BOK v Republic (Criminal Appeal E045 of 2024)
[2025] KEHC 6769 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6769 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E045 OF 2024

BM MUSYOKI, J

MAY 23, 2025

BETWEEN

BOK ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Being appeal from conviction and sentence in Senior Principal Magistrate's Court at Maseno (Hon. J Kimetto PM) dated 10th June 2024)

JUDGMENT

1. The appellant has appealed against both conviction and sentence through his petition of appeal dated 12-06-2024 on the following grounds;

    1. That the learned trial Magistrate erred in law and facts by failing to consider the mandatory nature of the sentence imposed is/was declared unconstitutional.

    2. That the trial Court erred in law and facts by inevitably relying on tainted prosecution case.

    3. That the learned trial Magistrate erred in law and facts by inevitably relying on the discrepancies and inconsistence meted.

    4. That the Court erred in law and facts by failing to adhere to the legal provision of Articles 50 (2) (p) of *the Constitution* of Kenya 2010.

    5. That the learned trial Magistrate erred in law and facts by acting on wrong principle of law, thus convicted me on the ambiguity of the sentence.

    6. That the learned trial Magistrate erred in law and facts in relying on inconclusive evidence of identification to convict the appellant yet the appellant is a close relative to the victim.

7. That I wish to be present during the hearing of this appeal filed within the stipulated time required by law that is 14 days and so supply me with the certified proceedings to enable me marshal more fundamental grounds as merited.

2. The appellant had been charged with two counts; defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* and committing unnatural Act contrary to Section 162(9) of the penal code. In the two main counts, the particulars were that;

    1. On the 25th day of April 2021 at [Particulars Withheld] North Kowe sublocation Seme Sub-County within Kisumu County intentionally and unlawfully caused his penis to penetrate the anus of DOA a child aged nine (9) years.

    2. On the 25th day of April 2021 at [Particulars Withheld] North Kowe Sublocation in Seme Sub-County within Kisumu County had carnal knowledge of DOA against the order of nature.

3. The appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. It was alleged that;

    > ' On the 25 th day of April 2021, at [Particulars Withheld] North Kowe Sublocation, Seme Cub-County within Kisumu County intentionally and unlawfully touched the buttock and anus of DOA a child aged 9 years with his penis.'

4. The appellant pleaded not guilty and the matter went for trial at the end of which the trial court found the appellant guilty of the first count and dismissed the 2nd and the alternative counts for being duplications. The appellant was consequently sentenced to life imprisonment.

5. This is a first appeal and as the law holds, this court should conduct it in a manner as of a re-hearing. I am called upon to re-evaluate and re-consider the evidence produced in the lower court and come to my own independent conclusion. This has been so held in many judicial pronouncements including Moses Njoroge Mbugua v Republic (2011) KEHC 133 (KLR) where the court held that;

    > ' On first appeal, this court must re-evaluate afresh the evidence on record in order to arrive at an independent conclusion, bearing in mind that this court, unlike the trial court has not had the benefit of seeing and hearing the witnesses.'

6. The prosecution called five witnesses including the complainant child herein. The complainant was at the time of the offence eight years. He told the court that on a day he could not exactly remember, he was with his elder brother COA when B (pointing at the appellant) called him to his house and told COA to go home. He called him by the name Othindi which had a literal meaning of 'the small one' which was how the child was referred to at home.

7. While inside the house in the sitting room, the appellant told him to go to an inner bedroom where he went and stood. The child described how the bedroom looked like. The appellant then locked the door and removed his belt and placed it on top of the bed net. He then held the child and removed his shirt and placed him on the bed. The appellant had told the child to climb on the bed but when he declined, he lifted him and placed him on the bed. He removed the child's innerwear up to the ankles and climbed on the bed and inserted his penis into his anus and started rubbing it on him. The appellant then pushed the complainant to lie on his stomach and turned him towards the opposite side as he remained behind. The appellant was rubbing his penis on his anus and caused him to lie on his stomach and at that point, the complainant turned and looked at him as he was rubbing his penis on his anus. It is recorded that the child demonstrated in court how he was able to turn and look at the appellant.

8. The child added that he pushed the appellant away and he fell down from the bed to the floor. He added that he felt some pain and that is why he pushed the appellant away. He took his trouser and inner wear, opened the door and ran away as he left the appellant in the house and went to place where there was a tree, put on his shorts and went home where he found his mother who asked him what had happened as his elder brother had informed the mother that he had heard a commotion in the appellant's house and had left the complainant there.

9. The appellant followed him to their home and when he saw him, he and COA ran away to the farm as they were afraid of him. When the two came back, they found their father talking to the appellant. Their mother informed their father what had happened in presence of the appellant and the child confirmed upon enquiry by his father. The appellant upon being questioned by the father he said that he would pay them with 1 kilogram of sugar.

10. The child stated that he knew the appellant as their neighbour where he lived with his mother. The next day, they went to Rata police station with his father. He had not taken bath following his father's caution. They also went to Kombewa hospital where the doctor examined his anus which was paining. He was treated after giving his story. The child added that the appellant had done the same thing to him on other three occasions and he used to tell him that he would stab him in the neck. He narrated how the other three incidents happened. The child gave the court his parent's names and also identified the appellant on the dock. He added that he knew the appellant's mother as Dollrosa.

11. On cross examination, the child insisted that the appellant called him and sent COA away. He also stated that he did not scream and maintained that the appellant lifted him to the bed with his hands as he had placed is walking stick next to the bed. He added that he saw the appellant often when he was sent to the shop. He stated that he ran away when the appellant came to their home because he feared that he would beat his mother. The child restated that the appellant had said that he would buy sugar for each of his parents so that they could forgive him.

12. PW2 was COA a child of ten years and brother to the complainant. He told the court that he knew the appellant as their neighbour since he was young. He recalled that, in 2021 on a month and date he could not tell, as they were passing by the appellant's house, the appellant called the complainant thus, 'Othindi come and take the stove to your mother'. He stated that Othindi was the name used at home to refer to the complainant. The appellant told the witness to go home but instead the witness went behind the house to wait for the complainant.

13. The witness heard the appellant tell the complainant to lie on the bed with the head facing downwards and open his buttocks. The words were said in dholuo although he told the police that he did not hear what the appellant had said. He then ran home and told his mother what he heard the appellant tell the complainant. Later, the complainant came home and told their mother that the appellant had done something bad to him.

14. After a short while, the appellant came to their home and denied having done anything to the complainant and walked out. Thereafter, the complainant's father came in and asked why the appellant was running away and their mother told him that he had sodomised the complainant. The father followed the appellant and when he asked him what he had done to his child, the appellant said he had done nothing but added that he will bring two kilograms of sugar.

15. The next day, they went to Rata police station. He added that he heard the appellant telling the complainant to remove his pant and throw it on top of the bed. He stated further that he also heard the complainant telling the appellant that he was hurting him and the appellant telling the complainant to calm down or he will strangle him to death. The witness identified the appellant in court.

16. When cross examined by the appellant, the witness insisted that he had heard him and that they ran away because they were fearing him. He confirmed that he told his father what the appellant did to the complainant. He said that he heard him telling the complainant to remove his panty and climb on the bed and open his anus. He insisted that he later saw the complainant's anus which had something like a crack.

17. JA was the third prosecution witness. He was the father to the complainant. On 25-04-2021, as he was coming home, he saw the appellant running through the fence of his home with a walking stick. He stopped him and asked him why he was in a hurry to leave and his wife came out of the house and told him that the appellant had sodomised the child. The appellant denied it but the child insisted in presence of the appellant that he had been sodomised. The appellant offered two kilograms of sugar which the witness declined, got annoyed and told the appellant to leave his home.

18. PW3 added that he took the child to Kombewa hospital where he was examined after which they went to the police station where they recorded statements. He added that the appellant went into hiding but he later traced him at Maranda and called the police. The appellant was arrested by police from Bondo police station who called Rata police station who picked the appellant and charged him. The witness added that his family had no grudge with the appellant's family. He also identified the appellant in court and produced the complainant's birth certificate as prosecution exhibit 1.

19. He told the court on cross examination that he stopped the appellant because he was rushing through the fence from his compound. The child repeated the claim of sodomy in presence of the appellant. He denied that he had threatened to cut the appellant's leg and insisted that they had no grudges.

20. PW4 was a clinical officer from Kombewa county referral hospital. She produced P3 form which was filled by one Wycliffe Abwao a colleague he said he had worked with for 2 and half years. He said that he had known Wycliffe for the past ten years and he was conversant with his handwriting and signature. He also produced the P3 as exhibit 2a and clinical notes dated 25-04-2021 as exhibit 2b.

21. According to this witness, examination of the complainant showed that there were faeces in the gluteal muscle with no bruises or discharge. There was tenderness in the gluteal during examination and a diagnosis of sexual molestation was returned. Tests for HIV and syphilis turned negative and the child was released on antibiotics and painkillers. The injuries were classified as harm. The medical opinion was that the faecal application on both outer and inner gluteal mass was a sign of penile penetration.

22. When he was cross examined, he stated that it was the child who reported that someone known to him had sodomised him.

23. The last prosecution witness was the investigations officer who narrated how the matter was reported to the police at Kombewa police station. In summary, he restated what he had been told by the witness whose evidence I have reproduced above. After the report, they went to look for the appellant but they could not trace him until 24-05-2021 when they received a call from Bondo police station that the appellant had been found at Maranda area in Bondo sub-county upon which police officers from Kombewa went to pick him from Bondo police station. He then charged the appellant the following day. He identified the appellant in court.

24. On cross examination, he stated that he visited the scene after five days and that he told the court what he was told by the witnesses.

25. The appellant was placed on his defence and he opted to give a sworn testimony. He told the court that he was engaged in business of selling movies cassettes and videos in Bondo. He stated that on 24-04-2021, he was arrested at his place of work by three people dressed in civilian. He was taken to

Bondo police station where he stayed until 5.00 pm when a vehicle from Kombewa police station took him to the station.

26. After he was charged in court on the 5th day, the mother of the child visited him after three days where he told one Mr. Ngeno that the appellant had not committed the offence. He further alleged that the child's father also visited him and sought for forgiveness because the charge was an afterthought. He alleged that the father disclosed that it was his sister-in-law who had differed with him and who decided to implicate him in collusion with the complainant's parents. He denied the allegations levelled against him as he was unaware of the incident.

27. On cross examination by the prosecutor, the appellant stated that he has never differed with the father or mother of the child or the child and alleged that the father was coerced to testify against him by his sister in law one HA a wife to his brother Wyllis Ochieng. Following these allegations, the trial court decided to summon the parents of the child to clarify on the allegations that they had visited the appellant and had intentions of withdrawing or forgiving the appellant. Both attended court and denied the allegations.

28. The appeal was disposed of by way of written submissions. I have read submissions of the appellant dated 21st November 2024 and those of the respondent dated 21st November 2024. The submissions covered both conviction and sentence.

29. The appellant has argued that the evidence adduced by the prosecution did not prove the requisite ingredients of the offence of defilement. He starts by submitting that the child testimony that he experienced pain in the anus was not consistent with the diagnosis of the hospital that there were no bruises. According to the appellant, the nature of injuries and the presence of faeces in the gluteal area are not proof of penetration and the victim's story is not believable and does not make sense.

30. The appellant also submits that the investigations officer did not do her job well as there was no concrete conclusion and she seemingly relied on what she was told without doing proper investigations. He also picks a phrase from the testimony of the investigations officer where she stated that she could not tell the truth. He submits further that there were variances in the evidence of the complainant and the other witnesses on the sequence of events leading to the alleged assault. According to him, the investigations officer stated that the incident was the third one while the child stated that it was the fourth.

31. The appellant goes further to submit that he was not able to do what the complainant alleged he did because he was disabled and could not lift the complainant to the bed using a single arm as it was alleged. He also submits that it was not logical that the child could have been defiled four times yet the parents failed to notice it. He also submits that the mother could not have remained quiet after she was informed of the act. The appellant has also cast doubt on his guilty by stating that if he had indeed committed the act, he would not have followed the child home. In further submissions, the appellant states that, the fact that the parents of the child visited him in custody and spoke of his innocence was a good defence for him.

32. On sentence, the appellant argues that the it was excessive and the court failed to act on right principles which would have led to imposition of a lesser sentence through invocation of Section 26(2) of the *Penal Code*. He submits that life sentence begets stigma and psychological torture and according to him the court disregarded his mitigation. He argues further that a sentence that renders mitigation to be of no value is unjustifiably discriminative, unfair and repugnant to the principles of equity. He submits further that life sentence is inhuman and violates the right to dignity under Article 28 of *the Constitution* and does not serve the purpose of reformation and social rehabilitation of prisoners.

33. The respondent has submitted that all the ingredients of the offence which are the age of the victim, penetration and positive identity of the perpetrator were proved. It adds that evidence presented was comprehensive, compelling and consistent. It adds that the evidence of PW1, PW2 and PW4 was enough proof of penetration which were consistent with penile penetration.

34. I agree with the respondent that the ingredients of the offence of defilement is age, penetration and identification. These are the principles which have been set by many authorities. In Gacheru v Republic (2023) KEHC 3005 (KLR) the court held that;

> ‘ The ingredients for the offence of defilement are identification or recognition of the offender, penetration and the age of the victim.’

35. There is no dispute that the victim was nine years at the time of the offence. The prosecution produced exhibit 1 which was a birth certificate. It shows the date of birth of the chid as 10-11-2011 while the offence was said to have been committed on 25-04-2021 meaning that the child was nine years five months.

36. The most contentious issue here is the ingredient of penetration. I have read through the evidence of PW1 and PW2. The child was emphatic and categorical that he turned and saw the appellant rubbing his penis on his anus. He stated that he felt pain which was corroborated by PW2 who told the court that he heard the victim complaining that the appellant was hurting him. It is the same pain that made the complainant push the appellant down and run away.

37. The appellant has submitted that the witnesses contradicted each other on this part but in my analysis and going by the evidence reproduced above, I don’t find any material contradiction in the testimony. The fact that the statement and testimony of the witnesses were not recorded in the same words does not make any much difference. In reported speeches, one is not expected to state the exact word used by the speaker. The investigations officer recorded what the witnesses told her and, in my view, she did not have to record the exact words said by the witnesses. All that matters is whether the complainant was able to describe the penetration provided the words used would translate to penetration. In Joseph Maina Mwangi v Republic (2000) KECA 282 (KLR), the Court of Appeal held that;

> ‘ In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.’

38. The P3 form which the appellant has attacked so much stated that there was evidence of sexual molestation because of presence of faecal matter in the gluteal muscles. It also states that there was tenderness in the anus which was interpreted to mean pain. This was a day after the stated act and the P3 form states that the age of injury was one day. This together with the treatment record produced as exhibit 2b is to me corroboration of the victim’s testimony that the appellant penetrated him. Penetration is defined in Section 2 of the *Sexual Offences Act* as;

> penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

39. In this case, the complainant talked of the rubbing of the appellant’s penis on his anus which caused him pain. It may not have been full insertion because the complainant stated that he pushed the appellant when he felt pain meaning that it could have been partial and going by the above definition, the same is for purposes of the Act penetration. In any event medical records is not the only proof of

penetration. Oral evidence if believable can as well be enough proof of penetration. In Victor Kipkoech Korir v Republic (2022) KEHC 12701 (KLR), it was held that;

> ‘ Penetration is proven either through the evidence of the child corroborated by medical evidence or in other circumstances, through the sole evidence of the child. Section 124 of the *Evidence Act* provides guidance for how the court should deal with the sole evidence of a child.’

40. I find the evidence of the victim and PW2 too consistently and systematically flowing to be a lie.

41. The appellant claims that he was implicated because of a land dispute. This has come in the proceedings for the first time in his submissions. It was not mentioned during the hearing before the trial court. The appellant told the court in cross-examination that there were no grudges between him and the family of the victim. He made unsupported allegations that his sister in-law had colluded with the parents of the victim to implicate him. I do not buy this argument as there was no basis or evidence adduced to support the allegations.

42. On the issue of identification, the witnesses were very clear that the appellant called the victim and told PW2 to go home. The appellant was a neighbour well known to the victim and PW2. He even called the victim by his moniker meaning that they were well acquainted. He was identified by the two young men when he followed them to the house. The identification was clearly be recognition and I hold that the ingredient of identification was proved against the appellant.

43. The last issue is whether the sentence was excessive. The victim in this matter was aged nine. Section 8(2) of the Sexual Offices Act provides for mandatory sentence of life imprisonment for a convict of an offence of defilement of a child of eleven years or less. The fact that the appellant was allowed to mitigate does not bind the court to break the law on sentencing. The appellant claims that Section 26(2) of the of the *Penal Code* gives the court discretion to hand down a lesser sentence. The Section reads;

> ‘ Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.’

44. Reading of this Section leaves no doubt that where there is no express provision binding the court on sentencing, the court has discretion to sentence the convict to a lesser term. In the Section under which the appellant was charged, there is express provision of a mandatory sentence and that takes away the discretion. I therefore find no merit in this ground of appeal.

45. Based on the above analysis, this appeal lacks merits and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23 RD DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT .

Judgement delivered online in presence of the appellant (from Kisumu Maximum Prison) and in absence of the respondent.