Maguto alias Hamza v Republic (Criminal Appeal E055 of 2024)
[2025] KEHC 11374 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11374 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E055 OF 2024

JN NJAGI, J

JULY 29, 2025

BETWEEN

SWALEH ALI MAGUTO ALIAS HAMZA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L. N. Wasige, SPM, in Garsen Senior Principal Magistrate's Court Sexual Offence Case No. E015 of 2022 delivered on 11/11/2024)

JUDGMENT

1. The Appellant was convicted for the offence of defilement contrary to Section 8[1] as read with Section 8[3] of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 14th day of August, 2022 and 5th day of September, 2022 at 1600hrs and 1800hrs at Galili location, Tana Delta sub-county within Tana River County he intentionally caused his penis to penetrate the vagina of H.A [herein referred to as the complainant], a child aged 15years.

2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal.

3. The grounds of appeal as per the appellant`s memorandum of appeal are that;

    1. That the Learned trial Magistrate erred in law and fact by failing to apprehend that the prosecution did not prove each of the ingredients of the offence of defilement beyond reasonable doubt.

    2. That the Learned trial Magistrate erred in law and fact in convicting the Appellant on the basis of contradictory evidence.

3. That the Learned trial Magistrate erred in law and fact by failing to consider that the exhibits by the prosecution were unreliable.

4. That the learned trial magistrate erred in law and fact by failing to analyze the evidence adduced by the defence hence made a wrong finding that the prosecution case was proved beyond reasonable doubt.

4. The prosecution called five witnesses in the case while the appellant called one witness in support of in his case.

5. The case for the prosecution was that the complainant was at the material time aged 15 years and was in school in Grade 5. She was living with her sister PW3 at [particulars withheld] village. That on 5/9/2022 she returned home from school and went to fetch water at a well near where she was staying. That while she was in the process of doing so, a person called Swaleh approached her from behind and held her by the neck. He carried her on his shoulders to the bush where he removed her clothes and inserted his penis into her vagina. It was around 9 pm that time. He then sent her home.

6. Meanwhile upon the complainant taking long to return home, her sister PW2 and her brother-in law PW3 started to look for her. They did not get her. The complainant then returned home around 10 pm. They questioned her on where she had been and she told them that she had been defiled by a young man whom she had been seeing grazing livestock in the locality. On the following day PW2 took her to Ngao police station where they made a report of defilement. PC Wechuli PW5 investigated the case. He escorted the complainant to Ngao Hospital where she was examined by a clinical officer PW4 who found her with a missing hymen and healing bruises on the vagina. PW4 completed a Post Rape Care form and a P3 form. Later on 9/8/2022 PC Wechuli accompanied the brother in law to the complainant to Shautama village where he arrested the perpetrator, the appellant. He was given the birth certificate for the girl. He charged the appellant with the offence.

7. During the hearing of the case in court, the clinical officer PW4 produced the Post Rape Care form, the treatment notes and the P3 from as exhibits, P.Exh.1, 2 and 3 respectively. The investigating officer PW5 produced the complainant`s birth certificate as exhibits, P.4.

8. When placed to his defence, the appellant stated in a sworn statement that his name was Swaleh Guyo Ali and not Swaleh Magudo Ali as stated in the charge sheet. That he was employed by a person called Hamsa Mathea as a herder. That he was arrested by police officers on 5/9/2022 but he was not told the reason for his arrest. He was brought to court and charged. He said that he never knew the victim and only came to know him in court.

Submissions

9. The appeal was canvassed by way of written submissions. The appellant submitted that the charges were not proved beyond any reasonable doubt. He faulted the trial court for relying on hearsay evidence and particularly relying on the testimony of PW1 without scrutinizing it. In this regard he cited the cases of John Mwiruri v Republic [1983] KLR 445, John Kinyua Nathan v Republic [2019] eKLR and that of RMM v Republic [2019] eKLR.

10. The appellant submitted that the learned trial magistrate failed to consider his alibi defence and that he was framed by the complainant's family. He submitted that the court failed to consider that there were inconsistences in the evidence of the prosecution witnesses. He urged this court to find that the trial magistrate failed to analyze and evaluate the evidence.

11. The Respondent on the other hand submitted that they had proved all the ingredients of the offence being: the age of the complainant, penetration and identification. It was submitted that the appellant was a person well known to the complainant as he was a person she used to see before.

12. It was further submitted that the defence of the appellant was a mere denial that did not cast doubt on the prosecution case. That his claim that his name was not as indicated in the charge sheet was a lie as he answered to the said name during plea and his denial of the name in his defence can only be aimed at defeating justice. Further that his defence that was not around on the material day was an afterthought as he did not raise such an issue during the prosecution case.

13. On the sentence meted out on the appellant, it was submitted that the same was just and fair in view of the provisions of section 8[3] of the *sexual Offences Act* which provides for a minimum sentence of 20 years for defiling a child of between 12 and 15 years. The respondent urged the court to dismiss the appeal.

Analysis and determination

14. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of Odhiambo v Republic Cr App No 280 of 2004 [2005] 1 KLR where the Court of Appeal held that: -

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."

15. The ingredients of the offence of defilement are: proof of the age of the victim, proof of penetration and proper identification of the perpetrator, see George Opondo Olunga v Republic [2016] eKLR.

16. 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 v 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."

17. In the present case, the Investigating Officer PW5, produced the complainant's birth certificate which evidenced that she was born on 5/11/2006 thereby making her 15 years at the time of commission of the offence. The age of the complainant was satisfactorily proved to be 15 years old at the time of the offence.

18. On the element of penetration, Section 2 of the *Sexual Offences Act* defines the same as:

> "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

19. The prosecution has a duty to establish that the complainant was partially or fully sexually penetrated by the Appellant. The Clinical officer PW4 who examined the complainant found her with a missing

hymen and bruises that were healing in the vagina. The fact that she had healing bruises in the vagina proves that she was penetrated on the vagina. Penetration was thereby proved.

20. The last question is whether the complainant identified the appellant as the person who defiled her.

21. It is trite that the court before basing a conviction on evidence of identification should examine the evidence carefully and satisfy itself that the circumstances of identification were favourable and free from the possibility of error. The Court of Appeal in the case of Cleopas O. Wamunga v Republic, Criminal Appeal No. 20 of 1989 stated as follows in that respect:

> " ..... evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he [accused] alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification...."

22. In Kariuki Njiru and 7 others v. Republic CR. Appeal No. 6 of 2001 it was held by the Court of Appeal that;

> " The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

23. Where the evidence on identification is from a single identifying witness as in this case, a guide on how to treat the evidence was given in the case of Kiilu & Another v Republic [2005] eKLR, where the Court of Appeal held that;

> " Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error."

24. It was the evidence of the complainant that she went to fetch water at the borehole with 2 jerricans. That she left one jerrycan at the borehole and carried one home. That when she went back to pick the second jerrrican, the appellant appeared from nowhere, got hold of her by her neck, carried her to the bush, removed her clothes and defiled her. He then sent her home. She did not state the time she went to fetch water but she said that the appellant defiled her around 9 pm.

25. I have considered the evidence of the complainant on identification. The complainant did not state the time she went to fetch water at the well. She did not state whether it was daylight when she saw the person she claimed to be the appellant. She said that it was around 9 pm when the person defiled her. The sister to the complainant PW3 said that the complainant returned home at 10 pm. It is then clear that the defilement took place at night. The complainant did not lead evidence on the conditions of lighting at that time of the night that enabled her to identify the appellant as the assailant. She never

led evidence that she was present when the appellant was arrested. She did not identify the appellant in an identification parade after he was arrested.

26. The brother in law to the complainant PW2 testified that the appellant was pointed out to them by a youngster who was coming from school and he was arrested. The youngster did not testify in the case. The investigating officer on his part PW5 told the court that he accompanied the brother in law to the complainant to Shautama village on 9/8/2022 where they arrested the appellant. He did not name the person who identified the appellant to them.

27. In view of the above I am not satisfied that the complainant identified the appellant as the person who defiled her. It was not shown that the circumstances were favourable for positive identification and that the identification of the appellant was free from the possibility of error. The trial court did not consider this aspect of the evidence. Neither did it consider that the complainant was the sole identifying witness in the case, thereby necessitating her evidence to be treated with a lot of caution which the trial court did not do. The appellant was in the circumstances entitled to the benefit of doubt.

28. The upshot is that the charge against the appellant was not proved beyond reasonable doubt. Consequently, the conviction entered against the appellant is quashed and the sentence set aside. I order the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 29TH JULY 2025.

J. N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Respondent

Appellant – present in person at G.K. Prison Malindi

Court Assistant - Jumaa