Musyoki v Republic (Criminal Appeal E014 of 2024)
[2025] KEHC 12909 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 12909 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E014 OF 2024

WM KAGENDO., J

JUNE 26, 2025

BETWEEN

JOSHUA MUSYOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against conviction and sentence in Mombasa Chief Magistrates Courts O. No. 69 OF 2019 delivered on 31/1/2024 by Hon. D.O Odhiambo (PM))

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on diverse dates between 28th June, 2019 and 29th June, 2019 at [Particulars Withheld] in Changamwe Sub-County within Mombasa County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of B.A. a girl aged 12 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 diverse dates between 28th June, 2019 and 29th June, 2019 at [Particulars Withheld] in Changamwe Sub-County within Mombasa County, the appellant intentionally and unlawfully touched the vagina of B.A. a girl aged 12 years.

4. The appellant was after full trial found guilty of the main count upon which the alternative count was deemed spent and was thereby sentenced to fifteen (15) years imprisonment.

5. The appellant being aggrieved by the conviction and sentence meted against him, he preferred the present appeal and based the same on grounds that the learned trial magistrate erred in law and fact by failing to appreciate that the offence was not proven beyond reasonable doubt, being that the

prosecution case and evidence was riddled with inconsistencies, the medical evidence in fact exonerated the appellant, and that the learned trial magistrate failed to comply with section 169 of the penal code.

6. As at the time of making this decision, only the respondent had complied with filing of submissions on record.

Written submissions

7. The state summarily argued that all elements relevant to suffice a conviction on the offence as against the appellant were met beyond reasonable doubt. Further, that the appellant was lucky to benefit from an illegal lenient sentence of 15 years.

Determination

8. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. See the case of *David Njuguna Wairimu* (2010) eKLR where it was held that:

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

Whether the prosecution established its case against the defendant beyond reasonable doubt?

9. 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 v. Republic* [2016] eKLR.)

10. 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.
>
> ...
>
> (3) 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.
>
> ...
>
> (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.

11. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo v. 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).

12. The age of the minor was established by the production a copy of the minor's birth certificate (pexh2) was produced by PW5 which settled that the complainant was born on 27/7/2007, and therefore as at the time of the incidence was 12 years. This was corroborated by the complainant's guardian, PW3.

13. 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).

14. 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."

15. According to the appellant the prosecution failed in its undertaking to prove its case beyond reasonable doubt. He argued that the testimony of the complainant was marred with inconsistencies.

16. 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 sworn and unsworn testimonies, respectively.

17. PW1 in her testimony gave a cogent and vivid account of how the appellant together with another not before the court, in company of PW2, passed by them as they were playing and asked for directions to the 'coca-cola shop'. They further insisted that the girls to take them to another shop near a flyover. At which point the appellant, and another held PW1's and PW2's hands respectively and directed them to a house where they ordered them to undress and lie on the bed. That, the appellant inserted his organ

that passes urine in her organ that passes urine. That, thereafter, they were both given kshs.1,000/- (PW1) and kshs.500/= (PW2) and ordered that if anyone asked them where they got the money, they should respond that they had picked up the same.

18. PW2 gave a similar account of they ordeal that they suffered in the hands of the appellant and another not before court. Further, she testified that it happened a 2nd time and the appellant gave PW1; kshs.300/- as the other man gave PW2; kshs.200/=.

19. The medical reports herein, the P3 Form (pexh1c) and the PRC Form(pexh1b) as presented by one Dr. Fadhil Hussein; PW4, exhibited that the complainant had a broken hymen.

20. It is not lost to me that a broken hymen is not absolute certainty of penetration, but the same coupled with the testimony of the victim, leaves no room for doubt that the indeed penetration sufficed.

21. Simply put, I conclude therefore that the second ingredient namely penetration was adequately proven based on the victim's evidence and the medical evidence.

22. On identification of the perpetrator, PW1's as corroborated by PW2, evidence is that the appellant is well known to them by dint that he operated a 'stall' which he sold 'chapatis' and they frequently purchased from him. Further, PW1 positively identified the accused at the time of his arrest and court as the perpetrator.

23. As to the purported inconsistencies and disparities in the prosecution witness testimonies I cede guidance to the case of *Philip Nzaka Watu v. Republic* [2016] eKLR where the court of appeal stated as follows:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".

24. I have considered the said discrepancies as alleged by the appellant, and I find 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. Having considered the appellant's defence, it is clear that the same fell short in dislodging the prosecutorial evidence. I have no reason to differ from the findings of the trial magistrate who had the opportunity to hear and see the complainant as she testified and weigh the same against the appellant's defence and tested both their demeanor.

26. As to the 15 years custodial sentence, imposed on the appellant, it is noteworthy that he neither questioned its legality or lack thereof, nor submit on the same. Further, 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

27. In my view, in as much as the trial court duly exercised it discretion, I find that it erred in issuing a sentence below the minimum statutory penal parameters. Section 8 (1) (3) of the *Sexual Offence Act*, stipulates that 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.

28. The strict principles guiding interference on sexual offences sentences by the 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.

29. 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. In the instant case, no reasons were issued by the trial court for deviating and/or striking down on the sentence parameters imposed in the statute for the present offence.

30. Simply put, the sentence must minimally comply with Section 8 (1) (3) of the *Sexual Offence Act*, and I so hold.

31. 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 a twenty (20) year custodial sentence, to run from the date of conviction by the trial court.

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

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

W. K. MICHENI JUDGE

In The Presence Of;

The Appellant.....

For The Respondent.....mr Sirima.....

Court Assistant.....bebora.....

SIGNED BY: HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

MOMBASA HIGH COURT HIGH COURT CRIMINAL DATE: 2025-06-26 20:18:43