Musyoka v Republic (Criminal Appeal E102 of 2023)
[2025] KEHC 12968 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 12968 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E102 OF 2023

WM KAGENDO., J

JUNE 26, 2025

BETWEEN

SENGU MUSYOKA ..... APPELLANT

AND

REPUBLIC ..... PROSECUTION

(Being an Appeal against conviction and sentence in Mombasa Chief Magistrates Court S.O No. 109 of 2019 delivered on 14/7/2022 by Hon. H. Onkwani (PM.)

JUDGMENT

1. The appellant was charged with three (3) counts namely: under Count I the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that the appellant on the 25th day of October, 2019 at [Particulars Withheld], Changamwe Sub–County, within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of J.N a child aged 8 years.

2. He faced an alternative charge to Count I, 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 the 25th day of October, 2019 at [Particulars Withheld], Changamwe Sub–County, within Mombasa County, intentionally and unlawfully caused his penis to rub the vagina of J.N a child aged 8 years.

3. Under Count II, he was charged with attempted defilement contrary to Section 9(1) as read with Sub Section (2) of the *Sexual Offences Act*, which particulars are that on the 25th day of October, 2019, at [Particulars Withheld], Changamwe Sub-County within Mombasa County, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the anus of I.N a girl aged 5 years old. He similarly faced and alternative charge to Count II, for the 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 the 25th day of October, 2019 at [Particulars Withheld], Changamwe Sub–County,

within Mombasa County, intentionally and unlawfully caused his penis to rub the vagina of I.N a girl aged 5 years old.

4. Under Count III, the appellant was charged with the offence 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 the 25th day of October, 2019 at [Particulars Withheld], Changamwe Sub–County, within Mombasa County, intentionally and unlawfully sucked the mouth and touched the breasts of A.W a girl aged 7 years old.

5. At the close of the prosecution's case, the trial court ruled that the appellant had a case to answer and was thereby put to his defence. The Trial Court recorded the compliance with Section 211 of the Criminal Procedure Code, and the appellant opted to give an unsworn testimony.

6. After full trial the appellant was found guilty under Count I and the alternative charge to Count II. Consequently, the court entered no finding as to the alternative charge to count I and further acquitted him on Count II and Count III. The appellant sentenced to serve life imprisonment under Count I, and ten (10) years under the alternative charge to Count II, which sentences were to run concurrently.

7. After being aggrieved by the conviction and sentence, the appellant preferred the present appeal based on grounds that the learned trial magistrate erred in matters of both law and factfor failing to find that the critical ingredients of the offence were not established against him nor corroborated by medical evidence. Further, that the prosecution's case was marred with massive contradictions and discrepancies. He further faulted the learned trial magistrate for failing to comply with section 329 of the CPC.

8. As at the time of making this determination neither of the parties had complied with filing written submissions.

Determination

9. 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).

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

10. Under Count I, the appellant was charged and convicted on the offence of defilement on J.M. The same 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.)

11. 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.

12. 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).

13. The age of the minor was established by the production of the minor's original birth certificate s.no. 055627 (mf-1) which settled that the complainant was born on 2/6/2011, and therefore as at the time of the incidence she was 8 years.

14. 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).

15. 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."

16. The record before me, shows clearly that complainant, PW1 was properly subjected to voire dire examination at the end of which, the learned Magistrate concluded that she was intelligent and

understood the duty of speaking the truth, but could not comprehend the realities of an oath and thereby directed her to give unsworn statement.

17. According to the appellant the prosecution failed in its undertaking to prove its case beyond reasonable doubt. He argued that the corroborative evidence was not cogent to establish a conviction.

18. PW1; the complainant, gave a cogent testimony of how the appellant, their houseboy, normally tasked to fetch water for their family, arrived at lunch time and found PW1 in the company of her friends PW2 and PW3, playing. That, he then asked "nani nitamuanza?" and PW2 answered "mimi!" That the appellant then took PW2 to the bed pulled the curtain undressed PW2, and did "tabia mbaya".

19. The appellant then asked again "nani anataka kufanywa?" and PW3 answered "mimi!" The appellant similarly, took PW3 to the bed told her to undress, inserted his "dudu" in PW3's (points at the vaginal area) and did "tabia mbaya".

20. It was PW1's testimony that the appellant left thereafter only to comeback, while PW1 was asleep on the bed, whilst still in company of PW2 and PW3. The appellant then took her, removed her clothes and inserted his "dudu" in her (points at the vaginal area). That, the appellant then made "back and forth movements" (PW1 demonstrates the movements), at which point she told him to stop.

21. PW1's vivid account of the ordeal was corroborated by PW5; Dr. Fadhili Hussein who produced J.N's PRC report (P-exh2) and the P3 as (P-exh3). On genital examination it was evidenced that; her hymen was not intact, and she had bruises around her vaginal canal. Further, they examination noted that she had tenderness around the vaginal area and pervaginal smelly discharge.

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 her by dint that he was their houseboy tasked to fetch water for their family. Further, she positively identified the accused person in court as the perpetrator.

24. As to the alternative charge under Count II, for the offence of committing an indecent act by intentionally and unlawfully causing his penis to rub the vagina of I.N a girl aged 5 years old. Section 11(1) of the *Sexual Offences Act* states as follows: -

> " 11(1) Any person who commits an indecent Act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years,"

25. Under Section 2(1) of the Act indecent act is defined as

> " Indecent act" means an unlawful intentional act which causes: -
>
> 1. any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration."

26. I have considered PW2's testimony, who similarly was properly subjected to voire dire examination at the end of which, the learned Magistrate concluded that she was unable to appreciate the meaning of an oath and thereby directed her to give an unsworn statement. In my view, all that PW2 alleged was that the appellant did 'tabia mbaya' to her, where he inserted his 'dudu' in her (touches her vaginal area).

27. From the foregoing, all that was alleged was penetration and no other contacts were alleged and proved. See Court of Appeal Mark Oiruri Mose v Republic [2013] KECA 67 (KLR). I needlessly reiterate that an 'indecent act' as contemplated in statute, does not include an act that causes penetration. I therefore find that the trial court misapprehended itself in its determination by holding that the appellant's penis came into contact with the child's vagina. It would follow that the conviction under the alternative charge to Count II is neither sound nor safe.

28. As to the sentence of life imprisonment under Count I, imposed on the appellant, it is noteworthy that he neither questioned its legality or lack thereof, nor submit on the same. In my view the trial court duly exercised it discretion and proceeded to sentence the appellant cognizant of Section 8 (1) (2) of the Sexual Offence Act, stipulates that a person who commits an offence of defilement with a child aged eleven years or less is liable upon conviction to imprisonment for life.

29. Accordingly, I find that the appeal partially succeeds, and I hold as follows;

30. That the trial court's conviction and sentence under Count I, is hereby upheld.

31 Consequently, the trial court's conviction and sentence on the alternative charge to Count II, is hereby set aside and quashed.

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.