Murigi v Republic (Criminal Appeal 70 of 2023)
[2025] KEHC 12282 (KLR) (27 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 70 OF 2023

RC RUTTO, J

AUGUST 27, 2025

BETWEEN

JOHN NJOROGE MURIGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in the judgment delivered on 6/7/2023 by Hon. R. N. NGumba (SRM) of Gatundu Law Court in S.O. No. E038 of 2022)

JUDGMENT

Introduction

1. The Appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8 (1)(3) of the *Sexual Offences Act* Cap 63A has lodged this appeal. He seeks that his conviction be quashed and the 20 years imprisonment sentence set aside.

2. The appeal is premised on the following grounds, that: -

    a. The learned judge erred in both law and fact considering the evidence adduced by the doctor which was not enough base for conviction.

    b. The learned judge erred in law and fact that the first report of the complainant was doubtful according to the other witnesses testimonies.

    c. The learned judge erred in law and in facts in convicting me basing on witnesses evidence which was fully contradictory.

    d. The learned judge erred in law and fact to give due consideration on the plausible defense.

    e. The learned judge erred in law and facts to rely on prosecution evidence that was riddled with contradictions and discrepancies leading to selective judgment.

B. Background

3. Before the trial court, the Appellant was charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. The particulars of the offence were that on 1st December, 2022, at Gatimu Village in Gatundu South within Kiambu County, he intentionally caused his penis to penetrate the vagina of E.M.N a child aged 13 years. He was also charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the said Act.

4. The Appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 5 witnesses.

B. Prosecution case

5. The victim, E.M.N, testified as PW1. She stated that she did not know the Appellant and that he used to dig with her sister and also used to pick tea. That on the material day, she was in the bathroom at around 6:00 pm whereas the Appellant was near the goat shed. That he went to the bathroom but her sister found him and he left, but at the time, her clothes were still on. That the Appellant again went to the bathroom and she was washing her head whilst bending and had already removed her clothes. That the Appellant inserted his thing for urinating into hers and she pushed him. That the Appellant warned her not to say and promised to give her money.

6. She testified that the Appellant had lowered his trouser. That her sister went to ask her why she was still in the bathroom and she explained what had happened, causing the sister to report to the Appellant's family the following day. That the Appellant said it was true and they were referred to hospital. She added that her father had also assaulted her and was arrested and he equally assaulted her sister causing her to leave their home.

7. On cross-examination, she stated that although she did not know the Appellant's name before, she had stayed at her sister's home for a week and she would see him pass there severally.

8. PW2 was the victim's sister. She testified that she did casual jobs in Gatimu and knew the Appellant as he was from where she used to work. That PW1 had come to visit her and on 1st December 2022 while at home washing dishes, she asked E.M. to go bathe. That PW1 overstayed and when she went to check on her, she found her shaking and informed her that the Appellant had defiled her. That it was around 7:00pm and she found the Appellant hiding behind the bathroom door.

9. She testified that she had gone prior around 6:00pm and the first time the Appellant was inside the bathroom, he was fully dressed and E.M had only removed her blouse. That on the first time, the Appellant saw PW2 and left. That it was the second time when she went to check on E.M that she found the Appellant hiding behind the bathroom door and he had lowered his trouser and E.M was naked. That E.M informed her that the Appellant had promised to give her money. That she took E.M to hospital the following morning where it was confirmed she had been defiled but it was not the first time, and on interrogation, she revealed that her father also defiled her. PW2 also testified that she was also defiled by their father.

10. PW3, a clinical officer at Karatu level 4 hospital, stated that he filled the treatment card and PRC form. That he saw E.M on 2nd December 2022 in the company of her sister. That she had pain in her private parts and said she was sexually assaulted the day before and further complained of pain in the lower abdomen. That on examination, there were no signs of injury on the body, the genital examination was normal and there was no vaginal lacerations, discharge or bleeding. That the hymen was broken but not freshly torn and there were no abnormalities on the vaginal orifices. That it was not the first

incident and on probing she informed him that she was previously sexually assaulted. That samples for investigations did not also reveal anything as she had showered.

11. PW4, Sgt Stanley Munene, from Karatu Police station stated that on 2nd December 2022, E.M and her sister went to the station and reported that on 1st December 2022, E.M had been defiled while at her sister's place when she was taking a bath. That on that night, he and other officers managed to arrest the Appellant and he was charged.

12. PW5, Dr. Wangui, testified that she filled the P3 form relying on the treatment card. She had been seen with history of defilement. She filled the P3 form seven weeks later, the weapon was penile penetration, there were no bruises on the outer genitalia, no discharges and hymen was broken. She gave PEP

B. Defence case

13. When put on his defence, the Appellant stated that he was from Kirangi, Gatundu South Gatimu Village and a farmer. That on 1st December, 2022 he was at the farm and returned around 3:00pm and found a visitor who had visited her sister, his fellow co-worker. That he had an issue with the said sister as she wanted to be employed by his grandmother and he had refused since his own wife did not have a job. That he did not know the complainant, PW1, and never had any bad intentions as he had a wife who he respected, and if at all he had bad intentions he would have already defiled her sister. He testified that the prosecution was giving false evidence which was fabricated.

14. Upon evaluation of the evidence on record, the trial court found that the prosecution had proved its case as against the Appellant and convicted him. He was sentenced to twenty years imprisonment as the minimum sentence prescribed by the *Sexual Offences Act*.

B. The Appeal

15. The appeal is as set out in the earlier paragraphs of this judgment. The Appellant seeks that his conviction be quashed and the sentence set aside. He relied on his undated written submissions filed on 19th July 2024, while the Respondent's submissions are dated 23rd October 2024.

a. Appellant's Submissions

16. The Appellant collapsed his grounds of appeal into three, summarised as follows, that: the trial court erred in relying on evidence of identification by recognition; the trial court erred in failing to subject the medical evidence to exhaustive and conclusive analysis in relation to the alibi defence; and the 20 years imprisonment mandatory sentence was harsh and excessive.

17. On identification, the Appellant submitted that the trial court solely relied on the testimony of PW1 and PW2 yet they were not credible witnesses. That PW1 testified that she did not know the Appellant and the offence was committed at night and PW1 never stated how she identified the Appellant. That there was need for an identification parade to enable the minor identify the assailant. That the trial court never considered that the minor could have mistakenly identified the Appellant as it was dark. He cited the cases of Marie and 3 Others versus Republic [1986] KLR 224 and Lesaru vs Republic [1988[KLR 783 in support of his assertion.

18. He further submitted that without presence of semen or seminal fluid, or supportive corroborative evidence, it was not safe to arrive at an abstract inference of sexual abuse. That PW3's evidence did not link anything to the Appellant and only supported the narrative that the minor was previously assaulted by her father. He thus, submitted that the evidence of recognition was not watertight to support the charge.

19. On the medical evidence, it was submitted that though PW1 testified that she was defiled on 1st December 2022, PW3 testified that he examined her on 12th December, 2022, contrary to the particulars of charge. That from the medical evidence, there was nothing to proof that the Appellant was defiled and all tests confirmed she was normal. It was thus submitted that there was no evidence of penetration.

20. Further, that the Appellant on his part raised the defence of alibi and stated that he did not know the minor. That the prosecution only brought the charge to score the differences between the Appellant and PW2 whom he had denied a chance to work at his grandmother's farm. He relied on the case of Joseph Peitun Losur vs Republic Nakuru CR Appeal No. 168 of 2001 (unreported).

21. On the imprisonment sentence of 20 years, it was submitted that the custodial sentence was sufficient punishment and there was proper denunciation of the offence. That the time spent in prison was already sufficient as a deterring factor. That sentencing was for purposes of rehabilitating the offender and then releasing them back to the society. That mitigation was not considered during sentencing and it denied the Appellant a right to dignity as per *the Constitution*. It was further submitted that the appellant was denied the right to the least severe punishment under Article 50 (2) (p) of *the Constitution*. He thus urged that the appeal be allowed, conviction quashed and sentence set aside.

b. Respondent's submissions

22. The Respondent opposed the appeal urging that all the ingredients of the offence of defilement were proved beyond reasonable doubt.

23. On penetration, it was submitted that according to PW1, the Appellant inserted his penis into her vagina. That PW3 produced treatment notes and PCR form which indicated that she was defiled and hymen was broken. That PW5 produced the P3 form which proved penetration thus the defence of alibi could not be sustained. The Respondent relied on the case of Mark Oiruri Mose vs Republic (2013) eKLR and Section 2 of the *Sexual Offences Act*.

24. As regards the identification of the assailant, it was submitted that it was the Appellant who defiled the complainant and she identified him and that she was well known to the Appellant thus the trial court's finding was correct.

25. On whether the sentence was sound, it was submitted that Section 8(3) of the *Sexual Offences Act* provided for a minimum sentence of 20 years imprisonment on conviction and as such, the court did not have discretion to give a finding outside the law, as held in Abdalla vs Republic (KECA 1054 (KLR).

26. It was thus submitted that the prosecution discharged its burden and the evidence tendered was not discredited by the defence thus the appeal ought to be dismissed.

B. Analysis and determination

27. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R [1957] EA 336; Shantilal M. Ruwalla v R [1957] EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that: -

> "the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without

overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

28. Having considered the record of appeal as well as the submissions by parties, I delimit the following issues for determination: -

a. Whether the offence of defilement was proved;

b. Whether there were contradictions and inconsistencies; and

c. Whether the sentence was harsh and excessive

a. Whether the offence of defilement was proved

29. Section 8(1) of the *Sexual Offences Act* provides that; "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement", while Section 8(3) states: "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."

30. In the case of George Opondo Olunga v Republic (2016) eKLR, the ingredients for the offence of defilement were set out as: " proof of the age of the victim; proof of penetration or indecent act; and identification of the perpetrator.

31. Regarding age, the charge sheet indicated that the victim was 13 years. The birth certificate produced by PW4 indicated that she was born on 15th August, 2009 thus the minor was indeed 13 years old at the time of the alleged incident.

32. On penetration, Section 2 of the *Sexual Offences Act* define penetration as follows: -

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

33. Addressing this element, the Court of Appeal in Chila v. Republic (1967) E.A 722 stated as follows: -

" The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

34. PW1 testified that on the fateful day she had visited her sister's home. That she went to bathe around 6:00pm and before she removed her clothes, the Appellant entered the bathroom. That the Appellant saw PW1's sister and went out. That later on when she had already removed her clothes, and was bending washing her head, the Appellant came in again and inserted his thing for urinating inside hers and she pushed him away. That her sister also entered the bathroom and inquired why she had taken so long and she informed her what the Appellant had done to her.

35. PW2, corroborated PW1's testimony. She stated that when she went to the bathroom to check on her sister, she found her shivering and that the Appellant had hidden behind the bathroom door with his trouser lowered down whereas the minor, PW1, was naked. That she reported the matter the next day and took the minor to hospital. Notably, these two witnesses were cross-examined by the Appellant

but he did not rebut their testimonies. The trial court equally never adjudged their testimonies as untrustworthy. They were all credible witnesses.

36. PW3 was the clinical officer who observed the minor. He concluded that the minor had showered and there was no specimen in her vagina. That there were no bruises and she appeared normal. That there was however evidence of prior defilement and a broken hymen and when questioned PW1 informed that she had been defiled by her step-father who was also arrested. That the minor however complained of pain in her private parts and said she was sexually assaulted the day before and further complained of pain in the lower abdomen.

37. From the foregoing, I find that there was proof of penetration. I say so noting that the trial court found that PW1 was a credible witness and was convinced that she was telling the truth. I am also cognizant of the fact that the minor was a victim of prior assault. The fact that she had unfortunately been a victim of a previous defilement ordeal did not negate the fact that any subsequent defilement, like in this case, was illegal and an offence on its own. I hasten to add that it has been held that the act of defilement is proved, not by medical evidence but by oral evidence. In AML v Republic [2012] eKLR, the Court of Appeal categorically held that "the fact of rape or defilement is not proved by way of a DNA test but by way of evidence." Hence, while the medical evidence disclosed acts of previous defilement, this did not negate the evdience that on the material day, she was defiled by the Appellant.

38. Consequently, I find that their was sufficient evidence to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court.

39. Turning to identification of the perpetrator, PW1 testified that she did not know the Appellant personally, but she would see him passing by her sister's home over her one-week stay. She would also see him digging and picking tea. Further, PW1, had not only seen the Appellant severally, though without interaction, but she also engaged in a conversation with him when the Appellant threatened her not to tell anyone and also promised to give her money. There was also testimony of a family meeting that occurred the following day and the Appellant was in attendance. There was enough interaction with the appellant to allow the minor, a thirteen-year-old, to identify him. Suffices it then that having previously seen the Appellant for a period of over a week, the Appellant was no stranger to the complainant. His identification was thus by was of recognition and not identification of a stranger.

40. This fact of recognition negates the need for an identification parade as urged by the Appellant. I would have been an act in futility for the police to seek to conduct an identification parade for a person that the victim already knew.

41. Further, the Appellant was also positively identified by PW2, who found him hiding behind the door in the bathroom. The Appellant was well known PW2 as they worked on the farm together. I thus find that the Appellant was well identified as the person who defiled the complainant. The complainant was found to be credible and the court also found no ground for her to maliciously implicate the Appellant.

42. I hasten to add that the Appellant, in his defence also stated that he saw PW2's sister, who turned out to be PW1, on 1st December, 2022 at 3:00pm while at PW2's house. This evidence further strengthens PW1's testimony that she would see the Appellant passing by her sister's home and further places him at the scene of the incident, contrary to his submission that he raised an alibi. In fact, while he states that he raised the defense of alibi, I note that his only defence before the trial court was that he was being framed on grounds of a vendetta and he did not once allege that he was elsewhere when the offence was being committed. Hence his allegations of an alibi are with no merit before this Court.

43. The defense of being framed as a result of vendetta also failed as it was not established that there was any bad blood between PW1 and the Appellant, or even between PW2 and the Appellant. Though

the Appellant testified that PW2 wanted to work on his grandmother's farm and he declined, he never stated that PW2 was angry or vengeful. He never brought this fact to PW2 in cross-examination.

44. I therefore find that the prosecution proved all the ingredients of defilement and the trial court did not err in its findings.

b. Whether there were contradictions and inconsistencies

45. The Appellant submitted that there was a discrepancy in the testimony in that when PW2 saw him hiding, she never talked to him or scream. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. Was lack of screaming by PW2 a grave discrepancy as to render her testimony and conviction fatal? The answer is in the negative. Notably, Pw2 testified that she was confused and did not know what to do. On the following day however, she took three steps: she reported the issue to the Appellant's family who advised her to report, she took the minor to hospital, and she reported the incident at the police station. Further, PW2 did not witness the act of defilement, hence nothing was stated in her testimony that contradicted the complainant's evidence that the Appellant defiled her. Hence, I find the allegations of contradictions and inconsistencies baseless.

c. Whether the sentence was harsh and excessive

46. On this issue, the offence of defiling a child aged between twelve and fifteen years with which the Appellant was charged with, prescribes a minimum sentence of not less than twenty years. While, there has been judicial discourse on constitutionality of the mandatory minimum sentences under Section 8 of the Act, the Supreme Court settled the issue in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) where it upheld the constitutionality of the mandatory sentences under the *Sexual Offences Act*.

47. Consequently, having upheld the Appellant's conviction, I find no ground to warrant interfering with the legally meted out sentence of 20 years imprisonment and find that the same was lawfully imposed and it is for upholding.

48. The upshot is that the appeal is found to be without merit and is dismissed. The trial court's decision is upheld.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF AUGUST, 2025.

RHODA RUTTO

JUDGE

In the presence of;

Appellant present from Kamiti Maximum prison

Ms Torosi for Respondent

Selina Court Assistant