Munyua v Republic (Criminal Appeal E0338 of 2024)
[2025] KEHC 11175 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11175 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E0338 OF 2024

HI ONG'UDI, J

JULY 29, 2025

BETWEEN

PAUL KINYUA MUNYUA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgment delivered on 9th October 2024 by Hon. Yvonne Luyana Khatambi Principal Magistrate in Naivasha CM's Criminal Case MCSO/E023/2023)

JUDGMENT

1. Paul Kinyua Munyua hereinafter referred to as the appellant was charged with two counts of defilement contrary to section 8(1) as read with sections 3 & 4 of the *Sexual Offences Act*. The particulars in the 1st count were that the appellant on 2nd April 2023 at Kampi Somali area in Gilgil Sub-County within Nakuru County intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of the V.W. a child aged 12 years. The particulars in the 2nd Count are that on the 2nd April 2023 at Kampi Somali area in Gilgil Sub-County within Nakuru County he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of P. N. a child aged 16 years.

2. The appellant equally faced two alternative counts of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. This is in respect of the victims in counts 1 and 2.

3. He denied all the counts and the matter proceeded to full hearing with the prosecution presenting six (6) witnesses. In his defence the appellant gave a sworn statement and called no witness.

4. After hearing the case, the trial Magistrate found the appellant guilty and convicted him on both counts on 9th October 2024. Later on 30th October 2024 the appellant was sentenced as follows:-

Count 1: Twenty (20) years imprisonment.

Count 2: Fifteen (15) years imprisonment.

She directed that the orders run concurrently.

5. Being aggrieved with both conviction and sentence the appellant filed this appeal on the following amended grounds:-

    1. THAT, the Learned Trial Magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt when in fact it had not.

    2. THAT, the Learned Trial Magistrate erred in law and in fact by relying on the complainant's evidence, which lacked probative value, as the report of the alleged defilemet was made under the duress of corporal punishment.

    3. THAT, the Learned Trial Magistrate erred in law and in fact in failing to give reasons and/or record reasons in the proceedings as to why she believed the victims evidence hence contravening Section 124 of the *Evidence Act* Cap. 80 of the laws of Kenya.

    4. THAT, the Learned Trial Magistrate erred in law and in fact when she relied on contradictory and uncorroborated testimonies of the witnesses to convict the appellant.

    5. THAT, the Learned Trial Magistrate erred in law and in fact in failing to independently analyze and/or evaluate the evidence on record hence reached an erroneous determination.

    6. THAT, the Learned Trial Magistrate erred in law and in fact in ordering the sentences to run consecutively which was wrong in the circumstances of this case.

    7. THAT, the Learned Trial Magistrate erred in law and in fact in failing to ensure that the appellant was supplied with the 1st report of victim 1 (PW1) and the victim 2 (PW2) even after he applied for the same on several occasions. The appellant was prejudiced.

    8. THAT, the Learned Trial Magistrate erred in law and in fact in failing to let the Investigating Officer to be recalled to produce the original Birth Certificate as applied by the prosecution and for the appellant to further cross-examine him even though the appellant had made the application for further cross-examination.

    9. THAT, the Learned Trial Magistrate erred in law and in fact in not finding that the evidence of the Doctor (PW6) failed to give evidence of the qualification of the Doctor/Clinical Officer who filled the P3 forms or the qualification of the Clinical Officer who filled the P.R.C. Forms which were produced in court as Exhibits and this rendered the entire evidence a hearsay.

    10. THAT, the Learned Trial Magistrate erred in law and in fact in not considering that the medical reports as per the P3 forms and P.R.C. forms did not disclose any injuries that would show the victims were defiled.

    11. THAT, the Learned Trial Magistrate erred in law and in fact in failing to find that the age of the victims was not satisfactorily proven.

    12. THAT, the Learned Trial Magistrate erred in law and in fact in failing to find that there was no sufficient evidence to prove that there was penetration on the part of the victims.

    13. THAT, the Learned Trial Magistrate erred in law and in fact in failing to find that the evidence of the doctor (PW6) did not corroborate the evidence of the victims PW1 and PW2.

14. THAT, the Learned Trial Magistrate erred in law and in fact in meting out a very harsh sentence under the circumstances of this case.

6. A summary of the case before the trial court is that on 2nd April 2023 PW1, (V.W.) then aged 13 years joined her friend who testified as PW2. Both were girls and PW2 was aged 15 years. It was in the evening and they met PW2's boyfriend (appellant) at the shop. They then all went to the appellant's house on a church compound. It was running to 8:00 p.m. The appellant went out of the house and the lights went off. The girls then went outside the house, whereby the appellant asked them to follow him to a nearby bush.

7. It was then that he had sex with each of them in turns. They all walked back to his house, where they slept. He gave PW2 Kshs. 50/= and 2 mandazis. They were later taken to hospital after the matter was reported.

8. PW6 - Dr. David Kuria Samson produced the medical reports on behalf of the Clinical Officer Alex Kariuki who had left employment at Gilgil Sub-County Hospital. Both PW1 and PW2 were examined 11 days after the alleged incident. PW1 had no external injury, broken hymen and no blood discharge noted. The P3 form dated 13/4/2023 was produced as P. Exhibit 2 while the Post Rape Care (PRC) form dated 4/4/2023 was produced as P. Exhibit 4. PW2 was upon examination found to have a whitish discharge with bad odour in her vagina. The P3 form dated 13/4/2023 was produced as P. Exhibit 6, while the PRC form dated 13/4/2023 was produced as P. Exhibit 8. It showed that she had an old broken hymen.

9. When placed on his defence the appellant in his sworn statement said he was a caretaker at a church and he sold bulbs. On 2/4/2023 he woke up at 5:00 a.m., prepared himself and went to the bush to get charcoal. He returned at 11:00 a.m. and found the bishop. He then had lunch and took a walk returning at 8:00 p.m. He put on the lights as usual and went to watch news at the village till 9:30 p.m, when he went back home and slept.

10. On 6/4/2023 two (2) officers came to his home. He was arrested for defiling a 12 year old girl who was present with her mother. Later a man (cobbler), came to the station complaining of defilement of his daughter. Several days after his arrest is when the cobbler appeared with PW2. PW2 had not even been taken to hospital. He stated that he was charged before P3 forms had been filled. He mentioned a grudge between him and PW4 for misplacing this shoes.

11. The appeal was canvassed through written submissions.

Appellant's Submissions.

12. These were filed by David K. Gichuki advocate and they are dated 6th May 2025. He submitted on all grounds combined. Counsel submitted that there were grave contradictions in the evidence of PW1 and PW2. That from this it was not clear where PW1 and PW2 met the appellant and whether the lights were on or off when they went to the appellant's house. Counsel also cited the evidence of PW1 and PW2 at page 7 & 8 of the record of appeal saying it was not clear who between them went to the appellant's house.

13. Counsel submitted that the contradictins went to the root of the case. And his conclusion was that the two witnesses never went to the appellant's house and no defilement ever took place.

14. On the medical evidence he submitted that the same was of no assistance to the court as PW2 was examined 11 days after the incident and nothing serious was noted. Counsel also noted that the qualifications of the Clinical Officer who did the examination for the P3 form were never given. This

evidence was therefore hearsay evidence. Reference on this was made to the case of Ndiki Senze vs Republic [2022] eKLR.

15. It was counsel's further submission that the ages of PW1 and PW2 were never proved, as the alleged birth certificates were only marked for identification. That the court assessed age based on its observation of PW1 and PW2 in court. To him this was unfair and unjust. He cited the case of Hezron Kamau Kimani vs Republic [2024] KEHC 5039 KLR, in support.

16. Finally he submitted that penetration was not proved as the evidence of PW1 and PW2 on this was so contradictory and PW5's evidence was of no assistance. He contended that the trial court shifted the burden of proof to the appellant. Referring to the sentences given it was his view that the same should run concurrently, and not consecutively.

Respondent's Submissions.

17. These were filed by Denis Atika prosecution counsel and are dated 3rd March 2025. Counsel equally filed grounds of opposition which were subsumed in the submissions. It is Counsel's submission that the prosecution proved all the three ingredients of defilement. On age he submitted that birth certificates were produced as P. Exhibit 1 and 5 showed that PW1 & PW2 were aged 12 years and 16 years respectively. On penetration he relied on the evidence of PW1 and PW2 and submitted that the girls said the appellant had defiled them. Further that the evidence by the doctor (PW6) confirmed that the children had been defiled.

18. On identification he submitted that PW2 knew the appellant as his friend, and both identified him as the defiler. This was therefore a case of recognition as held in Peter Musau vs Republic [2008] eKLR.

19. Counsel while referring to Section 124 of the *Evidence Act* argued that the trial court believed the minors and there was therefore no need for corroboration. He also cited Mohamed vs Republic [2006] 2 KLR 138 in support.

20. On sentence, counsel submitted that the same is within the Law as provided for under the *Sexual Offences Act*.

Analysis and Determination.

21. As a first appellate court, this court has a duty to re-consider and re-evaluate all the material before it and arrive at its own conclusion. It must bear in mind that unlike the trial court it did not have the opportunity to see and hear the witnesses and must give an allowance for that. This was the holding in the cases of Okeno vs Republic (1972) E.A. 32; Pandya vs Republic (1975) E.A. 336.

22. In Simiyu & Another vs Republic [2005] I KLR 192 the Court of Appeal on the same issue stated thus:-

> " It is the duty of the first Appellant court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions."

23. I have carefully considered the evidence on record, submissions by both parties, cited authorities and the Law. The main issue I find falling for determination is whether the charge of defilement was proved against the appellant. For this offence to be proved the following ingredients must be established by the prosecution.Age of the victimPenetration of the victim's genital organIdentification of the culprit.

Ages of the victims.

24. The charge sheet shows that PW1 was aged 12 years as at 14th June 2023. She told the court that she was 13 years old and the court took her through a voire dire examination. Besides that, no other document was produced to confirm age. The birth certificate availed by PW5 was never produced.

25. PW2 stated that she was 15 years old as at 14th June 2023. She too for unknown reasons was taken through a voire dire examination. Even for her no documents were produced to confirm age. Counsel Atika's submisson on this issue on birth certificates was therefore not correct.

26. The reason why the proof of age of the victims in defilement cases is critical is because the sentences are pegged on age. Section 8(3) of the *Sexual Offences Act* under which the appellant was charged in count 1 provides;-

> " 8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

While Section 8(4) provides;-

> 8(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."

27. In the Judgment by the trial court it is indicated that PW3 and PW4 gave the dates of birth as 13th June 2010 and 23rd November 2007 respectively. The record shows that they read out these dates from the birth certificates which were never produced as exhibits in court. It was not from their own knowledge.

28. The fact that the said birth certificates were not produced as exhibits means they are non-existent as far as this case is concerned. The court cannot rely on documents not produced even if they are marked for identification. Observation of PW1 and PW2 by the court can only assist to confirm that they are minors and not their exact age. The trial court should have ordered for an age assessment to be undertaken upon realizing the challenge in getting the birth certificates.

29. The above being the position I find that age was not proved.

Penetration of the victims genital organs.

30. Penetration is defined under the *Sexual Offences Act* as;

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

31. The evidence by PW2 is that the appellant was her boyfriend. She is the one who invited PW1 to go visit the appellant. According to PW1, they met at a shop then proceedd to the appellant's house. PW2 on the other hand made no mention of the shop. She said they met the appellant outside his compound, and went to his house.

32. What happened thereafter is of keen interest in this case. The two girls (PW1 & PW2) were led to a nearby bush and without any force nor restistance, they were each defiled in each other's presence. According to PW1, they calmly went back to the appellant's house and slept there. PW2 on the other hand testified that after the defilement in the bush they did not go back to the appellant's house. That

they spent the night at Peris' posho mill since PW1 was scared of going home. The next day PW2 also spent the night at the posho mill. In her evidence PW1 never mentioned anything about the posho mill during cross examination. She said on 3rd April 2023 she and PW2 went back to the appellant's house.

33. Though PW1 and PW2 are said to be minors at the time of incident their conduct is quite telling. In cross examination PW2 responded as follows:-

> " I am telling the truth. Police directed me on statement. I was sent by my mother at 7:00 p.m. It was not dark. We went to see Veronicah's boyfriend. He did not come out of the house. We came to the house and found you at the shop. We called you. It was heading to 8:00 p.m. The person tied our hands and took us to your house..... I was standing as you defiled Veronica under your instructions."

34. The court wonders who it is that tied PW1's and PW2's hands and took them to the appellant's house. The trial court ought to have inquired into this, but did not. Another wonder is how PW2 who was supposed to be the appellant's girl friend would stand there watching as the appellant had sex with PW1. Then when he is through she too goes there and removes her trouser to have sex with the same man. Is this the conduct of a real minor? What was it that the police directed her to put in her statement? I am setting out all this to set out the characters of PW1 and PW2.

35. PW1 who is said to be aged 12 years said in her evidence in chief as follows;-

> " I did not tell anyone of the incident. PW2 after spending nights at the posho mill went to her grand mother's home when she missed her. She went back to the posho mill. Her brother found her there and took her home where she was beaten by her mother who forced her to tell the truth."

36. It is clear that the complainants (PW1 and PW2) were seen in hospital almost 11 days after the incident. The reports speak for themselves. After the incident PW2 was sleeping at the posho mill. It is not clear whose posho mill it was and what she used to do during the day for all those days before her brother found her. The same story goes for PW1. If indeed she was back home in a few days, how come she was only presented to the hospital for examination on 13th April 2023? Had she indeed been defiled and was home as claimed she would have been taken to hospital.

37. I find a lot of untruthfulness in the evidence by PW1 and PW2. The record further shows that the appellant from 25th July 2023, sought to have PW2's P3 form and the investigating officer's report to be supplied. The court issued an order to that effect. The same were not supplied and similar orders were issued on 22nd August 2023, 12th September 2023, 3rd October 2023, 17th October 2023, 25th October 2023 (when summons were issued for the investigating officer to appear). Unforturnately the said documents were never availed to the appellant and the court did nothing about it.

38. Upon consideration of all the contradictory evidence which reflects a lot of untruths it cannot be confirmed that indeed PW1 & PW2 were defiled on 2nd April 2023 by the appellant. The P3 forms & PRC forms (P. Exhibit 2, 4, 6 & 8) were not of any assistance in this matter. The appellant denied the offence and it was the duty of the prosecution to avail sufficient evidence before the court to prove its case. The court having discarded the medical evidence, what is left is the unrealiable evidence of PW1 and PW2. Even their age was not proved and their conduct is so telling. There is no other evidence left to support it. As stated earlier the evidence of PW1 and PW2 is so questionable and cannot found a conviction. PW2 revealed she was thoroughly beaten to state what she said. See Erick Ochieng Okumu vs Republic [2023] KECA 353 (KLR).

39. The upshot is that the appeal against conviction and sentence succeeds. The conviction on both counts is quashed and the sentences set aside. The appellant shall be set free unless otherwise lawfully held under a separate warrant.

40. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND AND SIGNED THIS 29TH DAY OF JULY, 2025 IN OPEN COURT AT NAIVASHA.

H. I. ONG'UDI

JUDGE