Mukhetu v Republic (Criminal Appeal 103 of 2023)
[2025] KEHC 12008 (KLR) (14 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12008 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 103 OF 2023

BK NJOROGE, J

AUGUST 14, 2025

BETWEEN

DICKSON SIMIYU MUKHETU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the judgment and conviction delivered on 5th October 2017 by the Chief Magistrate's Court at Thika in Criminal Case No. 5820 of 2015 – Republic v. Dickson Simiyu Mukheti)

JUDGMENT

1. This judgment relates to the Appellant's Appeal dated 2nd April 2020, arising from the judgment and conviction delivered on 5th October 2017 by the Chief Magistrate's Court at Thika in Criminal Case No. 5820 of 2015 – Republic v. Dickson Simiyu Mukhetu.

2. The Appellant is aggrieved by the findings of the Trial Court. He contends that the prosecution did not establish the element of penetration beyond reasonable doubt. Further, the Appellant is dissatisfied that the Trial Court failed to inform him of his right to legal representation, particularly by a state-appointed Counsel. The Appellant also argues that the Trial Court failed to adequately consider the irregularities and inconsistencies present in the prosecution's case and did not properly evaluate the credibility of the witnesses presented.

3. Pursuant to the directions of this Court, the appeal was to be canvassed by way of written submissions. The Court has accordingly perused and considered the Appellant's written submissions, alongside those of the Respondent dated 27th November 2024. The Court commends both parties for the diligence and industry exhibited in the preparation and presentation of their respective cases. Due to pressure of work, exigencies of time and personal issues that befell the Court, there has been

delay in delivery of this Judgement. The Court apologises to the parties herein for any unintended consequences.

Background Facts

5. The Appellant was charged on the 8th October 2015 at the Chief Magistrate's Court with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* (2006). The Particulars of the charge is that on the 5th day of October 2015 at [Particulars Withheld] of Ruiru within Kiambu county intentionally and unlawfully caused his penis to penetrate the vagina of ENW a child, aged 4 years.

6. The Appellant also faced an alternative Charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* (2006). The particulars of the alternative Charge were that on the 5th day of October 2015 at [Particulars Withheld] of Ruiru within Kiambu county intentionally and unlawfully caused a contact with his penis with the vagina of the vagina of ENW a child, aged 4 years.

7. The Appellant pleaded not guilty to the charge. The Prosecution called four (4) witnesses in support of its case. In his defence, the Appellant gave unsworn testimony and did not call any witnesses.

8. Upon conclusion of the trial, the Learned Trial Magistrate, on 5th October 2017, found the Appellant guilty and proceeded to convict him. The Appellant was subsequently sentenced to life imprisonment for the offence of defilement. Aggrieved by both the conviction and sentence as contained in the judgment delivered on 5th October 2017 by the Chief Magistrate's Court at Thika in Criminal Case No. 5820 of 2015 – Republic v. Dickson Simiyu Mukhetu, the Appellant filed the present Appeal before this Court.

The Respondent's Case before the Trial Court

9. PW1, ENW, a minor, was subjected to a voire dire examination, after which the Trial Court found she had insufficient knowledge and did not understand the nature of an oath. She gave unsworn testimony. She testified that on the material day, her mother had gone to purchase a packet of maize flour when the Appellant picked her from their home and took her to a nearby bush. There, the Appellant placed her on the ground and proceeded to engage in what she referred to as "bad manners." The Appellant later left to buy bananas but did not return. PW1 was subsequently found by a pastor, who offered her transport to the hospital, where her parents later joined her. She further testified that she knew the Appellant, Simiyu, as a cobbler and as a person who used to visit their home.

10. PW2, MM, also a minor, also underwent a voire dire examination, and the Court found him of insufficient intelligence to comprehend the nature of an oath. Thereafter the Court proceeded to take his unsworn testimony. He testified that on the material day, 5th October 2015, he and PW1 were at home when Simiyu arrived and stated that he wanted to take PW1 to where their mother was. Simiyu left with PW1 and bought bananas for her. When their mother returned, she inquired about PW1's whereabouts, and they informed her that Simiyu had taken her. The parents searched for PW1 but were initially unsuccessful. PW2 stated that it was Pastor Joshua who eventually located PW1. He confirmed that he knew Simiyu as their neighbour.

11. PW3, Jane Munene, a Clinical Officer at Ruiru Sub-District Hospital, testified that she handled the P3 Form for PW1, who was then four (4) years old and had been brought for examination following allegations of defilement. She stated that the minor had initially been treated at Nairobi Women's Hospital. On examination, the minor's school uniform was found dirty and blood-stained. The mother reported that the minor had been taken by an unknown person while on her way from school.

Upon genital examination, PW3 observed that the hymen was widened and reddened, though there were no other external injuries. Laboratory examination of the urine and high vaginal swab samples revealed the presence of pus cells. PW3 classified the degree of injury as "harm" and concluded that the clinical evidence was consistent with defilement. She further testified that the P3 Form was filled by Dr. Ngetich, her former colleague with whom she had worked for two years and whose handwriting she was familiar with.

12. PW4, Police Constable Veronicah Wanjala, No. 83xxx, the Investigating Officer, testified on behalf of the initial Investigating Officer, who had by then been transferred and was on maternity leave at the time of trial. PW4 informed the court that the complainant's parents could not be traced as they had since relocated. PW4 produced several exhibits, including the initial Investigating Officer's recorded statements, the complainant's clinic card, and the complainant's checked blue dress, which was found to be dirty.

The Appellant's Case before the Trial Court

13. The Appellant gave unsworn testimony in his defence and did not call any witnesses. He testified that he was engaged in the business of selling mandazi from 2012 until March 2015, when he transitioned to working as a lorry transporter. The Appellant stated that he resided with his brother, who operated a shop, and that he would occasionally assist in the shop when he had no transport work. He further testified that the complainant's family lived near the shop and were known to him as regular customers who would sometimes take goods on credit. The Appellant claimed that he once declined to extend goods on credit to the complainant's father. He was told that he would see. He was subsequently arrested and charged with the offence of defilement, to which he pleaded not guilty.

Issues For Determination

14. Upon a comprehensive re-evaluation of the Record of Appeal, the judgment of the Trial Court, the Appellant's Petition, and the respective written submissions filed by both parties, the Court finds that the following issues arise for determination:

    a. Whether there was a mistrial.

    b. Whether the prosecution proved all the elements constituting the offence of defilement beyond reasonable doubt.

Analysis

15. The duty of the first Appellate Court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not

which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

16. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's 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, [1958] E. A. 424."

17. In Mbogo and Another v. Shah [1968] EA 93, the Court stated as follows:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

18. In undertaking this task, the Court must remain mindful that it neither saw nor heard the witnesses who testified before the trial court and must, therefore, make the appropriate allowance in that regard, as emphasized in Ajode v. Republic [2004] KLR 81.

Whether there was a mistrial.

19. With regard to the right under Article 50(2)(h) of *the Constitution*, an Accused person is entitled to legal representation at the State's expense only where it is demonstrated that substantial injustice would otherwise result. This right is not absolute; it is a qualified entitlement, dependent upon a showing that denial of legal representation would occasion injustice. Article 50 guarantees the right to a fair trial, which includes the right to legal representation where the interests of justice so demand. Accordingly, the provision ensures that an Accused person—regardless of the seriousness of the offence—may be afforded State-funded legal representation in appropriate circumstances. Such circumstances may include, but are not limited to, cases involving complex legal or factual issues, instances where the accused suffers from physical or mental disability or language barriers, or where public interest considerations necessitate legal aid due to the nature or gravity of the offence.

20. The Supreme Court in Republic v Chengo & 2 others (Petition 5 of 2015) [2017] KESC 15 (KLR) (26 May 2017) (Judgment) also expounded on the what substantial injustice means. The court said: -

> " In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expenses specifically. Inevitably, there will be instances in which legal representation at the expense of the State will but be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether

substantial injustice will be suffered, a court ought to consider, in addition to the relevant provision of *Legal Aid Act*, various other factors which include: -

(i) the seriousness of the offence;

(ii) the severity of the sentence;

(iii) the ability of the accused person to pay for his own legal representation;

(iv) whether the accused is a minor;

(v) the literacy of the accused; and

(vi) the complexity of the charge against the accused."

21. While the Appellant was charged with the serious offence of defilement, which carries a potential sentence of life imprisonment, there was no demonstration that he lacked understanding of the proceedings, that the case involved complex issues of fact or law, or that he was otherwise incapable of conducting his own defence. This Court notes that the Appellant duly exercised his right to cross-examine each of the prosecution witnesses. He was sufficiently engaged in the Court process that he asked for copies of the witness statements and charge sheets. He never complained that he did not understand the Court proceedings or the proceedings taking place., The Court, therefore, finds that the Appellant actively and fully participated in the trial proceedings. The Appellant also did not establish that substantial injustice would have resulted from proceeding without legal representation. Accordingly, the threshold for State-funded legal aid under Article 50(2)(h) of *the Constitution* was not met.

22. As to the alleged violation of Article 50(2)(j), the court record clearly reflects that the Appellant was arraigned and took plea. Prior to the commencement of the hearing, he was furnished with the charge sheet as well as witness statements, thereby enabling him to adequately prepare his defence. In the circumstances, there was no infringement of the right under Article 50(2)(j) of *the Constitution*.

Whether the prosecution proved all the elements constituting the offence of defilement beyond reasonable doubt.

23. The principle consistently affirmed across common law jurisdictions is that in criminal cases, the prosecution bears the burden of proving the accused's guilt beyond reasonable doubt. As established in Woolmington v DPP [1935] AC 462, this duty is fundamental and cannot be displaced except in limited statutory exceptions. R v Lifchus [1997] 3 SCR 320 further clarified that reasonable doubt must be based on logic and evidence, not on sympathy or speculation, and that even a belief that the accused is probably guilty is insufficient for conviction.

24. Similarly, in Moses Nato Raphael v Republic [2015] eKLR and Miller v Ministry of Pensions [1947] 2 All ER 372, it was emphasized that proof beyond reasonable doubt requires a high degree of probability, though not absolute certainty. Halsbury's Laws of England underscores that the legal burden of proof remains with the prosecution throughout the trial, and In re Winship 397 US 358 (1970) stresses the critical importance of this standard in upholding the integrity of criminal justice and safeguarding the Accused's liberty and societal standing.

25. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* (Cap 63A) which provides:

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement

8(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.

26. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* (Cap 63A) which the prosecution must prove beyond reasonable doubt are:

a. Age of the complainant;

b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act* (Cap 63A); and

c. Positive identification of the assailant.

27. In the case of CWK v Republic (Criminal Appeal 72 of 2013) [2015] KEHC 7553 (KLR) (Crim) (10 July 2015) (Judgment) it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

Age of the complainant

28. The age of the complainant forms one of the essential ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the *Sexual Offences Act* (Cap 63A) a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the *Sexual Offences Act* (Cap 63A), the definition of a child is the one assigned in the *Children Act* (Cap 141). This entails any human being of less than eighteen (18) years. The onus of proving age resides with the prosecution.

29. The significance of proving the ingredient of age in defilement cases was clearly spelt out by Mwilu J (as she then was) in the case of Hillary Nyongesa v Republic [2010] KECA 138 (KLR) stated that:

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* (Cap 63A) is determined by the age of the victim."

30. Therefore, in a charge of defilement, the age of the victim is important for two reasons:

i. defilement is a sexual offence against a child, and

ii. the age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

31. A child is defined as a person under the age of eighteen years. In this case, PW1 testified that she was four (4) years old at the material time. The child health and nutrition card were produced in evidence to confirm this. Additionally, PW4, the Investigating Officer, produced the complainant's clinic card, which indicated that the complainant was born on 28th August 2011. Having carefully considered the aforementioned documents, together with the P3 Form, the Post-Rape Care (PRC) Form, and the corroborative testimonies provided, the Court is satisfied that the complainant's age was sufficiently proved to the required standard.

Penetration

32. Section 2(1) of the *Sexual Offences Act* (Cap 63A)defines penetration as:

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

33. In addressing this issue, the Court is guided by the record. The complainant, in her testimony, provided a detailed account of the events leading up to the incident. PW1 testified that the Appellant engaged in "bad manners" with her. Upon evaluation of the evidence, this Court concurs with the Trial Court's finding that the complainant's use of the euphemism "bad manners" was, in the context, a clear reference to an act of defilement. It is not uncommon for minors appearing before the Courts to employ such language to describe acts of sexual assault. This Court, therefore, takes judicial notice that in cases of this nature, minors often use the words "Tabia Mbaya" or "bad manners" to describe acts of sexual violation, particularly where evidence of penetration is established.

34. In Daniel Arasa v Republic [2014] KEHC 3074 (KLR) the Court stated persuasively but quite correctly that:

> " It is common knowledge in this country and the court may thus take judicial notice that the words "Tabia Mbaya" i.e. bad manners coming from a young girl who has been a victim of sexual violence connotes nothing but sexual intercourse. Children in particular would always refer to sexual intercourse as "Tabia Mbaya" perhaps due to shyness or they may not know what description to give to such act. Suffice to hold that "Tabia Mbaya" is euphemism for sexual intercourse in sexual offences. The evidence by the complainant (PW1) and the clinical officer (PW2) was sufficient, corroborative and credible enough to establish the offence of defilement. The learned trial magistrate was therefore correct in his finding that penetration as defined by the *Sexual Offences Act* was proved."

35. The Appellant has vigorously challenged the probative value of the P3 Form and advanced several arguments questioning its reliability. Even assuming, for argument's sake, that the Appellant's objections regarding the P3 Form had merit—which this Court finds they do not, as the arguments are without substance—the Court is nevertheless satisfied that the Medical Laboratory Report and the Post Rape Care (PRC) Form, taken together, provide sufficient and cogent evidence establishing that defilement did in fact occur.

36. This sufficient description of the ordeal and an act of defilement and the fact of penetration was established by PW3 describing the injuries found in the victim's genitalia and the medical laboratory report position that there was presence of pus cells found in the high vaginal swab did corroborate the evidence of the minor on penetration.

37. The Court notes that it is not medically probable or typical for a child of four years of age to sustain hymenal rupture or disruption as a result of the use of tampons, engagement in vigorous sporting activities, riding bicycles, or from routine surgical procedures. At such a tender age, these activities are either developmentally inappropriate, unlikely to be undertaken, or not ordinarily associated with hymenal injury.

38. The medical report tendered in these proceedings confirms that the minor's hymen was widened and exhibited redness. According to the PW3's expert testimony, these findings are inconsistent with injuries arising from normal childhood activities or accidental causes. The evidence indicates that the observed condition of the hymen is consistent with penetrative trauma.

39. On the basis of the uncontroverted medical evidence, and in the absence of any plausible explanation consistent with normal childhood experiences, the Court is satisfied that the injuries sustained by the minor are indicative of defilement. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

Was the appellant the perpetrator?

40. The Appellant was a person well known to the complainants. Both PW1 and PW2 provided consistent and uncontroverted testimony that the Appellant was their neighbour and that he had, on several occasions, visited the complainant's home. PW2 was able to identify the Appellant through dock identification in court. The evidence of both witnesses is coherent and does not exhibit any indication of fabrication or malice. IN his defence the Appellant did not deny knowledge of the Complainants whom he said used to live near his brother's shop. This reinforces recognition.

41. The Appellant raised concerns regarding alleged inconsistencies in the witness statements, particularly relating to PW1's inability to recall the name of her father. However, in the view of this Court, such inability pertains to a peripheral or collateral detail and does not, in itself, cast doubt on the accuracy of the identification of the Appellant. Minor inconsistencies on non-essential matters do not undermine the credibility of otherwise clear and consistent identification evidence. Accordingly, this Court finds that there was no issue of mistaken identity and that the Appellant was positively and reliably identified as the perpetrator of the offence.

42. The prosecution's evidence was clear, consistent, and left no reasonable doubt that the Appellant caused penetration of the complainants. Accordingly, the key elements constituting the offence of defilement—namely, penetration and the minority age of the victims—were proved to the requisite standard of beyond reasonable doubt. The conviction entered against the Appellant was therefore proper and supported by the evidence on record. In conclusion, this Court affirms that the Appellant was positively identified as the assailant, with no possibility of mistaken identity.

43. Accordingly, the Court finds that the prosecution proved its case beyond reasonable doubt, and is satisfied that the Trial Court did not err in convicting the Appellant for the offence of defilement. Further the sentence handed out was the lawful sentence provided by the law. Until the situation otherwise changes, it remains the lawful sentence determined by Parliament for such offences.

Determination

44. The Appeal against both conviction and sentence is hereby dismissed as lacking in merit. The conviction is upheld, and the sentence of life imprisonment as imposed by the Trial Court is affirmed.

45. It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14TH DAY OF AUGUST, 2025

NJOROGE BENJAMIN K.

JUDGE

Judgment delivered in the presence of

Appellant present at Manyani Prison.

Miss Torosi for the State.

Ms. Susan Nzioka - Court Assistant