

KENYA / JUDGMENT

Dula v Republic [2026] KEHC 13461 (KLR)

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COURT

High Court

BEFORE

FR Olel

CASE / FILE NUMBER

Criminal Appeal E032 of 2025

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Dula v Republic (Criminal Appeal E032 of 2025) [2026] KEHC 13461 (KLR) (31 August 2026)
(Judgment) Neutral citation:

[2026] KEHC 13461 (KLR) Republic of Kenya In the High Court at Marsabit Criminal Appeal E032 of 2025 FR Olel, J August 31, 2026 Between Ali Tona Dula Appellant and Republic Respondent (Being an appeal arising from the conviction and sentence delivered on 04.09.2025, delivered by Hon W.K. CHERUIYOT (PM) in Moyale MCSO No E018 of 2024)

Judgment

A. Introduction 1. The Appellant was charged 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 of the offence were that on diverse dates between 24 th November 2024 to 28 th November 2024, at Manyatta area in Moyale Sub-County within Marsabit County, he intentionally and unlawfully caused his penis to penetrate the vagina of M.M.M, a child aged seventeen (17) years. 2. In the alternative, he was charged with the offence of committing 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 diverse dates between 24 th November 2024 to 28 th November 2024, at Manyatta area in Moyale Sub-County within Marsabit County, he intentionally and unlawfully caused his penis to penetrate the vagina of M.M.M, a child aged Seventeen (17) years. 3. The Appellant took plea and pleaded not guilty to the charges. B. Prosecution Case 4. PW1, M.M.M testified that she lived in Manyatta area of Moyale town and had worked for the appellant, Ali Tona Dulai, as a house help for three months in 2024. She stated that on 24 th November 2024, while at the accused's home, he had come with a knife, took her into his room, and had forceful sexual intercourse with her. In the process, he threatened her not to tell his wife. Between then and 28 th November 2024, the accused repeated the act under similar circumstances, until she reported the matter to their neighbors and later to the police at Manyatta after informing the accused's wife. She was taken to hospital, treated, and issued with a P3 form (PMFI 1), PRC form (PMFI 2), and treatment notes (PMFI 3). Her age assessment report (PMFI 4) confirmed she was 17 years old. She identified the accused in court as the person who defiled her. On cross-examination, PW1 stated that the

accused's wife was away on both occasions when the incidents occurred. 5. PW2, Hirbo Woche, a village elder from Moyale Burji, testified that on 29th November 2024 at around 9:00 p.m., he received a call from PW3, a nyumba kumi elder, informing him that PW1 had run away from her employer's house. PW1 was brought to him and reported that her employer, the Appellant, had raped her four times. She had no shoes or change of clothes. PW2 took her to the AP camp, where she made a report. The Appellant was not found that night but was later arrested. PW2 accompanied PW1 and police officers to hospital for examination. 6. PW3 Abdi Woche, a neighbour and relative of the appellant, testified that on 29 th November 2024 at about 6:45 p.m., he saw PW1 running from the direction of the Appellant's home while being chased by the said appellant. He noted that PW1 had no shoes at the time. PW3 further stated that when the Appellant saw him, he returned to his house. PW1 then told him that the Appellant had raped her several times and wanted to rape her again. The following morning, he called PW2 and took PW1 to him for appropriate redress. He confirmed that he could see the accused's home from his own, about 50 meters away. 7. PW4, Dr. Adan Husseinwork, a medical officer at Moyale Sub-County Referral Hospital, testified that on 2 nd December 2024, he examined PW1, who was escorted to the hospital by PW5. PW1 reported that she had been defiled by the appellant and threatened with a knife. On examination, her hymen was broken but not freshly so, and no other injuries were noted. He produced the P3 form (PEX 1), PRC form (PEX 2), and investigation notes (PEX 3). He confirmed that PW1 was presented to the hospital five days after the alleged incident. 8. PW5 Sergeant Tume Huka, attached to Moyale Police Station, testified that on 2 nd December 2024, she received a report from her OCS to investigate a defilement case, reported at Manyatta Police Post by PW1. She proceeded to the said police post and found both the Appellant and PW1 present. She placed the appellant into custody and then escorted PW1 to hospital for examination and later returned to the station, where her statement was recorded. 9. PW1 explained to her that on diverse dates between 24.11.2024 and 28.11.2024 the appellant had defiled her at her work place. Specifically, she affirmed that the Appellant was a boda boda rider and would come home at lunchtime, when he would forcefully hold her by her neck, while threatening her with a knife and then would push her to the bedroom, where he would forcefully defile her. On the said 28.11.2024 at about 18.40pm the Appellant had started to touch her breasts and buttocks, and in response she had escaped and ran to PW3's home for shelter. 10. On the following day, the elders were informed and the matter escalated to Manyatta Police post. PW5 further stated that PW1 was from Ethiopia and did not have a birth certificate, so she was taken for age assessment, which confirmed that she was 17 years old. She produced the age assessment report (PEX 4) and reiterated that the medical report revealed the PW1's hymen was broken, which corroborated PW1's evidence. On cross-examination, she stated that she had relied on the PW1's report and other evidence gathered during her investigations to charge the appellant. She confirmed that no one saw the accused defile PW1 but that a neighbour saw him chasing her. C. Defence Case 11. The appellant was placed on his defence and gave an unsworn statement. He stated that he lived in Manyatta and worked as a boda boda rider. He testified that elders had tried to intervene in the matter, but one elder reported the case to the police. He claimed that he was brought to court because of political differences and insisted that the accusation was false. He further stated that the person who brought him to court lied against him and that he had plans to sue him but lacked

the ability to do so. He added that the doctor (PW4) had testified that he had not noted any adverse medical findings after examining the complainant and concluded by saying he had suffered for no reason. 12. The learned trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and proceeded to convict him under Section 215 of the criminal procedure code. After mitigation, the trial court sentenced the Appellant to serve fifteen (15) years imprisonment. D. The Appeal 13. Dissatisfied by the conviction and sentence passed, the Appellant filed his petition of appeal and raised the following grounds of Appeal that; a. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution did not prove that the complainant was penetrated. b. That the learned trial magistrate erred in law and fact by failing to note that the prosecution did not prove its case beyond reasonable doubt according to the law. c. That the learned trial magistrate erred in both matters of law and fact by failing to consider the defence of the appellant. 14. The Appellant prayed that his Appeal be allowed, the conviction and sentence be set aside, and he be set free. E. Analysis and Determination 15. The being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno versus Republic* (1072) EA 32, *Pandya versus Republic* (1957) EA 336) & *Shantital M Ruwala versus Republic* (1957) EA 570, where the court of appeal set out the duties of the first appellant court. 16. Moreover, in *Peter's vrs Sunday Post* (1958) E.A. 424 it was said that it is not the function of the first appellant court to merely scrutinize the evidence to see if there was some evidence to support the lower court finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses. 17. I have examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the Appellant and the respondent Counsel and find that the following issues arise for determination; a. Whether the ingredients of the offence of defilement were proven. b. Whether the sentence passed should be interfered with.

- a. Whether the Ingredients of the Offence of Defilement were Proven 18. In criminal proceedings, the burden of proof rests squarely on the prosecution, which must satisfy the court through credible and convincing evidence that the material facts constituting the offence have been proved beyond reasonable doubt, thereby establishing the case and warranting a judgment in its favour. See *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 , *Republic Vs Edward Kirui* (2014) eKLR, and *Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another* (2008) INSC 1688. 19. Section 8 (1) and (4) 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. 4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. 20. In prosecutions for the offence of defilement, three essential ingredients must be proved: a. the age of the complainant; b. proof of penetration as defined under section 2(1) of the Sexual Offences

Act ; and c. the positive identification of the perpetrator. 21. On the question of age, the court relies on the case Edwin Nyambogo Onsongo vs. Republic (2016) eKLR where the Court of Appeal held that “ ... 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.” 22. In the case of Francis omuroni versus Uganda, court of Appeal criminal Appeal No 2 of 2000, it was held thus “ In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense 23. From the evidence on record, the age of the minor was established through the age assessment report produced as Exhibit 4 by PW5, which confirmed that at the time of the offence PW1 was seventeen (17) years old and no contrary evidence was offered to challenge the same. This leaves the court with no doubt that the complainant was a minor within the meaning of the Sexual Offences Act at the material time of the incident. 24. On penetration, Section 2 of the Sexual Offences Act defines it as; “ The partial or complete insertion of the genital organ of a person into the genital organs of another person.” 25. On the second element, penetration is proved through the complainant’s testimony, corroborated by medical evidence. Where medical evidence is unavailable or inconclusive, the court is required to subject the child’s testimony to thorough scrutiny and exercise utmost caution in determining whether penetration was proved. 26. In the present case, the complainant (PW1), a 17-year-old female, testified that on 24 th November 2024, while working as a househelp for the appellant, he threatened her with a knife, took her into his room, and had sexual intercourse with her. She further stated that the appellant warned her not to disclose the incident to his wife. Between the said date and on 28 th November 2024, the appellant defiled her three more times and eventually exhausted by continuous sexual assault, she sought refuge at PW3 home. 27. The medical evidence of PW4, Dr. Adan Hussein, lent weight to the prosecution case. The complainant was presented to Moyale Sub-County Referral Hospital five days after the incident and upon examination, he found that the complainant’s hymen was broken, though not freshly, and no other injuries noted. He produced the P3 form, PRC form, and treatment notes as exhibits. The medical findings indicated that the complainant had been sexually active, but no spermatozoa were seen. 28. The appellant however in his submissions alleged that penetration was not proved. He argued that the medical evidence only showed that the hymen was broken but not freshly, and that there were no bruises, lacerations, or spermatozoa observed. He submitted that the evidence of a broken hymen was not proof of penetration unless there was clear evidence that its breaking was caused by the act of the accused person. 29. The testimony of PW1 was direct and unequivocal. She recounted how the accused threatened her with a knife not to tell anyone and repeatedly forced her into sexual intercourse when his wife was away and

nobody else was at home. Her evidence was direct, consistent and it was not shown that she harbored any ulterior motive to maliciously fix the complainant. 30. Further, PW4 also confirmed that PW1's hymen was broken, although it was not freshly ruptured and there were no bruises, lacerations, or spermatozoa observed, these findings do not exclude the fact of penetration, particularly given that the complainant was examined five days after the incident had already occurred. Be that as it may, it is my finding that the question of penetration was sufficiently proved beyond reasonable doubt, based on the truthful evidence of PW1. 31. The final element to be proved was identification. PW1 testified that the accused was a person well known to her, having worked for him as a house help for three months at Manyatta area of Moyale town. She stated that the incident occurred repeatedly within the Appellants house, when his wife was away and that he threatened her with a knife not to tell anyone. When he last attempted to force himself on her on 28 th November 2024 in the evening, she ran to the home of PW3, who was the Appellant's neighbour. 32. PW3 also confirmed that on the material day at around 6:45 p.m., PW1 came to his compound running from the direction of the appellant's house, and he saw the appellant chasing after her. When the appellant noticed his presence, he retreated back into his house. PW3 further confirmed that his house was about fifty meters from that of the appellant. Identification was therefore properly established by way recognition and eliminated any possibility of mistaken identity. As a result, his Appeal against conviction fails.

- b. Whether the Sentence Passed should be Interfered with 33. Section 8(4) of the Sexual Offences Act , No. 3 of 2006 provides that a person who commits an offence of defilement with a child aged between sixteen and eighteen years shall upon conviction be sentenced to imprisonment for a term of not less than fifteen years. In the present case, the trial court found that PW1 was aged seventeen years at the time of the incident, and accordingly sentenced the appellant to fifteen (15) years' imprisonment on the count of defilement. 34. In Republic Vs Joshua Gichuki Mwangi; Initiative for strategic litigation in Africa (ISLA) & 3 others (Amicus Curiae),{2024} KESC 34 (KLR) the Supreme court reiterated its decision in Muruatetu II that the sentences in the Sexual offences Act were legal and went on to overturn a reduction of sentence imposed by the Court of Appeal. 35. In Ndungu Vrs Republic (Criminal Appeal No 57 of 2019),(2025) KECA 1094 (KLR), the court of appeal held that; " The above provision falls into the category of statutory provisions which create mandatory maximum/minimum sentences. Undoubtedly, the legislature can bind the sentencing court by laying down the minimum sentence (not less than) and it can also lay down the maximum sentence. If the minimum sentence is laid down, the sentencing court has no option but to impose a sentence, "not less than" that the sentence provides for. Therefore, the words, "not less than" must be given their natural and obvious meaning which is to say, not below a minimum threshold and in the case of Section 8(3) of the sexual offences Act , these words must be understood to mean the offence under Section 8(3) is punishable with a minimum of 20 years. 36. The sentence passed is what the law provides for and it has not been shown that the said sentence was excessive and/or harsh nor was

there any misdirection by the trial court in handing down the same. D. Disposition 37. The upshot, having considered the entire record of appeal and parties' submissions, I do find that the Appeal as against conviction and sentence fails and is hereby dismissed. 38. Right of Appeal 14 days. 39. It is so ordered. JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 31 ST DAY OF AUGUST 2026. FRANCIS RAYOLA OLEL JUDGE In the presence of:- Appellant For O.D.P.P Court Assistant

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