VWM alias MMK v Republic (Criminal Appeal E076 of 2024)
[2025] KEHC 4906 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4906 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E076 OF 2024

RM MWONGO, J

APRIL 23, 2025

BETWEEN

VWM ALIAS MMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. J. N. Githaiga, in Siakago MCSO No. E019 of 2024 delivered on 07tht October 2024)

JUDGMENT

The Charge

1. The appellant herein faced 2 counts in the lower court as follows:

    1. The first charge was the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. Particulars are that on diverse dates between February 2024 and 29th May 2024 in [Particulars wihheld] town in Mbeere North sub-county within Embu County, the appellant known as VWM [male name] alias MMK [female name] intentionally and unlawfully caused his anus to be penetrated by the penis of DMN without his consent within the view of DNM a child aged 17 years. The alternative charge to this first count was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars are that on diverse dates between February 2024 and 29th May 2024 in [Particulars wihheld] town in Mbeere North sub-county within Embu County, the appellant intentionally and unlawfully touched the penis of DMN a child aged 17 years, with his hands.

    2. The second charge was the offence of giving false information to a person employed in the public service contrary to section 129(b) of the *Penal Code*. The particulars are that on 04th June 2024 at around 1900hrs in Siakago Police Station at Siakago in Mbeere North sub-county within Embu County, the appellant informed CPL Geoffrey Kumbu, a person employed in

the public service as a police officer, that he was of the female gender, information that he knew to be false, intending thereby to cause the said CPL Geoffrey Kumbu to record his statement as a lady which he ought not to have done if the true state of facts respecting which such information was given had been known to him.

2. At the trial, the appellant pleaded 'guilty' to the second count on giving false information. He was convicted on his own guilty plea and was sentenced to 6 months imprisonment. Upon the court's order, the appellant was medically examined and found to be a man and not a woman as had been earlier indicated. He pleaded 'not guilty' to the first count on defilement, following which a full hearing was conducted and he was convicted and sentenced to 15 years imprisonment.

The Petition of Appeal

3. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 11th October 2024, seeking orders that the appeal be allowed, the conviction quashed and the sentence of 15 years imprisonment be set aside and that he be set at liberty. The appeal is premised on the grounds that:

    1. The learned trial magistrate erred in both law and fact by imposing a harsh and excessive sentence upon the appellant;

    2. The learned trial magistrate erred in both law and fact by rejecting the appellant's defense without giving cogent reasons;

    3. The learned trial magistrate erred in both law and fact by failing to note and observe the multiple contradictions on the prosecution side hence relying on inconsistent evidence;

    4. The learned trial magistrate erred in both law and fact by convicting the appellant without considering the irregularities and illegalities in the prosecution case;

    5. The learned trial magistrate erred in both law and fact by not considering the circumstances of the case; and

    6. The learned trial magistrate erred in both law and fact by failing to note that the adduced prosecution case did not corroborate the investigation.

The Evidence recorded at the hearing

4. The victim DMN testified as PW1. He stated that when they first met, the appellant, introduced himself to him as a woman called M. He visited the appellant on several occasions at his (the appellant's) house and they had sex with him, as he would with a woman. Every time he would have sexual intercourse with the appellant, he assumed the appellant was a woman and the appellant would give him money afterwards. One day when he was at the appellant's house, the appellant came home with another man. The appellant told his new companion that PW1 was a thief. Indeed, a neighbour confirmed that he had never seen PW1 before.

5. This neighbor thus advised the appellant to report the matter to the police and he did. The appellant's companion assaulted PW1 and tied him with ropes. When the appellant was interrogated by village elders, he said that he did not know PW1 and that he was a thief. At the police station, PW1 told his side of the story and he was taken to Siakago Level 4 Hospital alongside the appellant. He showed the police text messages that he had exchanged with the appellant and that is when the appellant owned up that he knew him. At the hospital, the appellant resisted medical examination afraid his identify would be discovered.

6. On cross-examination, DMN stated that the appellant was his friend who had given him a copy of his house keys. That the appellant used to lock him up whenever he visited him in the house and he paid him Kshs.2,000/= per week for the sexual encounters. He did not know that the appellant was a man, which is why he did not report the incident at the police station. He confirmed that he had anal sex with the appellant but at the time, he did not know what it was. The appellant had introduced himself to PW1 as M.

7. PW2 was Felix Kariuki Nyaga who stated that on 03rd June 2024, he accompanied the appellant to his house to charge his phone. They found PW1 inside the house and the appellant started screaming, saying that PW1 was a thief. When the matter was reported at Siakago Police Station, no stolen items were recovered from PW1. He later learned that the appellant and PW1 were in a sexual relationship and were living together. He stated that he knew the appellant as M, a female co-worker at the place where he worked.

8. PW3 was Peterson Muriithi Njeru, who referred to the appellant as M. He stated that on 3rd June, 2024 at around midnight, he heard distress calls about a thief. He went outside where he saw PW1, PW2 and the appellant. PW1 said that he was staying at the appellant's house but the appellant denied knowing him. It was his testimony that before that night, he did not know PW1 and whether or not he was staying at the appellant's home. The incident was reported at the police station and when the police investigated, they discovered that the appellant and PW1 were in a sexual relationship.

9. PW4 a village elder was Naomi Mboci. She stated that PW3 awoke her on 4th June, 2024 at 2.00 a.m to inform her that there was a thief outside and he needed her company as the village elder to go to the scene. They went together and found PW1, PW2 and the accused who told her PW1 had been stealing. PW4 knew the appellant as a female known as M. That night, she saw PW1 with a carrier bag and a hacksaw and the appellant said that PW1 had formed a habit of stealing from him. The appellant told him that he was in a sexual relationship with PW1 and she escorted them to Siakago Police Station and returned home.

10. PW5 was PC Lincoln Muriithi of Siakago Police Station who stated that he was at the police station when PW1, PW2, PW3 and PW4 together with the appellant, came to the station. The appellant was reporting theft in his house by PW1. Upon investigations, however, he established that PW1 was a minor who was in a sexual relationship with the appellant. There were no signs of theft in the appellant's house and no stolen items were recovered from PW1. The appellant was charged with the offence of defilement since it was unlawful to engage in sexual acts with a minor. On cross-examination, he stated that the appellant told him that PW2 was her husband.

11. The Investigating Officer CPL Geoffrey Kumbu testified as PW6. He stated that he noted that the appellant who identified himself as M had reported theft at his dwelling place. Following investigations, he learned that the appellant and PW1 were sexual partners and the appellant had given PW1 a copy of his house key. Since PW1 was a minor, they were both taken to the hospital for examination where it was established that the appellant was, in fact, a man even though he identified himself otherwise and was wearing female underwear. After it was revealed that he was a man, he told the police his actual name which is VWM. It was also discovered through age assessment that PW1 was a minor but he had been engaged in sexual relations with the appellant for a while and the appellant used to pay him for it at the rate of Kshs.2,000/= per week.

12. PW7 was John Mwangi, a Clinical Officer at Siakago Level 4 Hospital. He stated that he examined PW1 whose genitals he found were normal. He did not conduct a rectal examination of PW1 who had history of sexual relations with the appellant whom he had known to be a woman. He also examined the appellant whose genitals were normal and an anal examination revealed that the sphincter muscles

were loose but nothing else significant was noted. He produced the P3 forms and treatment notes for the appellant and PW1.

13. At the close of the prosecution's case, the trial court put the appellant to his defense.

14. He stated his name to be VWM and gave his defence as DW1. He stated that PW1 approached him to assist with finding work. They exchanged contacts but he noticed that PW1 was interested in more than what he had asked for. On 06th June 2024, he was in the company of PW2 at work when he decided to change the padlock to his house since someone had been continually breaking in. Later that night, he went home with PW2 and found PW1 in his house with one of the doors open.

15. They escorted PW1 to Siakago Police Station and reported that they had caught a thief. Instead, he (DW1) was charged with defilement. On cross-examination, he stated that PW1 did not show him his national ID and that they were not in a relationship at all. He denied having given PW1 a spare key to his house, or paying PW1 any money in exchange for sexual favours.

Submissions on the appeal

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

17. The appellant submitted that the testimony of PW1 was made up of pure lies. He argued that it was not possible that the appellant was a woman but PW1 went on to have sexual relations with a man and failed to notice the fact. He discredited the evidence by the prosecution as pure lies and inconsistent, given the fact that there was the question of whether he was a man or a woman.

18. The respondent submitted that the elements of the charge were proved beyond reasonable doubt. Reliance was placed on sections 2 and 8 of the *Sexual Offences Act* and the cases of Hadson Ali Mwachongo v. R (2016) eKLR, Mwangi v Republic [2022] KECA 1106 (KLR) and AML Vs R (2012) eKLR. The Respondent submitted that the prosecution evidence adduced proves the offence against the appellant. On the issue of sentence, it stated that the same was meted out as prescribed in the *Sexual Offences Act*, thus, it should be upheld. Citing the case of Shadrack Kipchoge Kogo v Republic, Eldoret Criminal Appeal No.253 of 2003 the respondent urged the court to uphold the sentence imposed by the trial court.

Issues for Determination

19. The issues for determination are as follows:

    1. Whether the offence of defilement was proved beyond reasonable doubt; and

    2. Whether the sentence meted out to the appellant should be reviewed.

Analysis and Determination

20. In the case of Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal stated thus regarding the role of an appellate court:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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."

21. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (4) of the *Sexual Offences Act* provide:

> "(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.."

22. Therefore, the elements of the offence may be broken down as follows:

1. The age of the complainant- it must be proved that the complainant was a child;
2. Penetration as defined under section 2(1) of the *Sexual Offences Act* must be shown to have happened to the child;
3. The perpetrator was positively identified.

23. In this case, PW1 testified that he was 17 years old at the time of the incident. It was also the evidence of PW6 that an age assessment was conducted. However, relevant report was not produced, a fact that was acknowledged by the trial court. The trial court opined that PW1 appeared intelligent and his evidence was believable. The Magistrate relied on the case of Edwin Nyambaso Onsongo v Republic [2016] KEHC 4738 (KLR) where the court relied on the sentiments of the court in the other case of Mwalongo Chichoro Mwanjembe v Republic [2014] KEHC 5046 (KLR) and stated that age of the complainant is sufficiently proved if by the complainant's testimony, he/she appears intelligent enough to know his/her age.

24. It is important that the age of the complainant be proved beyond reasonable doubt because everything else said in the matter depends on the age of the complainant. The burden to prove the complainant's age squarely lies on the prosecution. In Hadson Ali Mwachongo v Republic (supra), the court held thus:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello v Republic Cr. App. No. 203 of 2009 (Kisumu), this Court stated as follows;
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> "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

25. In this case, the only evidence relied upon by the trial court was that of the complainant who said that he was 17 years old at the time of the incident. His statement was not corroborated through any documentary evidence in the form of a birth certificate, baptismal card, or evidence from his parents or any other evidence to show that he is in fact a minor. There is on record a report form from the complainant's school stating that he was Form 4 student in 2024. That report does not indicate his

age or prove anything other than that he is a student. There is no age limit for students who may be admitted to Form 4 in a school.

26. In addition, where as in this case, a person's age is not strictly established, it is impossible to conclusively assign him as a minor merely on the strength of a Secondary School report. The problem here was amplified because although the doctor orally stated that PW1 was 17 years old, in the PRC Form he indicated PW1's age as 24 years whilst in the P3 form he indicated it as 17.

27. There is mention of an age assessment having been conducted but the relevant report was not produced as evidence. As a result of this non-existent evidence, the trial court ended up relying on the oral evidence of the complainant as persuasive.

28. In the case of Alex v Republic [2023] KEHC 19483 (KLR), the court cited the Ugandan case of Francis Omuroni v Uganda Criminal Appeal No 2 of 2020, where the Court of Appeal of Uganda stated as follows on proof of age in defilement case:

> " 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 the 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..."

29. In this case, the doctor has given three age estimates for the accused. 17 in the P3 form and on his oral evidence and 24 in the PRC form which he completed. This does not help us fall back on the "common sense" age assessment stated.

30. In the above cited case, common sense under normal circumstances could mean, for instance: if the education system demanded that a Form 4 student should not be older than 17 years old, commons sense would demand that the complainant, a Form 4 student, be deemed to be 17 years old by virtue of a policy like that. Here, in the absence of corroborating evidence as to the age of the complainant and the confusion brought by the doctor's conflicting age estimates, the question remains undetermined and it goes to the root of the charge itself.

31. In light of the foregoing, there is a glaring defect in the proceedings by the trial court on failure to ascertain the victim's age. The charge cannot stand on its feet without proof of the age of the complainant. It would be unsafe and unjust to assume the age of the victim as it goes to the root of the sentence and the administration of justice. In the circumstances, this is a case ripe for ordering a retrial given the doubts arising.

32. The grounds upon which a matter may be referred for retrial are well settled in the case of Samuel Wahini Ngugi v Republic [2012] KECA 180 (KLR) where the Court of Appeal held: -

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar v R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case

but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'."

33. Clearly, therefore, retrial may be ordered in the interest of justice, without compromising on the rights of the appellant. In Muiruri v Republic [2003] KECA 171 (KLR), the Court of Appeal held that:

> "It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala v Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

34. In the present case, it is in the interest of justice that a retrial be ordered. It is ascertained that the victim's age was that of a minor, an offence is proved on the available evidence.

35. The appellant pleaded guilty to the second charge and he was convicted and sentenced on his own guilty plea. At the beginning of the trial, the trial magistrate ordered that the appellant be examined to ascertain whether he is a man or a woman for purposes of the trial.

36. This was done and a report dated 08th July 2024 authored by Dennis Mwenda, a Forensic physician at Embu Level 5 Hospital was produced in court. Even though the issue of the appellant's sexual identity was determined through the second charge, for purposes of the first charge, there is also need for a more comprehensive examination of the appellant to inform the court better at the retrial.

37. Given the foregoing, it is immaterial to delve into the arguments of the parties as to the other 2 elements of the offence and the sentence because all these cannot be canvassed without proof of age of the complainant.

Conclusion and Disposition

38. In light of the foregoing discussion, It is necessary to order a retrial given that the age of the complainant was not settled or conclusively proved. The court hereby orders a retrial and that a chromosomal analysis of the appellant be conducted to prove his gender for purposes of the retrial.

39. Accordingly, the conviction on the first charge is unsafe and is hereby set aside pending confirmation of the victim's age. The sentence of 15 years is also set aside in the circumstances.

40. The retrial should take place before a magistrate other than Hon. Jackline Githaiga.

41. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23RD DAY OF APRIL, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Appellant in Person

2. Ms. Nyika for State

3. Francis Munyao - Court Assistant