Kimani v Republic (Criminal Appeal E008 of 2023)
[2025] KEHC 7035 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E008 OF 2023

JM NANG'EA, J

MAY 15, 2025

BETWEEN

JOHN KAMAU KIMANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon A. Mukenga (SRM) delivered in Molo Sexual Offence Case No. E080 of 2021 on 27th October, 2022)

JUDGMENT

1. The Appellant herein was charged before the lower court with the offence of defilement contrary to Section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. In the alternative, he was accused of committing an indecent act with a child contrary to Section 11 (1) of the same Act.

2. The particulars of the main charge are that on diverse dates between 25th May 2021 and 27th May 2021 at Molo Sub County, within Nakuru County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M.W.N, a girl aged 13 years.

3. In relation to the alternative charge it is alleged that during the same period and at the same place, the Appellant intentionally and unlawfully touched M.W.N's vagina using his penis.

4. The Appellant pleaded not guilty to both the main and alternative charges and the matter proceeded to full hearing. The prosecution called five (5) witnesses, and the Appellant gave sworn testimony in his defence after close of the prosecution evidence. The trial court returned a guilty verdict in respect of the main charge and sentenced the Appellant to twenty (20) years imprisonment. The alternative charge was held "in abeyance" in light of the conviction on the main charge.

5. Aggrieved by the said decision, the Appellant lodged this Appeal against the conviction and sentence on 17th February 2023 vide "Petition of Appeal" dated 9th February, 2023 based on 6 grounds that may be condensed into two broad grounds as follows;

    1. That the learned trial magistrate erred in law and fact by convicting the Appellant against the weight of evidence.

       And;

    2. That the learned trial magistrate erred in law and fact by failing to consider or evaluate the Appellant's sworn defence.

Summary of the evidence before the lower court

6. PW1 (HN) is the mother of the alleged victim. The witness told the court that her daughter was born on 16th November 2008 as per copy of her Certificate of Birth purportedly issued on 5th August 2014. PW 1 further testified the court that on 25th May, 2008 she left home and on returning she did not find her daughter. She enquired about her whereabouts and searched for her in vain. She thereafter lodged a report with the police and was advised to keep looking for her. On 29th May, 2021 during her own investigations she peeped into a house in their neighbourhood and saw "tiny legs". She called the police who went in search of the Appellant who opened the door of the house in which M.W.N was found. The girl was taken to the hospital for medical examination while the Appellant was arrested and charged on suspicion that he defiled the girl.

7. M.W.N (PW 2) testified on oath. The record does not show that she was taken through voire dire examination before being allowed to testify on oath, if in fact she was a child of tender years. Be that as it may, M.W.N related that on a date she didn't state, she was looking for a key which had gotten lost while she was playing. Her mother sent for her and she declined to meet her out of fear that she would be disciplined over the loss. She decided to spend the night in a neighbour's house. While she was going to the river the following day, she met with the Appellant who took her to his house and had sexual intercourse with her. She used to see him in the area but did not know his name. His house was across from the river. She alleged that the Appellant lifted her skirt, removed her pants and proceeded to defile her. He covered her mouth to prevent her from screaming. The Police later visited the Appellant's home asked a young man to get into the house through a window to confirm if M.W.N was inside. M.W.N added that she was found hiding under the bed. The Appellant was brought in by the officers and he opened the door.

8. M.W.N. further told the trial court that she didn't know her age but learnt at the Police Station that she was 13 years old.

9. PW3 (PC Oscar Litali) was one of the arresting officers. He testified confirming receipt of the report by PW1. The latter later informed the police that her missing daughter was locked in the Appellant's house. PW 3 and other officers went to the house and found the door locked. The officer told the court that he knew the Appellant and went in search of him, finding him at the local Trading Centre. He was arrested and he led the officers to his house where they found the girl who alleged that the Appellant defiled her.

10. PW4 (PC Veronica Chepng'eno) was the case Investigating Officer and corroborated PW1's and PW3's evidence. After concluding her investigations, she brought these charges against the Appellant. She tendered a copy of the complainant's Birth Certificate indicating that she was born on 16th November 2008. The original Certificate had been shown to the court before the copy was admitted.

11. PW5 (George Biketi), a doctor attached to Elburgon Sub-County Hospital, produced M.W.N 's medical examination report dated 29th May 2021, popularly known as P3 Form, showing lacerations to her labia majora and minora. A whitish discharge was also noted in the vaginal opening but presence of spermatozoa was not observed. The witness opined that there was evidence of penetration of M.W.N's genitalia.

12. The Appellant gave sworn evidence after close of the prosecution case saying he is a casual worker. While confirming his arrest at his local Trading Centre, the Appellant reiterated his denial of the charges. Officers led by PW3 who he also acknowledged to be known to him, had asked him to accompany them. He was led up to his home where there were many people who had gathered. A window of his house was open. On orders of the officers, he unlocked the door of the house and they entered. The Appellant said he was shocked to find the complainant in the house and told the officers and the members of the public that he didn't know how the girl got there. He alleged that the complainant's mother was in the habit of offering her daughter to men for sexual intercourse in exchange for money.

13. The Appellant continued to testify that police officers later told him that PW1 was demanding for Kshs. 100,000 to abandon the complaint. He turned down the offer, expressing his innocence.

14. The Prosecution's written submissions were filed on 3rd March 2025, and this judgement date was fixed the following day on 4th March 2025. On this date the Appellant's Counsel were given 14 days from 4th March 2025 to file and serve their submissions. I have seen purported submissions of the Appellant filed online apparently outside the period given by the court, and more importantly it is doubtful if the same were served upon the Prosecution Counsel for any reply thereto. The court will therefore disregard the Appellant's submissions. Besides, the legal issues raised as to fair trial in the lower court have not been urged in the Grounds of Appeal.

Respondent's Submissions

15. The Respondent's case in opposition to the appeal is summed up in their written submissions dated 3rd of March, 2025. Regarding the age of M.W.N, it was submitted that her Birth Certificate tendered in evidence and corroborated by PW1 to the effect that she was 13 or thereabouts at the material time is credible. Reliance is placed in Mwalango Chichoro Mwanjembe [2016] eKLR where such evidence was found to be sufficient to prove age unless there is any other better evidence of the fact.

16. The court was further told that penetration was proved through direct evidence of the alleged victim and corroborated by medical evidence. I am referred to the case of Muganga Chilenjo Saha vs Republic [2017] eKLR where the Court allowed the use of euphemisms in description of sexual acts relating to penetration when dealing with cases where children are victims of sexual abuse due to their immaturity and devastating experience as well as having to relive the moment before people, more so in a court room.

17. On identification of the perpetrator, the prosecution evidence is that the victim stated that the Appellant took her to his house. PW1 and PW3 confirmed that the victim was discovered locked in the Appellant's house and the Appellant was also well known to PW3 who was instrumental in arresting him. M.W.N also identified the Appellant as the culprit. The Prosecution therefore thinks that the Appellant was credibly identified, nay, recognized as the culprit.

18. As regards the Appellants' defence, it is submitted that the defence consists of mere denials and was not strong enough to rebut the prosecution's evidence.

19. Pertaining to the sentence, the Prosecution approves of the lower court's in invocation of the provisions of Section 382 of the Criminal Procedure Act after noting an error in the charge sheet. According to the learned trial magistrate the main charge ought to have been preferred under section 8(3) of the *Sexual Offences Act* and not section 8(2) since M.W.N was between 12 and 15 years old at the material time. The court observed that the error did not occasion prejudice to the Appellant and proceeded to mete out a prison term of 20 years. The Prosecution Counsel therefore vouches for the sentence was lawful and necessary for deterrence.

Analysis and Determination

20. I have considered the grounds of appeal, the evidence adduced before the Trial Court, the applicable law and the Prosecution submissions. This being a first appeal, I am obliged to analyze and evaluate afresh all the evidence adduced before the Trial Court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses testify.

21. The Court of Appeal in setting out the duties of the Court of first appeal in the case of Okeno vs Republic [1972] EA 32 state as follows:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."

22. Section 8 of the *Sexual Offences Act* provides as follows:-

> " i. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> ii. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> iii. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> iv. 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."

23. The Appellant faulted the Court for convicting him yet according to him the ingredients for the offence of defilement were not conclusively proven by the Prosecution. The elements that need to be proven by the Prosecution to sustain a conviction in a case of defilement are now well settled. These are; first, age of the victim, whether the victim was a child, secondly is whether there was penetration and thirdly the identification of the perpetrator and whether the penetration was by the perpetrator.

Age of the victim

24. The offence allegedly occurred between the 25th and 27th of May, 2021. PW4 produced M.W.N's Birth Certificate which shows that she was born on 16th November 2008, placing her age at the time the offence was allegedly committed at 12 years and 6 months. The Complainant was therefore a child within the meaning of the *Children Act*. There is no ground on which to discredit this evidence seeing that the Certificate of Birth was issued long before these charges were brought. One cannot therefore say that it was obtained for the purpose of incriminating the Appellant.

Penetration

25. Section 2 of the *Sexual Offences Act* defines penetration as;

> " the partial or complete insertion of the genital organs of a person into the genital organs of another person".

26. M.W.N testified that the accused defiled her and the lower court recorded the testimony as follows:-

> " ...In the house he lifted my skirt. He did not remove it. He pulled down my under pant. He covered my mouth to prevent me from screaming. He inserted his thing for urinating in my place where I use to urinate. He did not put anything on top of his thing for urination before inserting in me. On Friday, police officers came and rescued me. He defiled me on Tuesday and left. He did not come back on Wednesday he came back on Thursday..."

27. This evidence is corroborated by the evidence of PW5, who produced the medical examination among other medical records indicating injuries to the child's genitalia in the form of lacerations. He concluded that there was evidence of penetration.

28. In Wachira v Republic [2024] KEHC 5972 (KLR) the Court stated that:

> " Unlike other crimes where invariably eye witness evidence is available, it is seldom that eye witness accounts would be available in a sexual offence as the act will always be perpetrated in secrecy away from the public eye. That explains why the evidence to be relied upon more often than not will be the evidence of the victim corroborated by medical evidence (where available) and circumstantial evidence." (emphasis)

Moreover, the testimony of the minor was corroborated by medical evidence of PW5. To this end I am satisfied the ingredient of penetration was proven as concluded by the Trial Court.

Identification of the Perpetrator

29. The proviso to Section 124 of the *Evidence Act* states as follows:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim

and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

30. The Court can therefore rely on the testimony of a single witness, that is the alleged Victim, in a case involving a sexual offence such as this one if it is satisfied that the Victim spoke the truth implicating the accused.

31. With respect to the contention that the Appellant's defence was not considered by the Trial Court, I have perused the impugned judgment in which it is observed thus regarding the defence evidence:-

> " Therefore, the accused person's defence that she was brought to his house by someone else is too remote to be true ad I dismiss the line of defence. Also his defence that the complainant's mother used to pimp her to men for money was not convincing to the Court".

32. The trial court did not quite state why it reached the above conclusion that the defence to the effect the girl was sent to the Appellant for commercial sexual intercourse, was too remote to be believed. This defence is not, however, credible as it seems to be an afterthought as questions in this regard were not put to PW 1 and M.W.N on cross-examination by the Appellant.

33. The Victim described the incident explicitly and with clarity and so the Trial Court rightly accepted the evidence. This Court has no reason to doubt that the M.W.N spoke the truth in this regard.

34. The Victim stated that she used to see the Appellant in the area but did not know his name. She identified the Appellant in open court as the person who locked her in his house. PW1 led Police Officers including PW3 to the house of the Appellant where the girl was found locked inside.

35. PW3 told the court he knew the house belonged to the Appellant and he was the one who went and fetched him to come and open the house in which they found the girl. The Appellant conceded that the Victim and her mother were known to him as neighbours. The Appellant's identification was therefore by way of

36. For the foregoing reasons, I am of the opinion all the ingredients of defilement were proven and the Prosecution discharged its burden of proof of the main charge beyond reasonable doubt and the Appellant was thus lawfully convicted thereof.

37. As regards the sentence, the Appellant prays that the sentence be set aside. The Trial Court in sentencing the Appellant noted that the charges preferred were brought under the wrong subsection to wit; Section 8 (2) of the *Sexual Offences Act* which relates to defilement of a child aged eleven years or less. The correct subsection ought to have been (3) of the *Sexual Offences Act*.

38. The Trial Court addressed the question of whether or not the Charges are defective having been preferred under the wrong section of the law. Reference is made to the judicial determination in Morris Murimi vs Republic [2021] eKLR where it was found that misstatement of the offence in the Charge Sheet did not prejudice the Appellant therein. The Respondent submitted that such defect is curable under Section 382 of the *Criminal Procedure Code*.

39. Section 382 of the *Criminal Procedure Code* provides that:-

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any

inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

40. Section 8 (2) of the *Sexual Offences Act* envisages a situation where the child victim of the offence is aged eleven (11) or below whereupon the sentence on conviction shall be mandatory life imprisonment. The sentence that it is appropriate in the instant matter where the child victim was aged between twelve (12) and fifteen (15) years is not less than twenty (20) years imprisonment pursuant to section 8 (3) of the Act.

41. The Appellant herein was sentenced to twenty (20) years imprisonment. That is the minimum sentence for the offence in law. Since the sentence was lawful, the error in the Charge Sheet was not fatal to the Prosecution case as it did not go to the substance of the case and no prejudice or miscarriage of justice was occasioned. The defect is indeed curable under Section 382 of the *Criminal Procedure Code* as determined by the lower court.

42. In the result, I find the appeal both on conviction and sentence devoid of merit and I hereby dismiss it.

J. M. NANG'EA,

JUDGE.

JUDGEMENT DELIVERED THIS 15TH DAY OF MAY 2025 IN THE PRESENCE OF;

The Prosecution Counsel, Mr Wakasiaka.

The Defence Counsel, Mr Karuga.

The Court Assistant, Jeniffer

J. M. NANG'EA,

JUDGE.