Ngoka v Republic (Criminal Appeal E060 of 2023) [2025] KEHC 6391 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E060 OF 2023

M THANDE, J

MAY 16, 2025

BETWEEN

BETHWEL MWAMURE NGOKA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant herein, was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* and sentenced to 25 years imprisonment. The particulars of the offence are that on 29.6.21 at [Particulars withheld] village, [Particulars withheld] sub-county within Kilifi county, intentionally and unlawfully caused his penis to penetrate the vagina of R. S. N. a child aged 10 years.

2. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. The grounds of appeal are that the trial Magistrate erred by:

    1. failing to consider great contradictions and inconsistences in the prosecution witnesses.
    2. by shifting the burden of proof on to the appellant herein.
    3. by failing to appreciate that the matter was poorly, shoddily and inadequately investigated.
    4. by convicting the appellant on unreliable questionable document exhibit.

3. The Respondent opposed the appeal in submissions dated 15.1.25. The Respondent submitted that the evidence was consistent throughout the trial. Further, that the prosecution was able to establish all 3 elements of the offence namely age of the Complainant, penetration and identification of the Appellant as the perpetrator.

4. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See Okeno v. Republic [1972] EA 32.

5. To sustain a conviction for the offense of defilement, 3 ingredients must be established by the prosecution. This is was set out in Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where the Court stated:

> The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.

6. This Court is required to determine whether in the court below, it was demonstrated that the Complainant was below 18 years of age. Secondly, that there was penetration of the Complainant's genitalia. Lastly, that the evidence identified the Appellant as the perpetrator.

7. The record contains the birth certificate of the Complainant produced by PW4 No. xxxxx, PC Beth Kagendo which indicates that she was born on 22.10.10. In June 2021, when the offence is alleged to have been committed, the Complainant was just 10 years old. This was not challenged by the Appellant. The test of age was thus established.

8. As regards penetration, the Complainant testified that on the material day at around 9am, she and her siblings were herding their father's goats in the bush. Her siblings were ahead of her when the Appellant grabbed her and pulled her into the bush. He then removed her clothes "akanirape, alitoa mdudu wake akanifanya tabia mbaya". She then went and reported the matter to her father who took her to hospital.

9. In the case of Muganga Chilejo Saha v Republic [2017] eKLR, the Court of Appeal had this to say about the term "tabia mbaya" in the Kenyan context:

> Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement.

10. PW3 Dr. Moses Rimba of Malindi Subcounty Hospital stated that the Complainant was treated at Marafa Health Centre on 29.6.2021. Her clothes were dirty and had soil. She was found to have lacerations in her vagina and was in pain. A vaginal swab indicated there was spermatozoa. She was referred to Malindi Subcounty Hospital where PW3 filled the P3 form. Taking into account the findings of the doctor in Marafa, he concluded that there was penetration. From Complainant's testimony and this medical evidence, I am satisfied that penetration was established.

11. The Appellant contends that the medical documents produced were unreliable. His contention is that the treatment notes are dated 29.6.21 while the P3 form is dated 2.7.21. The Appellant further contends that on the second page, on site, situation, shape and depth of injuries is indicated as normal.

12. In his testimony, PW3 stated that he Complainant was treated at Marafa Health Centre and then referred to Malindi Subcounty Hospital. He further stated that based the findings of the doctor in

Marafa he concluded that there was penetration. A careful look at the cited section of the P3 form will show that the same refers to head, neck, thorax, abdomen, upper and lower limbs. The issues raised by the Appellant are not helpful to his case and my view is that he is clutching on straws. The fact of penetration was adequately proved by the evidence on record.

13. On identification of the perpetrator. The Complainant stated that the Appellant is her neighbor and has known him for long. The Appellant was thus positively identified.

14. In his defence, the Appellant stated that the Complainant's father is his father's neighbor and that there was a land dispute between them. Further that the Complainant's father had said he would teach the Appellant a lesson. After considering this defence, the trial Magistrate found that the same was an afterthought. She noted that the Appellant did not raise the issue of the land dispute during cross examination of PW2. Further, that PW2 had stated that he had talked to the Appellant's father about the incident.

15 I concur with the trial Magistrate. This defence is clearly an afterthought. The Appellant never challenged PW2 during cross-examination about the alleged land dispute. The learned trial Magistrate rightly dismissed the defence. It is further noted that, PW4 stated that after recording witness statements she sought to arrest the Appellant but he had ran away. He was only charged 1 year later when he was arrested.

16. After considering the evidence, I find that the prosecution proved its case beyond reasonable doubt. I see no contradictions and inconsistencies in the prosecution evidence. There is also nothing on record to support the Appellant's claim that the burden of proof was shifted to him.

17. In the end and in view of the foregoing, I find that the Appeal lacks merit and is accordingly dismissed.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 16TH DAY OF MAY 2025

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M. THANDE

JUDGE