Hussein v Republic (Criminal Appeal E032 of 2024)
[2025] KEHC 7267 (KLR) (27 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7267 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E032 OF 2024

JN ONYIEGO, J

MAY 27, 2025

BETWEEN

OMAR ALASOW HUSSEIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E006 of 2023 at Wajir Law Courts and delivered on 06.08.2024 by Hon. R. Aganyo (PM))

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. Particulars of the charge were that on unknown date in the month of July, 2022 at unknown time in [Partculars withheld] location, Wajir East Sub County within Wajir County he intentionally caused his penis to penetrate the vagina of BIM, a child aged 16 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars were that on unknown date in the month of July, 2022 at unknown time in [Partculars withheld] location, Wajir East Sub County within Wajir County he intentionally touched the vagina of BIM, a child aged 16 years with his penis.

3. He pleaded not guilty to the charge and a full hearing was conducted with the prosecution calling four (4) witnesses in support of its case.

4. At the close of the prosecution's case, the trial court ruled that a prima facie case had been established against the appellant thereby placing him on his defence.

5. The trial court delivered its judgment on 27.05.2024 thus convicting the appellant and consequently sentenced him to 15 years' imprisonment.

6. Aggrieved by the determination of the trial court, the appellant filed an undated petition of appeal citing the following grounds:

   i. That the learned magistrate erred in law and fact by drawing inferences from the evidence which was not corroborated.

   ii. That the learned magistrate erred in law and fact by convicting him notwithstanding the fact that the prosecution did not prove its case.

   iii. The learned magistrate erred in law and fact by failing to consider the evidence of the defence thus reaching a wrong determination.

7. The court directed that the appeal be canvassed by way of written submissions.

8. The appellant via undated submissions urged this court that the prosecution did not prove its case beyond any reasonable doubt. That the prosecution's case was marred with contradictions not warranting the trial court reach the impugned verdict. It was his contention that there was no proof of the alleged drug that he fed the complainant thus making her unconscious.

9. He contended that the prosecution erred by failing to call Ramla who appeared to have played a major role in confirming and /or advising the complainant in as far as the pregnancy was concerned. That noting that the prosecution failed to present Ramla as a witness, the same was detrimental to its case. He thus urged this court to consider his appeal and allow the same.

10. Mr. Okemwa for the respondent filed submissions dated 17.03.2025 wherein he stated that the prosecution was expected to prove three things namely: proof of penetration, proof that the complainant was a child and proof that the accused was indeed properly identified. That the evidence on record is not expressly placing the appellant or linking him to the offence. It was his case that based on the storyline of the complainant who talked about telephone conversations to the meetings with the appellant, bad encounters while with the appellant and the repeated sexual ordeals then the attempted abortion, the same leads to confusion and disbelief that such could go on without the knowledge of any other party.

11. According to him, the same punctured the aspect of a sound and trustworthy evidence worth relying on. To that end, he relied on the case of Evans Wanjala Wanyonyi vs Republic [2019] eKLR where it was held that an essential ingredient of the offence of defilement is penetration and not pregnancy. To that end, the respondent conceded to the appeal.

12. This being the first appellate court, this court has a duty to re-evaluate the evidence on record afresh and come to its own conclusion without losing sight of the fact that it did not see nor hear witnesses testify to be able to assess their general demeanour. This position was set out by the Court of Appeal in the case of Kiilu & Another vs Republic (2005)1 KLR 174.

13. PW1, B.I testified that she lives with her grandmother as her parents are separated. That she is 16 years of age and that the appellant used to call her using her phone. It was her testimony that one day, the appellant call and requested her to meet at his sister's house at stage Griftu. It was her evidence that while at the appellant's sister's place, the appellant defiled her after having served her water and some rice which made lose consciousness.

14. She further stated that, after waking up, she realized blood was oozing from her private parts and thighs. She went further to state that after some time, she started feeling unwell and upon going to the hospital, it was confirmed that she was expectant. It was her testimony that thereafter, the appellant offered to help her terminate the pregnancy in vain as her relatives declined. That it was her relative one Ramla

who informed PW2 her grandmother about the incident thus causing pw2 to report the matter to the police.

15. PW2, Habiba Yogana, grandmother to the complainant testified that on 18.11.2022, together with Ramla, they arrived their home from Eldoret. That due to fatigue, she slept early enough. That later, Ramla informed her that PW1 was four months pregnant and that she had plans of terminating the pregnancy. It was her testimony that she advised the complainant not to terminate the pregnancy as the same was risky. According to her, after the complainant returned home, she asked her about the incident and the complainant told her that the appellant was responsible. She reported the matter to the police station. Subsequently, they were referred to the hospital where it was confirmed that PW1 was expectant.

16. PW3, Siyad Sanei Hassan,a clinical officer testified that he examined the complainant and noted no remarkable injuries. From the lab results, it was noted that the pregnancy was positive and so, the complainant was referred for a scan to confirm the gestation period of the pregnancy which turned out to be 18 weeks and 6 days. On genital examination, the same revealed no physical injuries, hymen was not intact, no bleeding was noted and there was a whitish discharge signifying vaginal candidiasis implying fungal infections of the genitalia.

17. Pw4, 85136 PC Richard Kirui, the investigating officer testified that the matter was reported by PW2 who informed them of the incident herein. That the defilement occurred on 14.11.2022 and the degree of injury was categorized as grievous harm due to the fact that the complainant became pregnant yet she was a child. He basically reiterated the complainant's testimony.

18. In his defence, DW1, Omar Alasow Hussein denied committing the offence. He stated that the complainant was simply a friend. That the complainant had wanted him to be in a relationship so as to cover up her shame of being pregnant. It was his evidence that upon rejecting the said deal, the complainant promised that he would teach him a lesson. That after some time, he was arrested and charged with the offence herein. Further, he stated that the complainant's family fetched Kes. 200,000 from his family to settle the issue. On cross examination, he stated that in as much as he did not know the age of the complainant, they used to talk a lot via phone.

19. I have gone through and considered the trial court's proceedings, the petition of appeal and the submissions by the parties. The grounds that stand out for determination are:

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the evidence by the prosecution was contradictory.

    iii. Whether the sentence preferred against the appellant was manifestly harsh and excessive.

20. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the perpetrator have to be proved.

21. In the case of Edwin Nyambaso Onsongo vs Republic (2002) eKLR, the court cited the case of Mwolongo Chichoro Mwanyembe vs Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR) where the Court of Appeal held thus: "...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, guardian or medical evidence among other forms of proof..."

22. On age, PW1 testified that the complainant was aged 16 years. PW4 also testified that the complainant was aged 16 years and further produced a birth certificate. From the birth certificate, it is clear that the complainant was born on 06.06.2006 when the offence herein was allegedly committed on unknown

date in the month of July,2022. It therefore follows that the complainant was a minor roughly aged 16 years at the time of the occurrence herein.

23. On penetration, section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution is obligated to prove penetration or act of sexual intercourse to sustain a charge of defilement. In the circumstances of this case, save for the victim, none of the witnesses saw the complainant being defiled. The medical evidence merely confirmed that the victim was pregnant. There was no proof medically that the pregnancy was caused by the appellant. The evidence of pw2 the grandmother to the victim was mere hearsay evidence hence not helpful. To that extent the court is left with the testimony of the complainant alone.

24. 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...".

25. Although there was evidence of the existence of pregnancy suggesting that there was penetration, the donor remains the big question to be answered. It is only the complainant who is linking the appellant with the pregnancy. Her evidence is not corroborated. The trial court relied on her evidence alone after warning herself that she appeared truthful hence the application and reliance of Section 124 of the *evidence Act*.

26. In as much as section 124 can be relied on to convict based on the evidence of a single witness, the same is not an avenue for general condemnation. 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."

27. As stated, there was no proof that the appellant was the donor of the pregnancy. He denied responsibility. He claimed that he was being framed and that the pregnancy belonged to somebody else in as much as he was a friend to the complainant. Why din.t the victim report immediately the defilement took place. If she was drugged, why didn't she report. This conduct is not consistent with a honest and credible witness to be trusted in accordance with section 124 of the *evidence Act*. For that reason, corroboration was necessary.

28. It defeats logic that the complainant kept silent for over four months without reporting the incident. Although DNA is not mandatory, in this case, it should have been done since the child was born to ascertain paternity which is disputed. It is no wonder that the prosecution conceded to the appeal.

29. Having perused the record, I note that the trial magistrate noted that she was convinced that indeed, the appellant defiled the complainant. Of importance to note is the fact that she stated that the appellant sexually exploited and assaulted the minor and left her bleeding and with abdominal pains.

30. In this case the trial court merely relied on the evidence of pw1 and section 124 of the evidence and held that the victim was truthful but fell short of stating the reason for such believe. See the case of John Mutua Munyoki v Republic(supra)

> " The trial court felt that the complainant was a truthful witness worth of believing. But given what we have stated regarding her credibility we doubt whether this assessment is correct. In reaching this conclusion which was also adopted by the High Court, the trial court was trying to rely on the proviso to section 124 of the *Evidence Act*. However, we think that the trial court went about it the wrong way. What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, "therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school." What or where are the reason(s) for the belief?"

31. It is trite that throughout the trial, the burden of proof in a criminal case always lies with the prosecution. [See section 107 of the *Evidence Act*; the case of Woolmington vs DPP (1935) A.C 462

32. In view of the above holding, the existence of the pregnancy alone without credible evidence to connect the appellant with it would be unsafe to find the appellant culpable. It is possible that somebody else would have had the opportunity to impregnate the complainant. The benefit of doubt should have been given to the appellant. To that extent, am satisfied that the appeal is merited and therefore allowed. Accordingly, the conviction herein is quashed and the sentence thereof set aside. The appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MAY 2025

J. N. ONYIEGO

JUDGE