MOI v Republic (Criminal Appeal E045 of 2023) [2025] KEHC 8985 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8985 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E045 OF 2023

TW OUYA, J

JUNE 26, 2025

(FORMERLY KIAMBU HCCRA E054 OF 2022)

BETWEEN

MOI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. A.M. Maina (Senior Principal Magistrate) in Thika Chief Magistrate's Court Sexual Offence Case No. SO 113 of 2018 delivered on 2nd December 2020)

JUDGMENT

1. The appellant was charged with the offence o defilement contrary to Section 8 (1) (3) of the *Sexual offences Act*. The particulars of the offence are that on diverse dates between the month of July and August 2018 at Ruini within Kiambu county intentionally and unlawfully caused his penis to penetrate the vagina of C.N. a child aged 14 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between the months of July and August 2018 at Ruini village within Kiambu county wilfully and unlawfully caused contact with his penis with the vagina of C. N., a child aged 14 years.
3. The appellant denied the charges and the matter proceeded to full trial.
4. The prosecution called six witnesses and at the end of the trial the court convicted the appellant on the main charge and sentenced him to twenty years imprisonment.
5. Aggrieved with both the conviction and sentence, the appellant filed the instant appeal on the following grounds:

i. The learned magistrate erred in law and in facts in his failure to observe that the elements of the offence of defilement were not conclusively proved as required by law.

ii. The learned magistrate erred in law by failing to observe that the prosecution had failed to prove its case to the standard required by law that is beyond reasonable doubt.

iii. The learned magistrate erred in law by failing to observe that the case for the prosecution contained contradictions and inconsistencies contrary to Section 163 of the *Evidence Act*, CAP 80 Laws of Kenya

iv. The learned magistrate erred in law by failing to observe that the evidence relied upon by the prosecution fell too short of the certainty required in cases of this nature

v. The learned magistrate erred in law by failing to observe that the provisions of Section 169(1) of the CPC were contravened.

6. The Respondent opposed the appeal and prayed that the appeal be dismissed.

7. PW1, EN, testified that on 12th July 2018 she sneaked back to their house to pick her clothes, since her mother had chased her out of the house. On entering the house, she found the appellant in bed with her sister, PW2. The appellant was in the bed that she shared with her siblings. She said that the appellant was hr step father and used to live with them. She opened the curtain covering the bed area and the accused jumped out of bed. PW2, who is mentally challenged, did not have her underpants on. PW1 went out of the house and infirmed her aunt about the incident. Her aunt thereafter informed PW1's mother about it but PW1's mother defended the appellant and admonished her to be wary of breaking their home. PW1 then reported the incident to PW2's teacher who commenced investigations into the matter. The appellant was then arrested. PW1 had known the appellant for a year prior to the incident.

8. The victim, CN, testified as PW2. She gave unsworn evidence stating that she is a 14-year-old pupil at [Particulars Withheld] primary school. She testified that she used to live with the appellant together with her mother and sisters. The appellant would have sex with her on Sundays when her mother was away but she would not tell anyone. but he did manners to her. She pointed to the accused in the dock as the one who would touch her breast. The appellant would tell her to remove her pants and then proceed to defile her. She told PW1 that the appellant used to defile her. She was taken to Ruiru hospital for treatment. She denied being defiled by a certain P and insisted that it is the appellant who had defiled her.

9. PW3, TNN, testified that on a certain Monday in October 2018 she was doing household chores when police officers visited her claiming that one of her children had been defiled. She accompanied them to the hospital where PW2 was examined and found to have been defiled. PW2 was born on 24th August 2004. She says that the appellant was her husband and he was living in her house.

10. PW4, Jane Nyambura Macharia, testified that she is a volunteer children officer and social worker in Ruiru. She states that in August 2018, she was educating parents on parenting their young girls. After having such a session around Fort Jesus area on 24th November 2018, one lady approached her and told her that she was a landlord and one of her tenant's daughter was a victim of defilement. She proceeded to the said house and interviewed the girl who told her that her step father had been touching her breasts and defiling her. Her sister also conformed the position. She then informed the police and they proceeded to the girl's home. The girl was also escorted to hospital in the company of her mother and upon medical examination, it was determined that she had been defiled. She was present when the appellant was arrested and PW2 was placed at Ruiru Rehabilitation Centre. She did not know the appellant prior to the incident.

11. PW5, Rose Waruguru, a clinical officer at Ruiru level 4 Hospital, testified that PW2 visited the health facility on 26th November 2018 having been brought from [Particulars Withheld] primary school with a history of being defiled by a person known to her. PW2 was not conscious of her surrounding as she was mentally challenged. Medical examination revealed that her hymen was missing. No injuries were noted and she had a whitish discharge from her vagina. The urine test revealed no abnormalities. She administered medication and referred her for counselling. She noted that the child was dirty and her inner wear was also unclean. She clarified that the discharge on the minor's vagina could either be the result of failure to take medication after sexual assault or living on unhygienic conditions.

12. PW6, Cpl. Mary Ngina Mutua, the investigating officer testified that in 2018 she was attached to Ruiru police station gender desk. On 26th November 2018 she was in the office when the OCS informed her that a child with a mental disability had reportedly been defiled. She proceeded to PW2's home while in the company of PW4 and another police officer. The family lived in a one roomed house. She accompanied PW3 to Ruiru police station where the report on defilement was booked before they proceeded to Ruiru subcounty hospital. Thereafter, she recorded the witness statements of the prosecution witnesses. The victim informed her that the appellant would defile her whenever PW3 was away. PW1 on the other hand informed her that she saw the appellant touching the child's breast. She called the child outside and PW2 informed her that the appellant used to touch her breasts and defile her. She produced the child's baptismal certificate which showed that she had been born on 24.08.2005. the appellant was arrested by police officers from Gitambaya Police Post. She clarified that though PW2 kept referring to the appellant as P, she positively identified the appellant as the one who had defiled her when the appellant was in the cells.

13. At the close of the prosecution case, the court ruled that a prima facie case had been established against the appellant. The appellant elected to give s worn statement. He did not call any witness. He testified that he lives in Ruiru, Fort Jesus as a casual labourer and a carpenter. On 26th November 2018 he left his house at round noon, he was living with PW2 and PW3, and proceeded to work. He came back at around 5.00pm and found PW1 and her brother N. He was informed that PW2 and PW3 had left with some police officers. Shortly thereafter, police officers came to where he was and arrested him and escorted him to Ruiru police station. He found PW3 at the report office. He was then booked in the cells, his finger prints were taken and he was subsequently arraigned in court to plead to charges of defilement. He alleged that he had been framed by PW1 as there was bad blood between them.

14. The appeal was canvassed through written submissions.

15. The Respondent contended that the prosecution proved all the ingredients of the offence of defilement beyond reasonable doubt. Also, there were no inconsistencies or contradictions in the prosecution's case as alleged by the appellant. Finally, the Respondent submitted that the trial court complied with the provisions of Section 169 of the *Criminal Procedure Code*.

16. I have considered the proceedings before the trial court, all the submissions and the grounds of appeal. The issue for determination is whether the charge against the appellant was proved beyond any reasonable doubt.

17. This is a first appellate court. The duties of this 1st appellate court are well laid down in the decisions of this court and those of the Court of Appeal. In Okeno –v- Republic (1972) E.A 32. It was held that:

> 'The duty of the first appellate court is to subject the evidence to a fresh evaluation, analyse it and come up with its own independent finding while bearing in mind that it did not have

a chance to see the witnesses when they testified and leave room for that. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."

18. In Shantilal M. Tuwala –v- Republic (1975) E.A 57, the court stated:

> 'It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own finding and draw its own conclusions; only then can it decide whether the magistrate's findings would be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

19. The appellant was charged under Section 8 (1) (3) of the *Sexual Offences Act*, which provides:

> 'A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 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."

20. Under this provision, the ingredients which the respondent is supposed to prove in order to secure a conviction are:-

    i. Age of the victim

    ii. Penetration

    iii. Identification or recognition of the perpetrator

21. 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."

22. From the evidence on record the age of the minor in this case was proved to be 14 years. PW2 testified that she was 14 years old. PW3 confirmed the same by testifying that the minor was born on 24th August 2004, PW6 the investigating officer produced the baptismal certificate Exhibit 3, which confirmed that the minor was born on 24th August 2004. I have no doubt in my mind that this element has been proven.

23. The second element is the second ingredient is penetration which is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."
>
> The same section defines "genital organs" to include; "the whole or part of male or female genital organs and for purposes of this Act includes the anus."

24. The minor in her defence said that the appellant often defiled her whenever her mother was away. PW1 testified that on 12th July 2018 she sneaked back to the house and found the appellant defiling PW2. She thereafter informed her aunt about it. Curiously, though PW1 alleges that the incident occurred in July, it is only in November that PW4 learnt that the minor was a victim of defilement and the necessary steps were taken to arrest the appellant. In fact, the Charge Sheet itself says that the appellant allegedly defiled the minor in on diverse dates between July and August 2018. None of the prosecution witnesses has led evidence to prove that the appellant actually defiled the minor between July and August 2018. PW3, the other to the minor, testified that in October 2018, she was visited by police officers who informed her that her daughter had been defiled.

25. Out of all the witnesses called by the prosecution, only PW1 testified to the fact that the offence in question occurred on 12th July 2018. If PW1's testimony regarding the defilement of 12th July 2018 is to be believed, one wonders why it took a whole four months before the appellant was arrested or the minor taken to hospital. Also, even though PW1 alleged that PW3 defended the appellant when confronted with the fact that the appellant was defiling the minor, the aunt whom she allegedly informed that the appellant had been defiling the minor was not called as a witness.

26. Although PW5 testified that there was vaginal discharge noted on the minor when she was subjected to medical examination on 26th November 2018, she clarified that the same could be the result of untreated sexual assault or poor hygiene. The medical evidence conducted in November does not offer much to prove that there was an act of penetration between the appellant and the minor on diverse dates between July and August 2018.

27. In the case DS v Republic [2022] eKLR, the court observed at paragraph 19 that:-

> '19. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

28. Section 124 of the *Evidence Act*, Cap 80 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."

29. In the present case, the victim gave evidence after being affirmed. She did not testify to a specific incident of defilement, instead, she said that the appellant used to defile her every time her mother was away. That the appellant would ask her to remove her pant, touch her breasts with his hands and then proceed to defile her. PW2's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex.

30. In Julius Kioko Kivuva v Republic [2015] KEHC 712 (KLR) the court in addressing itself to the element of penetration stated thus:-

> 'Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."

31. Also, Kemei J in P M M v Republic [2017] eKLR stated that;

> 'As noted in the case of Julius Kioko Kivuva =vs= Republic (Machakos HCCRA NO. 60 OF 2014) that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. I share the same findings of the learned justice Nyamweya in the above stated case. It was necessary for the Complainant to provide the vivid details of the sequence of how the rape ordeal took place.'

32. PW2's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place in the absence of further evidence and details as to what actually happened. Even though PW1 also testified that she saw PW2 in bed with the appellant, she did not specify exactly what she saw the appellant and PW1 doing. Therefore, even PW1 herself did not see the appellant having sex with the minor. Therefore, there was nothing else to link the Appellant to the commission of the offence given the fact that the complainant explanation as to what transpired between her and the Appellant was vague.

33. In addition, it is also my finding that the medical evidence by PW5 was not sufficient corroboration as to the defilement of PW2, this is because the medical examination was done on 26th November 2018 when the alleged act of defilement occurred in diverse dates between July and August 2018. In the circumstances, the medical evidence could not conclusively link the Appellant to the offence.

34. PW5 noted that:-

> 'On examination, according to her treatment notes, her hymen was missing,. No injuries was noted. She had a whitish discharge from her vagina. I was satisfied that she had been defiled.

35. There is no reason preferred by PW5 for forming an opinion that PW2 had been defiled. She did not describe whether the whitish discharge was seminal fluid, or vaginal discharge. I note that on re examination, she mentioned that the discharge could have been the result of failing to seek treatment after sexual assault or poor hygiene. It is now well established in law that a missing hymen is not prima facie evidence of defilement. In David Mwingirwa vs Republic (2017) eKLR, the Court of Appeal observed:

> " From that reasoning of the learned judge, it would seem that the certainty or confidence with which the [Court]asserted that there was overwhelming evidence of L K having engaged in sexual activity came in no small measure from what she considers the corroboration afforded by the evidence of PW4 on the broken hymen. According to the learned judge, PW4 was of the view that "there was continuous process of defilement." With respect, we do not think that this was entirely correct. The Clinical Officer PW4 noticed that the hymen was broken but there were no other injuries to L K's genitalia. Nor were there spermatozoa or any male emission in her vaginal carnal. He merely stated that the broken hymen was suggestive of an

ongoing process of defilement. He did not suggest that his said conclusion was based on any other observation beyond the broken hymen. Then this brings to the fore the issue raised by the appellant whether, in the absence of any other medical or physical evidence, a broken hymen is conclusive proof of penetrative sexual intercourse as PW4 seemed to suggest (his remarks in the P3 and his testimony in Court do not go beyond a suggestion) and as the learned judge seemed to have concluded, we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen." Emphasis added."

36. I have noted from the proceedings of the trial court that the trial court did not record any reasons for believing the statement of the minor. Moreover, PW1 and PW3 testified that the minor was mentally challenged. This position was confirmed by PW5 who observed that the minor was not conscious of the time and place during her medical examination. Therefore, the trial court needed to record reasons for believing PW2's testimony.

37. The record shows that though the trial court considered the appellant's defence of being framed by PW1, the same was disregarded on the basis that neither PW3, PW4, PW5 or PW6 had any reason to frame the appellant. Remarkably, without the evidence of PW1, there would be no testimony of PW3, PW4, PW5 or PW6. This is because it is PW1 who allegedly initiated the chain of events that led to the arrest of the appellant for defiling PW2, including informing PW4 about it.

38. The main question that emanates from this is that, if PW1 is acting in good faith, how come she witnessed the incident on 19th July 2018 but waited until 24th November 2018 to inform, PW4 about it? What is it that was going on between July and November that was so important or urgent as to prevent PW1 from reporting the incident to any other person? Or better still, what situation triggered PW1 to report the incident of July in November 2018?

39. PW3 testified that PW1 ran away from home at some point, this is corroborated by both PW1 and the appellant who say that there is a time that PW1 was not living home with them. The appellant in his defence testified that PW1 returned home in October and allegedly framed him in November for an offence purportedly committed between July and August. The appellant explanation sounds cogent and believable enough to explain the reason why an act witnessed by PW1 on 19th July 2018 came to gain traction in November 2018.

40. I therefore find that the prosecution failed to prove the element of penetration beyond reasonable doubt, and it was therefore unsafe for the learned trial Magistrate to convict the Appellant on the evidence on record.

41. The issue of identity is not in dispute as the appellant and PW2 know each other. They used to live together prior to the appellant's arrest. In the case of P Musau Mwanzia V R (2008) eKLR in the Court of Appeal, the Court stated:

> " In the well-known case of R vs Turnbull (1976) 3 ALL ER 549 at page 552, it was stated: "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger.........Such knowledge need not be for a long time but must be for such time that the witness, in seeing

the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."

42. The appellant has raised concern that the prosecution case was riddled with inconsistencies. In MW v Republic [2019] eKLR, the court stated that:

> "The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.

43. Similarly, in the case of Philip Nzaka Watu v Republic (2016) CR APP 29 of 2015, the stated as follows:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.
>
> However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

44. The role of this court is to be in the shoes of the Trial Court in evaluating, assessing and reconciling the evidence and to determine whether the said contradictions, discrepancies and/ or inconsistencies are prejudicial to the Appellant.

45. The inconsistency as to the date of the offence are material as the appellant ought to know the specific date in which the act that causes penetration was committed. From the foregoing, I hold the opinion that prosecution failed to prove beyond reasonable doubt that the appellant committed an act that causes penetration of the minor, PW2, on diverse dates between July and August 2018.

46. In light of my observations above, I also doubt whether there was any sexual conduct between the appellant and PW2 that would fall under the category of committing an indecent act with a child contrary to Section 11 of the *Sexual Offences Act*.

47. The upshot of the matter is that this appeal succeeds in its entirety. I set aside the conviction and quash the sentence. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH JUNE, 2025.

HON. T. W. OUYA

JUDGE

For Appellant....Present at Kamiti Medium

For Respondent.................MS Torosi

Court Assistant....................Brian