Mwanyika v Republic (Criminal Appeal E039 of 2024)
[2025] KEHC 13011 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 13011 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E039 OF 2024

WM KAGENDO., J

JUNE 26, 2025

BETWEEN

BENSON NDAMBO MWANYIKA ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Being an Appeal against conviction and sentence in Mombasa Chief Magistrates Courts .ONo. E015 of 2022 delivered on 22/3/2024 by Hon. Rita Orora (SRM))

JUDGMENT

1. The appellant was charged with 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. The particulars of the offence are that the appellant on the 25th day of January, 2022 at Ofisi ya (particulars withheld), Likoni Sub-County within Mombasa County, unlawfully and intentionally caused his penis to penetrate the Anus of M.M a child aged 7 years.

3. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 6 of 2006, which particulars of the offence are that on 25th day of January, 2022 at Ofisi ya (particulars withheld), Likoni Sub-County within Mombasa County, the appellant unlawfully and intentionally touched the Anus of M.M a child aged 7 years with his penis.

4. The appellant was after full trial found guilty of the main count and no finding was made on the alternative count and was thereby sentenced to thirty (30) years imprisonment.

5. The appellant being aggrieved by the conviction and sentence meted against him, he preferred the present appeal. He based his appeal on amended grounds that the learned trial magistrate erred in matters of both law and fact by not appreciating that the issue of identification under recognition was used to fix the incident as to its circumstances, that the medical evidence was left under questionable

circumstances as to who was behind the act, the origin of the document used to prove the age of the complainant was not established and that his defense was not considered which was not vitiated by the prosecution. (Sic)

6. The appeal was further canvassed by way of written submissions, where only the appellant complied.

Written submissions

7. The appellant contends that the evidence was not cogent to convict him. First, as to identification, he argues that PW1 gave contradictory statements where on one instance he stated that the appellant held his hand to his house, and the other hand said that he did not know where the appellant lived. Similarly, PW2 testified in one instance that he saw the appellant with the complainant in bed, but they could spot him as they were facing the wall then in another instance stated that the appellant wanted to do the same thing to him, but he refused. Further, that PW1 stated that at the time of the ordeal the appellant's wife was in the house, which in view places doubt as to where the scene of the crime was.

8. As to the age of the victim, the appellant contends that the copy of the birth certificate was neither accompanied by its primary document to establish its authenticity nor was the origin of the same established.

9. Lastly, on proof of penetration, the appellant relies on his arguments that by dint of the inconsistencies of PW1's testimony, the prosecution case was not established beyond reasonable doubt.

Determination

10. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See Pandya vs. Republic (1957) EA 336).

11. Whether the prosecution established its case against the appellant beyond reasonable doubt?

12. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *Sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. (See George Opondo Olunga vs. Republic [2016] eKLR.)

13. Section 8(1) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) 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.
>
> (5) It is a defence to a charge under this section if –
>
> a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b. the accused reasonably believed that the child was over the age of eighteen years.

14. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

15. The age of the minor was established by the production a copy of the minor's birth certificate, Entry no. 08918xxxxx (pexh4) which settled that the complainant was born on 21.2.2014, and therefore as at the time of the incidence she was 8 years. This was corroborated by the complainant's mother PW4. The appellant's argument that the birth certificate ought to be verified by its original copy/primary copy is accordingly dislodged under Section 83 (1) (c) of the *Evidence Act*.

16. The second issue is whether the prosecution established proof of penetration of the complainant, beyond reasonable doubt. Penetration is proved through the evidence of the victim corroborated by medical evidence. Nevertheless, what this court requires is proof of facts that the offence was committed, the medical evidence, notwithstanding. The provisions of Section 124 of the *Evidence Act*, informative to the end that a conviction can rest squarely on the sole testimony of the victim. See Daniel Maina Wambugu v Republic [2018] KEHC 5656 (KLR).

17. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> "Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

18. The record before me, shows clearly that both the complainant, PW1 and PW2 were properly subjected to voire dire examination from which, the learned Magistrate in considering the minors intelligence to comprehend the realities of an oath concluded that they would give unsworn and sworn testimonies, respectively.

19. PW1: the complainant, gave a cogent testimony of how the appellant held his hand and took him to his house. He gave him his phone to play a game. He later put him on his bed, removed his panty and put his dudu (holding his penis) and put it in his anus (holding his buttocks). Further, that the next day the appellant called the complainant again did the same thing but gave him 20 shillings "...and it became a habit."

20. PW2: testified that he was sent by his mother to the appellant to borrow a hammer. He found the accused and the complainant on the bed, their pants were down, and the appellant had put his penis on the complainant's anus. They however could not see him as they were facing the wall.

21. His testimony of the ordeal was corroborated by PW3; Dr. Victor Obanda who produced the PRC report (P-exh1) and the P3 as (P-exh1). On genital examination of the complainant, it was evidenced that; he had multiple lacerations on the buttocks and anus, and he could not hold stool.

22. From the foregoing, there leaves no room for doubt that the indeed penetration sufficed. Simply put, I conclude therefore that the second ingredient namely penetration was sufficiently proven based on the victim's evidence and the corroborating medical evidence.

23. On identification of the perpetrator, PW1's evidence is that the appellant is well known to him by dint that he was their neighbour. He testified that he used to frequent his house to play games on his phone. In fact, at some point PW1 referred to him as his friend, leaving no room for doubt as to the positive identification and recognition of the appellant as the perpetrator.

24. I have considered the said discrepancies as alleged by the appellant, and nothing can be further from the truth. The existence of the same is merely curated by the appellant in disjunctively picking out the prosecution witness testimonies to suit his narrative. The same is inconsequential in so far as it neither threatens on the veracity of the prosecution witnesses' testimonies nor prejudices the appellant's defence.

25. Thus, I have no reason to deviate from the findings of the trial magistrate who had the opportunity to hear and see the complainant as he testified and weigh the same against the appellant's defence and tested both their demeanor.

26. Whether the sentencing was grossly harsh and excessive?

27. It is trite that although sentencing is at the discretion of the trial court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.

28. However, the strict principles guiding interference on sexual offences sentences by the appellate Court were recently considered by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) which noted that minimum sentences unlike mandatory sentences set the floor rather than the ceiling when it comes to sentences. Simply put, the statute prescribes the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In so stating the learned judges held as follows;

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial

arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.

29. Guided by the above Supreme Court decision, against the thirty (30) year sentence imposed on the appellant, I find that the trial court erred in issuing the said sentence. First, no reasons were issued by the trial court for deviating and/or striking down on the sentence parameters imposed in the statute for the instant offence.

30. As held above, in as much as sentencing is an exercise of judicial discretion, it is not the Judiciary that sets out the sentencing parameters as contained in statute. Unless in special circumstances where the statutory provision is declared unconstitutional, court are enjoined to adjudicate based on the said statutory provisions of law.

31. In this instance Sec 8 (2) of the *Sexual Offences Act*, proposes that the minimum sentence on the offence, is imprisonment for life.

32. For the above reasons, this court finds and holds that the prosecution proved its case against the appellant beyond reasonable doubt. Accordingly, the conviction is upheld, but the sentence is hereby set aside and substituted with imprisonment for life.

33. Consequently, the appeal is hereby dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS...26TH.....DAY OF....JUNE. 2025.

W.K. MICHENI JUDGE

In The Presence Of;

The Appellant(s).....

For The Respondent.....Mr Sirima

Court Assistant.....Bebora

Signed By: Hon. Lady Justice Wendy Micheni

The Judiciary Of Kenya.