Mwangi v Republic (Criminal Appeal E032 of 2024)
[2025] KEHC 10148 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10148 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E032 OF 2024

JN NJAGI, J

JULY 11, 2025

BETWEEN

JOHN WAHOME MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. M. M. Wachira, Principal Magistrate, in Lamu Magistrate's Court Sexual Offence Case No. EO11 of 2023 delivered on 26/3/2024)

JUDGMENT

1. The Appellant was charged with 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 were that on the 12th day of September,2023 at around 1415 hours at [Particulars Withheld] village in Hindi Location within Lamu Central Sub County in Lamu County he intentionally and unlawfully caused his penis to penetrate the anus of EN, (herein referred to as the complainant), a child aged 7 years.

2. The appellant was in the alternative charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on the 12th day of September, 2023 at [Particulars Withheld] village Hindi Location within Lamu central Sub-County in Lamu County he intentionally and unlawfully touched the anus of EN a child aged 7 years with his penis.

3. The appellant was acquitted of the main charge and was convicted on the alternative charge and was sentenced to serve 10 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:

1. That the learned trial magistrate erred in law and fact by failing to consider that the prosecution did not discharge the burden of proof to the legal required standard threshold.

2. That the learned trial magistrate erred in law and fact by ignoring the contradictions and inconsistencies by the prosecution witnesses thereby making the appellant's conviction unsafe.

3. That the learned trial magistrate erred in law and fact by failing to consider that the conviction and sentence were against the weight of the evidence adduced by the prosecution.

4. That the trial magistrate failed to take into consideration the defense of the appellant.

5. The learned trial magistrate erred in both matters of law and fact by failing to take into consideration the appellant`s mitigation.

4. The prosecution called 7 witnesses in the case at the close of which the court found the appellant to have a case to answer and placed him to his defence. The appellant defended himself and did not call any witness.

Case for the Prosecution

5. The case for the prosecution is that the complainant who was PW2 in the case was at the material time aged 7 years and was attending school at Lamu. He was living with his father, PW1 and his mother PW3. That on the material day, he was coming from school when he met with the appellant who took him to the bush and gave him some sweet things. The appellant then undresses him and inserted his penis into his anus. The complainant went away and met his father, PW1. He reported to his father what the appellant had done to him. PW1 called the complainant`s mother PW3 and informed her of the report. On getting home, PW3 checked the anus of the boy and found sand inside the anus. The boy`s father went home and confirmed the sand in the anus. He took the boy to Magogoni dispensary where he was examined by a clinical officer, PW5. The complainant and his father reported the matter to the police. The case was investigated by PC Mbogo PW6 who issued the complainant with a P3 form and escorted him to Magogoni dispensary where the P3 form was filled by the clinical officer, PW5. The clinical officer found the boy with a mix of sand and feaeces in the anus. The spinster muscle was loose. An anal swab was taken that revealed presence of pus. The boy was in pain when the swab was taken. On the 14/9/2023, PC Mbogo and other police officers went with complainant to the home of the appellant. He identified the appellant as the person who had defiled him. The appellant was arrested. The complainant took them to the scene in an abandoned house where he said the appellant had defiled him. The appellant was charged with the offence.

6. During the hearing, the clinical officer PW5 produced his treatment notes, the P3 form and Post Rape Care form as exhibits, P.Exh.3, 4 and 5 respectively. The investigating officer PW6 produced a sketch map of the scene together with photographs of the scene as exhibits, P.Exh.2 and 6 respectively. PC Kaitani PW7 produced the birth certificate of the complainant as exhibit, PExh.1. It indicated that the complainant was born on 24/5/2016, which placed his age at the material time at 7 years.

Defence Case

7. When placed to his defence, the appellant stated in a sworn statement that on 12/9/2023 he was at home and nothing unusual happened. That on 7/9/2023 he was at home when he heard people talking in an abandoned house. He went to check and found a boy, the complainant, who was not known to him. Neither did he know his parents. The boy told him that he was going to pick mapera. He told him that he ought not to go to the forest or he would beat him up if he returned to the place. That

the boy went and told his parents what he had told him and they changed the story. He denied that he committed the offence he was charged with.

8. The appeal proceeded by way of written submissions.

Appellant's submissions

9. The appellant submitted that the prosecution was under duty to prove the charge against him but they failed to do so. That according to the medical report, there was no evidence that there was penetration as has been alleged by the prosecution. He submitted that the case by the prosecution was marred by contradictions that the trial court ought to have noted in order to come to a safe conviction. It was his submission that the victim had been coached by PW1 and PW3 on what to say.

10. The appellant further submitted that the trial court failed to analyze the evidence tendered to determine his criminal culpability. That there was no direct, cogent, convincing and compelling evidence to warrant his conviction and that the evidence tendered fell short of the standard required in a criminal trial. He prayed that this appeal be allowed and that he be set free.

Respondent's Submissions

11. The Respondent on the other hand submitted that the three ingredients of the offence of defilement of proof of the age of the complainant, penetration and positive identification of the perpetrator were proved. That the age was established by the evidence of PW1 who stated his son was 7 years old. That the birth certificate indicated his age as 7 years. It was submitted that the complainant was attended to by a doctor after defilement who found that his anus was covered with feaces and sand and that there was injury on the rectum. The respondent urged the court to dismiss the appeal.

Analysis and determination

12. This being a first appeal, this court is obligated to revisit and re-evaluate afresh the evidence adduced at the lower court, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses, see Peter M. Kariuki v Attorney General (2014) eKLR.

13. I have considered the grounds of appeal, the submissions by the Appellant and the record in general.

14. An "indecent act" is defined in the *Sexual Offences Act* 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.

15. Therefore, the main ingredients of the offence of committing an indecent act with a child are: -

a) The victim is a child, as prescribed in law;

b) Intentional contact by the accused with the genital organ, breast or buttocks of the child victim. The act must not be an act that caused penetration; or

c) exposure or display of any pornographic material to a child; and

d) absence of any lawful justification for the act(s) complained of.

16. The standard of proof in criminal cases is that of beyond reasonable doubt. In Elizabeth Waithiegeni Gatimu v Republic [2015] eKLR, Mativo, J. (as he then was) expressed himself as hereunder in respect to the standard of proof in a criminal case:

> "To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

17. In regard to the age of the complainant herein, the same was proved by production of the complainant`s birth certificate that indicated that he was born on 24/5/2016. This placed his age at 7 years at the time the offence was said to have been committed. It was therefore proved that the complainant was at the material time aged 7 years.

18. The complainant testified that the appellant took him to the forest where he undressed him and inserted his penis into his anus. The clinical officer who examined the complainant PW5 found him with a mixture of feaces and sand in his anus, There was loose sphincter but there was no blood seen on the anus. There were no sperms found in the anus.

19. Upon considering the evidence that was adduced before the trial court I do not think that the medical evidence was sufficient to prove that the complainant had been penetrated. The complainant did not adduce evidence how he got the sand in his anus. The Ioose sphincter muscle by itself was not conclusive proof of penetration.

20. That means that the only evidence of the alleged indecent act was that of the complainant. The proviso to section 124 of the *Evidence Act* allows a court in cases involving sexual offences against children to convict on the sole evidence of the child if the court is satisfied that the child is telling the truth. The section proviso states that:

> 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.

21. I have keenly gone through the evidence of the complainant. I am not satisfied that he was a credible witness. According the investigating officer, PW6, the complainant was unable to show them the home

of the appellant. When he was asked to take them to the place where he was defiled he was unable to do so and he took them to 3 different sites before he took them to an abandoned house in the forest near the home of the appellant.

22. Whereas the complainant told the court that the appellant had earlier on defiled him in his house, parents never said that the appellant defiled the at any other time. They interrogated and he never them of any other incident. The complainant may not be telling the truth.

23. The above notwithstanding, I have noted from the record of the trial court that the court did not conduct a voir dire examination before it allowed him to give unsworn in the evidence in the case, while the complainant was a child of tender years. In the case of In Maripett Loonkomok v Republic [2015] eKLR, the Court of Appeal had this to say in respect of voir dire examination:

> " Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No 137 of 2014 and in Samuel Warui Karimiv R Criminal Appeal No 16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honored 14 years remains the correct threshold for voire dire examination.....
>
> It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;
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> "In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction".

24. The evidence of the complainant in this case could not be used to convict the appellant since no voir dire examination was conducted before he gave evidence in court. The court could only convict if there was other independent evidence to support the conviction. I find no such evidence.

25. The upshot is that the charge against the appellant was not proved beyond reasonable doubt. I find merit in the appeal. The conviction is hereby quashed and the sentence set aside.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 11TH DAY OF JULY 2025.

J.N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Republic

Appellant – present virtually and in person at G.K. Prison Malindi

Court Assistant - Ndonye