Muleka v Republic (Criminal Appeal 29 of 2019)
[2025] KEHC 9648 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9648 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 29 OF 2019

DO CHEPKWONY, J

JUNE 27, 2025

BETWEEN

WYCLIFF IMBALI MULEKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, Wycliff Imbali Muleka, was arraigned before the trial court and 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 charge against him was that:-

   > "On the 14th day of December, 2016, at Matimbai Location within Kiambu County, the Appellant intentionally and unlawfully defiled EV, by penetrating his male organ namely penis into the vagina of a girl aged 15 years.

2. Upon hearing the case against the Appellant, the trial Court found him guilty of the offence, and proceeded to convict and sentence him to serve fifteen (15) years' imprisonment.

3. Being dissatisfied with the said conviction and sentence, the Appellant filed this appeal.

4. As this is the first appellate court, it is incumbent upon the court to subject the entire evidence that was presented at the trial to a fresh and independent evaluation so as to arrive at its own independent

conclusion while remembering that it did not hear or observe the witnesses as they testified. This is as guided by the decision in the case of Odhiambo –vs- Republic (2008) KLR 565, where it was stated:-

> " ...The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on the evidence."

5. This position was reaffirmed in the case of Okeno –vs- Republic (1972) EA 32:-

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence... The first appellate court must itself weigh conflicting evidence and draw its own conclusions..."

6. Guided by the above principles, this court proceeds to outline the evidence as presented before the trial court. The prosecution called four witnesses, in support of its case, being;

   i. PW1: the complainant, Veronica Moyale.,

   ii. PW2: Jackson Liyai Muyale (brother to the complainant),

   iii. PW3: James Kabue (clinical officer), and

   iv. PW4: PC Julius Githinji (investigating officer).

Summary of the Prosecution Case

7. PW1, the complainant, testified that on 14th December, 2016, she visited her sister and brother-in-law, the Appellant. She stated that that evening around 6.00pm while in the sitting room, she fell asleep but was shocked from sleep by some pain she felt. Upon waking up, she realized that her clothes had been removed and saw the Appellant present in the room she even saw his penis. That she noticed blood on her clothes coupled with the pain she felt and she was shocked because the Appellant had entered her. Shortly thereafter, her sister I, who is married to the Appellant, entered the room since the door had not been locked, and upon witnessing the scene, she screamed and this attracted the attention of neighbours. It was her testimony that the Appellant was on top of her when the sister screamed and the neighbours came, and that at all material times, the Appellant was present and did not attempt to flee. That two (2) days later, the complainant was taken to Tigoni District Hospital for medical examination and thereafter, the matter was later reported at Uplands Police Station, where she was issued with a P3 medical examination form.

8. During cross-examination, the complainant reiterated that she had been asleep when the incident occurred, and was shocked upon waking due to the pain she experienced. She also confirmed that she did not speak to the Appellant during or after the alleged incident.

9. PW2, the complainant's brother, testified that on 14th December, 2016, at approximately 11:30 p.m. he was called by his sister L, who informed him that the complainant had been defiled by their brother-in-law, the Appellant. He travelled to their home the following day and found the complainant's blood-stained clothes. And, together with the Appellant's wife, they agreed to escalate the matter to police. He then took the matter to Uplands Police Station and accompanied the complainant to hospital. He stated that the Appellant was later arrested while attempting to leave their house but his wife, I (the Appellant's wife) and another witness she identified as Esther had refused to record their statements with the police.

10. On cross-examination, he acknowledged that he was not present during the incident but relied on what was reported to him and although he could not confirm whether the Complainant had been defiled, he saw her blood-stained clothes and could still identify them.

11. PW3, the clinical officer, testified that he examined the complainant, who was approximately fourteen (14) years old at the time and seemed normal at that time. That on examination of her genitalia, he found that she had no hymen or bruises. It is noted that this was on 19th December, 2016, which was five (5)days after the incident had allegedly happened. PW3 told court that he did not trace any discharge, he concluded that the complainant had a history of penile penetration awareness. He ruled out any sexually transmitted infection and pregnancy. He proceeded to produce the medical reports, including the P3 form and post-rape care forms.

12. On cross-examination, PW3 noted that he did not receive the clothing during his examination, which was conducted six (6) days after the alleged incident. Further, that even after concluding that the complainant had a history of penile penetration awareness, he did not investigate to establish whether the Appellant had actually defiled the complainant as alleged.

13. PW4, the investigating officer, told court that the complainant made a report at the police station on 16th December, 2016 hereby she informed him that the Appellant had found her asleep at their house and because she had "Kifafa" (translated into English to mean epilepsy), the Appellant held her forcefully and defiled her. That PW4 recorded her statement and escorted her to Lari Hospital on the 19th December, 2016 for medical examination. He confirmed the arrest of the Appellant after being identified by PW2. The complainant handed over clothing stained with blood, and a birth certificate showing her date of birth as 22nd July, 2000, which were both produced as evidence in court.

14. On cross-examination, PW4 maintained that it was the complainant who gave him the blood-stained clothes and emphasized that the blood came out because the complainant was in pain and not as a result of natural causes such as menstrual periods.

Defence Case

15. Placed on his defence, the Appellant opted to give sworn testimony in defence and called no witnesses. He denied the charges and claimed that he was falsely accused due to a grudge allegedly held against him by PW2, who was unhappy with his relationship with the complainant's sister. He testified that PW2had been interfering in their marriage and therefore, he was maliciously targeted. maliciously. He added that after his arrest, the police asked for a ransom which he could not afford, and immediately thereafter, his brother-in-law, PW2, went to his house, took a TV and a generator but later his wife (Appellant's) took them back.

16. On cross-examination, the Appellant maintained that the accusations against him were majorly due to the grudge he has had with PW2 and had nothing to say with regard to what the complainant had testified.

Trial Court's Findings

17. In its Judgment, the trial Court held that the prosecution had established all the essential elements of the offence of defilement; namely, that the complainant was a minor, that there had been unlawful penetration, and that the Appellant was properly identified as the person responsible for the act beyond reasonable doubt. That the trial court found that the complainant's testimony was credible, consistent, and corroborated by both medical and circumstantial evidence, a result of which, the Appellant was found guilty and convicted whereupon he was sentenced to serve a custodial term of fifteen (15) years

imprisonment which is the minimum mandatory sentence provided for under Section 8(2) of the *Sexual Offences Act*.

Issues for Determination on Appeal

18. I have carefully considered the evidence on record, the submissions by both parties, and the applicable legal principles with regard to the issues raised in this appeal. Once again, this Court reiterated that as the first appellate court, this Court is enjoined to independently reconsider and re-evaluate the evidence that was presented before the trial court and to draw its own conclusions as to whether the evidence presented by the prosecution was cogent enough to sustain a conviction under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006.

19. In determining whether the evidence on record met this legal threshold, this Court is guided by the standard laid out in the case of Wamunga –vs- Republic [1989] KLR 424 and Okeno –vs- Republic [1972] EA 32, which underscore the duty of the first appellate court to re-evaluate the evidence afresh and arrive at its own conclusions, while making due allowance on the fact that the trial court had the benefit of seeing and hearing the witnesses.

20. In criminal law, the standard of proof is that of beyond reasonable doubt and the burden of proof lies on the prosecution to establish all the elements of the offence as required under Section 8(1) and (2) of the *Sexual Offences Act*. In the present case, it was incumbent upon the prosecution to prove: that the complainant was under the age of 18 years at the time of the alleged offence; that there was penetration of the complainant's genitalia by the male genital organ; and that the accused was the perpetrator of the said act.

21. With respect to the first element, in this court's view is whether or not the complainant was a minor at the time of the alleged incident, was sufficiently proven. In this regard, the prosecution produced a birth certificate (Exhibit 6), which confirmed that the complainant was born on 22nd July, 2000 and given that the incident occurred on 14th December, 2016, the complainant then was fifteen (15) years old at the time, hence legally a child as defined under Section 2 of the *Sexual Offences Act* and Article 260 of *the Constitution*. It is noted that there was also no dispute regarding this element from the Defence.

22. However, as regards the element of penetration and the identity of the perpetrator, the evidence placed before the trial court reveals significant inconsistencies and evidentiary gaps as will be highlighted below.

23. First and foremost, penetration, as defined under Section 2 of the *Sexual Offences Act*, means 'the partial or complete insertion of the male genital organ into the female genital organ'. The complainant (PW1) testified that she was asleep when the alleged incident occurred. She stated that she woke up experiencing pain in her genital area, found her clothes removed, and saw the Appellant's male organ and blood on her body and clothing. From this, the complainant (PW1) concluded that the Appellant had defiled her. However, it is worth noting that the trial court's record does not indicate that PW1, felt anything penetrating her vagina since she was asleep. The record has it that PW1 only woke up to experience pain in her genital area and thereafter, her sister entered the room and screamed.

24. In this Court's view, the complainant did not testify that she saw or felt the act of penetration. Her narration of events is based entirely on inference drawn from what she observed after waking up, but did not describe any real-time perception of an act being committed against her, nor did she confront the Appellant immediately or raise an alarm until her sister allegedly entered the room.

25. When cross-examined, the complainant reaffirmed that she was asleep and only woke up to find she was in pain, with blood present and the Appellant nearby. In this Court's view, this explanation

casts uncertainty as to whether penetration really occurred at all, and if so, when and by whom. The complainant's belief that she was defiled was not based on personal observation or real experience of the act, but rather on post-event assumptions or imagination.

26. The clinical officer (PW3), examined the complainant five (5) days after the alleged incident, and he stated that the complainant's hymen was absent, but there were no bruises, swelling, lacerations, or abnormal discharges noted. He concluded by clarifying that although the complainant had "a history of penile penetration" he could not determine when the penetration had occurred or the identity of the person responsible. In the Court's view, the findings by PW3 are not inconsistent with the possibility that the complainant may have previously been sexually active or subjected to penetration at some other time other than this particular time of the alleged incident and this weakens the prosecution's claim that the Complainant was penetrated on the day when the incident

allegedly happened.

27. The third and most critical element is whether the Appellant was the person

who committed the alleged offence. As already discussed, the complainant did not witness the act taking place. She found the Appellant present in the room when she woke up, but did not describe him engaging in any explicit act at that moment. The assumption that the Appellant must have been responsible was drawn from circumstantial cues, that when she woke up feeling pain in her genitalia, she saw the Appellant's penis and she had blood on her clothes.

28. The trial court further relied on the evidence that the Appellant was allegedly found "on top" of the complainant by his wife, I. However, this I was never called as a witness in this case hence did not testify although both the complainant and PW2 acknowledged that I witnessed the alleged incident. As the Appellant's spouse and the sister of the complainant, I was a central witness who could have provided direct and crucial evidence to clarify what transpired.

29. Section 127(3)(b) of the *Evidence Act* allows for a spouse to be a compellable witness in offences involving minors. There is no legal or evidential explanation on record as to why the prosecution failed to call I, the Appellant's wife. Thus, this Court's view, the failure amounts to the withholding of material evidence which could have filed the gaps in the Complainant's testimony, given that no other witness witnessed the Appellant commit or found in circumstances that would render him culpable for the alleged offence. In such circumstances, under Section 119, of the *Evidence Act*, the court is entitled to draw an adverse inference that had she testified, her evidence may have been adverse to the prosecution. And without her testimony, the circumstantial evidence linking the Appellant to the act is incomplete leaving the complainant's narrative speculative as to what actually transpired since the medical evidence is inconclusive as to whether the Appellant could be linked to the offence, and the sole potential eyewitness not being called to testify in the trial.

30. Be that as it may, the law regarding reliance on circumstantial evidence is well settled. In the case of Sawe –vs- Republic [2003] eKLR, the Court of Appeal held that:-

> "In order to justify a conviction based purely on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

31. In view of the aforegoing analysis, the present case does not meet that threshold. The facts on record are not inconsistent with the innocence of the Appellant. The complainant's perception of what happened is unclear, and her conclusions are not supported by any direct or forensic evidence linking the Appellant to the act of having defiled her. If the Appellant was caught in the act, no such evidence

was led before the court, and no neither was DNA done on the blood stained clothes presented by the complainant to trace the Appellant's biological samples. The only person who could corroborate or refute the complainant's version being the Appellant's wife, was never called as a witness.

32. The possibility that the complainant may have suffered pain or bleeding due to other causes, be it medical, biological, or historical given that PW4 identified the complainant would have seizures and had one on the alleged night, was not adequately explored. Indeed, the examining officer did not rule out other plausible explanations but reiterated what the complainant had informed him, and the police did not conduct any investigative steps to scientifically connect the Appellant to the alleged conduct.

33. Taking all the above into account, the Court finds that the evidence tendered before the trial court was riddled with material gaps and speculative conclusions. The complainant's evidence, while earnest, was not sufficient enough to conclusively prove the act of penetration on the complainant or identify the Appellant as the perpetrator of the act of defilement beyond reasonable doubt. The medical evidence was non-specific as to when the Complainant might have been penetrated and who was responsible. The prosecution's failure to call a key eyewitness undermines the reliability of its case.

34. This court finds that the conviction of the Appellant was therefore not supported by evidence that meets the legal standard required in criminal trials as it was based more on suspicion and inference other than on proof beyond reasonable doubt. This court wishes to reiterate that in criminal trials, suspicion, however strong, cannot take the place of legal proof.

35. Consequently, this Court finds that the conviction of the Appellant cannot stand. Thus the appeal succeeds and the conviction of the Appellant for the offence of defilement is hereby quashed, and the sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held.Bottom of Form

    It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF JUNE 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Appellant in person – present

M/S Ndeda counsel for the Respondent

Court Assistant - Martin