TAW v Republic (Criminal Appeal E042 of 2024)
[2025] KEHC 11566 (KLR) (1 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11566 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E042 OF 2024

DK KEMEI, J

AUGUST 1, 2025

BETWEEN

TAW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from the judgment of Hon. B.Limo (P.M) delivered on 4th July 2024 vide Siaya Chief Magistrate's Court Criminal cases S.O.No.E068 of 2023)

JUDGMENT

1. The Appellant herein TAW was charged at the trial court with the offence of defilement contrary to section 8(1) as read with section 8 (4) of the *Sexual Offences Act* No. 3 of 2006. The Particulars were that on diverse dates between 18th April 2020 and 2nd September 2020 at [Particulars Withheld] Siaya Subcounty within Siaya County, intentionally caused his penis to penetrate the vagina of S.O.O. a child aged 16 years.

2. The Appellant likewise faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The Particulars were that on diverse dates between 18th April 2020 and 2nd September 2020 at [Particulars Withheld] Siaya Subcounty within Siaya County, intentionally touched the vagina of S.O.O. a child aged 16 years with his penis.

3. The matter proceeded to full trial whereupon the Appellant was convicted and sentenced to 15 years' imprisonment.

4. Aggrieved by the conviction and sentence, the Appellant has since lodged his appeal vide his Petition of Appeal filed on 6/8/2024 wherein he has raised the following grounds:

i. That the trial magistrate erred in law and fact in putting much reliance on the sole evidence of recognition notwithstanding that there was no cogent report to the authority to confirm the allegations instead based on inconclusive circumstances.

ii. That the trial magistrate erred in law and fact by failing to consider the need for forensic examination reports as well as section 65(1) of the *Evidence Act* to avoid mischief in the wheels of justice.

iii. That the trial magistrate erred in law and fact by not considering that the prosecution's case was made up due to a pending family dispute.

5. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court to arrive at its independent findings and conclusion. (See Okeno vs. Republic [1972] EA 32). In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to make due allowance in that respect as was held in Ajode v. Republic [2004] KLR 81.

6. In determining this appeal, I have to bear in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden is always on the prosecution to prove the allegations levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt as held in Woolmington Vs Dpp [1935] AC 462 as well as in Sawe versus Republic [2003] eKLR.

7. The prosecution called a total of four witnesses in support of its case while the defense called two witnesses.

8. S.O.O (PW1) gave her evidence that she is 20 years old. It was her testimony that she knew the Appellant as her maternal cousin. That on 20/6/2020 while she was working at her mother's shop, she had gone to the store when the Appellant followed her, removed the short that she wore and had sex with her. She stated that the Appellant threatened her. Out of fear she did not tell anybody. That later on 2/9/2020 the Appellant went to her home and had sex with her again. That she later decided to disclose the issue to her mother EAA (PW2) who took her to Siaya County Referral Hospital. At the hospital, one Isaac Imbwaga attended to her, prepared and signed her P3 form. However, at the time of giving evidence the said Isaac was out of the country. Eunita Nyakundi (PW3) stepped in for him. She testified that she was a medical officer at Siaya County Referral Hospital and had had worked with the said Isaac Imbwaga for four years and was conversant with his handwriting and signature. She stated further that the minor was examined at the facility on 18/9/2020 when she was aged 16 years old. That the examination of the genitalia showed bruised vagina walls, old broken hymen scar, and whitish vaginal discharge. That HIV test was negative while pregnancy test was positive, VDRL test was positive and that blood was also seen. That an ultra sound was done and a foetus aged 5 weeks 6 days was seen. She opined that the complainant had indeed been defiled. She produced the medical documents as follows: P3 form (P exhibit 1(a), treatment notes (P exhibit 1(b), post rape care form (P exhibit 2), X-ray results form (P exhibit 3), lab request form (Exhibit 4), Ultra sound request form was (P exhibit 5).

   On cross-examination, she stated inter alia; that the Appellant first defiled her on 20/6/2020 when she still a virgin; that the Appellant closed her mouth; that she informed her mother after he defiled her a second time on 2nd September 2020.

9. The complainant's mother (PW2) made a report with the police and the matter was investigated by Pc Luseno and No. 25655 Pc Khamala (PW4) who testified that he was a co-investigating officer. That the matter was first allocated to PC Sara Luseno who issued the P3 form and escorted the minor to the hospital. That PC Luseno later recorded statements from the Complainant and her witnesses. She later tracked the Appellant who had gone missing since the year 2020 to Nairobi. The Appellant had

been arrested in Nairobi for a different crime and that they asked for him to be transferred to Siaya. That he drafted the charges and escorted the Appellant to the court to take plea. He produced the birth certificate of the Complainant as P Exhibit 6.

10. That marked the close of the prosecution's case and that the court later ruled that the prosecution had established a prima facie case against the Appellant who was subsequently placed on his defense. He opted to tender a sworn testimony and called one witness.

11. TW (DW1) testified that he was 25 years old at the time of his arrest, a fourth-year student at Methodist University pursuing a Bachelor's degree in Economics. He stated that he knew PW1 as his cousin and that he used to live in the home of PW2 at the servant quarters and worked at her shop. That he was aware of PW1's age since the year 2020. He denied the charges and maintained that he has been framed due to a succession case involving his mother and her siblings.

    On cross-examination, he stated inter alia; that the complainant is his cousin; that he was aware of the alleged dates when the complainant was agitated; that he was aware of the complainant's age in 2020 which was 16 years; that the complainant was known to him.

12. AA (DW2) testified that the Appellant is her first son out of 6 children. That after the Appellant completed his form four, he went and lived with PW2 at her home. That she knows nothing about the charge of defilement.

13. That marked the close of the defense case.

14. The appeal was canvassed by way of written submissions. Both parties duly complied.

15. I have considered the evidence on record plus the submissions on appeal and find the issue for determination is whether the Respondent's case was proved against the Appellant beyond any reasonable doubt.

16. Section 8(1) and (4) of the *Sexual Offences Act* No. 3 of 2006 stipulates as follows:

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

    4) A person who commits an offence of defilement with a child between the ages of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

17. The burden of proof lies on the prosecution and that it never shifts to an accused. Under Section 107 of the *Evidence Act* (Cap 80), the burden of proof is on the person who alleges to prove the allegations levelled against another. This being a criminal case, the standard of proof is beyond any reasonable doubt. The prosecution must prove its case against an accused person beyond a reasonable doubt, and if there is a doubt the case must be resolved in favor of the accused. This was the holding by the House of Lords in the leading Judgment in that area in the case of Woolmington v Director of Public Prosecutions [1935] AC 462 where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant's guilt beyond any reasonable doubt.

18. That position and the holding in Woolmington (supra) has been accepted and applied by our Courts for many years. For instance, in the case of Moses Nato Raphael v Republic [2015] eKLR, the Court of Appeal referred to the speech by their Lordships in the said case and stated:

    > ''The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for

the converse, and shifts this duty to the accused, but that is not the case here. This principle is well captured in the time-honored English case of Woolmington v DPP (1935) AC 462 where the Court stated:

'Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to the qualification involving the defence of insanity and to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

19. The Court of Appeal in the case of Simon Mwangi Wambui v Republic [2014] eKLR stated the duty of the prosecution in criminal cases on burden of proof following Woolmington (supra):

> ''That is the principle that emerges from the House of Lords decision in Woolmington v DPP [1935] All E R 1 to which we were referred."

20. As the offence against the Appellant is one of defilement, the Respondent was under obligation to prove the ingredients of the offence namely, the age of the complainant (must be a minor), penetration (partial or complete) and the identity of the Appellant as the perpetrator.

21. As regards the age of the Complainant, the investigations officer (PW4) produced a birth certificate of the complainant which indicated that she was born on 11/04/2004. This made her about 16 years and two months at the time of the offence. The complainant testified that she was then aged twenty years at the time of her testimony but that she was a minor at the time of the incident. Hence, it was confirmed that the complainant was a minor. Under section 2 of the *Children Act*, any person who is below the age of 18 years is a child and thus under the law does not have capacity to give any consent to any transaction. The ingredient of age is a very critical component in these kinds of offences as the subsequent sentences to be imposed upon conviction will heavily rely on it. The Court of Appeal in the case of Elias Kaingu Kasomo Vs R Criminal Appeal No. 504 of 2010 (UR) held as follows:

> ''Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

As the complainant's age fell within the age bracket of 16-18 years old, i find that this ingredient was proved by the Respondent beyond reasonable doubt.

22. As regards the aspect of penetration section 2 of the *Sexual Offences Act* provides that penetration may be partial or complete.

Section 2 of the *Sexual Offences Act*: "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

In the case of Mark Oiruri Mose Vs R Criminal Appeal No. 295 of 2012 [2018] eKLR the Court of Appeal held that the law does not require the proof of spermatozoa in the genital organ of the victim and that as long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and that the penetration need not be deep inside the girl's vagina"

It was the evidence of the complainant that the Appellant removed her pair of shorts and defiled her during the first encounter and that during the second encounter he defiled her as well. The evidence of the medical officer (PW3) testified that upon examination of the Complainant, the genitalia showed bruised vagina walls, old broken hymen scar, whitish vaginal discharge. HIV was negative, pregnancy positive, VDRL positive and that blood was also seen. An ultra sound was done and that a foetus aged 5 weeks 6 days was seen. She opined that the complainant had indeed been defiled. She produced the medical documents as follows: P3 form (P exhibit 1(a), treatment notes (P exhibit 1(b)), post rape care form (P exhibit 2), X-ray results form (P exhibit 3), lab request form (Exhibit 4), Ultra sound request form (P exhibit 5). I am satisfied that ingredient penetration was proved by the Respondent beyond reasonable.

23. As regards the identity of the perpetrator, the complainant (PW1) testified that the Appellant was her maternal cousin. The same was affirmed and corroborated by the Appellant (DW1) in his defence evidence that he knew the Complainant very well as his cousin. Hence, the issue of the Appellant's identity was not in doubt. It came out clearly that the two love birds knew each other quite well. It transpired from the evidence of both the Appellant and the complainant that there was no grudge which existed between the family of the complainant and that of the Appellant. Even though the Appellant attempted to bring up a certain case involving his mother and the complainant's mother, nothing turned out since the same was just a succession matter between the two who were sisters and which did not affect the Appellant in any way. I find that this was a matter of identification by recognition. The learned trial magistrate indeed warned himself of the fact that the evidence of the complainant was sufficient without corroboration regarding the issue of the sexual intercourse between the Appellant and the complainant. Indeed, in these kinds of offence which are done in secret, the possibility of an eye witness is always remote. In Wamunga vs Republic (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

24. Similarly, the Court further cited its own decision in Abdala bin Wendo & Another vs Republic (1953), 20 EACA 166 where it held:

> " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

25. In the case of Reuben Taabu Anjononi & 2 others vs Republic (1980) eKLR by the Court of Appeal in Nairobi held that:

> " .... recognition not identification of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant..."

From the above, it is clear that the Appellant was not a stranger to the Complainant. The Complainant was able to recognize the Appellant as the person who had defiled her. In the case of Abanga Alias Onyango –Vs- R, Criminal Appeal No. 32/1990, the court stated that circumstantial evidence should be such that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused.

26. Taking into account the above circumstances of this case, I am convinced that the same point is made to no one but the Appellant as the person who defiled the Complainant. Iam satisfied that this ingredient was proved beyond any reasonable doubt by the Respondent

27. In the grounds of appeal, the Appellant has claimed that a DNA test should have been done to confirm exactly who the culprit was. It is my humble view that the same may not be relevant in cases of defilement where the above three ingredients are to be proved. The Appellant's argument would hold water had it been a case of paternity of the child or pregnancy. The mere fact that the Complainant recognized him as the person who penetrated her even if she would not have gotten pregnant is enough to be convicted of defilement. The said ground therefore must fail.

28. An analysis of the evidence herein clearly point out to the fact that the Appellant was placed at the scene of crime. Hence, I find that the conviction arrived at by the trial court was quite sound and must be upheld. The Appellant's defence evidence was properly rejected by the trial court as the same did not shake that of the Respondent which was quite overwhelming against him.

29. As regards the issue of sentence, Section 8(1) and (4) of the *Sexual Offences Act* No. 3 of 2006 stipulates as follows:

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

4) A person who commits an offence of defilement with a child between the ages of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years

33. The Court of Appeal in the case of Benard Kimani Gacheru v. Republic Criminal Appeal No. 188 of 2000 stated:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."
>
> It is noted that the trial magistrate imposed a sentence of 15 years' imprisonment. Guided by the above precedent and the legal provision captioned above, I find the sentence lawful and commensurate to the offence. It is noted that the Appellant took advantage of the complainant who was then naïve and a cousin of the Appellant who had been staying with the complainant's parents. The actions of the Appellant has scarred and psychologically affected the complainant. The Appellant came out as ungrateful after being hosted by the complainant's parents and who paid his school fees. I find the Appellant's conduct was abhorrent and that the custodial rehabilitation was merited in order to help him become

a better individual before being released back to the society. I hereby uphold the sentence imposed by the trial court. It is also noted that the Appellant was in custody throughout the trial and hence the said period must be factored in the sentence. The trial court did not consider the same. Under section 333(2) of the *Criminal Procedure Code*, the period spent in custody must be considered during sentencing of an accused. Hence, the sentence of 15 years' imprisonment should commence from 27/11/2023.

34. In the result and save only that the sentence of 15 years imprisonment shall commence from 27/11/2023, the Appellant's appeal lacks merit and is dismissed.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 1 ST DAY OF AUGUST 2025.

D. KEMEI

JUDGE

In the presence of :

TAW.....Appellant

M/s Kerubo.....for Respondent

Kevin/Kimaiyo.....Court Assistant