Macharia v Republic (Criminal Appeal E041 of 2023)
[2025] KEHC 10430 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10430 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E041 OF 2023

CW MEOLI, J

JULY 17, 2025

BETWEEN

JOHN KOKURIA MACHARIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence in Ngong Sexual Offences Case No. E003 of 2020 before P. Achieng, SPM)

JUDGMENT

1. John Kokuria Macharia, the Appellant herein was charged in the main count with Defilement of a child with mental disability contrary to Section 7 of the *Sexual Offences Act*. The particulars of the offence stating that on 11.11.2020 at 1700hrs at Ongata Rongai township within Kajiado County, he intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of N.W a child aged 16 years.

2. The Appellant faced an alternative charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars being that on 11.11.2020 at 1700hrs at Ongata Rongai township within Kajiado County, he intentionally and unlawfully caused his male genital organ (penis) to touch the female genital organ (vagina) of N.W a child aged 16 years.

3. The Appellant denied the charges and following a full trial, he was found guilty and convicted on the alternative charge. And consequently, sentenced to serve 10 years imprisonment. Aggrieved by the conviction and the sentence he lodged the instant appeal via his undated Amended Petition of Appeal raising the following grounds:-

    a. That the Learned trial Magistrate erred in both law and facts whereby the prosecution case was not proved beyond reasonable doubt.

b. That there was no sufficient evidence to link the appellant to the offence of indecent act against the complainant.

c. That the learned trial Magistrate erred in both law and facts on failing to observe that the complainant was not telling the truth.

d. That the evidence on record was inconsistent, hearsay and fabrication against appellant.

e. That the medical evidence did not support the offence for which the appellant was convicted of.

f. That the time spent in remand custody was not factored pursuant to Sec 332(2) *CPC*.

4. The appeal was canvassed through written submissions. By his undated submissions, the Appellant argued that the prosecution did not prove its case beyond reasonable doubt. He relied on several decisions including the case of *Gerald Ndoho Munjuna v Republic* (2016) eKLR.

5. Concerning the alternative offence of committing an indecent act with a child, he asserted that it was not proved beyond reasonable doubt. Citing the ingredients of the offence to be age of the victim, body contact between the accused and the genitalia, breasts, buttocks of the victim, and that the act was committed intentionally, all which the prosecution had a duty to prove. He contended that there was no evidence of penetration, a fact that the trial court noted. Or that that the Appellant intentionally caused contact between any part of his body and the genitalia, breasts, buttocks of the victim.

6. Asserting that the testimonies of PW1 and PW2 that he forcefully defiled the minor, were not supported by the evidence by PW4 the clinical officer, he dismissed the former evidence as untruthful. And claimed that the trial court having observed that there was no penetration had proceeded to make a finding that an indecent act had occurred. Despite the fact that the act described by the minor was an act of penetration and not contact with the minor's genitalia, breasts, buttocks. He faulted the trial court for founding a conviction on the lesser charge of committing an indecent act with a child , in the absence of proof of the main charge. Here relying on the case of *Abdi Ismail Moulid v Republic* [2019]eKLR.

7. As regards his sentence, he stated that he was arrested on 11.11.2020 and was in custody until he was sentenced on on 30.11.2022. He complained that the period of his incarceration was not taken into account by the trial court during sentencing him as required by Section 333(2) of the *Criminal Procedure Code*. He cited the Court of Appeal decision in *Ahmad Abolfathi Mohammed & another v Republic* (2018) eKLR and *Bethel Wilson Kibor v Republic* [2009] eKLR.

8. On their part, the prosecution submitted that the ingredients of defilement comprise of age of the complainant, penetration and identity of the perpetrator. Terming identification in the case to be a matter of recognition, they cited the Court of Appeal decision in *Anjononi & Others v Republic* [1980] eKLR. It is their case that the minor identified the Appellant and that the age of the minor was also proved through evidence of her mother and the birth certificate, to be 16 years.

9. Regarding penetration the prosecution referred to clinical officer's report on the minor, showing that though the labia majora and labia minora was intact, the hymen was broken. Citing the definition of penetration in Section 2 of the *Sexual Offences Act* that penetration to include partial or complete insertion of a genital organ into the genital organs of another person and the Court of Appeal holding in *Mohamed Bachero v Republic* [2015] eKLR that the slightest penetration is sufficient to establish the offence of defilement. There contesting the trial court's finding that the medical evidence was not conclusive proof for penetration.

10. Defending the veracity of the minor's evidence, they argued that the trial court had the chance to view the demeanor of the witnesses and determine their truthfulness. And stated that the appellate court will not interfere with findings of credibility unless it is demonstrated that the trial court misapprehended the evidence or acted on wrong principles. Here relying on the case of *Republic v Oyier* [1985] eKLR. And argued that the trial court found that the evidence of the minor was corroborated by medical evidence. Besides, under Section 124 of the *Evidence Act* a court to convict on the evidence of the victim of a sexual offence, even if uncorroborated, provided that the court believes the victim and records the reasons for that belief, as affirmed by the Court of Appeal in *Keter v Republic* [2002J 1 KLR 35.

11. It was their case that the trial court rightly applied the law and facts in convicting the Appellant for the alternative count of Indecent act with a child, based on evidence that the Appellant inserted his penis in the vaginal area of the complainant, which sufficiently the offence of committing an indecent act contrary to Section 11(1) of the *Sexual Offences Act*. Thus, it was the prosecution's contention that that the appeal lacked merit and should be dismissed.

Analysis and Determination

12. The court has reviewed the entire 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.

13. The duty of the first appellate court as spelt out in the case of *Okeno v Republic* [1972] EA 32, is 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 v R* [1957] EA 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 v R*., [1957] EA 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 v Sunday Post*, [1958] EA 424".

a. Similarly, in the case of *David Njuguna Wairimu v 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."

14. During the trial, the minor N.W. testifying as PW1 stated that she lived in Kiserian and was in standard six at the time. Further saying she did not recall what happened on 11.11.2020, she stated that the incident happened at the Appellant's house. Where, the appellant removed her clothes and took her to

the toilet and locked her there. That he thereafter removed her clothes and slept on top of her, inserted ''his thing'' in her private parts. That he was later arrested. She also testified that her brother V.K (PW2) witnessed what the Appellant did and reported to their mother.

15. PW2 testified that he was a minor aged 12 years, and that on 11.11.2020 at 4:00pm he was at home when he saw PW1 and the Appellant at a shade. He stated that he also saw one Rosie. That he went into the house to change from his uniform so he could go and play. But not finding PW1 on his return, he asked Rosie where PW1 was. Rosie replied that she did not know, and after retracing his steps back home and not finding her, so he continued his search for her. In the process, while passing by the neighbor's house, he peeped through a hole at the door. That he then saw the Appellant holding PW1 whose mouth was covered with a white cloth as he defiled her. Despite his screams no one came to his aid and he ran to call his mother who accompanied him to the scene, and knocked on the door until the Appellant opened. That the mother confronted the Appellant, who was subsequently escorted to the police station.

16. M.M (PW3), the minor's mother testified that the minor was born on 20th March, 2004. She stated that on 11.11.2020 she was at work while PW1, one of her two children, was at home. That at 4:00pm her son PW2 came to her workplace and informed her that the Appellant, had defiled PW1. She stated that the Appellant was at the time visiting his brother who was her neighbor. That on arriving home, she found many people gathered at the said neighbour's house. She stated that she rescued the child and took her first to Rongai Police Station and then to Nairobi Women Hospital.

17. John Njuguna (PW4) is the clinical officer who produced the PRC form (P. Exh. 2(a)), the GVRS form (P. Exh. 2(b)) and the P3 form (P.Exh.3) on behalf of his colleague at Nairobi Women Hospital, Perminus Mungai. He stated that when PW1 was examined on 11.11.2020, she reported that one John inserted' ''his thing'' (penis) into her "susu" (vagina), earlier that day. That although PW1 had no physical injuries on her body, she had a whitish discharge around her vagina and a penetrated hymen with an old scar.

18 PC Veronica Ntabo (PW5) testified that she investigated the matter, and upon questioning PW1 learned that the Appellant who was a neighbor called her into his brother's house, that he put her on the bed and defiled her. She also produced a certificate indicating that PW1 was a person with mental disability and the birth certificate of PW1 as P.Exh. 4 and P.Exh. 1, respectively.

19. When placed on his defence, the Appellant gave an unsworn statement. He stated that on 11.11.2020 he was at work when three police officers approached him, accusing him of possession of stolen items. That he was then taken to the police station, where police demanded Kes. 20,000/- for his release but he told them that he could not get the money and denied having stolen anything. Which angered the officer who threatened that he would get him imprisoned forever and on 16.11.2020 he was arraigned in court on charges, which he denied.

20. The gravamen of this appeal is that there was no sufficient evidence to support the conviction. In the main count, the Appellant had been charged with Defilement of a child with a mental disability under Section 7 of the *Sexual Offences Act*. Which provides that: -

> " A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."

21. In its judgment, the trial court correctly observed that the said provision does not define an offence of defilement of a child with mental disability, but deals with instances where acts which cause penetration or indecent acts are committed within the view of a family member, child or a person with

mental disability. Thus, finding that on the evidence on record, the Appellant was charged under the wrong provision of the law in the main count, rather than Section 8 of the *Sexual offences Act*.

22. The trial court therefore invoking the provisions of Section 179 of the *Criminal Procedure Code*, which provides for conviction of an accused on a minor and cognate offence, to that charged. The said section provides as follows

> "(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

23. The trial court therefore found that the only valid charge was the alternative count and upon considering the evidence proceeded to convict the Appellant on the alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. An indecent act is defined in the Sexual Offences Act as inter alia an unlawful intentional act which causes 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.

24. In an appeal involving offences under Section 8 of the *Sexual Offences Act* , the Court of Appeal considered the provisions of Section 179 of the *Criminal Procedure Code* in the case of *Robert Mutungi Muumbi v Republic* [2015] eKLR, and stated as follows:-

> " The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under Section 179 of the *Criminal Procedure Code* without having to plead to the offence, so long as it was a minor and cognate offence to that charged. Section 179 of the *Criminal Procedure Code* provides as follows....As is apparently clear, Section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by Section 179 can be either the trial court or the appellate court.....The question is whether the special circumstances contemplated by Section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *Robert Ndecho & another v Rex* (1950-51) EA 171 and *Wachira S/O Njenga v Regina* (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in *Ali Mohammed Hassani Mpanda v Republic* [1963] EA 294, while construing the provision

of the Tanzania *Criminal Procedure Code* equivalent to Section 179 of the Kenya *Criminal Procedure Code*: "Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence." That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial." (Emphasis added).

25. The court concluded by stating that:

> " The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *Republic v Cheya & another* [1973] EA 500). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under Section 179 of the *Criminal Procedure Code* even though he was not charged with that offence and had not pleaded to it. The requirements of Section 179 were satisfied."

See also *Kalu v Republic* (2010) 1 KLR.

26. In the case of *David Ndumba v R* [2013] eKLR, the Court of Appeal observed regarding alternative counts that:

> " On the issue of the alternative charge we find nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M. B. O. v Republic* Criminal Appeal No. 342 of 2008, this Court held:
>
> > 'The practice of charging offences in the alternative is of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge." (Emphasis added).

27. According to PW2, a short while after he went to change from his school uniform, he went back outside the house only to find that PW1 and the Appellant had moved from where he had last seen them "in the shade", leaving behind Rosie who told PW2 that she did not know where PW1 had gone. PW2 decided to look for PW1 in the plot where the family lived. Not finding her in their home, he continued the search. Eventually peeping into the house, presumably of the Appellant's brother, he saw the Appellant, assertedly defiling PW1.

28. According to PW1, the Appellant had earlier held her by hand and led her to his house where the Appellant removed her clothes and took her to the toilet and locked her there. That he thereafter removed her clothes and slept on top of her, inserted ''his thing" in her private parts. A similar description of the incident is also recorded in medical history part of the GVRC form and PRC form (P.Exh. 2 (a) and 2(b) dated 11.11.2020 as *'John aliingiza kitu yake kwa susu yangu and alinifanyia tabia mbaya.*

29. The records also document the presence of a whitish discharge around the genital area of PW1. From the evidence of PW2 and PW3, upon returning home, they found people gathered at the door to the neighbor's house (Appellant's brother's house) and PW3 knocked on the door until the Appellant opened it, whereupon she took PW1 and went off to report to police. PW3 denied having falsely implicated the Appellant.

30. In this case, the minor's age was established through the production of a birth certificate P.Exh. 1 showing that she was 16 years old at the material time. In *Thomas Mwambu Wenyi v Republic* (2017) eKLR the Court of Appeal cited with approval a passage from *Francis Omuromi v 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...."

31. Similarly, in *Mwalongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015) (UR) cited in the case of *Edwin Nyambaso Onsongo v 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".

32. As regards the indecent act itself entailing an unlawful intentional act which was stated in the particulars of the alternative charge to be that the Appellant "intentionally and unlawfully caused his male genital organ (penis) to touch the female genital organ(vagina) of N.W" , the trial court considered evidence by PW1, 2, 3 and 4 . Noting the presence of a whitish discharge around PW1's genital area as documented in the medical evidence upon her examination and the testimony of PW1, PW2 and PW3 the trial court was satisfied that the alternative charge had been established. On its part, this court having reviewed this evidence found it consistent.

33. The claim in the Appellant's defence that the charges were trumped up against him when he failed to pay a bribe to police after his arrest on allegations of possessing stolen goods appear farfetched. Not only was the allegation not put to PW4 during cross-examination, it was also flatly rejected by PW3. Besides, it is hard to see how PW1, herself a child with mental disability and her younger brother PW2 could have been involved in a conspiracy of the kind suggested by the Appellant. Indeed, no such allegation was put to them during cross-examination.

34. By his submissions the Appellant emphasized the trial court's statement that there was no conclusive evidence of penetration and stated that the evidence of PW1 should therefore not have been believed. The ingredients of the alternative charge did not include penetration and the statement in the judgment by the court was irrelevant to the charge under consideration. The court had already correctly found that the main charge could not stand for reasons stated in the judgment, hence proceeding to consider the alternative charge.

35. Be that as it may, the absence of conclusive proof of penetration while irrelevant did not render the evidence of PW1 false, or render the prosecution evidence inconsistent and incapable of supporting the

alternative charge. The trial court found as a proven fact that the ''accused put his penis at her (PW1's) vaginal area". Equally, the court was satisfied that the Appellant had been identified as the perpetrator.

36. As a minimum, the total sum of the evidence of PW1 was that the Appellant having led her into his brother's house undressed her and lay on top of her before he caused his genital organ to touch that of the witness. This evidence is supported by medical evidence of the presence of a whitish discharge in her genital area and also that of PW2 who witnessed the actions of the Appellant upon his sister, and PW3 who found both the PW1 and the Appellant in the Appellant's brother's house shortly thereafter. The witnesses acquitted themselves well during cross-examination.

37. Upon its own review of the evidence before the trial court, this court is equally satisfied that it established the alternative charge to the required standard. The trial court cannot be faulted for reaching the findings it did. The appeal against conviction is therefore without merit.

38. In closing, the court observes that the trial court was perfectly entitled in the circumstances of the case to reject the main count and to invoke Section 179 of the *Criminal Procedure Code*. However, it was redundant for the trial court to pronounce itself, as it did at the end of the judgment, by acquitting the Appellant on the main charge which it had effectively found to be a non-existent offence, unknown to the law. Indeed, even if the offence in the main charge was proper, it would have been unnecessary upon convicting the Appellant on the lesser charge, for the trial court to pronounce itself on such main count.

39. Regarding sentence, the Appellant has argued that the time he spent in remand custody during the trial was not considered in passing sentence, as required by 333(2) of the *Criminal Procedure Code*. The provision states that:-

> " Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*.
>
> Provided that where the person sentenced under Subsection (1) has prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

40. In this regard, the Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR held that: -

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by Section 333(2) of the *Criminal Procedure Code*. By dint of Section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court.
>
> With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already

spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

41. From the record of proceedings in the lower court, the Appellant in his mitigation address sought that the time he had spent in custody be considered in sentencing him. However, the sentence notes do not indicate any consideration of the said period. The Appellant was arrested on 11.11.2020 and was held in custody until 30.11.2022 when he was convicted and sentenced to ten years imprisonment.

42. The period of the Appellant's incarceration ought to have been factored into the sentence. This ground of appeal succeeds. Accordingly, the court will order that the sentence of ten years imprisonment shall be reckoned from the date of the Appellant's arrest, that is, the 11th November 2020. In that respect only has the appeal succeeded. The appeal against conviction is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 17TH DAY OF JULY 2025.

C.MEOLI

JUDGE

In the presence of:

The Appellant: Present

For the Respondent: Mr. Kilunda

C/A: Lepatei