Koros v Republic (Criminal Appeal E007 of 2024)
[2025] KEHC 9069 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9069 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E007 OF 2024

JN KAMAU, J

JUNE 26, 2025

BETWEEN

JOSEPHAT KIPKIRUI KOROS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. Manyura (RM) delivered at Hamisi in the Senior Principal Magistrate's Court in Sexual Offence Case No 11 of 2020 on 7th November 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The Learned Trial Magistrate, Hon S. Manyura (RM) convicted him on the main charge of defilement and sentenced him to fourteen (14) years imprisonment.

3. Being dissatisfied with the said Judgement, he lodged an appeal herein. His Petition of Appeal was dated 15th September 2023 and filed on 24th January 2024. He set out six (6) grounds of appeal.

4. His undated Written Submissions were filed on 27th November 2024 while those of the Respondent were dated 16th January 2025 and filed on 17th January 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Ground of Appeal No (1), (2), (3) and (4) of the Petition of Appeal were dealt with under this head.

10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Appellant did not submit on this issue. On its part, the Respondent placed reliance on the case of Musyoki Mwakavi vs Republic [2014] eKLR where it was held that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism card, school leaving certificate, by the victim's parents and/or guardians, observation and common sense.

13. It pointed out that No 82xxxPC Fredrick Otieno (hereinafter referred to as "PW 4") testified that he took the Complainant, HKM (hereinafter referred to as "PW 1") for age assessment on 10th March 2020 and that the report confirmed that she was aged fifteen (15) years at the time. It added that it produced the said Age Assessment Report and that the Appellant did not contest to its production.

14. This court had due regard to the case of Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It could also be proven by the victim's parents or guardian and observation or common sense as was held in the case of Musyoki Mwakavi vs Republic(Supra).

15. PW 4 tendered in evidence the Age Assessment Report dated 10th March 2020 by Isaac Chelimo, Dental Specialist, Vihiga County Referral Hospital. The same showed that PW 1 was aged fifteen (15) years at the time of the assessment as her third molars were yet to fully erupt.

16. As the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven using medical evidence and that she was a child at all material times.

B. Identification

17. The Appellant did not submit on this issue. On its part, the Respondent submitted that PW 1 testified that the Appellant was her friend and that she knew him as Koros. It added that she also stated that she stayed at the Appellant's house for three (3) days. It was its contention therefore that the Appellant was a person well known to her and that this could not be a case of mistaken identity.

18. It pointed out that that was evidence of recognition which was held by courts to have been more reliable and weightier than the identification of a stranger as was held in the case of Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568. It was emphatic that there was proper identification as there was prior knowledge of the Appellant.

19. PW 1 testified that on the morning of 25th February 2020, her grandmother, whom she stayed with, told her not to go to school. As she was walking on the road coming from Kegondi, Kilingili she met Koros, the Appellant herein. She said that he was her friend.

20. She told the Trial Court that he asked her three (3) times if she could escort him to where he was going and that she only agreed to go with him on his third request. She arrived at his house in Kegondi at 7.00am. His house was around thirty (30) minutes from her house. He gave her tea to drink and left for work. He returned at around 2.00pm and brought her vegetables for her to cook. He went back to work and came back at 8.00pm. They ate and slept.

21. He told her to remove her clothes and she removed her shirt and pant. He then put his private parts in her private parts and after having sexual intercourse, they slept until morning when he left for work. He returned in the evening but nothing happened. She said that on the third day, he came back from work at 1.00pm and told her to go back home.

22. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

23. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 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 (emphasis)."

24. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

25. Notably, PW 1 stayed with the Appellant in his house the whole night of the material day until when she left on the third day. That was enough time to recognise the Appellant. She could not therefore have been mistaken by his identity. In any event, they were friends and she referred to him by name.

26. Without belabouring the point, this court came to the firm conclusion that the ingredient of identification was proven through recognition and she positively identified him in court.

C. Penetration

27. The Appellant submitted that based on the evidence of PW 1 it was clear that he was framed as he claimed that PW 1 planned this case against him with her grandmother. He argued that if PW 1 stated that he told her to go home on the third day, then the question arose as to where PW 1 was on the several dates between the said 25th February 2020 and 7th March 2020. He pointed out that some crucial witnesses that PW 1 referred to in her testimony were not called as witnesses in the case.

28. It was his contention that the Assistant Chief, Albert Nabani Linanye (hereinafter referred to as "PW 2")'s testimony was contradictory because he was not sure when he recorded his statement. He argued that the medical evidence of PW 3 did not prove penetration but that the Trial Court relied on the oral evidence of PW 1 and convicted him. He pointed out that the truth was that it was the Masaai man who defiled PW 1 and not him and that PW 2 found him with his wife but PW 2 did not interrogate PW 1 to find the truth.

29. On its part, the Respondent cited Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed vs Republic[2020]eKLR where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer.

30. It contended that PW 1 testified that they went to the Appellant's house where they engaged in sexual intercourse and that she stayed there for several days. It added that the Clinical Officer, Ibrahim Vonyoli (hereinafter referred to as "PW 3") testified that PW 1 had a history of having engaged in sexual intercourse with a person well known to her but that she was never examined on her private parts.

31. It asserted that the Trial Court relied on Section 124 of the *Evidence Act* and stated that it believed that she was telling the truth. In this regard, it placed reliance on the case of Stephen Nguki Mulili vs Republic[2014]eKLR where it was held that as a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence was corroborated.

32. It was emphatic that penetration was proved and noted that in sexual offences cases the victim was normally the only witness as the offence was committed in secrecy and that the Trial Court warmed itself of such evidence. It was categorical that all ingredients of defilement were proved beyond reasonable doubt as was held in the case of Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013(eKLR citation not given).

33. It further submitted that pursuant to Section 211 of the *Criminal Procedure Code*, the Appellant chose to give a sworn statement and did not call any witness. It pointed out that he gave the evidence of the

date he was arrested but did not touch on the dates the offence was committed. It was its contention that the Appellant did not rebut the Prosecution's evidence hence his claim that the Trial Court did not consider his defense was without merit.

34. It further argued that the inconsistencies and contradictions if any did not go into the core of the case and that variance in itself did not in any manner distort or dislodge the commission of the offence as was held in the Tanzanian Case of Dickson Elia Nsamba Shapwata & Anothr vs Republic Criminal Appeal No 92 of 2007.

35. In his evidence, PW 3 confirmed that PW 1 was well coordinated in place, time and person in a fair general condition with no influence of any substance. However, he pointed out that Section C of the P3 Form was not filled. On cross-examination, he confirmed that no examination was done on PW 1's private parts.

36. In his defence, the Appellant narrated the events of 6th March 2020 when he was arrested by the help of the Chief, PW 2. He denied ever knowing PW 1 nor defiling her. He pointed out that when he was arrested, he was with his wife but that he did not call her as a witness to his case.

37. It was evident that PW 1 was examined after several days. PW 3 was non-committal as to whether PW 1 was defiled. When he was cross-examined, he said that he never examined PW 1 and that he could not tell if there was penetration because he and the doctor did not examine her private parts.

38. Although PW 1 pointed out that she could recall what happened between 25th February 2020 and 7th March 2020, she only testified of the first three (3) days. It created doubt in the mind of this court as to where she was for the remaining about seven (7) days. There was no medical evidence to corroborate that she was defiled.

39. The gaps and inconsistence in her evidence created doubt in the mind of this court as to what really transpired herein. The Appellant may have committed the offence but there was a possibility that he never committed the offence. PW 1 was to give evidence that was cogent and consistence.

40. Punishment under *Sexual Offences Act* was very stiff and had the potential of curtailing and/or limiting people's liberties for unusually long periods. A court therefore had to be satisfied that sufficient evidence had been adduced to prove that a person had committed an offence before returning a verdict of "guilty."

41. From the facts of the case, the Trial Court erred for having concluded that sexual offences could be proven by oral and circumstantial evidence and in the absence of medical evidence. Indeed, although a court could rely on the evidence of a single witness as was stipulated in Section 124 of the *Evidence Act*, there had to be some corroborating evidence as sexual offences were one person's word against the other.

42. In the instant case, this court was hesitant to conclude that the Prosecution had proven its case against the Appellant to the required standard, which in criminal cases, was proof beyond reasonable doubt. The Appellant may very well have defiled PW 1 but the law was the law. A case had to be proven beyond reasonable doubt which was not the case herein.

43. In the premises foregoing, this court found and held that Grounds of Appeal No (1), (2), (3) and (4) of the Petition of Appeal were merited and the same be and are hereby allowed.

II. Sentencing

44. As this court had found that the Prosecution did not prove its case to the required standard, it did not analyse the submissions that the Appellant and the Respondent herein had filed with regard to

sentencing. Suffice it to state that the Appellant herein was convicted under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* Cap 63A (Laws of Kenya).

45. Notably, Section 8(3) of the *Sexual Offences Act* provides that:-

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

46. The Trial Court sentenced the Appellant to fourteen (14) years imprisonment which was lower than the twenty (20) years imprisonment that was provided therein. Had this court found him to have been guilty as charged, it would not have reduced the fourteen (14) years imprisonment as it was way below the prescribed mandatory minimum. Whether the court could have enhanced it if it had convicted him was dependent on if he would have been given a Notice of Enhancement by the Respondent herein so that he could have made an informed decision as to whether to proceed with the Appeal or not. However, as the issue of his sentence was now moot, the court did not wish to say no more on it.

Disposition

47. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 15th December 2023 and filed on 24th January 2024 was merited and be and is hereby allowed. The conviction and the sentence be and are hereby set aside and/or vacated as they were both unsafe.

48. It is hereby directed that the Appellant herein be and is hereby released from custody forthwith unless he be otherwise held for any other lawful cause.

49. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF JUNE 2025

J. KAMAU

JUDGE