Njiru v Republic (Criminal Appeal E087 of 2024)
[2025] KEHC 11252 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11252 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E087 OF 2024

RM MWONGO, J

JULY 30, 2025

BETWEEN

JAMES NJAGI NJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. R. Njoki Kihara, in Siakago MCSO No. E030 of 2021 delivered 14th October 2024)

JUDGMENT

The Charges

1. In the lower Court, the appellant herein was charged with 2 counts as follows:

    1. The 1st count was defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. The Particulars were that on diverse dated between 2014 and 2016 an unknown time as Mbeere South Subcounty in Embu County, the appellant intentionally and unlawfully inserted his penis into the vagina of MWG a child aged 7 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, and the particulars were that on diverse dates between 2014 and 2016 at unknown times at Mbeere South Subcounty in Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of MWG a child aged 7 years.

    2. The 2nd count was defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. The Particulars were that on diverse dated between 2014 and 2016 an unknown time as Mbeere South Subcounty in Embu County, the appellant intentionally and unlawfully inserted his penis into the anus of MWG a child aged 7 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, and the particulars were that on diverse dates between 2014 and 2016 at unknown times at

Mbeere South Subcounty in Embu County, the appellant intentionally and unlawfully caused his penis to touch the anus of MWG a child aged 7 years

2. At the trial, the appellant pleaded 'not guilty' to the charges. A full hearing was conducted and the appellant was subsequently convicted on the first count and acquitted on the 2nd count. Following conviction, he was sentenced to 15 years imprisonment.

The Appeal

3. Dissatisfied with the decision of the trial court, the appellant filed a petition of appeal dated 27th October 2024, seeking orders that the conviction be quashed and the sentence be set aside. The appeal is premised on the grounds that:

    1. The Learned Magistrate erred in law and in fact in convicting the Appellant on account of a defective charge;

    2. The Learned Magistrate erred in law and in fact in failing to allow the application hear the matter de novo on extraneous grounds;

    3. The Learned Magistrate erred in law and in fact in considering the Complainant's evidence despite not being subjected to voir dire examination as required by the law;

    4. The Learned Magistrate erred in law and in fact in relying on the medical evidence conducted 7 years after the alleged defilement of the minor without considering the accuracy of the same;

    5. The Learned Magistrate erred in law and in fact for failing to consider hearing the matter afresh after transfer of the initial Magistrate who took the evidence of the key witness;

    6. The Learned Magistrate erred in law and in fact in convicting the Appellant on evidence which did not meet the required standard;

    7. The Learned Magistrate erred in law and in fact by relying on extrinsic evidence that was not adduced during trial;

    8. The Learned Magistrate erred in law and in fact by relying on evidence that was full of inconsistencies and contradictions; and

    9. The Learned Magistrate erred in law and in fact by holding that the prosecution had proved all the ingredients of the offence for defilement.

Summary of the Evidence in the trial Court

4. The trial commenced on 21/06/2021, five years after the incident, and concluded on 14/10/2024.

5. PW1 was the complainant, presently aged 14 years. The court noted that she was not a child of tender years, therefore, she gave sworn evidence. It was her testimony that she knew the accused person as an employee of their neighbor. He first defiled her when she had gone to herd goats in the bushes, and he did this several times within a period on 2 years. Every time he would defile her, he would threaten to kill her if she told anyone about it. He would show her sharpened knives and pangas to scare her. He stopped defiling her when she told him that her sister was a police officer. She never saw the appellant again until one day in 2020 when she was visiting her sister in Siakago and saw him. He recognized her and even greeted her and her sister. She testified that she started feeling unsafe after seeing him and that is when she attempted suicide. Her sister intervened and she opened up about the appellant defiling her. She was escorted to hospital where she was examined and counseled. Before 2020, she had last seen

the appellant in 2016. The matter was reported at the police station and the appellant was arrested and charged. On cross examination, she stated that the incidences occurred when she was 7 years old.

6. PW2 was John Mwangi, a Clinical Officer at Mbeere Hospital. He testified that upon examining the victim in July 2021, he observed that there was an old perforated hymen, a sign of penetration. He also noted on rectal examination that her anus was gapping, a sign of anal penetration. He produced the P3 and PRC forms as evidence. On cross-examination he stated that he was informed that the victim was defiled in 2016 but was examined in 2021 when the injuries were not fresh.

7. PW3 was Francis Njiru a counsellor who stated that he attended to the victim who had been found attempting suicide. He spoke to the victim for about 2 hours and she told him that she had been defiled by someone who had threatened to kill her if she told anyone about it. He counselled her and got her permission to tell her sister about the incident. The victim's sister knew who the perpetrator was and the matter was reported. PW3 recorded his statement with police and continued counselling the victim for 3 months.

8. PW4 was the victim's father who stated that he knew the appellant because he was a farmhand at a neighbor's home. He learned of the defilement incidences from the victim's sister who had caught the victim attempting suicide. He stated that the appellant had run away following the incidences. On cross-examination, he stated that the family did not know about the defilement, or why the appellant had disappeared from the area.

9. PW5 was PC Kathure of Makima Police Station who stated that the victim reported the incident at the police station in 2020. She was examined and a P3 form was filled. She recorded statements and traced the appellant who was arrested and charged. On cross-examination, she stated that besides the testimony of the victim and the examining medical officer, there was no other evidence.

10. The prosecution closed its case and the appellant was found to have a case to answer. He was placed on his defense.

11. In his defense as DW1, the appellant stated that he knows the victim and her parents but he denied committing the offence. He said that he worked as a caretaker at the same place from 2014-2021.

12. DW2 was Emily Wambere Mbara a village elder who confirmed that the appellant was working as a caretaker at the home of one Josphat Gichovi and he never left the village at any given point. She stated that she knew nothing about the victim's defilement.

Parties' Submissions

13. The appeal was canvassed by way of written submissions.

14. The appellant submitted that the charge was defective since it indicated it the offence was contrary to section 8(4) of the *Sexual Offences Act*. That the charge was incurably defective under section 382 of the *Criminal Procedure Code*. He submitted that the issue of defective charge was raised early and the trial court acknowledged it but proceeded to convict based on it. He relied on the case of Akolon v Republic [2024] KEHC 7987 (KLR). The appellant decried the fact that the trial court defused to start the matter afresh following the transfer of the previous trial magistrate.

15. He relied on Article 50(2)(k) of *the Constitution* and sections 150 and 200 of the *Criminal Procedure Code* and the cases of Lerai v Republic [2023] KECA 752 (KLR), Dismas Wafula Kilwake v Republic [2019] KECA 5 (KLR), Ndegwa v Republic [1985] KECA 138 (KLR) and Mursal & another v Evelyn Nthangu Manesa (Suing as the legal administrator of Chris Kipkoech) (Civil Appeal E23 of 2021) [2022] KEHC 286 (KLR).

16. It was his submission that the evidence adduced was 7 years old hence it should not have been held as credible. That the victim should not be held as a credible witness. He relied on section 107(1) of the *Evidence Act* and argued that the case against him was not proved beyond reasonable doubt.

17. He argued that the age of the victim at the time of the offence is a crucial matter in defilement charges and he relied on the case of Kaingu Kasomo v Republic Criminal Appeal No. 504 of 2010 and Francis Kariuki Njiru & 7 others v Republic [2001] KECA 58 (KLR). He argued that none of the prosecution witnesses positively identified him and relied on the case of Mercy Chelangat v Republic [2022] KEHC 1827 (KLR).

18. The respondent relied on sections 2 and 8(3) of the *Sexual offences Act* and the case of DS v Republic [2022] KEHC 2502 (KLR) and Edwin Nyambaso Onsongo v Republic [2016] KEHC 4738 (KLR). It was its argument that the age of the complainant was proved beyond reasonable doubt and it relied on the case of Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR).

19. It stated that the trial court declined to restart the case under section 200 of the *Criminal Procedure Code* because the witnesses had relocated. It stated that the restarting of a case by a different Magistrate is not a right and it relied on the cases of Mutai v Republic [2023] KEHC 3864 (KLR) andAbdi Adan Mohamed v Republic [2017] KECA 517 (KLR).

Issues for Determination

20. The issues for determination are as follows:

    1. Whether the charge was fatally defective;

    2. Whether the offence was proved beyond reasonable doubt; and

    3. Whether the sentence meted out to the appellant should be set aside.

Analysis and Determination

21. In the case of Okeno v Republic [1972] EA 32, the court held thus regarding the role of a first appellate court:

> " 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 the appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

22. The appellant was charged with 2 counts of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. These provisions provide:

> " (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

23. Part of the evidence adduced was the victim's birth certificate which indicates that she was born in February 2007. The charge sheet indicates that she was defiled on diverse dates between 2014 and 2016. Accordingly, by referring to the birth certificate, the victim was between 6-8 years old at the time of defilement. This means that when the charge sheet was being drawn, it should have indicated the charge as being an offence under section 8(1) - and not Section 8(4) - as read with 8(2) of the *Sexual Offences Act*, since the victim was at the time aged below 11 years. The statement of offence should have read that he was charged with defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* which state as follows:

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

(2) 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."

24. For offences under the Section 8 of the *Sexual Offences Act*, the importance of establishing the age of the victim cannot be understated. It is the age of the victim that informs the sentence to be imposed by the court upon conviction. In this case, the appellant argued that this proof of age was elusive, causing the charge to be fatally defective. The degree of defect of a charge lies in the accused person's ability to understand it. Superior courts have held that a charge is held to be defective if a person does not understand the charge he is facing and is thus hindered in his ability to defend himself adequately.

25. In the present case, the appellant alleges that he was charged of defiling a child between the ages 16-18 years but it should be a child below the age of 11 years. He asks the court to find that this charge is fatally defective. The Court of Appeal in Benard Ombuna v Republic [2019] KECA 994 (KLR), addressed the issue of a defective charge sheet in the following terms: -

"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence." [Emphasis added]

26. The question of prejudice that arises leads to the question whether the defect occasioned an injustice? Or, whether the accused person will be prejudiced as a result of such defect? In the present case, the accused person faces a lesser sentence compared to the life imprisonment sentence prescribed under the correct provision that ought to have been cited in the charge sheet. Here, it appears that the accused person would not suffer prejudice if the defect on the charge sheet is retained until the point of judgment and sentencing. In Benard Ombuna v Republic (supra), the court relied on Supreme Court of India in Willie (William) Slaney v State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], which held that: -

"Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the

shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities." [Emphasis added]

27. In further answering whether the charge was defective with reference to the above discussion, it is evident from the trial proceedings that the appellant clearly understood the charge he was facing, which was defilement of a child (a person below the age of 18 years). He pleaded not guilty and the prosecution called witnesses. After the prosecution witnesses testified, he cross-examined some of them with precision and, eventually, he defended himself when he was placed on his defense.

28. Section 382 of the *Criminal Procedure Code* allows an appellate court such as this one to determine the gravity of the defect in the charge sheet only if the issue was raised early enough before the trail court. It provides:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

29. The appellant submitted that he raised the issue of the defect in the charge during his submissions on case to answer before the trial court. In those submissions dated 29th August 2024, he urged the trial court to acquit him since the charge was defective. The trial court nevertheless found that a prima facie case had been made against him and he was placed on his defense. The trial court did not address the question of whether the charge was defective.

30. Clearly, the issue was brought before the trial court at the close of the prosecution's case and before the ruling on case to answer was delivered. This is deemed as early enough. However, the fact remains that the sentence is not prejudicial to the appellant. In fact, it is prejudicial to the victim and the State in general given that it was a departure from the mandatory statutory sentence of life imprisonment had the proper provision of the *Sexual Offences Act* been applied. This is a miscarriage of justice. It follows that if this court re-examines the evidence and finds that the appellant is guilty, the High Court is vested with revisionary jurisdiction to review the sentence accordingly.

31. On the issue of whether the charges were proved beyond reasonable doubt, section 8(1) of the *Sexual offences Act* provides for the elements of the offences, which may be broken down as follows:

    1. The age of the complainant- that the complainant was a child;
    2. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child; and
    3. The perpetrator was positively identified.

32. As stated earlier, the age of the complainant was proved through her birth certificate which was produced as evidence. It shows that the complainant was born in 2007 and was between 6-8 years old at the time of the incidences which occurred over the course of 2 years. In the case of Mwalango Chichoro

Mwanjembe v Republic (2016) eKLR the court stated thus regarding proof of age of the defilement victim:

> " 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 documentary 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."

33. In her testimony, PW1 stated that the appellant was known to her because he worked at a neighbor's farm. She stated that he used to defile her between 2014-2016 when she went to herd goats in the bushes. That the appellant defiled her on several occasions and he used to threaten to kill her and her family if she told anyone what had happened between them. PW2 testified that when he examined the victim, he found that there were signs of penetration in the vagina and anus.

34. This examination was carried out several years after the said incidences and only after the intervention of PW3, a professional counselor. The victim needed counselling because she had attempted suicide after seeing the appellant several years after the defilement. The victim relived the appellant's threats to kill her and that is why she attempted suicide. The trial magistrate noted that PW1 did not testify that the appellant penetrated her anally. However, the medical examination reports that the anus was gapping, a sign of anal penetration. These testimonies considered together are sufficient proof that the victim was penetrated vaginally and anally.

35. The final element to prove is identification of the perpetrator. The victim knew the appellant who worked as a caretaker at a neighbour's farm. She stated that he defiled her over a period of 2 years and she identified him in court. In his defense, the appellant also stated that he knew the victim and her parents but he denied defiling her. Section 124 of the *Evidence Act* provides that the testimony of the victim of a sexual offence on identification of his/her assailant is sufficient proof. It states:

> " 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."

36. There is proof beyond reasonable doubt that the appellant is the victim's perpetrator. Therefore, the offences were proved beyond reasonable doubt.

37. On the issue of whether the sentence meted out to the appellant should be set aside, the trial court sentenced the appellant to 15 years imprisonment in line with the erroneous provision being section 8(4) of the *Sexual Offences Act*. The trial court acknowledged the error but stated that it was the appellant's lucky day since the sentence is much less than the one proposed under section 8(2) of the *Sexual Offences Act* which should have been cited in the charge sheet.

38. In the previous paragraphs, it has been established that an error occurred on the face of the charge sheet regarding the provision of the *Sexual Offences Act* that should apply. The issue was raised before the trial court prior to sentencing. However, it has already been established that the error does not prejudice the appellant in any way. In any event, it puts him at an advantage because he ended up being

sentenced to 15 years imprisonment instead of life imprisonment. It means that section 382 of the *Criminal Procedure Code* does not protect the appellant in any way in this case because he does not stand prejudiced. However, there is still a miscarriage of justice in terms of the sentence imposed.

39. Notably, Section 364(1)(a) and (2) of the *Criminal Procedure Code* allows the High Court to exercise its revisionary jurisdiction to cure such miscarriage of justice where the issue has come to the knowledge of the court. That section provides:

> "(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:
>
> Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned." (Emphasis added)

40. The sentence imposed by the trial court is based on the wrong provision, a fact that the trial magistrate noted. Given the High Court's jurisdiction, it is in order that the sentence prescribed under section 8(2) of the *Sexual offences Act* be applied in order for justice to be served as it ought to be. That provision is as follows:

> "(2) 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."

41. The court is not at liberty to review the sentences prescribed under section 8 of the *Sexual Offences Act*. The Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR), Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) and Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) adequately guided on this issue and stated that the sentences prescribed should be applied as prescribed unless in cases where parliament revises them as the law-making branch of government.

42. In my view, the trial court erred in imposing a sentence prescribed under the wrong provision of the law due to the error in the charge sheet, and the same should be enhanced on the strength of Section 364(1)(a) and (2) of the *Criminal Procedure Code*.

Disposition

43. Accordingly, the appeal fails and the Court hereby makes the following orders:

1. The conviction on the 1st count is hereby upheld;

2. The acquittal on the 2nd count is hereby set aside and substituted with a conviction;

3. The sentence of 15 years imprisonment imposed on the 1st count is hereby set aside and substituted with a sentence of life imprisonment as provided under section 8(2) of the *Sexual Offences Act*; and

4. The appellant is sentenced to life imprisonment on the 2nd count which sentence is however held at abeyance.

44. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 30TH DAY OF JULY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Appellant present in Court

Gitonga for Appellant

Ms. Nyika for the Respondent

Francis Munyao - Court Assistant