Kisoi v Republic (Criminal Appeal E023 of 2024)
[2025] KEHC 9610 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E023 OF 2024

CW MEOLI, J

JULY 3, 2025

BETWEEN

DAUDI KISOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in Loitokitok S.O Case No. 20 of 2019)

JUDGMENT

1. The Appellant, Daudi Kisoi, was charged in the main count with Defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars being that on 26th July, 2019 in Kajiado south sub-county within Kajiado County, he intentionally caused his penis to penetrate the vagina of D.W a child aged 4 years. In the alternative he was charged with Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. In that on 26th July, 2019 at Isineti trading centre in Kajiado south sub-county in Kajiado County, he intentionally touched the vagina of D.W a child aged 4 years.
2. The Appellant denied the charges, but following a full trial, he was convicted on the main count and sentenced to serve 30 years imprisonment. Aggrieved by the outcome, he filed this appeal via his undated Petition of Appeal, based on the following grounds: -
    a. That the Honourable trial court Magistrate erred in law and fact by failing to find that I was not properly identified as the perpetrator of the offence alleged as defined by law.
    b. That the Honourable trial Magistrate erred in law and fact by failing to find that the prosecution failed to prove penetration of the alleged complainant's genitalia as required by law.

c. That the Honourable trial court Magistrate erred in law and fact by failing to find that the complainant in this case was an incredible witness whose evidence could not be used to base a conviction.

d. That the Honourable trial court Magistrate erred in law and fact in convicting the appellant based on the complainant's single evidence without giving the reason for believing in the said complainant's testimony.

3. However, by the Appellant's submissions dated 5th February, 2025, he proposed to amend his petition to include a challenge to the sentence, the only matter addressed in the said submissions. Primarily asserting that the trial court erred in law for failing to take into account the age factor in sentencing him.

4. The prosecution case through six witnesses who testified at the trial was that D.W (PW3) was aged four years at the material time and resided with her mother R.N. (PW2) at Isineti trading center. The Appellant also resided at Isineti centre as a neighbour to the victim's family, a friend to the husband of PW2 and was known to the witnesses as Babu. On the material date, the minor was playing on a path at the centre when the Appellant called her to his house, and after undressing her, removed his clothes and placed her on his bed where he did "tabia mbaya" to her, causing pain in her private parts. Thereafter, he sent her away with a warning not to reveal what had happened, while promising to buy her biscuits.

5. According to PW2, on 26.7.2019 the minor complained of pain in her private parts while being bathed and on being questioned, told the mother what had transpired earlier. Noting a slimy substance on the minor's thighs and underwear, PW2 took her on 27.7.2019 to Loitokitok sub county hospital where she was examined and treated. The P3 form and post rape care (PRC) form (Exh. 1 and 2) prepared by Sharon Yelet were produced by her colleague Kipape Sanitu (PW1), together with the lab results and treatment notes (Exh. 3,4, and 5).

6. The examination revealed that the minor's hymen was perforated and that she had a foul-smelling discharge which was confirmed by lab tests to arise from a urinary tract infection (UTI), also similarly found in the specimen taken from the Appellant. This followed his arrest by Cpl. Nguru (PW5) on 29.7.2019, upon a report being made to PCW Khatievi (PW6) of Loitokitok Police station by PW2. The Appellant was thereafter charged.

7. The Appellant when placed on his defence opted to give an unsworn statement. He testified that he lived in Isineti and was a farmer. It was his evidence that he was framed for the offence because of business differences with PW2.

8. In his submissions, the Appellant has complained that the sentence imposed by the trial court was contrary to the decision of the Court of Appeal in the case of Ali Abdullah Mwanza -vs- Republic, Criminal Appeal No 259 of 2012 regarding the concept of normal life expectancy of a human being. Stating that the above case compares to his as he is 57 years of age, the Appellant asserted that as of 2022, the normal life expectancy in Kenya according to the World Health Organization was 63.5 years. He therefore urged the court to review his sentence downwards from 30 years to 15 years taking into consideration his age, in alignment to Article 27(1)(2) of *the Constitution* of Kenya. He stated that the sentence of 30 years imprisonment was excessive and shatters his hopes of rehabilitation, as he would be 87 years old on release, hence too old to start afresh.

9. Further the Appellant urged that Articles 27(1)(2) as read with 20(3)(a) and (b) of *the Constitution* be applied to his benefit. He cited the Supreme Court decision of Francis Karioko Muruatetu & Another- vs- Republic, Petition No 15 of 2015 wherein the court outlined the objectives of sentencing to be retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation.

He also referred to Article 10(3) of the International Convention on Civil and Political Rights of 1966 (ICCPR) to the effect that the essential objective of imprisonment ought to be the reformation and social rehabilitation of prisoners.

10. On his part, the Respondent's counsel defended the conviction which he asserted was secured through cogent, credible and sufficient evidence proving the charge beyond reasonable doubt. With regard to identification, counsel for the Respondent asserted that the victim though aged 4 years gave a detailed account of the defilement incident through an intermediary, in accordance with the law. That she had stated that she knew the Appellant who went by the nickname "Babu" and that there was no one else similarly named in her locality. Further, that this was a case of recognition unlike identification of a stranger, therefore more reliable. On this aspect citing the Court of Appeal case of Anjononi & others-vs- Republic (1980) eKLR.

11. Further pointing out that the child victim made a prompt report to her mother, the Respondent relied on the Court of Appeal case of Kimeu -vs- Republic (2002) 1KLR 756 which emphasized the evidential value of prompt reporting of sexual offences cases.

12. As regard penetration, the Respondent cited the definition in Section 2 of the *Sexual Offences Act* on what comprises penetration and argued that the minor's evidence was strong and corroborated by medical evidence. Which confirmed that the minor had a perforated hymen, the doctor's conclusion being that there was evidence of penile penetration. The decision of the Court of Appeal in the case of Mohammed Bachero -vs- Republic (2015) eKLR was cited in this regard.

13. It was the Respondent's position that under Section 124 of the *Evidence Act*, the court could convict on the evidence of the minor even if uncorroborated, provided the court believed the victim and recorded reasons for the belief. The Respondent citing the case of Keter-vs- Republic [2002]1KLR 35. Counsel reiterated that an appellate court will not interfere with the trial court's findings of credibility of a witness unless it was demonstrated that the trial court misapprehended the evidence or acted on wrong principles, as held in the case of Republic – vs- Oyier [1985] eKLR.

14. Further asserting that in the instant case, the trial court recorded clear and sufficient reasons for believing the minor, whereas the minor's evidence was corroborated by the medical as well as the mother's evidence. The Respondent's counsel asserted in addition, that the trial court correctly dismissed the defence offered by the Appellant, being a mere denial.

15. Defending the sentence of 30 years imprisonment as lawful and within the prescribed range, counsel for the Respondent stated that Section 8(2) of the *Sexual Offences Act* provides for a minimum sentence of life imprisonment for defilement of a child aged 11 years or below. Hence, the sentence imposed by the trial court was lenient and within the discretion of the court. Counsel finally submitting that the appeal is without merit and ought to be dismissed.

Analysis and Determination

16. The Appellant confined his submissions to the question of severity of the sentence, pursuant to his purported "amended ground". The said ground introduced through submissions could not properly be considered as an amended petition of appeal. However, in the interest of justice, the court will consider the said ground alongside his earlier grounds challenging the conviction, as contained in his initial petition of appeal.

17. The court has reviewed the record of the lower court. As the first appellate court, this court is required to re-evaluate the evidence adduced before the trial court with a view to arriving at its own conclusions.

The duty of the first appellate court was spelt out in the case of Okeno vs. Republic [1972] EA 32, as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R. [1957] E.A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs. R., [1957] E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post, [1958] E.A. 424".

18. Similarly, in the case of David Njuguna Wairimu vs. Republic [2010] eKLR the Court of Appeal reiterated that: " The duty of the first appellate court is to analyse 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."

19. Three key elements, namely, the age of the victim, penetration and identity of the perpetrator must be proved beyond reasonable doubt for the prosecution to succeed in a charge of defilement. The prosecution bears the burden of proof beyond reasonable doubt. This burden of proof never shifts to an accused person.

20. In proof of these ingredients the prosecution relied on the evidence of six witnesses. The star witness was PW3. Following a voire dire examination of the PW3, the trial court received her evidence through an intermediary Anne Kitenge, a Children Officer Loitokitok sub-county. PW3 gave a graphic account of the incident in question, which is worth restating here.

21. She testified that she resided at Isineti centre and that Babu (the Appellant) lived near their home. It was her evidence that Babu "alinifanyia tabia mbaya". She stated that on the material day, she wore a dress under which she wore underpants and biker; that while playing on a path, and looking for toys to play with, Babu invited her to his house. Inside the house, he did tabia mbaya to her genitalia (pointing to her private area) after undressing her, removing her underpants and having removed his clothes. PW3 stated that he placed her on his bed and thereafter Babu "aliniingiza kitu kwangu." That during the act she felt pain (pointed her private area) and that she cried.

22. Further, she testified that Babu told her not to tell anyone about the incident, promising to buy her biscuits, before she went home, and that she put on her underpants and biker on the way home. That she informed her mother PW2 who took her to hospital and reported to police. The minor identified Babu as the accused person by pointing at him during the trial. During cross examination her testimony remained unshaken.

23. While acknowledging the use of euphemisms by children when describing acts of sexual intercourse, the Court of Appeal in Muganga Chilejo Saha v Republic [2017] eKLR had this to say:

> " Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."

24. So that the reference by the minor in this case to "tabia mbaya", taken together with her description of the transaction inside the Appellant's house leaves no doubt that she was referring to penetration. Regarding the defilement incident in the Appellant's house only PW3 was a witness. From the judgment, it is apparent that the trial court was alive to the provisions of Section 124 of the *Evidence Act* and was persuaded that despite her tender years the minor was ''clear as to what had happened to her'' and believed her evidence. In this case, the evidence of the minor did not stand-alone; it was corroborated by PW2 as to her receipt of the report of defilement and minor's state on 26.7.2019 and reinforced by the testimony of PW1. The latter produced records (Exh. 1-5) containing medical findings inter alia that the minor's hymen was perforated via penile penetration, that she had yellow discharge with a foul smell indicating the presence of a UTI, an infection also found in the Appellant's specimen.

25. PW1 stated that the UTI could be because of sexual intercourse or dirt in the urinary tract and that no bruises were found on the labia majora or minora of the minor. Further clarifying that it was possible for the hymen to be perforated without causing injuries to the labia minora or majora. The suggestion in his defence that the Appellant was framed was not put to any of the witnesses. Looking at the foregoing evidence, there can be no reason to fault the trial court's finding that PW3 was indeed defiled.

26. The age of the minor was also determined to be 4 years through the age assessment report by PW1 and through the testimony of PW2, the victim's mother. In Thomas Mwambu Wenyi v Republic (2017) eKLR the Court of Appeal cited with approval a passage from Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000 where it was held that:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

27. Similarly, in Mwalongo Chichoro Mwanyembe -vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR) cited in the case of Edwin Nyambaso Onsongo -vs- Republic (2016) eKLR, the Court of Appeal stated: "... 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 presented in proof of the victim's age, it has to be credible and reliable".

28. On the identification of the perpetrator, PW2 testified that the Appellant was known to her family as ''Babu'' and was a neighbor and a friend to PW3's father. On her part, PW3 also identified the Appellant and referred to him as "Babu" and pointed at him during the trial as the person who hurt her in the course of doing ''tabia mbaya'' to her. According to PW6 who arrested the Appellant at Isinet, the Appellant lived in close proximity to the victim's family. There is therefore no doubt that the Appellant was well known to the minor.

29. The allegation that the case against the Appellant arose from a business dispute with PW2 was not elaborated in the statement of defence nor put to PW2 during cross-examination, despite her assertion that the Appellant was a friend of the father of the victim. Given the firm proof of defilement of the minor and her identification of the perpetrator, the suggestion appears farfetched; the minor was too young to be roped into and to sustain a conspiracy of the kind proposed in the Appellant's defence in her evidence. The minor's evidence was consistent during cross-examination, disputing that there was anyone else in her locality going by the name Babu. Indeed, her identification of the Appellant was not solely based on the name but primarily on recognition. In the court's view the Appellant's bare defence was completely displaced by the prosecution evidence and was properly dismissed by the trial court.

30. In the result, the court agrees with the finding of the trial court that the ingredients for the offence of defilement were proved beyond reasonable doubt and the appeal against conviction must fail.

31. Regarding the sentence, Section 8(2) of the *Sexual Offences Act* provides that 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. The Court of Appeal in Dismas Wafula Kilwake v Republic [2019] eKLR discussed Section 8 of the *Sexual Offences Act* as follows: -

> " In Hadson All Mwachongo v. Republic (2016) eKLR, this Court stated as follows regarding the sentences prescribed by the *Sexual Offences Act*:
>
> > "The *Sexual Offences Act* provides for punishment for defilement in a graduated scale. The younger the victim, the more severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment."

32. While sentencing the Appellant on 23.02.2021, the trial court observed that although the offence carried a life sentence, the Appellant was a first offender. And citing the ''Muruatetu case'' (in reference to the Supreme Court case of Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR) also cited on this appeal by the Appellant, the trial court sentenced the Appellant to imprisonment for 30 years. This is the sentence described by the Appellant as harsh and excessive, and allegedly imposed without consideration of the age factor and the objectives of sentencing. He therefore sought the reduction of the sentence to 15 years, a proposal opposed by the Respondent's counsel who describe the sentence meted out by the trial court as lenient, in view of the offence.

33. The rationale in the Muruatetu case (supra) has hitherto been applied in many cases involving offences under the *Sexual Offences Act*. Including Christopher Ochieng Vs. Republic (2018) eKLR and Manyeso V. Republic CRA No. 12 of 2021 (2023) KECA 827 (KLR). However, the Supreme Court has recently pronounced itself in Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024) KESC 34 (KLR) as follows, regarding minimum sentences prescribed under Section 8 of the *Sexual Offences Act*:

> " In any case, the sentence imposed by the trial court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with the sentence."

34. Further, in Republic Versus Evans Nyamari Ayako Petition No: E002 of 2024 the Supreme Court in its judgment delivered on 11th April 2024 stated that:

> "(51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.
>
> In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the *Penal Code*. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence." (emphasis added).

35. In the circumstances, as explained in Muruatetu II case above, the decision in the Muruatetu I case cannot be applied in sentencing an offender convicted under Section 8 of the *Sexual Offences Act*, and this court, like the Court of Appeal in Mwangi's case above, lacks the jurisdiction to reduce the sentence of 30 years imposed by the trial court . The appeal against sentence must fail.

36. However, based on the provisions of Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*, and flowing from the foregoing recent decisions of the Supreme Court thereon, the lawful minimum sentence for the offence for which the Appellant was convicted is life imprisonment , and not 30 years imprisonment as awarded by the trial court. This Court will therefore set aside the illegal sentence of thirty years imprisonment imposed by the trial court and substitute therefor the lawful sentence of life imprisonment.

It is so ordered. In the result, the appeal has failed in its entirety and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 3RD DAY OF JULY 2025.

C.MEOLI

JUDGE

In the presence of:

The Appellant: Present

For the Respondent: Mr. Kilunda

C/A: Lepatei