



**Benja alias Rasta v Republic (Criminal Appeal E025 of 2024)
[2025] KEHC 11845 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E025 OF 2024
MS SHARIFF, J
JULY 30, 2025**

BETWEEN

KEVIN MUINDI BENJA ALIAS RASTA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. G. Adhiambo
(SPM) in Bungoma S.O Case No. E010 of 2023 on 22nd November 2023)*

JUDGMENT

Background

1. This appeal is against the conviction and sentence to 25 years' imprisonment for defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. It was alleged that on 20th January 2023 at [Particular Withheld] village, in Bungoma North Sub-County, within Bungoma County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of ANL a child aged 11 years old.
2. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. It was alleged that on 20th January 2023 at [Particular Withheld] village, in Bungoma North Sub-County, within Bungoma County, the Appellant intentionally touched the vagina of ANL a child aged 11 years old with his penis.
3. The Respondent called Four (4) witnesses. The Appellant testified but did not call any witness.
4. The trial Court evaluated the evidence and made a finding that the Respondent had proved its case beyond reasonable doubt and convicted the Appellant on the main count. The Appellant was consequently sentenced to serve 25 years imprisonment.



Appeal

5. Dissatisfied with the conviction and sentence, the Appellant filed a petition of appeal listing seven (5) grounds of appeal:
 - a. That he did not plead guilty to the charges.
 - b. That the learned trial Magistrate erred in law and fact by convicting the Appellant based on contradictions and uncorroborated evidence from the Prosecution's side.
 - c. That the learned trial Magistrate erred in law and fact by failing to keenly observe circumstantial evidence.
 - d. That the learned trial Magistrate erred in law and fact by failing to adhere to Section 36 of the [Sexual Offences Act](#) No. 3 of 2006.
 - e. That the Appellant wishes to raise more grounds at the hearing of the appeal thereof.
6. As a first appellate Court, I must reconsider, re-evaluate and re-analyze the evidence on record and arrive at an independent conclusion while bearing in mind that I did not hear or see the witness as they testified. In *Kiilu & Another V Republic*, [2005] 1 KLR 174, the Court of Appeal set out the duties of a 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 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. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should 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.”

Respondent's Evidence

7. After a brief voir dire examination, the trial Court established the victim was intelligent, understood the importance and the effect of oath taking and ruled that she could give sworn testimony.
8. The victim testified as PW1 was born in 2011. A copy of her Birth Certificate indicated that she was born on 16th August 2011. PW1 told the trial court that she used to live with her grandmother, B, at [Particulars Withheld] within Bungoma County and was a grade 7 student.
9. It was the testimony of PW1 that on 20th January 2023, at 2p.m, her grandmother, BW, sent her to the posho mill to mill some maize and whilst on her way, the Appellant herein accosted her, held her, held her by the neck and covered her eyes. That when he uncovered her eyes and she was able to see him clearly as Kevin, who was a frequent visitor of her grandmother. The Appellant welded a knife and threatened to kill her if she were to disclose to anyone the act that he intended to do to her. He also threatened to pursue her to her home and torch their house up with it's occupants. This witness narrated how the appellant dragged her into a nearby sugarcane plantation, undressed and blindfolded her, place her on the ground while facing upwards and tied up her hands and legs using a sisal rope used to tether cattle. That the Appellant tied each of her legs to a shrub thus positioning them wide apart and he then proceeded to defile her. She demonstrated to the trial Court that the Appellant (pointing to her vagina) inserted his penis into her vagina. That after the ordeal the Appellant untied her and



left. The court record indicates that PW1 broke down as she narrated the incident. She told the court she then dressed up and still went to the posho mill and then headed home. She testified that members of the public who met her kept inquiry from her whether she was well but she kept quiet out of fear. Upon reaching home PW1 said that she found her grandmother, B, but she kept mute of malice. That later on her maternal grandmother, M, who had visited her at School and found her asleep in class and on advise from a teacher, took her to Hungai Dispensary, where upon examination of her genitals, the doctor informed her grandmother, M, that she had been defiled. And at that juncture PW1 narrated the defilement ordeal to the doctor and disclosed that it was Kevin who had defiled her. The doctor in turn informed her grandmother, M. That the latter then took her to the police station to lodge a report and record her statement. PW1 did a dock identification of the Appellant.

10. On cross-examination, she told the Court that she persevered the ordeal then went to the posho mill and while on her way people kept asking her whether she was okay. The court record indicates that PW1 left the dock in tears .
11. PW2, MWN, testified that PW1 was her granddaughter and that she had encountered PW1's grandfather who resided with PW1 and he had informed her that PW1 appeared distressed and he requested her to find time to talk to her with a view of establishing what her issues were, as she was not opening up to him. That on 29th January 2023, when she had taken her last-born daughter M2 for admission at Junior school, she met PW1 who was visibly afraid and stressed. PW1 did not make any disclosure to this witness. PW2 then requested a female teacher to talk to PW1 but the latter remained mum whereafter the teacher advised PW2 to take PW1 to Hungai Dispensary. This witness testified that she had noticed that PW1 had been laboring to walk as she was simply dragging her feet. On arrival at the dispensary PW2 requested the attending nurse to examine PW1. That PW1 then divulged to the nurse that the Appellant had raped her in the sugarcane plantation, while she was on her way to the posho mill. PW1 then reiterated the incident to her and begged her not to tell anyone as the Appellant had threatened to stab and kill her if she were to tell anyone about what happened. PW2 testified that she knew the Appellant well and that at one time he had sort for casual work from her. She said that upon receiving the sad information from the nurse she took PW1 to the police station to lodge a report and they recorded their respective statements. She identified the perpetrator as the Appellant before the Court.
12. On cross-examination, she told the Court that she is only reiterating what she had witnessed and the confirmation by the doctor who examined PW1, that she had been defiled.
13. PW3, No. xxxx PC Josiah Alukwi, testified that he was attached at Wabukhonyi Police Station and was the investigating officer in the matter. He recalled on 30th January 2023, at around 5.30 p.m. while he was at the said police station the victim while accompanied by her grandmother went and lodged a defilement report against the Appellant herein. The victim told him that she had been on her way to the posho mill on 20th January 2023, at around 2p.m. when the Appellant herein accosted her from behind, grabbed her by the hand and led her into a sugarcane plantation just beside the road. That she had fought off the appellant only for the Appellant to produce a knife from his trouser and threaten to kill her. Out of fear she gave in and went into the said sugarcane plantation with the Appellant who tied her up her hands with a rope, removed her inner pants and proceeded to defile the her severally. After the ordeal, the Appellant untied the victim's hands and proceeded to warn her of dire consequences if she reiterated to anyone what had happened. He told the Court that the Appellant threatened to kill the victim. According to him, PW2 received information of the defilement of the victim while on her way to church and she inquired from the victim's paternal grandmother about what happened but the latter had no information. This witness narrated the events as per the information recorded in the statements of PW1 and PW2. It was the testimony of PW3 that the defilement report was lodged



on 30th January 2023 while the defilement occurred on 20th January 2023. He received the medical report, issued the victim with a P3 form which was eventually filled at Naitiri Sub-County Hospital wherein the doctor confirmed that the victim had been defiled. That the Appellant was apprehended by members of the public and handed over to the police, after the news of his actions spread. This witness produced a copy of PW1's Birth Certificate as PEXH 1. It indicated that PW1 was born on 16th August 2011. He told the Court that the person who was arrested was the Appellant before the Court.

14. On cross-examination, he told the Court that the incident occurred during the day and that the victim had ample time to see the perpetrator and that his investigations revealed that the Appellant committed the offence.
15. PW4, Harrison Barasa, testified that he was a clinical officer based at Naitiri Sub-County Hospital and that the victim had visited the hospital on 31st January 2023 accompanied by a relative with a report of her defilement by a person well known to her and that the incident had occurred on 20th January 2023. On general examination he established that the victim's systems were normal and she was not under the influence of alcohol or drugs. On vaginal examination he established that the victim had normal female genitalia with no bruises or lacerations noted but there was no hymen. He noted there was no discharge on the labia. On laboratory examination, he established that her urine had puss cells and leucocytes indicating presence of an infection. The doctor concluded that the victim had been defiled. He produced in Court the victim's P3 form and treatment notes as PEXH 2 and 3 respectively.
16. On cross-examination, he told the Court that the Appellant was not availed for examination.

Appellant's evidence

17. When put on his defence, the Appellant denied the offence. He alleged that his arrested was due to lack of an operating license for his hotel business and that the police at Wabukhonyi Police Station had solicited for a bribe of Kshs. 10,000/= which he did not have and that was how he ended up in Court on tramped up charges. He maintained that he was arrested for lacking an operating license and uniform.

Analysis and determination

18. This appeal was canvassed by way of written submissions; Both parties filed their respective submissions.
19. I have carefully considered the grounds of appeal, the evidence presented before the trial Court, and the rival submissions of the parties herein. I have also read the judgment of the trial Court and the issues that emerge for my determination are whether the Respondent had established the charges brought against the Appellant to the required standard of proof; beyond any reasonable doubt, and if the answer to that issue is in the affirmative, then whether the sentence was appropriate or excessive in the circumstances.
20. The ingredients that need to be proved in the offence of defilement are;
 - i. Age of the victim
 - ii. Penetration
 - iii. Positive identification of the perpetrator



Age

21. In *Hadson Ali Mwachongo v 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).”

22. The victim herein told the Court that she was born in 2011 and was 12 years old. PW3 produced a copy of the victim’s Birth Certificate indicating her date of birth as 16th August 2011 (PEXH 1). As at the date of the incident, 20th January 2023, the victim was indeed 11 years 5 months 4 days old which simply means that she was still 11 years old, and I am satisfied that the child’s age was established.

Penetration

23. The next issue is whether the Respondent had proved penetration.

24. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

25. PW1 had narrated vividly how the appellant, a frequent visitor of her paternal grandmother, waylaid her forcefully into a sugarcane plantation while wielding a knife at her, tied her hands and leg up, with the legs apart and each tethered to a shrub whereupon he defiled her. That after the ordeal the Appellant untied her and left, but not before warning her not to make any disclosure to anyone. PW1, while in tears, demonstrated to the trial court the part of her body that the Appellant had forcefully inserted his penis in. PW1 was consistent and did not falter on cross examination.

26. In *Muganga Chilejo Saha v Republic* [2017], eKLR the Court of Appeal analyzed various cases where descriptive terms had been used to narrate sexual abuse.

“Naturally, children who are victims of sexual abuse are likely to be devastated by the experience, and given their innocence, they may feel shy, embarrassed, and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, “alinifanyia tabia mbaya” (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), “he used his thing for peeing” (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), “he inserted his “dudu” into my “mapaja”, (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), “he used his munyunyu”, (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement.”

28. PW4 who adduced the medical evidence told the trial court that he examined the victim on the 10th day of the occurrence, and no laceration was noted in the genitalia save for a missing hymen. He noted



no discharge on the labia. On laboratory examination, he established that the victim's urine had puss cells and leucocytes indicating presence of an infection. The doctor concluded that the victim had been defiled. He produced in Court the victim's P3 form and treatment notes as PEXH 2 and 3 respectively. The evidence by PW4 effectively corroborated the testimonies of PW1 and PW2. I am persuaded that penetration was proved beyond any reasonable doubt.

Positive identification of the perpetrator

29. The next key question is the identification of the perpetrator. PW1 told the Court that the incident happened during the day at around 2p.m at a sugarcane plantation beside the road while she was heading to the posho mill and that the perpetrator was the Appellant who was a frequent visitor of her grandmother. That the Appellant used to visit and stay late while conversing with her grandmother. He was thus well known to her. This was clearly recognition evidence. The cross-examination of PW1 did not displace her testimony on the time and place of occurrence of the sexual abuse and the identity of the perpetrator. The Appellant's claims of fabrication of the charges by the police cannot hold water. The appellant failed to establish a nexus between the complaint then lodged by the minor victim viz avis his allegations that he had been framed for failure to bribe the police who had discovered that he had been operating a hotel without the requisite licenses. There was no doubt that PW1 properly identified the Appellant as the perpetrator of the sexual assault. The trial Court gave reasons for discrediting the defence tendered by the Appellant.

30. One of the Appellant's grounds of appeal is that, he was not medically examined to connect him to the offence and that the trial court contravened the provisions of section 36 of the [Sexual Offences Act](#). This Court notes that PW1 eloquently rendered herself concerning the events of that afternoon, where she placed the Appellant at the scene and even recognized him. In any event a medical examination of the Appellant, 10 days post the incident would not have yielded any useful evidence.

31. In the case of *George Kioji Vs R Nyeri Criminal Appeal No. 270 of 2012 (unreported)* the Court of Appeal rendered itself as hereunder:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the [Evidence Act](#), Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

32. Section 36 (1) of the [Sexual Offences Act](#), 2006 provides thus:

“Evidence of medical, forensic and scientific nature

1. Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”



33. The wording of Section 36(1) above is couched in discretionary, rather than mandatory terms. The above provision was a subject of discussion by the Court of Appeal in the case of Robert Mutingi Mumbi Vs Republic, Criminal Appeal No. 52 of 2014 (Malindi) where the appellate Court of Appeal stated:

“Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms.DNA evidence is not the only evidence of which commission of a Sexual Offence may be proved.”

34. In the case of Martin Okello Alogo Vs Republic [2018] eKLR as cited in the case of Williamson Sowa Mbwanga Vs Republic the Court of Appeal stated:

“.....As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be ruptured.....It is partly for this reason that Section 36 (1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing.”

35. Premised upon the afore-cited authorities, it is clear that medical examination on the Appellant was not mandatory but discretionary as there are other ways of proving the commission of a sexual offence other than DNA profiling. The testimonies of the Respondent’s witnesses sufficed.

36. The Appellant contended that the Respondent’s evidence was replete of contradictions thus discrediting it’s case. In Joseph Maina Mwangi Vs Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

37. Therefore, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that, clearly, it will be of little effect and certainly would not necessarily mean that the witness is lying or that his/her testimony cannot be relied on. The Court must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness’s evidence or any part of his testimony. [See Nyakisia Vs R. E. A. C. A. Crim. App. 35-D-71; -/5/71].

38. This Court has subjected the evidence adduced before the trial Court to a fresh scrutiny and has not encountered any contradictory evidence on the part of the Respondent.

39. The Appellant also alleges the fact that trial Court relied on uncorroborated evidence to find a conviction. In the case of Khalif Haret Vs The Republic [1979] KLR 308, Trevelyan and Hancox, JJ pronounced themselves as hereunder:

“What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means “no more than evidence tending to confirm other evidence”. It is not, as the judge-



advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration.”

40. This court has already made a finding that penetration was proved by the evidence of PW1 as corroborated by the testimonies of PW2, her grandmother and PW4, a Clinical Officer from Naitiri Sub-County Hospital.
41. In any event a trial Court can, pursuant to the provisions of Section 124 of the *Evidence Act*, convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, in instances where the Court is persuaded by the veracity and credibility of the victim and records the reasons for such persuasion. PW1 was truthful, consistent and even broke down as she narrated the gruesome ordeal to the trial court. It is discernible from a reading of the record that the victim’s pain and anguish was palpable even as at the time she took the stand. The trial court was in order in believing the testimony of PW1, as the same was sufficient to form a basis for a conviction. Moreover the respondent availed relevant witnesses and was not duty bound to call a superfluity of witnesses. See the Ugandan case of *Bukenya & Others Vs Uganda* (1972) EA 549.

Whether the sentence was harsh and excessive

42. In this case, the complainant was of the age of 11 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:
- “ A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
43. The Appellant was sentenced to 25 (Twenty-Five years) imprisonment for the said offence. This sentence was not statutory compliant and had the Respondent issued a notice of enhancement I would have enhanced it to the statutory prescribed life sentence. See *Republic Vs Joshua Gichuki Mwangi & Others*, Petition NO 18 of 2023, KESC 34(KLR) (12 July 2024).
44. In view of the foregoing, I find that the appeal on both the conviction and the sentence, devoid of any merit and I hereby dismiss it.
45. The conviction is confirmed and the sentence is upheld
- It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JULY 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Ms Kibet for State

Appellant

Peter Machoni-Court Assistant

