Nyongesa v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 8647 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8647 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E008 OF 2024

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

ANTHONY WEKESA NYONGESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment dated 27/03/2024 delivered in Iten Senior Principal Magistrate's Court Sexual Offence Case No. E046 of 2023 by Hon. E. Kigen-PM)

JUDGMENT

1. The Appellant, currently aged about 40 years, was charged in the said criminal case with the offence of attempted defilement contrary to the provisions of Section 9(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on 06/10/2023, in Marakwet West Sub County, within Elgeyo Marakwet County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of FJK, a girl aged 15 years. He was also charged with the alternative charge of committing an indecent act with the same child contrary to Section 11(1) of the same Act.

2. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the Prosecution called 3 witnesses. At the close of the Prosecution's case, the Court found the Appellant as having a case to answer and placed him on his defence. The Appellant, in his defence, then gave unsworn statement and did not call any other witness. By the Judgment delivered on 27/03/2024, he was acquitted of the main charge but convicted on the alternative charge of committing an indecent act with a child. On 27/03/2024, he was sentenced to serve 10 years imprisonment.

3. Dissatisfied with the decision, the Appellant filed this appeal on 15/03/2024, against both the conviction and sentence. Reproduced verbatim, the Grounds of Appeal are as follows:

    i. That the Learned trial Magistrate erred in law and fact when she presided over the case of the Appellant without noting a violation of his right to fair hearing violating article 50(2) (k) of

the Constitution when a letter was read out to the Court as a statement of the eye witness in his absence making Appellant unable to test the evidence through cross examination.

ii. That the Learned trial Magistrate erred in law and fact where the Court subjected him to suffer double jeopardy contrary to article 50(2) (O) where he was acquitted under section 87A for lack of evidence for a charge similar to the one he was charged with of indecent act with a child got re arrested and charged and found guilty of the same charge.

iii. That the trial Magistrate erred in law by misapplying an unsubstantiated claim that the Appellant committed an indecent act to the complainant on the contrary the ingredients of the alleged offence were not properly established. The conviction was based on suspicion, fabrication and not on evidence.

iv. That the Learned trial Magistrate erred in law and fact this case was a keeping in mind that the mother to the complainant was my girlfriend and the daughter did not approve of the relationship after she found out when she was sent over to collect money from the Appellant. Furthermore, the source of this issue was due to the cash (I) had given the and her refusal to return my change.

v. That the Learned trial Magistrate shifted the burden of proof to the Appellant contrary to the provision of section 107 of the *Evidence Act* when the Prosecution failed to discharge its duty of proving its case.

vi. That the trial Magistrate erred in law and fact by imposing a mandatory sentence while he had the option of giving out an appropriate or a lesser sentence.

vii. That the trial Magistrate erred in law and fact as his mitigation as well as the circumstance of his case were not considered by the Court in sentencing him for 10 years imprisonment.

viii. That the trial Magistrate erred in law and fact by imposing a mandatory sentence and as a result deprived him of the right to an appropriate sentence in violation of Article 50 (2) (p) of the C.O.K in effect applying a wrong principle.

ix. That the trial Magistrate erred in law and fact when the ingredients were not proved as the complainant said she was touched which to another offence other than attempted defilement.

x. That the Trial Magistrate erred in law and fact by not according a fair trial by not complying with section 333(2) of the *Criminal Procedure Code* where 6 moths he spent in remand custody was not factored in his sentence of 10 years.

xi. That the Trial Magistrate erred in law and fact as the witness's statements were full of major contradiction and discrepancies in this instant the Complainant indicated that she was touched on her breast and vagina but on cross examination she said the stomach.

xii. That the Trial Magistrate erred in law and fact by not complying with provisions of section 169(1) of the Criminal procedure Code while writing a Judgement. In particular the justification to impose a harsh and excessive was not indicated.

Prosecution evidence before the trial Court.

4. PW1 was the minor-complainant, FJ. She stated that she was 14 years old and had just completed Class 8. She testified on 06/10/2023 she was going to school in the morning at 6.00 am when she met the Appellant who called her and gave her Kshs 1,000/- which she refused to take and continued walking, that the Appellant followed her and told her that she should pass through the fence to his house on

Friday and that in return, PW1 told him that she would report him, and he told her to go. She testified that she went ahead and found 2 of her classmates, and told them what had happened, and that her friend, C, told her that the Appellant had bought her "kangumuu" (donut) and asked her to go to his house but she refused. She testified further that when she got home, she told her mother what happened. She also testified that on 08/10/2023, she had gone to collect water when the Appellant followed her and called her but she ignored and kept walking, her mother then sent her to get maize and a neighbour by the name L agreed to accompany her but the Appellant came and asked PW1 to ask L to remain behind and he would go with her to the stores, and that he was holding her breasts as he said this. She stated further that he then gave her Kshs 1,000 and asked her to buy panties, which money she however took to her mother. She stated that they then went and reported the incident to the Chief who told them that the Appellant had become notorious for such habit, that they later went and reported the matter at the police station. She stated that when the Appellant touched her breasts, she pushed him away. She also stated that she was born in 2008 and referred to her Certificate of Birth. She also referred to the Appellant as "Anthony" and stated that his home is far, and he carries out casual jobs in the area. In cross-examination, she stated that children in the school were stating the Appellant gave them money and then approached them for relationships. She insisted that the Petitioner touched her breasts and also extended his hand to her private parts.

5. PW2 was DY, the complainant's mother. She testified that on 06/10/2023 the complainant had gone to school and upon returning home at lunch time, told her that the Appellant had lured her with money but she refused to take it. She testified that she looked for the Appellant but did not find him, that on the following Sunday, she sent the complainant and her brother K to go and fetch water and when the complainant returned, she narrated to her how the Appellant had found her and called her but she rushed home. She testified that she later sent the complainant to get maize and that the Appellant again followed the complainant towards the farm, that shortly, the complainant returned with Kshs 1,000/- note which, she said, the Appellant had given her, and that they took the money to the Chief. According to her, the Appellant lives in the area. In cross-examination, she stated that the Chief told them that the Appellant had the habit of luring children to his house. She also stated that the villagers had raised alarm about the Appellant.

6. PW3 was Police Constable Ann Wafula, who testified that on 08/10/2023, she received a phone call from a colleague who informed her of a case of attempted defilement. She testified that she proceeded to the police station and called the complainant came in the company of her mother and explained what had happened. She stated that the complainant was 14 years old, that the complainant told her that on 06/10/2023 while she was heading to school, the Appellant approached her and offered her Kshs 1,000/- because he loved her but which she refused and threatened to report the Appellant, that on 08/10/2023, the complainant was fetching water when the Appellant followed her and gave her Kshs 1,000/- and he then caressed her breasts and she reported the incident to her mother who reported to the sub-Chief. She stated that she then went and arrested the Appellant. She also produced the complainant's Certificate of Birth and the Kshs. 1,000/- note as exhibits. In cross-examination, she stated that the minor narrated to her that the Appellant had tried to penetrate her, and that she was with one NK when she went to fetch water and who witnessed the Appellant caressing the complainant's breasts. She also stated that the complainant told her that the Appellant followed her to the farm and gave her Kshs 1,000/- and told her to join him so they could have sex. According to PW3, the other children did not record statements because the Appellant had threatened them.

7. At this point, the Prosecution Counsel Mr. Kirui informed the Court that the 4th (last expected witness) was a minor boy but who was not willing to come to Court. He thus closed the Prosecution case.

8. As aforesaid, upon close of the Prosecution case, the Court found the Appellant with a case to answer and placed him on his defence. The Appellant then opted to give unsworn statement.

Defence evidence before the trial Court.

9. The Appellant, testifying as DW1, denied committing the offence and stated that on 02/10/2023 he was on the road when the complainant's mother (PW2) took him to his house, that PW2 had prepared muratina (alcoholic liquor) which they drunk and she told him that once she needs "the child" she would come to his house. He testified that on 3/10/2023, he met one Mary's grandmother who told him "kumbe haujawacha hiyo madharau yako" (so you have not stopped these acts of disrespect of yours?) and she left. He stated further that on 06/10/2023, PW2 phoned him and told him that the complainant would pass by his house for the Appellant to give her money for Parents & Teachers Association (PTA) contributions, that indeed in the morning, the complainant came for the money but since the Appellant did not have it, he escorted her to school and told the head-teacher to allow her to sit in class since he had the complainant's mother's Kshs 200/- which he would pay later.

10. He testified further that on 8/05/2023, Mary's grandmother asked him to make seats for her and he then gave her a deposit of Kshs 1,000/-, that he then walked on the road and met the complainant and L, that the complainant told him that her mother (PW2) had asked her to collect the money from the Appellant, that the Appellant told her that did not have "change" and the complainant offered to get the "change" for her. He stated that he then gave the Appellant Kshs 1,000/- to go and get the change but when the complainant did not return, he went to look for her in their home but her mother (PW2) told him that he had overstayed with her money and asked that they should go to the Chief. According to him, when they went to the Chief, the Chief asked them to sort out their issues and they left but shortly thereafter, a Police Officer came and made him to board a vehicle which took him to the police station, where he was placed in a cell. He stated that he and PW2 were put in different cells and the police demanded for Kshs 1,000/- from each of them, that PW2 was however released and he gave her his house keys and asked her to go and secure his house and to also take his child to go and sleep in her house.

11. He testified further that PW2 phoned him on the following day and confirmed receipt of Kshs 600/-. Further, according to him, he was taken to Court and was discharged, but was re-arrested and taken to a Police station and taken back to Court and charged afresh. He pointed out that the Prosecution did not call the complainant's friends and also the alleged eye-witness.

Hearing of the Appeal.

12. The Appeal was canvassed by way of written Submissions. The Appellant filed the Submissions dated 4/11/2024 while Prosecution Counsel Grace Mukangu filed the Submissions dated 25/02/2025.

Appellant's Submissions.

13. The Appellant, in lengthy submissions, contended that the trial Court did not accord him a fair trial and violated his right to a fair hearing under Article 50(2)(k) of *the Constitution*, that the trial Court convicted him without making an adverse finding against the Prosecution for not availing key witnesses, and that the Prosecution even attempted to advance their case by presenting a letter by a presumed eyewitness by the name L. He urged that presenting a letter instead of a live witness presented a legal challenge in terms of challenging such evidence which threatened his constitutional right, that besides this attempt, the Prosecution did not present other listed witnesses such as one Koech, school teachers, and the Chief, among others, who were lined up as witnesses. He submitted that the Prosecution had the capacity to compel the witnesses but chose the simplest task of presenting

letters to the Court. He submitted that the failure to avail the witnesses occasioned a major miscarriage of justice as he is now serving a jail term of 10 years for an offence he did not commit. According to him, the Prosecution lacked solid evidence.

14. He submitted further that the trial Court allowed him to be charged twice under a charge he had been earlier acquitted of thus making him suffer double jeopardy. He reiterated that he was charged with the offence of defilement and was discharged under Section 87A of the *Criminal Procedure Code* for lack of evidence but was later re-arrested and charged with the same offences for which he had already been acquitted. He urged that this violated his constitutional right under Article 50(2)(o) of *the Constitution* and that the Prosecution could have amended the charge sheet. He contended that the trial Magistrate misapplied the law on an unsubstantiated claim by finding that he committed an indecent act yet none of the ingredients of the charge was established to the required standard of the law.

15. He submitted that in cross-examination, the complainant stated that she was touched on the stomach which is not listed as one of the parts of the body prohibited from being touched, that he was implicated in the offence simply on suspicion that he was giving young girls cash which was a fabrication as evidenced by the rushed process of charging him and in the absence of witnesses who were sending letters to the Court as evidence. According to him therefore, there was a miscarriage of justice. He submitted that the major source of his trouble was his long-standing debt, that some of the information coming out of the trial were unbelievable and untruthful and which raises credibility issues on the Prosecution witnesses, that the witnesses denied knowing the Appellant while in reality, for instance, the complainant's mother was his girlfriend, was selling home-made beer, and he was her big customer. He submitted that he had taken some beer on credit and the amount that he was alleged to have given to the girl was meant to settle some debt of Ksh 200/- and that the point of misunderstanding came about when the change was not refunded to him for allegedly having overstayed with the debt. He also submitted that the complainant never liked him and never approved of his relationship with her mother and that this is why there were many cases being fabricated against him "to settle scores".

16. He also alleged that the trial Court shifted the burden of proof to him contrary to the requirements of Section 107 of the *Evidence Act* which places such duty on the Prosecution and also contrary to Article 50(2)(a) of *the Constitution* which presumes an accused to be innocent until proved guilty, and that it is a constitutional right to keep silent and not to incriminate oneself in a criminal charge. Regarding the sentence, he urged that the trial Court had the discretion to impose other sentences other than the mandatory sentence based on the circumstances of the case, that the prison sentence prescribed for a person convicted of the offence of indecent act is described as "liable" to "not less than10 years" which indicates that the Court had the discretion to impose a lesser sentence where the circumstances dictate. He cited the case of Daniel Kyalo Muema vs Republic (2009) eKLR. He submitted that the trial Magistrate imposed a maximum sentence but did not assign a reason for doing so. He further prayed that the period he spent in remand custody during the trial be factored as part of the 10 years sentence as the trial Court failed to order the sentence to commence from the date of arrest, which was on 03/10/2023, and he was sentenced on 27/03/2024. He cited Section 333 (2) of the *Criminal Procedure Code*. He then prayed that the prison term be reduced by a period 5 months 24 days, being the period he spent in remand custody.

Appellant's Submissions.

17. Prosecution Counsel, on her part, cited the definition of "indecent act" as provided in the *Sexual Offences Act* and also cited Section 11(1) thereof. Regarding the age of the complainant, she submitted that the same was proved by the Certificate of Birth. She then recounted the testimonies of the witnesses and contended that the charge was proved beyond reasonable doubt. On the sentence, she

cited the case of S vs Malgas 2001(1) SACR 469 469 (SCA) and also the case of Bernard Kariuki Gacheru v Republic [2002] eKLR, and submitted that the Appellant was given the minimum sentence and that in doing so, the trial Magistrate considered all relevant factors and properly applied her discretion.

Determination.

18. The issues that arise for determination in this Appeal are evidently the following:

    a. Whether the alternative charge of committing an indecent act with a child was proved.

    b. Whether the sentence of 10 years imprisonment was justified.

19. Before I determine the said issues, I may restate that as a first appellate Court, I am obligated to revisit and re-evaluate the evidence afresh, assess the same and make my own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32).

20. Under Section 2 of the *Sexual Offences Act*, "an indecent act" is defined as follows:

> " indecent act" means an unlawful intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will."

21. It is therefore evident that the main ingredients of the offence of committing an indecent act with a child are: (a) that the victim is a child; (b) intentional contact by the accused with the genital organ, breast or buttocks of the child; or, exposure or display of any pornographic material to a child; and (c) absence of any lawful justification for the act complained of.

22. On the sentence that may be imposed upon conviction for the said offence, Section 11(1) provides that:

> " 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."

23. Before I delve further, I have to disabuse the allegation by the Appellant that the trial Court relied on letters from some people who did not testify as witnesses. This, clearly, is a baseless allegation since the record does not anywhere disclose such fact. Similarly, the Appellant's allegation that the trial Court convicted and jailed him for an offence in respect to which he had earlier been acquitted is also not supported by the record. I will not therefore belabour these grounds of appeal.

24. Regarding proof beyond reasonable doubt, it is clear that there was no eye-witness who testified to corroborate the claims by the complainant's claim that the Appellant caressed her breasts. The only alleged eye-witness mentioned by the complainant, one NK, did not testify.

25. I am cognisant of the fact that Section 124 of the *Evidence Act* provides that the testimony of the victim under the *Sexual Offences Act* does not need to be corroborated so long as the Court believes that the witness is telling the truth. It 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 proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence 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 offence, 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."

26. While appreciating the wisdom behind the said provision, I am disturbed by the fact that no sufficient reason was given on why the said eye-witness was called. I note that the Prosecution did inform the trial Court that the last witness was a minor boy who was not willing to testify. I presume that this is the alleged eye-witness. If so, I am concerned that the trial Court was not told what efforts were made to convince the boy to testify and also, whether any safeguards were put in place to protect him, and further, the reasons for his unwillingness to testify were also not disclosed. While the failure to call the boy as a witness may as well have been on genuine grounds, the absence of an explanation as aforesaid, may cast doubts on the strength of the Prosecution case. There are a number of people whom it is alleged the complainant reported the incident to and narrated the events. However, apart from the complainant's mother, none of these other people, including the Chief, schoolmates, friends and teachers, were also called to testify. Had these people testified, then the trial Court could have been in a position to establish whether there was consistency in the accounts given by all these people as pertains to what the complainant told them. I also note that the complainant, in cross-examination, claimed that some witnesses did not record statements because they were threatened by the Appellant. Again, no effort was made to verify this claim

27. There is also testimony that the Chief told the witnesses who testified that the Appellant is notorious for attempting to lure young girls with cash for sexual favours and that there were several reports made against the Appellant for these acts. As aforesaid however, the Chief was not called to testify.

28. Further, Section 124 above contains the rider that although the trial Court can convict on the basis of the sole testimony of the victim-minor, it should only do so "if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth". I note that in her Judgement, the trial Magistrate did not state the reasons for her satisfaction, if at all, that the complainant was "telling the truth". Was it on account of her demeanour, was it because of her consistency, was it due to her credibility? We do not know as no disclosure on this was made in the Judgment.

29. In his defence, though a bit incomprehensible, the Appellant had ready explanations for allegations made against him. Regarding the Kshs 1,000/- note produced in evidence and alleged to have been given by the Appellant to the complainant to lure her into a sexual act, the Appellant alleged that the complainant's mother brews alcohol and that he had drunk some of her alcohol on credit and thus owed the complainant's mother a debt for the same. He alleged he gave out the Kshs 1,000/- note to the complainant because she had offered to get "change" for him but never returned. He also alleged that it is in fact the complainant's mother who sent the complainant to get the money from him. According to

him, it is this demand to be given his "change" that led to the complainant and her mother fabricating the charge against him. He also alleged that the complainant's mother was his girlfriend and that the complainant had a borne to pick with him because she did not approve of the relationship. Since the Appellant, in his defence, gave unsworn statement, he was not cross-examined and thus the credibility and/or veracity of these claims could be tested. They may as well be false but considering the detailed particulars which the Appellant gave, they sound plausible.

30. Considering its nature, the tag of having committed a sexual offence is one that is a serious one as it leads to ostracization and shunning of the suspect by the society and the clamour for his severe punishment. For this reason, Courts must be extremely cautious to ensure that suspects are only convicted on sound and cogent evidence to avoid the possibility of sending to the gallows innocent persons. It may well be that in this case, the Appellant did in fact commit the offence. However, the law allows him to stay silent about the allegation and does not compel him to self-incriminate himself. This is because the burden of proof always lies with the Prosecution.

31. In view of the foregoing, and the standard of proof in criminal cases being one of beyond reasonable doubt as stated in the case of Miller v. Minister of Pensions (1947) 2 ALL ER 372, I am not satisfied that the evidence on record attained such standard. I find that the Prosecution case was not watertight and the Prosecution thus failed to prove its case beyond reasonable doubt. The Appellant's conviction was therefore, in my view, unsafe and, in the circumstances, should not stand.

32. Having found as above, I find no reason to belabour the rest of the grounds of appeal presented.

Final Order.

33. In the circumstances, this Appeal succeeds and is allowed, and I hereby order as follows:

    i. The conviction of the Appellant by the trial Court in Iten Senior Principal Magistrate's Court Sexual Offence Case No. E046 of 2023 for the charge of committing an indecent act with a child is hereby quashed and the sentence of 10 years imprisonment imposed therein set aside in its entirety.

    ii. Accordingly, the Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF JUNE 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Appellant

Ms. Muriithi h/b for Ms. Mwangi for the State

Court Assistant: Edwin Lotieng