobile number post arrest.

75. The issue of the different names was not minute as held by the trial court. The minor reported that the person who defiled her was called Edu and she did not know any other name. The police arrested and charged a person known as 'Cosmas'. The police and prosecution ought to have conducted investigations to establish that 'Edu' and 'Cosmas' were the same person. I am inclined to agree with the appellant that no investigation was done whatsoever to confirm that Edu and Cosmas, the appellant herein, were one and the same person.

76. As it stands, there is confusion as to whether Edu, the person who the minor met on 5/3/2023, was the same person who PW2, her mother, had allegedly seen in her home prior to the incident posing as the minor's teacher. It is not clear to this court whether the appellant, Cosmas Mwaura Wairimu, was also Edu, the person who allegedly defiled the minor. Despite the issue of different names coming up from the very beginning, the prosecution made no effort at all to clear the air and proof beyond reasonable doubt that Edu and Cosmas were one and the same person.

77. Going by the above, I do find that the ingredient of identification was not proven beyond reasonable doubt as held by the trial court.

78. As to the defence of alibi raised by the defendant, I do note that the trial court found that it was raised too late in the day and the prosecution was not given a chance to verify it. It is trite law that the defence of alibi must be raised at the earliest stage to enable the prosecution to investigate it. This is because even where the appellant (accused) raises that defence he has no obligation to prove his alibi. In criminal cases the burden of proof does not shift. In this case of R.V – Sukha Singh S/o Wazir Singh and others (1939) 6 E.A C.A 145 the court held that: -

> " if a person is accused of anything and his defense is an alibi, he should bring forward that alibi as soon as he can, because firstly if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly if he brings it forward at the earliest possible moment, it will give the prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuine, proceedings must stop."

79. This remains the position. The Court of Appeal in the case of Kiarie Vs Republic (1984) KLR stated as follows on defence of alibi: -

> " An alibi defence raises a specific defence and an accused person who puts an alibi defence does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduced in the mind of a court a doubt that is not unreasonable"

80. The court in Nalkona v Republic (Criminal Appeal E013 of 2023) [2024] KEHC 4019 (KLR) held that: -

> " when the defence of alibi is raised at the defence stage, it should not escape the scrutiny of the court. The prosecution no doubt required adequate notice to investigate the allegation of alibi defence. The governing principle on alibi defence is that it must be disclosed early enough in the proceedings to permit it to be investigated by the police. That determines the weight the court will give to it."

81. It then follows that the dense of alibi ought to have been scrutinized despite that it was raised at the defence stage. The trial court simply found that the appellant's defense was outweighed by the prosecution without conducting such scrutiny or giving reasons why it arrived at that conclusion. I am inclined to agree with the appellant's submission that his defence was not considered.

82. Going back to the case, the appellant testified that between 1/3/2023-26/3/2023, he was in Nairobi where he worked as a hawker. That he went back home to find that he was accused of the instant offense and was arrested. He did not however call any witnesses to support the claim that he was in Nairobi when the offense was allegedly committed. The explanation was that he lived independently and his mother would not know when he was in Nairobi or at home. That when at home, he lived with his grandparent but did not call either of them as witnesses. He alleged that his grandfather was hospitalized at the time.

83. In light of the above, I find that the defense of alibi was not properly proven. The appellant could have called his grandmother if at all the grandfather was hospitalized at the time. The defense was not sustainable. It is however important to note that on the three occasions that the minor and her parents visited the appellant's home, he was not present and only showed up on 26/3/2023, the same date he was arrested. It is possible that the appellant way away for some time, but the appellant was not able to establish that he was away on the material dated between 5/3/2023 and 9/3/2023.

84. As regards the sentence, the trial court sentenced the appellant to 15 years imprisonment and I do find that the trial court correctly applied Section 8(4) of The Act on the sentence for the offence charged upon a conviction of guilt. Section 8(4) of the Sexual Offenses Act provides: -

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

85. In the instant case however, I do find that but for age, the paramount ingredients of penetration and identification were not established to the required standard so as to sustain a conviction of guilt. It is trite that the standard of proof in a criminal trial is beyond reasonable doubt. Lord Denning explained this standard in the case of Miller v Minister of Pensions [1942] A.C. and held that: -

> " It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to

protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

86. Further, this court has subjected the evidence adduced before the trial court to a fresh scrutiny and with honest belief, it is persuaded that the inconsistencies in the evidence of the witnesses were material to the case. Did the minor meet the appellant at a market before meeting him again for the second time on 5/3/2023 as she alleged? Had the minor met the appellant on several occasions and even take him home under the guise of being her teacher as claimed by her mother, PW2, or had the minor met the appellant, Cosmas, for the first time as claimed by the investigating officer, PW4? Did the minor communicate with the appellant constantly on phone as claimed by PW2 or was she unbale to communicate to the appellant due to lack of a mobile phone as stated in her statement?

87. Did the minor tell PW2 that she stayed with the appellant for the four days or that she stayed with Polly? Which of the two versions fronted by PW2 were true? Did the minor state that the boy was called Edu or did she state that he was called Cosmas as stated by PW4? Is it possible that there was an Edu out there who met defiled the minor? Was Edu and Cosmas the same person? Were they two different people? Is it possible that Cosmas is being confused for Edu? Is it possible that there is a score to be settled by turning against the appellant? None of these questions could be answered as each witness had her own answer that was inconsistent and contradicting to the rest and none of the witnesses aided this court in finding out the truth of what transpired between 5/3/2023 and 9/3/2023. Those contradictions and inconsistencies ought to have been weighed and considered against the evidence. Having done so, I find that they were major and went to the material facts of the case.

88. The Uganda Court of Appeal in Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 quoted with approval by the Court of Appeal of Kenya in Erick Onyango Ondeng' v Republic [2014] eKLR held thus: -

> "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."

89. Further, in Joseph Maina Mwangi v Republic *CA No. 73 of 1992* (Nairobi) Tunoi, Lakha & Bosire JJA held: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

90. The court must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (See Nyakisia v R. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal]. I find that the inconsistencies in the minor's statements vis a vis PW2 and PW4's testimonies to be major. I also find the inconsistency of the appellant's name and the name of the alleged offender to be major and prejudicial to the appellant. Further, the minor was not only inconsistence, but the prosecution's witnesses were contradicting and did not corroborate the minor's allegations thereby weakening the

prosecution's case in establishing penetration and identification for reasons that have been already discussed in detail above.

91. From the foregoing, I do find that the prosecution's case was not strong enough to convict the appellant. As such, the conviction of guilt for the offense of defilement contrary to Section 8(1) as read together with Section 8 (4) of the *Sexual Offences Act* Cap 63 is hereby quashed and the sentence of 15 years imprisonment set aside.

92. The upshot is that the appeal is found to be merited and the appellant is acquitted and is to be set at liberty forthwith.

Orders accordingly

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

.....

J.K.NG'ARNG'AR

JUDGE

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