SNM v Republic (Criminal Appeal E061 of 2024)
[2025] KEHC 12256 (KLR) (27 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12256 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E061 OF 2024

RC RUTTO, J

AUGUST 27, 2025

BETWEEN

SNM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence delivered on 29th July 2024 by Hon M.Otindo (SPM) in Machakos CMCC SO Number E062 OF 2021)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read together with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 13th day of September 2021 at Mutituni location in Machakos Sub-County within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of one CNK, a child aged 13 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on the 13th day of September 2021 at Mutituni location in Machakos Sub-County within Machakos County, the Appellant touched the vagina of one CNK, a child aged 13 years.

3. He pleaded not guilty and the trial commenced with the prosecution calling five (5) witnesses in support of its case, while the appellant called four (4) witnesses in his defence.

The Prosecution Case

4. PW1, CNK, stated that she was in Class 6 and she had seen the person who did bad manners to her. That she was called by the appellant and told “ingia hapo ndani”. She entered. The appellant had a knife and removed her clothes. He told her, “hii kitu inaua”, and that she should sleep on the floor and

face upwards. He then slept on top of her and did tabia mbaya. PW1 stated that the appellant removed his trouser and his innerwear. That he removed his thing, found between the buttocks. She stated that "it is found here" and showed at the given area. That he inserted it in her"suedi", that is found at her groin area, to which she pointed at. That it was painful. He covered her mouth and she was not able to scream. After he finished, he told her if she told anyone, he will kill her. That he then gave her Kshs. 10/- to buy a sweet. That she left at around 1.00 p.m, and went home. She stated that she had pus, it was coming out of her vagina.

5. PW2, TW, stated that the complainant was her granddaughter and she stayed with her. That she knew the accused as he was family and they stay close. She further stated that on 24/09/2021, the complainant came from school, and went to sleep. She did not bother. In the morning she asked the complainant to take tea. That the complainant could not bend as she had pain at the groin area. She asked if she had a wound, or thorn, but she kept quiet. That she took the tea while standing. PW2 then told the complainant to sleep on the chair. She opened her clothes and panties and found she had a wound in her vagina, and the anus was ruptured. She called her mother to take her to hospital.

6. PW3, JN, is the complainant's mother. She stated that the appellant was like a cousin to her. That PW2 told her that the child had a wound inflicted by S. She called her daughter, and asked her to go bath and she saw the wound. She asked and the complainant told her it was S who laid on her. That she was from school when S called her and she entered the shop. He then asked her to remove clothes and lie down. That he also removed his clothes. He defiled her and gave her 10 shillings.

7. PW3 stated she went and reported. S was called, but he denied. She took the child to Machakos Level 5 where a PRC Form and a P3 form were filled. She also produced a Birth certificate and indicated that the complainant was a child in a special class. On cross examination, she stated that she first learned of the defilement allegations on 24th September 2021. That the complainant had complained of stomach pain, for which she initially bought medicine instead of taking her to hospital. That on 10th October, 2021, the complainant reportedly confessed the incident and asked for forgiveness. The witness then took her to hospital on 12th October, 2021 where the doctor confirmed defilement, noting a small wound of around 2 centimeters. That she was told by PW2 that the appellant, was responsible. She also stated that the incident was first reported to the sub-chief on 11th October, 2021 and the appellant was arrested on 13th October 2021.

8. PW4 Dr Jacks Muhanga testified on behalf of Dr. Mutunga whom they had worked together at Machakos Level 5 Hospital. He stated that Doctor Mutunga examined the victim who was alleged to have been defiled by a person known to him. No physical injuries were seen. The patient received antibiotics and analgesic. The child was estimated as being 13 years old. The genitalia was normal for the age. The hymen was broken. but not freshly broken, it was old. No injuries were noted. HIV, and urinalysis test were negative. No vaginal swab was done, and the nature of injuries was 'harm'. The P3 form did not conclude on defilement.

9. On cross examination he stated that as per the documents, the incident was of 11/10/2021, that the offence would not have occurred in September 2021. As regards the hymen, the doctor indicated that it was an old broken hymen. Further, that the report was not conclusive of defilement. The alleged offence was on 13/10/2021, yet the PRC form indicates that the alleged offence was on 13/09/2021.

10. PW5, PC Mary Wanjiku Njoki, stated that on 11/10/2021 a report was made by one CMK alleging that one SNM had defiled her on 13/09/2021 at his shop located at Mutituni market. She recorded the statement of complainant and inquired why it was not reported when the act was taking place. The minor disclosed to PW5 that the accused warned her not to tell anyone. That out of fear, she did not tell it out. She told the grandmother who informed her mum and father.

11. PW5 sent the child to hospital, had the P3 form filled and she charged the accused. That she conducted investigation and the complainant told her that the appellant called her, closed the door when she entered, removed her pant and inserted his penis in her vagina. She produced the birth certificate as an exhibit in evidence.

Defence Case

12. DW1, the appellant, gave sworn evidence. He stated that the complainant is his niece. He recounted his activities on 13th September 2021, detailing his movements from morning to evening to establish his whereabouts. He stated that he visited multiple church members, participated in church cleaning and water-fetching activities, and later met with colleagues to discuss church matters before heading home.

13. He averred that he learnt of the alleged defilement on 25th September 2021, when contacted by the assistant chief. He was summoned to the chief's office where the minor and her mother, JK, were present. The mother allegedly accused him and threatened imprisonment. The appellant stated that he denied the accusation, refused to negotiate due to its seriousness, and voluntarily presented himself at the police station where he was later arrested. He emphasized that he did not commit the offence. He also stated that they had land disputes.

14. DW2, Margaret Luka confirmed knowing the appellant as one, who served as a church elder at AIC Ngomeni. On 13th September 2021, she recalled seeing him at her home around 10:30 a.m. and after serving him porridge, they went together to the church, they parted ways at 12:30 p.m. She stated that she was with S throughout that period and recognizes him as their pastor.

15. DW3 Samuel Wambua Kitavi stated that on 13th September 2021, at around 12:45 p.m., the appellant visited. They shared lunch at 3:10 p.m. before S left. DW3 confirmed knowing the appellant as a christian, church member, and church treasurer, stating he has no known criminal history.

16. DW4, DMN, the appellant's son stated that on 13th September 2021 he was at work in Mutituni at his dad's shop. That his dad reported there at 8.30 a.m. to 9.00 shop and he did not see anything unusual.

17. The Trial court after hearing the witnesses delivered its judgment on 8th July 2024 wherein it found the accused person guilty of the main charge and sentenced him to twenty years imprisonment.

The Appeal

18. Being dissatisfied by the conviction and sentence, the appellant preferred this appeal on the grounds, among others, that the learned Trial Magistrate erred in law and fact by;

    a. Failing to find that the whole case was marred by material contradictions and inconsistencies which went to the root of the charges facing him.

    b. Failing to find that the legal burden against the appellant was not established due to the weak evidence that was adduced.

    c. Failing to properly consider the cogent defence case which reasonably exonerated the appellant from the commission of the ill-fated offence.

    d. Imposing a sentence of twenty (20) years which is manifestly harsh.

19. The Appeal was canvassed by way of written submissions. The appellant filed submissions dated 4th December 2024 in which he contended that the elements of defilement were not proven, that no DNA or forensic evidence linked the Appellant to the alleged crime. It was submitted that the trial court relied solely on the testimony of the complainant who had a mental disability and that testimony

was inconsistent, contradictory and uncorroborated and failed to record reasons for believing the complainant was a truthful witness contrary to Section 123 of the *Evidence Act*.

20. In support of this contention, reliance was placed on the cases of George Opondo Olunga vs Republic [2016] eKLR, Kaingu Kasomo vs Republic, Criminal Appeal No 504 of 2010, PKW vs Republic [2012] eKLR, John Mutua Munyoki vs R [2017] eKLR, Mohamed vs R [2008] eKLR, Bassita vs Uganda SC Criminal Appeal No 35 of 1995, S vs Trainor [2003] 1 SACR (SCA), JMN vs Republic [2022] KEHC 279 (KLR).

21. In support of the submissions that there were contradictions in the witnesses' testimonies and there being no voire dire examination, reliance was placed on the cases of Richard Munene vs Republic [2018] eKLR, Omar Nache Uche vs Republic [2016] eKLR , Bukenya vs Uganda [1972] EA 549, Donald Majiwa Achilwa and two other vs R [2009] eKLR, Johnson Muiruri vs Republic [1983] eKLR, Sammy Ngetich vs Republic [2018] eKLR.

22. Thirdly, it was submitted that the prosecution did not prove the case beyond reasonable doubt and that the appellant was convicted on the basis of circumstantial evidence. To buttress this point, reliance was placed on the case of Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR, Stephen Ngulu Mulili vs Republic [2014] eKLR and Njue & another vs Republic [2023] KEHC 256 (KLR).

23. As regards the sentence, it was submitted that the sentence was harsh and ought to be reviewed while considering the current jurisprudence on sentencing. Reliance was placed on the case of Ogalo S/O Owuor vs Republic [1954] 24 EACA and Thomas Mwamba Wanyi vs Republic [2017] eKLR.

24. The Prosecution Counsel in submissions dated 4th April 2025 conceded to the appeal on the ground that failure to conduct voire dire examination of the complainant rendered the conviction unsafe. It was submitted that judgment was delivered on 18th July 2024 and sentence given on 19th July 2024, less than a year ago, that the offence committed is a serious once considering it was done against a person living with a disability. That the original trial was defective on account of a procedural lapse by the trial court and no prejudice will be suffered by the appellant as he has served less than one year. The Respondent prayed for a re-trial. In support of its argument, reliance was placed on the cases of Haji vs R [2023] KEHC 26498 (KLR), Mwangi vs Republic[1983[KLR 522 and Pius Olima & another vs Republic [1993] e KLR.

Analysis and Determination

25. This Court being a first appellate court, is bound by the principles laid down in the case of Okeno vs Republic (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to arrive at its own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. 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; it must make its own findings and draw its own 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, see (Peters V Sunday Post 1978) E.A. 424."

26. I have considered the Trial Court record, the memorandum of appeal and the submissions on record. The Respondent/Prosecution has conceded to the Appeal. However, that concession does not

automatically lead to the appeal succeeding. The High Court in Onunga v Republic (Criminal Appeal E030 of 2023) [2024] KEHC 6750 (KLR) (6 June 2024) (Judgment) aptly addressed this issue thus:

> " Whether or not to concede an appeal is within the constitutional remit of the Director of Public Prosecutions (DPP). However, his views in that regard are not binding on the Court, which is obliged to re-evaluate the evidence and consider the merits of the appeal. The approach that the Court takes when the DPP concedes an appeal was succinctly stated in Patrick Omukunda Omung'ala v Republic, Cr. App No. 195 of 2012 as follows:
>
> > " While it is the right of the respondent to oppose or concede a criminal appeal, that in itself does not bind this Court. The decision of this Court turns on whether, based on the evidence on record and the law, the conclusions of the first appellate court are proper. The respondent's opposition of an appeal does not invariably lead to a dismissal of the appeal; conversely the respondent's concession of an appeal cannot lead to its automatic success."
> >
> > (See also Godfrey Ngotho Mutiso v. Republic, Cr. App. No. 17 of 2008 and Norman Ambich Miero & Another v. Republic, Cr. App. No. 279 of 2005)."

27. Consequently, despite the concession from the Respondent, this court is charged with determining two main issues:

    i. whether the Court should order for a re-trial due to lack of voir dire examination; and

    ii. Whether the prosecution proved its case against the appellant to the required standard.

28. On the first issue whether a re-trial should be ordered because of lack of a voir dire, I have perused the record and noted that the appellant never raised this issue in the petition. Failure to conduct a voir dire examination is not even addressed by the appellant in his submissions. Notably also, the respondent did not file a cross-appeal to legitimately allow it to seek a substantive order from this Court, such as an order for a re-trial. It therefore emerges that while the respondent has not responded to the appeal as framed in the petition of appeal, it has 'crafted' an issue not raised by the appellant, and on that basis, sought to concede the appeal. I find this approach irregular on the part of the respondent.

29. Be that as it may, the purpose of voir dire examination was discussed in the case of Madegwa v Republic (Criminal Appeal E080 of 2021) [2024] KECA 350 (KLR) where the court stated that;

> " It is trite that the purpose of conducting a voir dire examination is for the court to satisfy itself that the child of tender years understands the nature of the oath. If the child does not understand the nature of the oath, his/her evidence may be received, though not given upon oath, if, in the opinion of the court the child possesses sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

30. Also, the Court of Appeal in Maripett Loonkomok vs Republic Supra continued to state that;

> " It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender

years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

> " In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

31. It thus emerges that the law mandates that a voir dire MUST be conducted for a child of tender years. Who is a child of tender years then? This question amplifies the fact that there is a difference between a 'child', being a person below the age of majority of 18 years, and a 'child of tender years'. In Njoki v Republic[1988] eKLR, a definition was proposed thus:

> " We have not been able to obtain a legal definition of the word "child" or a "child of tender years" of a general application. The Children and Young Persons Act defines a child for the purpose of that Act as a person under 14 years of age. The *Evidence Act* has no definition and the Penal Code has none also. However in the Concise, Oxford Dictionary, a child is defined as a person who has not reached the age of discretion, while "tender age" is said to be one who is immature.
>
> Taking the two definitions together, a child of tender years seems to us to be a child who is legally immature and incapable of being responsible for own actions. According to section 14 (1) of the Penal Code all children under the age of eight years are said to be immature, are not a criminally responsible for any acts or omissions. Such persons can in our view be properly said to be children of tender years. It is therefore our view that section 124 of the *Evidence Act* only applies to children under the age of 8 years upon whose uncorroborated evidence no conviction can be based. We also believe that other considerations ought to be applicable to children who are not of "tender years".
>
> In the case before us, the complainant was aged about 12 years. He was therefore not a child of "tender years" whose evidence required corroboration as a matter of law. In our view however as he was not over 14 years age and his evidence still needed corroboration as a matter of practice and the court must caution itself on the dangers of convicting on uncorroborated evidence of such a child (as against a child of tender years) before acting on such evidence."

32. In this case, the complainant was 13 years old and as such, while she was a child, she was not a child of tender years. Consequently, lack of conducting a voir dire examination was not fatal to the prosecution case. Hence, while the respondent's concession is dismissed for not being part of the grounds raised by the appellant, the same issue of failure to conduct a voir dire was not fatal to the prosecution case.

33. Turning to the second issue whether the prosecution proved its case, the appellant urged that there were contradictions in the evidence that vitiated the appellant's conviction. Again, the respondent having not responded to these issues, this Court is left to examine the appellant's allegations alongside the record before it.

34. From the onset, it is worth noting that not all contradictions will lead to vitiating of a conviction. The contradictions must be so material as to go to the root of the case and prejudice the accused in marshaling his defence.

35. In considering the contradictions, I will examine whether the ingredients of the offence of defilement were proved. First as regards age, this is not in contention as even the appellant concedes that PW3 produced a birth certificate proving that child was aged 13 years old.

36. The main ingredient for consideration is whether there was penetration as alleged by the prosecution. The chargesheet states that the appellant defiled the complainant on 13th September 2021. The question that arises is whether the prosecution led evidence to confirm defilement on 13th September 2021. PW1, the victim, in her testimony, did not mention the date of the incident. PW2 in her testimony stated that on 24th September 2021, PW1 came back from school and went to sleep. That she did not bother until the next morning (which will be 25th September 2021) when she realized that PW1 could not bend, and that is when she examined her and noticed she had a 'wound' in her vagina. PW2 did not establish how the 'wound' occurred and when. She called PW3 to take her to hospital.

37. PW3 confirms being called by PW2 over the incident and taking PW1 to hospital. She states that she took her to hospital on 12th October 2021 and from the doctor's examination, the hymen was not freshly broken and the only injuries were two days old, meaning the incident could have happened on 11th October, 2021. This casts aspersions on the date cited in the chargesheet of 13th September 2021. This contradiction and inconsistencies in the dates are not remote. They go to the core of the offence. The question is was the victim defiled on 13th September 2021? Given the evidence on record, this Court is unable to find in the affirmative.

38. This Court is cognizant of the provision of section 124 of the *Evidence Act* to the effect that in sexual offenses, the Court may convict even on the testimony of a single witness, so long as that evidence is credible and admissible. In this instance, PW1's evidence is full of gaps. It does not state the date the incident happened. Both PW2 and PW3 do not corroborate or state the date the incident happened. This situation coupled by the fact that the appellant gave a strong alibi defence, creates doubt on the prosecution case. It is trite law that for criminal matters, proof is beyond reasonable doubt and any doubt should be interpreted to the benefit of the accused person.

39. Additionally, the issue of penetration remains contested. The prosecution alleges that the victim was defiled on 13th September 2021. However, in her testimony, PW1—the victim—did not specify the date on which the alleged defilement occurred. PW2, on the other hand, referred to a different date, 24th September 2021, and stated that upon examining the victim, she observed a wound on the vagina and a ruptured anus. These injuries were not mentioned by the victim herself, nor were they noted by the medical officer, PW4. In fact, apart from PW2, no other witness—including the complainant—made reference to any injury to the anus. The upshot is that a holistic evaluation of the record before me shows that the prosecution case was marred with glaring inconsistencies and contradictions that no court, properly directed would have returned a verdict of guilty. I therefore find that the appellant's conviction was not safe and proceed to set it aside.

40. Consequently, the appeal succeeds, the appellant's conviction and sentence dated 29th July 2024 is set aside and he is acquitted. He is set at liberty unless otherwise lawfully held.

41. Orders accordingly.

Dated, signed and delivered at Machakos this 27th day of August, 2025.

RHODA RUTTO

JUDGE

In the presence of;

Ms Mueni for Appellant

Ms Torosi for Respondent