Abdi v Republic (Criminal Appeal E046 of 2024)
[2025] KEHC 8979 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8979 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E046 OF 2024

JN ONYIEGO, J

JUNE 25, 2025

BETWEEN

JIMALE MOHAMUD ABDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence arising in SPM's Court at Wajir in Criminal Case Number E019 of 2024 delivered on 11.10.2024 by Hon. Xavier Baraka (R.M))

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on 01.08.2024 at around 0900hrs in Wajir West Sub – County within Wajir County he intentionally and unlawfully caused his penis to penetrate the vagina of H.A., a girl aged 14 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*. The particulars were that on 01.08.2024 at around 0900hrs in Wajir West Sub – County within Wajir County he intentionally touched the vagina of H.A., a child aged 14 years with his penis.

3. He also faced a second Count of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The particulars were that on 01.08.2024 at around 0900hrs in Wajir West Sub – County within Wajir County he assaulted H.A. causing her actual bodily harm namely; bruises on the left cheek, swollen lower lips and injured left ear.

4. He pleaded not guilty to the charges, and the case proceeded to full trial with the prosecution calling 8 witnesses. Placed on his defence, the appellant gave sworn testimony.

5. In a judgment delivered on 11.10.2024, the appellant was convicted and sentenced to 22 years' imprisonment in reference to Count I and 1 year in regards to Count II. The sentences were to run concurrently.

6. Being dissatisfied with both the conviction and the sentence, he appealed to this court vide a petition of appeal amended in March, 2025 in which he raised the following grounds of appeal that;

    a. The learned trial magistrate erred in fact and law in convicting and sentencing him yet the prosecution's evidence was replete with contradictions and inconsistencies.

    b. The learned trial magistrate erred in fact and law in convicting and sentencing him yet the witnesses were not credible.

    c. The learned trial magistrate erred in fact and law by not considering that the prosecution did not prove the ingredients of defilement beyond any reasonable doubt.

    d. The learned trial magistrate erred in fact and law by disregarding his defence.

    e. The learned trial magistrate erred in law and fact by meting out a harsh and excessive sentence in the circumstances.

7. PW1, H.A.M testified that on 01.08.2024, the appellant found her grazing goats, greeted her and then asked her whether she had seen his goats which were allegedly lost. That as she walked away, the appellant started following her and upon catching up with her, he stepped on her face and then proceeded to choke her. It was her evidence that the appellant dragged her into the bush where he undressed her while beating her before defiling her. She testified that the appellant defiled her once more in the afternoon when he tore her clothes and then tied her legs and hands using pieces of her torn clothes.

8. It was her evidence that upon the appellant leaving, she managed to free herself and proceeded to a nearby homestead where she found the appellant who ran away upon seeing her. That a lady who was at the homestead one H who is also her aunty gave her clothes before calling her relatives who came and took her to the hospital. She stated that the appellant had gone to the said homestead to seek for water and so, when she narrated to her the incident, the lady screamed prompting two men to chase the appellant. That the men traced the appellant who was arrested and consequently taken to the nearby police station where she identified him. She stated that the appellant was still in the very t-shirt that he was in at the time when he defiled her.

9. PW2, SBM, a cousin to PW1 testified that on the material day, the appellant visited her home seeking for drinking water. That she heard him ask for water and so, she directed the children to give him some. According to her, she did not see the face of the appellant. She further stated that PW1 arrived naked prompting the appellant to run away and that by that time, she only saw the appellant in a white t-shirt. She screamed thus attracting people who proceeded to chase the appellant. On cross examination, he stated that the t-shirt that the appellant wore on the day he was before court was the very t-shirt he wore on the material day.

10. PW3, David Wafula, a clinical officer stated that he filled the documents except the PRC which was filled by Mr. Kirui. According to him, when the complainant was presented at the hospital, she was bleeding on the right ear. That there was a laceration from the jaw and neck and her clothes were torn on the front. He told the court that upon checking her private parts, he found that the labia majora was swollen, she had sand in her vagina, there was discharge on the vaginal wall and hymen was broken but with no blood. The external walls (labina) were inflamed and so he carried out a pregnancy test which turned negative in as much as blood test showed infection. He stated that the complainant

had neck bruises and so, he recommended anti biotic, emergency pills, post exposure prophylaxis and counselling to PW1.

11. PW4, Osman Ali Gedi, assistant chief Wajir west testified that he received information in relation to the incident and therefore, organized two search groups to follow up footsteps from the scene. That one team tracked footsteps from where the appellant allegedly came from while the other followed the footsteps of the appellant allegedly coming to the scene. He stated that being in the team that tracked the alleged footsteps from where the appellant came from, the same led them to the home of one Abdullahi. And while at Abdullahi's place, he informed them that he knew the appellant as he had been brought by one Hamud who informed him that the appellant was seeking for work.

12. That Hamud further informed them that the appellant had big ears, a t-shirt that had a DG writing, grey shirt and a red kikoi. He went further to state that the appellant had boarded a motor vehicle and had left for Bojire and so, on the following day, they followed more footsteps leading to Bilibur where they arrested him. According to him, the appellant is an orphan and further, a jailbird.

13. Pw5, HMG, PW1's mother testified that on the material day, she had asked her 14-year-old daughter to take their goats to the grazing field. That unfortunately, she got defiled. That she got concerned when PW1 failed to return home by 3.00 p.m. as it was the norm. She stated that Abdi Hassan called and informed her that PW1 had been defiled and that some family members were the ones who had taken charge of the goats. She stated that PW1 also informed her of the incident.

14. PW6, Yussuf Hassan Arale testified that on the material day, he was called by Abdi Hassan who informed him of the incident herein. That the appellant had been given goats to take care but instead neglected them. It was his evidence that he remained with PW1 at the police station and that she had injuries on the right ear, she could not walk properly and that her mouth had a bulge. He told the court that the appellant was still in the shirt that he was in when he was arrested. It was his testimony that it was the victim who revealed to him how the appellant had attacked him.

15. PW7, HHM, a 12 year old testified that he remembered that the appellant previously sought for water at their home. That the appellant looked very worried and so, she enquired from him why he seemed worried but the appellant remained quiet. She stated that all over sudden, PW1 showed up naked and when the appellant saw her, he ran away. She further stated that PW1 informed them that the appellant had defiled her. It was her evidence that she identified the appellant in the parade as the person whom she saw on the material day and further, as the person who allegedly defiled PW1.

16. PW8, No. 22XX40 Cpl. Abdikadir Hussein Mohamed, the investigating officer reiterated the evidence of the other prosecution witnesses and further stated that the appellant prior to defiling the complainant he assaulted her thus injuring her. It was his evidence that the appellant tied PW1's hands and walked with her for a distance of 6 to 8 kilometers and when he approached some settlement, he tied PW1 on a tree and went to the manyatta to ask for water. While there, PW1 showed up and when the appellant saw her, he ran away. He stated that the appellant was on the run and was only arrested on 03.08.2024 at Bil-il Burbur by foot trackers. That he organized for an ID parade assisted by Chief Inspector Muitire Geoffrey on 30.08.2024 from 1000hrs to 1020hrs. That at the parade, the appellant was positively identified by PW7 who touched him as he was standing between numbers 4 and 5 of the participants of the ID parade.

17. DW1, Jimale Mohamud Abdi in his sworn testimony denied defiling the complainant. He stated that on 01.08.2024 and 30.08.2024, he went looking for work at Gurder. That he reached a home where he was given food. He stated that he was looking for work as a shepherd but before he left the home, all over sudden, many people arrived and started beating him. He was later taken to the hospital for treatment and then charged with the offence herein.

18. The appeal proceeded through written submissions. The appellant submitted that the trial court erred in reaching a finding against the weight of the evidence adduced. It was his submission that in management of sexual offence cases, the first document to be filled is the PRC as the same informs the information filled in the P3 Form. That in this case, the P3 Form was filled on 01.08.2024 while the PRC 03.08.2024, two days later. That the same was not only irregular but also ought not to have been admitted as forming evidence.

19. It was his submission that the complainant having been found to be infected, the same offered a golden opportunity for him to be tested as well so as to prove that indeed the said infection emanated from him. It was his contention that, it could not authoritatively be stated that he defiled the complainant as he was not tested. The appellant also stated that ordinarily, identification parade is usually done before a suspect is arraigned in court. That contrary to the foregoing, the appellant herein was presented before the court, hearing proceeded and along the way, subjected to an identification parade. That after PW2 testified, the alleged minor who allegedly served the appellant water was thus called to identify him in the said identification parade.

20. That this was not only against the law but also against his rights as an accused person. The prosecution was faulted for having waited to conduct an ID parade that was meant to rectify its case noting that the same had gone south. The appellant thus relied on the case of MTG vs Republic, Criminal Appeal No. E067 of 2021 [2022] KEHC 189 where the court held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial.

21. It was also urged that the prosecution witnesses were not credible for the reason that, the complainant could not describe the appellant save for his dental arrangement. The appellant thus relied on the case of Kimani Ndung'u vs Republic [1979] KLR 282 where the court held that:

> " The witness whose evidence is proposed to rely should not create an impression in the mind of the court that he/she is not straight forward person or raise suspicion about his/her trustworthiness or do or say something which indicates that he/she is a person of doubtful integrity and therefore unreliable which makes it unsafe to accept his/her evidence".

22. He also submitted that not only was his defence disregarded but also the subsequent sentence meted out being inappropriate and excessive. He urged this court to allow the appeal as prayed.

23. The respondent filed submissions dated 20.03.2025 urging that it is opposed to the appeal for the reason that the case was proved to the required standard. Mr. Owuor, counsel for the respondent urged that prosecution had proved the elements of the offence inter alia; age, penetration and identification. Reliance was placed on the case of Mwalango Chichoro Mwanyembe vs Republic [2016] eKLR. That the voire doir conducted by the court revealed that the complainant was 14 years old. That the same was corroborated by the medical documents such as the PRC Form and treatment notes which denoted that the complainant was indeed 14 years old.

24. On penetration, prosecution counsel contended that apart from the evidence of the complainant, the medical report by PW3 corroborated the fact that indeed, the complainant was penetrated. Learned counsel further contended that the ID parade did corroborate the testimony of the complainant. In the same breadth, it was contended that PW1 and PW2 managed to identify the appellant through the t-shirt that he was wearing when he defiled PW1 as the same resembled the t-shirt he was wearing when arraigned before the court.

25. In regards to count II, counsel urged that noting that identification was proper, it is clear that the appellant was responsible for assaulting the complainant. On sentence, counsel relied on the case of

R vs Ruth Wanjiku Kamande, criminal Appeal No. 102 of 2018 where the court held that there are circumstances when a court is at liberty to mete out the mandatory sentences. To that end, this court was urged to uphold the finding of the trial magistrate.

26. This being the first appellate court, I am guided by the principles enunciated in the case of Okeno v Republic (1972) EA 32, where the court of appeal set out the duty of the first appellate court as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA 3365) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion".

27. I have considered and analyzed the evidence that was tendered before the trial court by both the appellant and the prosecution, the grounds of appeal, and the written submissions by the parties herein. The issues for determination are two pronged;

a. Whether the prosecution proved its case to the required threshold;

b. Whether there was positive identification

c. Whether the I/parade was properly conducted

d. Whether the defence of the appellant was considered.

e. Whether the sentence was appropriate.

28. The Appellant 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. To prove the offence charged, the prosecution was duty bound to establish beyond reasonable doubt all the elements of defilement as was stated in the case of George Opondo Olunga vs Republic [2016] eKLR that the ingredients of an offence of defilement are: i. Age of the victim. ii. Penetration. iii. Positive identification of the perpetrator.

29. In the case of Hadson Ali Mwachongo vs Republic [2016] eKLR, the Court of Appeal held that: -

> " The importance of proving the age of a 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 victim. In Alfayo Gombe Okello v Republic Cr. App. No. 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 the 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. That must be so because dire consequences flow from proof of the offence under section 8(1)."

30. The age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR that:

> " ... 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."

31. The age of a victim of defilement may be proved through oral evidence of the child if the child is sufficiently intelligent - see Edwin Nyambogo Onsongo case (supra). In this case the complainant testified that she was 14 years old and the same was corroborated by her mother. The trial magistrate who saw and further conducted voir doir was also convinced that the complainant was a minor aged 14 years. Additionally, the PRC Form and treatment notes all showed that the complainant was aged 14 years. I therefore find that the age of the complainant was proved to be 14 years.

32. On penetration, the same is defined under Section 2 of the *Sexual Offences Act* to mean: 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. Penetration, as an essential ingredient of the offence, must be proven beyond reasonable doubt. Penetration can be evidenced through the victim's sole testimony or the victim's testimony corroborated by medical evidence. [See Bassita Hussein vs Uganda, Supreme Court Criminal Appeal No. 35 of 1995].

33. The prosecution produced treatment notes and the P3 Form as medical evidence in supporting the case. The examination, as earlier outlined, showed that the complainant's labia majora was swollen, there was discharge on the vaginal wall and the hymen was broken but with no blood. The external walls (labia) were also inflamed. It is important to note that the absence of spermatozoa does not rule out penetration and further, noting that the appellant was not checked to be having infection as that of the complainant also does not rule out penetration.

34. On identification, in the case of Wamunga vs Republic [1989] KLR 424 at 426, the court held that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.

35. The trial court weighed the accuracy concerns regarding the perpetrator's identity. From the record, I note that apart from the court stating the reasons to support the ingredient on identification, it is enough to state that the process of ID parade was flawed. I say so for the reason that Identification parades are meant to test the correctness of a witness's identification of a suspect. This position was appreciated in Njihia vs Republic [1998] KLR 422 which held: -

> "...If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

36. The appellant faulted the identification parade on several fronts by arguing that the same was not only unfair but was also improperly conducted. That the same ought to have been conducted immediately after the arrest and prior to the appellant being arraigned in court. It is unfortunate that it was the court which directed the Investigating officer to conduct the ID parade long after the case had proceeded and six witnesses testified. Infact, it was hurriedly conducted in the court cells. The officer who conducted

the parade never testified. I totally agree with the appellant that the parade conducted if at all did not meet the threshold of a proper ID parade.

37. The purported parade was a sham by all standards and quite irregular. The court had no business stepping into the arena of litigation by assisting the prosecution to fill gaps in the middle of a trial.

38. The procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the *National Police Service Act* No. 11A of 2011. These procedures were explained in R vs Mwango s/o Manaa [1936] 3 EACA 29. The rules include:

    a. The accused has the right to have an advocate or friend present at the parade;

    b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

    c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;

    d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);

    e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

    f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

    g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

39. I have evaluated the evidence and the findings thereto; the appellant was identified by the complainant as she stated that she managed to see his dental formula which was not properly arranged. Additionally, the time spent by the two during the ordeal was sufficient to enable identification noting that the offence was perpetrated during the day. Besides, pw2 corroborated the evidence of pw1 that while serving the appellant with water, pw1 appeared while naked and immediately pointed at the appellant as the person who had defiled her thus prompting the appellant to run away. Pw2 further corroborates pw7's testimony who stated that while at her home the appellant sought for some water to drink and while there pw1 appeared while naked. That pw1 pointed at the appellant as the one who had defiled her.

40. However, other than the identification parade, there is also evidence of recognition as defined earlier, which is, where a witness states he/she could recognize a previously seen person. A common thread running across the prosecution evidence is that the complainant spent quite some time with the appellant and further, she was able to see his dental formula which she said was improperly arranged and not to mention that the offence was committed during daytime thus identification in my view was proper.

41. Although the three witnesses did not appear before a properly conducted ID parade, the chain of events leading to the arrest of the appellant and the description of the manner in which he was dressed which was similar to the dressing in which he was dressed while in court is sufficient corroboration. I am fully aware that in certain circumstances dock identification may be relied on to convict. See Muiruri & others versus Republic (2002)1KLR 274 where the court of appeal held that not all dock identification is worthless. The trial court was satisfied that identification was positive and therefore sufficient.

42. From the set of facts and circumstances under which the offence was committed and eventually the appellant arrested, it could not have been a case of suspicion but positive identification.

43. Although direct evidence was only that of the victim alone, section 124 of the *evidence Act* is clear that in sexual offences, a court can safely convict based on the evidence of the victim as long as the court is satisfied of the truthfulness of the witness. See JWA V Republic (2014) eKLR where the court held that corroboration is not mandatory in in sexual offences pursuant to section 124 of the *Evidence Act* as long as it is satisfied of the victim's truthfulness.

44. Similar position as above was held in the case of Mohamed v Republic (2006)2 KLRR 138. In the circumstances of this case, the evidence on record coupled with the dock identification is sufficient proof that the appellant was properly identification. It was based on the description of the appellant given by pw1, pw2 and pw3 that the appellant was arrested. There was no grudge alleged by the appellant. There was no reason to frame up the appellant.

45. As to the failure by the court to consider his defence, the same is not correct as it found that the defence given was a mere denial. As a consequence of the above analysis it is my finding that the prosecution proved to the required standard all the ingredients of the offence of defilement contrary to Section 8(1), as read with Section 8(3) of the *Sexual Offences Act*. Accordingly, the appeal against conviction is dismissed.

46. On the charge of assault, section 251 of the *Penal Code* states that:

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

47. The essential elements of the offence of assault causing actual bodily harm are;

i. Assaulting the complainant or victim,

ii. Occasioning actual bodily harm.

48. I have carefully evaluated the evidence adduced by the prosecution witnesses. The appellant was positively identified by the complainant as already explained elsewhere in this judgment. Thus in the case of Rex vs Donovan [1934] 2KB 498, Swift J stated: -

> " For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."

49. It therefore follows that the prosecution ought to show that the assault resulted in actual bodily harm, and that there must have been an intention to assault (mens rea) and the assault must have taken place (actus resus).

50. The complainant testified that the appellant dragged her into the bush, undressed her while beating her before defiling her. The same was corroborated inter alia by the medical officer who testified that when the complainant was presented at the hospital, she was bleeding on the right ear, there was a laceration from the jaw and neck. The same was corroborated by pw2, pw3, pw4, pw6', pw7 and pw8 all of whom saw the complaint immediately after the incident. It therefore points at the appellant to be responsible for the injuries sustained by the complainant during defilement and as such, I also find that the said count was also satisfactorily proven.

51. On sentence, the appellant submitted that the sentence of 20 years' imprisonment was way too harsh. The Court of Appeal of East Africa stated in Wanjema vs Republic [1971] EA 494 that: -

> " An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on the wrong principle, or the sentence is manifestly excessive in the circumstances of the case."

52. The appellant was convicted under Section 8 (3) of the *Sexual Offences Act*. Under that section, a person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years.

53. The Supreme Court has given guidance on minimum sentences under the *Sexual Offences Act* in Republic vs Joshua Gichuki Mwangi Petition No. E018 of 2023. The court held that where a sentence is set in statute, the legislature has already determined the course unless it's declared unconstitutional. From the foregoing, it is thus clear that the trial court exercised its discretion in sentencing and, in doing so, meted an appropriate, lawful sentence. The same in my view was also informed by the reason that the appellant is a repeat offender and the same notwithstanding, it was not proven that the sentence by the trial court was not legal.

54. It is my firm belief that the appellant needs time to reform.

55. The upshot of the above is that the appeal is without merit, and the conviction and sentence in both counts are hereby upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF JUNE 2025

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J. N. ONYIEGO

JUDGE