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Bare v Republic (Criminal Appeal E008 of 2025)
[2025] KEHC 11735 (KLR) (1 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11735 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E008 OF 2025

JN ONYIEGO, J

AUGUST 1, 2025

BETWEEN

MOHAMED BARE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence in Wajir PM's Court in Criminal Case No. E025 of 2024 delivered on 06.03.2025 by Hon. Baraka Xavier Francis – R.M.)

JUDGMENT

1. The appellant was charged with 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 13.10.2024 at around 1900hrs at [Partciulars Withheld] location, in Wajir East sub County, within Wajir County, intentionally he caused his penis to penetrate the vagina of SMB a child aged 14 years.

2. In the alternative, he was charged with an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on 13.10.2024 at around 1900hrs at [Partciulars Withheld] location, in Wajir East sub County, within Wajir County, he intentionally touched the anus of SMB a child aged 14 years.

3. The appellant took plea and denied the charges. Prosecution called five witnesses in its endeavor to prove its case. On being placed on his defence, the appellant gave sworn testimony and called four witnesses.

4. At the conclusion of the hearing, he was convicted of the main count and consequently sentenced to 20 years imprisonment. Dissatisfied by the conviction and sentence, he filed an amended petition of appeal on grounds that;

i. The learned magistrate erred in law and fact by convicting him notwithstanding the fact that the prosecution did not prove its case.

ii. The prosecution witnesses and especially the complainant was an unreliable witness.

iii. The learned magistrate erred in law and fact by meting out a harsh sentence.

5. Briefly, PW1, SMB testified that the appellant is a person known to her as they previously used to communicate on phone. That on 13.10.2024, at 4.30p.m., the appellant called and told her that he desired to meet her physically and so, they agreed to meet at 6.00 p.m., near her home. She stated that she left her home to meet the appellant whom she found inside a tuktuk. It was her testimony that upon peeping inside the tuktuk, the appellant called her mrembo as he brushed his hand on her face. That suddenly, she felt very weak but still, she could hear all the conversation that wass going on.

6. She stated that she heard the driver ask the appellant where he wanted to take them. In response, the appellant directed the driver to drive towards frontier girls. According to her, she could hear the conversation between the two but she was unable to speaks. That upon the tuk tuk driver stopping, the appellant tore her dera and proceeded to defile her. She stated that the driver tried to protect her but he was assaulted by the appellant.

7. It was her testimony that while she was undergoing the ordeal, the driver was also beaten by the appellant every time he would attempt to stand up. She stated that, after the appellant defiled her, the tuk tuk driver drove her home. That she was in pain as blood oozed from her private parts. She reiterated that while the appellant was defiling her, the driver was present watching and that any time the driver would try to help her, the appellant would hit him.

8. She further stated that after the ordeal, she requested the appellant to help her with his phone which she used to call her cousin Abdikake. She thus informed her cousin that she had been defiled and the same prompted the appellant to take his phone away.

9. That her mother together with her cousin received her when the very tuk tuk driver retuned her home. She recalled taking a bath before she could be taken to the hospital for medical examination and treatment. She further stated that her mother was aware of her relationship with the appellant in as much as she had wanted the appellant to talk to her (mother) first.

10. On cross examination, she stated that she identified the appellant to the police leading to his arrest and that the appellant had been seducing her for two months prior to the incident. On re-examination, she stated that the appellant defiled her twice between 7 p.m. and 9.00 p.m. and that he assaulted her when she resisted.

11. PW2, TD, the complainant's mother testified that on 13.10.2024 at 7.00 p.m., the complainant experienced some headache thus prompting her to go buy some Panadol. That PW1 took along neighbours' children but after some time, the said children returned home and informed her that PW1 entered a tuk tuk while screaming. She stated that the occupants of the tuk tuk were two men and the man who sat at the back had beards. It was her evidence that at 8.00 p.m., PW1 called and told her that Mohamed had defiled her.

12. That Abdikani was at that time helping her look for the complainant when all over sudden a tuk tuk stopped and dropped the complainant. According to her, PW1 looked very weak and dirty and so, they let her have a bath. The following day, she took her to the hospital for medical checkup and treatment. It was her evidence that PW1 told her that it was the appellant who defiled her. That on 14.10.2024, she shared the appellant's phone number with the police who tracked the appellant noting that previously, PW1 had shared the appellant's photo from his face book page.

13. PW3, MB, PW1's father testified that on the material day, PW2 called and informed him that PW1 had left to buy drugs when the appellant took her away. That PW2 told him that the appellant not only physically assaulted PW1 but also defiled her. It was his testimony that given that he was away from home, he returned the following day when they took PW1 to the hospital. He stated that PW1 has been sickly ever since the incident happened.

14. PW4, Julius Kipsang, a medical officer testified that on 14.10.2024, he received the complainant accompanied by PW2 and a police officer. That on general examination, she had a wound on the right and left side of the forehead. On her genetalia, she had a laceration on the left upper labia majora and a posterior fourchette on the lower vagina. He thus opined that the complainant had been assaulted and at the same time defiled.

15. PW5, xxx Sgt. Fardosa Yusuf, the investigating officer testified that on 14.10.2024, while at the gender desk, she received a minor accompanied with an adult man who reported that the minor had been defiled. That the appellant called PW1 and arranged for a tuk tuk which took the minor to the place where he defiled her. It was her case that in as much as the duo had been communicating, they had never met. She stated that PW1 lied to her mother that she had a head ache requiring her to go buy medicine but instead used the opportunity to meet the appellant.

16. That the appellant and PW1 were inside the tuk tuk when the driver drove them to Frontier Secondary area. That after a while, the complainant felt dizzy hence the appellant took the opportunity to defile her. That upon PW1 waking up, she asked the appellant what had ensued. It was then that she realized that she had ben defiled. She thus used the appellant's phone in calling her brother informing him of the incident. At that point, the appellant took the complainant back home and ran away. That after carrying out investigations, she tracked the appellant and consequently arrested him.

17. DW1, Mohamed Bare in his sworn testimony denied committing the offence urging that he was framed. He alleged that he was arrested even before the complainant was examined and further, that he had desired to marry PW1 but her mother was against the same. On cross examination, he stated that he had known PW1 for a period of two months and that she had told him that she was single and she did not have a boyfriend. That he gave her his phone number and further asked her whether she was working to which she responded that she simply stayed at home. He went further to state that he thought she was 20 years of age in as much as the charge sheet read 14 years. That PW1's mother knew his age and at no time did she tell him to stop dating PW1 and additionally, that PW1 had a son aged 4 years.

18. He raised an alibi defence by alleging that on the material day, he was at Eldas hence not Wajir. That PW2 demanded a lot of money from him and having in mind that PW1 was a divorcee, he felt that Kes. 150,000/- was a lot in the given circumstances.

19. DW2, Jibril Dagane recalled that PW2 was out to fix the appellant as she had demanded that the appellant stop dating her daughter. That he knew PW1 as the appellant's girlfriend and that he also thought that the complainant was an adult as the appellant had desired to marry her. It was his evidence that when the appellant was arrested, PW2 demanded money from the appellant. That when the matter was brought before the court, the appellant's family declined to give out the money.

20. DW3, Adan Abdi in his sworn testimony testified that he was aware that PW1 and the appellant were in a relationship. That in as much as he had never seen the complainant physically, he had seen her in the appellant's WhatsApp timeline as he used to post her and that they had been in a relationship since the year 2023. It was his evidence that PW1 loved the appellant but PW2 would not hear of it.

Additionally, that PW1 is a mother to a son aged 5. Of importance to note is the fact that according to the trial magistrate, the witness appeared deceptive and unreliable.

21. DW4, Ayub Ahmed Issack recalled that the appellant was his friend and that he was in the habit of posting the complainant's photo in his timeline. That the appellant used to call the complainant 'star'. He stated that due to the case herein, the appellant was forced to marry PW1 and that had PW2 demanded to be paid Kes. 400,000/-. That before the said money could be paid, PW2 reported the matter to the police thus prompting the arrest of the appellant. He urged that the appellant was ready to marry PW1 and sought for forgiveness on behalf of the appellant.

22. The appeal was canvassed by way of written submissions.

23. The appellant urged through his submissions dated 25-04-2025 that the prosecution did not adduce sufficient evidence to support the charge. He took issue with the testimony of pw1 which he termed as being unreliable. He contended that pw1 having lied to her mother that she had ahead ache and that she needed to go and buy medicine which she did not and instead went to meet him is proof enough that she was dishonest hence her uncorroborated evidence alone should not have been relied on to convict. To buttress that position, he referred the court to the case of Josephat Kiprotich Koech vs Republic (2025)e KLR.

24. It was further submitted that, the court did not promptly inform him of the need to have legal representation nor was he given such legal aid as required under Article 50(2)(h) of *the constitution*. He further contended that the exhibits were not properly documented and stored before production.

25. That in as much as sentencing is at the discretion of the court, the trial court in the given circumstances meted out a harsh and severe sentence against the appellant. This court was urged to quash the conviction and set aside the sentence by the trial court. In the end, the court was urged to order for a retrial.

26. The respondent through the learned prosecutor, Mr. Owuor filed submissions dated 13.05.2025 urging from the outset that the prosecution was opposed to the appeal as the trial court reached a fair determination. The court was referred to the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013, where the court stated that in an offence like defilement, the prosecution was expected to prove three elements namely: proof of penetration, the complainant was a child at the time of the act complained of and proof that the accused was indeed properly identified.

27. Counsel submitted that age of the complainant was established when the court conducted voire dire examination thus confirming that the minor was intelligent enough. Further, that the minor in her testimony stated that she was 14 years at the time when the act herein was allegedly perpetrated. As such, the same settled the fact that PW1 was a minor aged 14 years. To that extent, counsel relied on the case of Daniel Kamau vs R [2019] eKLR where the Court of Appeal cited with approval the case of Fappyton Mutuku Ngui vs R [2014] eKLR thereby holding that:

> " ...that 'conclusive' proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

28. On penetration, counsel urged that the complainant stated how the appellant had unlawful carnal knowledge of her on the material day. That the same was confirmed by the medical officer who confirmed that indeed the complainant was penetrated. In support of the foregoing, counsel relied on the case of Mark Oiruri Mose vs R [2013] eKLR where the court was of the view that penetration of a minor does not necessarily end in the release of sperms.

29. On identification, the learned counsel stated that it was not denied that PW1 previously had been communicating with the appellant prior to the incident herein. That the time also spent while in the said vehicle was also enough to identify the appellant.

30. On sentence, counsel relied on the case of Francis Karioko Muruatetu and Anor vs Republic [2021] eKLR where the Supreme Court gave guidelines to the effect that the said case cannot be used as an authority to infer that all laws prescribing mandatory or minimum sentences are inconsistent with *the constitution*. This court was urged to dismiss the appeal and uphold the finding by the trial court.

31. I have considered the trial court's record, the grounds of appeal and the submissions filed by both parties. The following issues does germinate for determination;

    i. Whether the ingredients of the offence of defilement were proven.

    ii. Whether failure to offer legal representation for the applicant prejudiced the appellant

    iii. Whether the sentence is harsh.

    iv. Whether the court should order for a retrial

32. This being the first appeal, this court is as a matter of law enjoined to re-analyze and re-evaluate a fresh all the evidence adduced before the lower court and draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses testify. [See Okeno vs Republic (1072) EA 32].

33. Section 8 (1) and (3) of the Sexual Offence Act No 3 of 2006 provides that;

    1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    2. A person who commits an offence of defilement with a child aged between age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

34. The offence of defilement is rooted on three main ingredients being; the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. [See Dominic Kibet Mwareng vs Republic [2013] eKLR].

35. With regard to age, the Court of Appeal in the case of Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated as follows:

> " ... 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." (emphasis added)."

36. From the evidence on record, the age of the minor was proved to be 14 years.PW1 and her father pw3 testified that she was a 14-year-old girl and the same was corroborated by her birth certificate (p.ex.5) which proved that the minor was born on 01.01.2011. While the offence herein was alleged to have occurred on 13.10.2024, it is thus clear that the age of the complainant was 14 years. As such, I find that PW1 was a minor.

37. The appellant in his defence stated that he believed that PW1 was an adult aged 20 years and so behaved and by her actions, he thought that she was an adult.

38. Section 8(5) and 8(6) of the Sexual Offence Act, No 3 of 2006 avails a defence to a person who is charged with the offence of defilement. The said provisions provide that;

> " Section 8(5) of the sexual offence Act "It is a defence to a charge under this section if- (a) It is proved that such child deceived the accused person into believing that he or she was over the age of 18 years at the time of the alleged commission of the offence; and (b) the accused reasonably believed that the child was over the age of eighteen years." Section 8(6) of the *Sexual Offences Act* also provides that ;"The belief referred to in subsection 8(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

39. In the case of Irene Atieno Ochieng vs Republic (2017) the High Court in Migori held that: -

> " whenever the accused opts to rely on the defence under section 8(5) of the *Sexual Offences Act*, the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that:
>
> a. That it was the child who deceived the accused person into believing that he/ she was over the age of 18 years at the time of the alleged commission of the offence;
>
> b. That the accused person reasonably believed that the child was over the age of eighteen years; and
>
> c. That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable. "The accused person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or action on the part of the child. (Emphasis).

40. Similarly, the Court of Appeal in the case of Eliud Waweru Wambui vs Republic (2019) eKLR had the opportunity to discuss the issue of the defence provided under section 8(5) and (6) of the *Sexual Offences Act* and stated thus;

> " Subsection (5) states that it is a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it is rather curious provision in so far as it sets in conjunctive as opposed to disjunctive terms which seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to the require that his such belief be reasonably held.
>
> Indeed, a reading of subsection (6) seems to add a qualification to subsection 5(b) that separates it from the belief proceedings from deception in subsection (5)(a). We would therefore opine that the elements constituting a defence should be read disjunctively if the two sub sections are to make sense...we would find merit in the Applicants contention that in all circumstances of the case he reasonably believed that the complainant was over the age of 18 years. The burden of proving that deception or belief fell upon the Appellant, but the burden is on a balance of probabilities as is to be assessed on the basis of the appellant's

subjective view of the facts. Thus whereas indeed the complainant was still in school in form 4, that alone would not rule out a reasonable belief that she would be over 18 years old.

It is germane to point out that a child need not deceive by way of actively telling a lie that she is over 18 years. We would give the term deceive the ordinary dictionary meaning which is to; "Deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to" (As per the concise oxford English Dictionary, 12th Edition).So understood, we would think that had the two courts below properly directed their minds to the Appellants defence and the totality of the circumstances of this case, they would have in all likelihood have arrived at a different conclusion on it.

It was a non-direction that they did not do so, rendering the conviction unsafe. We need to add as we dispose off this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of an age younger than 16 years old. We think it is rather unrealistic to assume that teenagers and maturing adults in the since employed by the English house of lords in Gillick Vrs West Norefolk & Wisbech Area Health Authority (1985) 3 ALL ER 402, do not engage in, and often seek sexual activities with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process and not a series of disjointed leaps.

As Lord Scarman put it in that case (at page 421); "if the law should impose on the process of, "growing up" fixed limits where nature knows only a continuous process, the price would be artificially and lack of realism in an area where the law must be sensitive to human development and society change." At page 422The law also referred to the judgment of chief justice Lord Parker in R vs Howard (1965) 3 ALL ER 684".... Where he ruled that in the case of prosecution charging rape of a girl under the age of 16 the crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist and added the comment that, " there are many girls who know full well what it is all about and can properly consent". Where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion.

In England for instance, only sex with persons of less than the age of 16 years, which is the age of consent, is criminalized and even then the sentences are much less stiff at a max of 2 years for children between 14 to 16 years of age. See Archbold criminal pleadings Evidence and Practice (2002) page 720.The same goes for a great many jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue.

Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.

41. On the allegation by the appellant that the complainant had a four-year-old baby, the same was not raised during cross examination. There was no evidence that the complainant had a baby aged 4 years which could imply that she delivered while aged ten years. Even if she had, it could still be possible that she was still a minor who needed protection from repetitive sexual abuse. It is not likely that one would mistaken a 14-year child to be 18 or 20 years old as alleged by the appellant. I do not agree with that type of defence.

42. Assuming for a moment that the complainant was over 18 years old, would one say that there was consent? The answer is no. This is evident from the fresh physical injuries the complainant suffered during the ordeal after being drugged to the point of being stupefied such that she became weak, Dizzy and unconscious. Pw1, pw2 and pw4 the doctor confirmed the existence of those injuries. This is not the conduct of a consenting adult which she was not.

43. The second element is penetration which is defined under Section 2 of the *Sexual Offences Act* as follows: "The partial or complete insertion of the genital organ of a person into the genital organs of another person."

44. PW1 in her evidence in chief testified and confirmed that the appellant penetrated her and further, PW4 corroborated PW1's testimony by stating that the complainant had not only been physically assaulted but was also defiled. Pw1, was emphatic how the appellant her friend of two months called her on phone requesting to meet her. That when they met, the appellant called her a mrembo lady as he laced his hand on her face thus causing her to become dizzy and weak.

45. It was her case that the appellant defiled her while in a condition she could hear the communication but was not able to talk. That her resistance was met with some beating (assault). That when she was released she had blood oozing from her private parts as a consequence of defilement. Pw5 the investigating officer confirmed that the complainant was in pain. Pw2 stated that when her daughter reported back home, her clothes were torn and dirty, was bleeding, she had injuries on the forehead and the shoulder.

46. Pw4, the doctor who examined the complainant stated that; she was blooding from her vagina; was bitten on her left hand; had a wound on the forehead and left side of the head; laceration on the labia majora and wounds inside the vagina. He concluded that the complainant was defiled and assaulted.

47. The subject of penetration was well elaborated in the case of Mark Ouiruri Moses v Republic [supra] and Eric Onyango Ondeng v Republic [2014] eKLR where it was held that penetration did not need to be deep inside a girl's organ or need for presence of spermatozoa and that it was sufficient that there was penetration only on the surface. From the above evidence, I have no doubt that there was proof of penetration.

48. Finally, on identification, based on the evidence of the appellant and his witnesses, it was clear that the parties herein knew each other so well. At one point, it was stated that the appellant had desired to marry the complainant but PW2 was against the same. The offence took place at 6.00pm when it was still day light. The two exchanged before the ordeal commenced. They had no grudge before to infer a frame up by pw1. Pw1 assisted in the arrest of the appellant. As such, the issue of identification does not arise as both parties were known to each other and related as boyfriend and girlfriend.

49. As to the admissibility of uncorroborated evidence of the complainant, Section 124 of the *Evidence Act* is very clear that in sexual offences, a court can convict based on the evidence of a single witness as long as it is satisfied of the truthfulness of the witness. See Ismael Nyambo Mwadime v Republic (2021) e KLR where the court held that;

> " Under section 124 of *evidence Act*, evidence of a single sexual offence victim does not require corroboration and a court can convict on such evidence upon recording reasons for believing such evidence"

50. The court was satisfied that pw1 was reliable and truthful hence corroboration was not mandatory.

51. As to legal representation under Article 50(2), the same is not mandatory. It is within the discretion of the court if gross or substantial injustice is likely to arise. I do not find it fatal in the circumstances of this case considering the detailed cross examination done by the appellant. Hamisi Swaleh Kibuyu v Republic [2015] KECA 296 (KLR) where the court of appeal held that legal representation was not absolute in non-capital offences.

52. As to the alibi defence, the same was raised during the defence hence an afterthought. Superior courts have time and again held that an alibi defence should be raised at the earliest opportunity possible. See Victor Mwendwa Mulingevs Republic[2014]eKLR where the court of appeal rendered itself on the issue of alibi thus:-

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs Republic[12]this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought"

53. From the above analysis, it is my finding that the trial court properly analyzed the evidence on record and arrived at a just decision. I have no reason to disturb the conviction and the sentence which is the minimum provided by law hence proper exercise of discretion. Accordingly, the appeal is hereby dismissed.

ROA 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST AUGUST 2024 2025

....

J. N. ONYIEGO

JUDGE