Wambua v Republic (Criminal Appeal E064 of 2025)
[2025] KEHC 6595 (KLR) (21 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6595 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKADARA

CRIMINAL APPEAL E064 OF 2025

J WAKIAGA, J

MAY 21, 2025

BETWEEN

PHILIP WAMBUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(being an appeal from the original conviction and sentences in Criminal case no SO 303 of 2019 of the Chief Magistrate Court at Makadara)

JUDGMENT

1. The appellant was charged, tried, convicted and sentenced to serve twenty years' imprisonment for the offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006.

2. Being aggrieved by the said conviction and sentence he filed this appeal having been granted leave to file an appeal out of time on 15th June 2022 and raised the following grounds of appeal:

    a. The prosecution case was not proved beyond reasonable doubt

    b. The court erred in law and fact in convicting the appellant yet the prosecution failed to prove the allegation

    c. The prosecution case was based on contradictory evidence

    d. The court erred in law and fact in failing to make adverse inference as regards to the inconsistencies and contradictions in the prosecution case

    e. Vital and essential witnesses were not called contrary to the provisions of section 150 of the CPC

f. Provision of section 169(1) was not complied with.

3. This appeal was initially filed at the High Court Criminal Registry at Milimani where it was admitted and directions on its hearing issued under High Court Criminal Appeal no E089 of 2022 before being transferred to this Registry for trial and determination by way of written submissions.

Submissions

4. On behalf of the appellant, it was submitted that the prosecution case was not proved beyond reasonable doubt. It was submitted that though the offence is defined as defilement, the particulars of the charge ought to have read section 8(1) as read with section 8(20 of the *Sexual Offences Act* and therefore the charge sheet was defective and contrary to the provisions of section 134 of CPC as the age of the complainant was stated to be nine years whereas in the judgement it was indicated as ten, in support of which reliance was placed on the case of Michael Lennos Odero v Republic

5. It was further contended that the date of the offence was given as 24th November 2029 while the evidence of PW4 and PW5 gave the date as 2nd and 1st December 2019 respectively. It was submitted that penetration was not proved as the complainant only referred to the appellant doing "tabia mbaya' to her and that her removed his trouser then he inserted the thing for urinating inside her anus. It was contended that the penetration must be explicit as possible so as to leave no doubt that the genital organs of the assailant were partially or completely inserted into the complainant's genital,

6. It was submitted that it was not enough for the complainant to state that the appellant had did " tabia mbaya " to her from behind. The appellant contended further that the medical evidence of PW4 Dr Lorna Kerubo faulted the evidence of PW1 and PW2 since the dates when the offence was committed differed. She further stated that the complained had a healing tear as opposed to a fresh one. It was contended that no reason was given for the nine days delay in taking the complainant to hospital which created a doubt as to whether she had been assaulted on 24th November 2019 and that it was possible for anything to happen to PW1 between 24th November and 2nd December 2019 when she was taken for examination .

7. It was submitted that vital witnesses mentioned by PW2 and PW5 were not called to testify as well as the father of the complainant who took her to the hospital. The appellant submitted further that the evidence of PW5 to the effect that the appellant defiled two children, contradicted the evidence of PW1 who stated that she was alone with the appellant since her younger sister had left.

8. It was contended that the appellant alibi defence was rejected by the trial court while he had testified that he had spent the night at the company known as furniture show room on the basis that it was not raised earlier enough to accord the prosecution an opportunity to investigate and that reliance should have been made to section 309 of CPC. It was stated that the trial Court did not analyse the whole evidence adduced as it was duty bound to so do and therefore the appeal should be allowed .

9. On behalf of the respondent , it was submitted that the charge sheet was not defective, and that going by the age of the complainant . The appellant was lawfully charged under section 8(2). The age of the complainant through the copy of immunization certificate indicating that she was ten and not nine. It was submitted that penetration was proved by PW3 and the appellant was identified through recognition since he was a neighbour to the complainant who knew him well .

10. The appellant alibi defence was raised at the stage of the defence and not at the investigation stage so as to be verified , it was contended that there was a possibility of it being an afterthought. It was submitted that the defence of a grudge with the mother of the complainant was not established and since the sentence was not challenged the court should not interfere with the same.

Proceedings

11. This being a first appeal, the court is under a duty to re-evaluate the evidence tendered while giving allowance to the fact that unlike the trial court, it did not have the opportunity of seeing and hearing the witnesses.

12. PW1 MA a minor who was found competent to testify on oath stated that she was in class 2 and lived with his dad and Mum in house no 8 while the appellant was living with his mum in house no 3. On the material day while she was home for lunch, the appellant called her to their house and asked her to sit on the seat where he was sleeping on and asked her to closed the door after they had watched a movie together with her younger sister who left after being called out.

13. The appellant then removed her trouser and inserted his thing used for urine inside her anus , she felt pain causing her to scream. He told her not to scream and gave her ten shillings. She left the house and went back to their house where she gave food to the children. She reported to a mama Sammy who informed her dad who then took her to the police station and to the hospitals for examination.

14. In cross examination she stated that she did not report to her mother and that on the material day they were many children who watched movie with the appellant and that he defiled her after the other children had left and that the appellant had told her not to tell anybody .

15. PW2 the mother of the complainant stated that she was born in 2009 November 12th and that she knew the appellant as a neighbour, when she came back from work, a neighbour called Lilian informed her of what had happened to the children in her absence. When she inquired from PW1,she told her how the appellant had defiled her and that Ann also confirmed having been defiled by the appellant whom they went with to the police post. It was her evidence that when she checked on PW1 she had semen like discharge on her backside .

16. PW4 Lorna Kerubo produced both PRC Form and P3 form which confirmed that PW1 had faecal matter around her anal orifice and a healing tear which confirmed penetrations on the anal region .PW5 Leah Keino received a report at the station from the parents of two children who were accompanied with the appellant who had defiled them in the anus. She stated that the appellant had given the victim money and when AA who had not been given money as promised saw it they started fighting over it and when a neighbour overheard them she called them and they told her what had happened which information she gave to their parents .

17. When put on his defence, the appellant stated that on the alleged day he spent the night at work and got home at 12 noon and met his cousin Rakeli at the gate who informed him that the police were looking for him. He went to the station and was locked in on allegation of having defiled a child. He stated that he had a grudge with the mother of the victim who wanted him to marry her but he declined since they were working together and was his mothers agemate and that he was earning more than her and wanted him to pay for her rent and shop for her. In cross examination , he stated that he did not know where she was living.

18. In convicting the appellant, the trial court found that the age of the complainant was proved through immunization card to be 10 years and not 9 as per the charge sheet , penetration proved through the testimony of the complainant as corroborated by the medical evidence of PW3 and that the alibi defence of the appellant was not raised during the hearing so as to accord the prosecution an opportunity to conduct further investigations. The court further dismissed the appellant defence of a grudge between him and the complainant's mother.

Determination

19. From the proceedings herein and the submissions, the following issues have been identified for determination :

    A. Whether the charge sheet was defective

    B. Whether the prosecution case was proved

    C. Whether the appellants defence was considered .

20. On the defect of the charge sheet, Section 134 of the *Criminal Procedure Code* provides that every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.

21. The Court of Appeal in Nyamai Musyoka v Republic [2014] eKLR stated that "the test for whether a charge is fatally defective is a substantive one... if a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person or the defect goes to the root of the charge distorting it in a way that the accused cannot understand the charge "

22. In this cause the charge sheet indicated the age of the victim to be six years as at 2019 whereas the evidence on record during the trial was that the same was born on 12th November 2009 and was therefore 10 years as indicated by the trial court. The alleged defect on the charge sheet did not go the root of the case as the same contained adequate details to enable the appellant prepare for his defence . The age of the victim is only important when it comes to sentencing which the court took into account and therefore find no merit on this ground of appeal.

23. On proof of the case, the age of the appellant was proved through her testimony as corroborated by immunization card, penetration was also proved by the victim's evidence that the appellant " did tabia Mbaya " to her by inserting his thing for " urinating " into her anus. This was corroborated by the medical evidence tendered and the appellant was positively identified through recognition as a neighbour by both the victim and her mother. The appellant was put at the scene by the victim's mother and PW5 who received both the victim and the appellant at the station and therefore find that the identification was free from error.

24. On the appellants defence whereas the trial court did not consider the same on the basis that it was not raised at the trial so as to give the prosecution adequate opportunity to investigate, the same, which was in error as it was upon the court to consider the same not withstand the stage at which it was raised, I have looked at the said defence in view of the evidence on record , in particular the fact that the same was found at the scene and his evidence in chief to the effect that he got to the estate at 12.00 against the complianants account that it was lunch time when the appellant called her to his house and find and hold that the said evidence did not weaken the prosecution case.

25. On the appellants submission that vital prosecution witnesses where not called to testify, the law is very clear that appellant could be convicted on the uncorroborated evidence of a single witness this being a sexual offence. I therefore find and hold that failure to call the arresting officer was not fatal to the prosecution case as PW2, the complainant mother and the complainant, gave an account on how the appellant was found at the estate at taken to police post which he did not controvert .

26. The appellant other submissions as regards his defence is not supported by the evidence on record and is therefore dismissed.

27. By reasons of the matters stated herein I find and hold that the conviction of the appellant herein was safe and free from error and therefore dismiss the appeal against conviction as lacking merit.

28. On the sentence, the appellant was sentenced to twenty years imprisonment whereas the sentence provided for under section 8(2) based on the age of the victim is life imprisonment. Technically the sentence mated out to the appellant was illegal and unlawful in view of the current jurisprudence from the Supreme Court. Whereas the appellant appealed against both conviction and sentence, the same did not specifically challenge sentence in the memorandum of appeal. I have further noted that the appellant was not warned of the danger of the court enhancing the same and neither was there a counter appeal by the prosecution .

29. I have further taken note that the respondent in its submissions stated that the sentence was proper and within the legal parameters which should not be interfered with at all and therefore the appellant legitimate expectation and right to fair administrative action will be interfered with should the court enhance the sentence herein without giving the appellant the opportunity to be heard thereon.

30. I would therefore not interfere with the sentence herein.

31. In the final analysis, I find no merit on the appeal herein both on conviction and sentence which I hereby dismiss and affirm the trial court finding thereon, both on conviction and sentence.

DATED SIGNED AND DELIVERED AT MAKADARA THIS 21ST DAY OF MAY 2025

J. WAKIAGA

JUDGE

In the presence of: