**Malkwen v Republic (Criminal Case E007 of 2022) [2025] KEHC 9719 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9719 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAROK**

**CRIMINAL CASE E007 OF 2022**

**CM KARIUKI, J**

**JULY 4, 2025**

**BETWEEN**

**DOMINIC MALKWEN .......................................................................... APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

## JUDGMENT

1. The Appellant was charged with the offense of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offenses *Act No. 3 of 2006*. The particulars were that on the 1st day of January 2020 at Olchobosei Trading Center in Transmara East Sub- County within Narok County intentionally caused his penis to penetrate the vagina of MC a child aged 7 years. He was convicted on this count and subsequently sentenced to serving an imprisonment for twenty-five (25) years.

2. In the choice of one, he was charged with the offense of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 1st day of January 2019 at Olchobosei Trading Center in Transmara East Sub-County within Narok County intentionally touched the vagina of MC a child aged 7 years.

3. The Appellant lodged an appeal after being convicted as stated above. He lodged 5 grounds in amended ground of appeal: -

   i. That the learned trial magistrate erred in both law and facts by convicting the Appellant yet failed to appreciate that the prosecution had not discharged its duty of disclosure by providing the Appellant with the witness statements and any other documentary evidence that they were relying on to prove their case.

   ii. That the learned trial magistrate erred in both law and fact by convicting the Appellant in the present case yet failed to find that the Appellant was not given an opportunity for cross-examination of the complainant hence the veracity of her evidence was not tested.

iii. That the failure to provide the Appellant with witness statements and also accord him an opportunity to cross-examine the complainant was a violation of the Appellant's right to a fair trial which is a non-derogable right pursuant to Article 25(c) of the *Constitution*.

iv. That the learned trial magistrate erred in both law and fact by convicting the Appellant in the present case yet failed to appreciate that the prosecution did not prove that indeed the Appellant's genital organs penetrate the genital organs of the complainant's drawn on the charge sheet.

v. That the sentence imposed upon the Appellant is both hash and excessive and is not based on the unique facts and circumstances of the case.

4. The court gave directions that the parties canvass appeal submissions which were complied with.

**Appellant Submissions**

5. Appellant submitted that, he was presented in court for plea taking on 6/01/2020. The Appellant denied the charge and the state made an application for taking the evidence of the child immediately which the trial court acceded to on the ground that "The victim was a child of tender years and that, Due to her age and likelihood of interference. Thus ordered the evidence to be taken upfront and that Accused was given liberty to recall (if need be)."

6. Thus, the appellant submit that the trial court fell into error by bullying the Appellant into hearing without inquiring whether he was ready or not. The prosecution had not even provided the Appellant with the witness statements or other documentary evidence which the state was relying on. That not even a single pre-rial conference had been held. The he was simply ambushed.

7. That he a novice in law and thus could not be expected to navigate the strange legal "superhighway" with expertise. Reliance was made on the case of Pett v Greyhound Racing Assciation (1968) 2 ALL ER 545 at 549.

8. That the prosecution's duty of disclosure was not discharged as set out in the case of Thomas Patrick Gilbert Cholmondeley v. Republic, [2008] eKLR. Where the court noted that the prosecution is required to provide an accused person in advance of the trial with "all relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

9. He contends that, PW 1, MC, gave detailed evidence but at the end of her evidence, there was no cross-examination, and no explanation was availed for that omission. The Appellant was not represented and hence would not have ensured his rights were honored.

10. He cites the provision of Section 146(1) of the *Evidence Act* states that; Witness shall first be examined in chief, then if the adverse party so desires, cross examined, then if the party calling them so desire, re-examined. Thus, contend that the omission by the prosecution and the trial court resulted in the violation of his rights to a fair trial. He relies on the provisions of;

11. Article 50(2)(j) as read with Sub-article (c) provides that: Every accused person has the right to a fair trial, which includes the right (j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

**(c) to have adequate time and facilities to prepare a defence.**

12. Thus, he sums up that the failure to give him an opportunity to cross-examine PW 1 handicapped his ability to challenge the prosecution's evidence because PW 1's evidence was not tested for veracity. This greatly prejudiced him, resulting in his conviction.

13. Further, the prosecution in the present case did not prove that there was penetration of PW 1's genital organs. PW 1 stated in her evidence that: "He removed my inner wear. He also removed his and then "alinifanyia tabia mbaya". I felt pain. I cried out. Thus, he submits that it was on this uncorroborated sentence that the Appellant was convicted and sentenced to twenty-five (25) years imprisonment.

**Respondent Submissions**

14. The prosecution submitted that, Section 8(1) of the Sexual Offenses *Act No. 3 of 2006* (hereinafter referred to as the Act) provides that, "any person who commits an act that causes penetration with a child is guilty of the offense defilement.

15. That" penetration is defined under Section 2(1) of the act to mean, "the partial or complete insertion of the genital organs of a person into the genital organs of another person. Section 8(2) of the Act then provides that, "a person who commits an offense of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.

16. To sustain a conviction in a defilement charge, as was held in Charles Wamukoya Karani Vs. Republic, quoted with approval by Aburi J. in Simon Oduor Oloo versus Republic (2022) eKLR, one has to establish the existence of the ingredients constituting the offence. "The critical ingredients forming the offense of defilement being -age of the complainant, proof of penetration and positive identification of the assailant."

17. On prove of victims age it is urged relying on the case of Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. That "in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only one who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

18. That PW 3 testified that the complainant was 7 years of age. The investigating officer reiterated the same and further stated that she (the officer) obtained the complainant's clinic attendance cards, prosecution exhibit 3 and also produced an age assessment form for the complainant as exhibit 4. Both documents show that the complainant was 7 years of age on the date of the offence. The age of the complainant was not disputed by the defense. For all these reasons, it was proved to the required standard of beyond reasonable doubt.

18. On Penetration element, it is submitted that, same was proved through the evidence of the victim corroborated by the medical evidence. Reliance is made on the case of Onzare Versus *Republic (Criminal Appeal 15 of 2023*) (2024) KEHC 494 (KLR) (25 January 2024) (judgment), para 23).

19. The complainant, PW 1, stated that on the 1st day of January 2020, her mother left her playing as she went to the posho mill, that is when the Appellant went to where she was, asked her to lie on the mattress, removed her innerwear, removed his then did to her "tabia mbaya" PW 2, the complainant's mother testified that on the material day she had left four of her children playing, including the complainant and when she returned, she noticed that the complainant was walking with her legs apart. The complainant reported to her that she had been defiled and after informing her husband, she took the child to hospital.

20. PW 6, the clinical officer testified that he examined the complainant and filled the P3 form four days after the offense. He stated that the complainant was walking with difficulty and fearfully. She had multiple lacerations in the perineal region, labia majora and labia minora were swollen and reddish, upper vaginal orifice was swollen, hymen was freshly broken, there was notable bleeding with vaginal discharge. Upon conducting urinalysis, several puss cells were seen and white leucosides were also seen, which as he stated, was a sign of infection. He concluded that there was a defilement. He produced P3 as Exhibit 1, treatment notes as exhibit 2 and PRC form as exhibit 3.

21. On identification of the assailant, the complainant stated that she knew the Appellant before. She added that she knew his home. According to PW 2, the Appellant is the uncle to the complainant. PW 4 also stated that the complainant was the Appellant's niece. The complainant stated that it is the Appellant who went to where they were, defiled her and told her not to disclose to anybody. Reliance is made on the cases of Anjononi and others Vs. Republic (1980) KLR, quoted in Daniel Muthomi Marigu & 4 others VS. Republic (2021) eKLR, where court held that"......this however was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

22. The complainant was consistent and was not shaken during the cross examination. She always identified the Appellant as the perpetrator when she reported him to PW 2 on the date of the offense and to the investigating officer as per their respective testimonies before court.

23. Contrary to the assertions of the Appellant, the court applied the standard of beyond reasonable doubt as opposed to a balance of probabilities. Manifestly from the judgment, the court appreciated that it was the duty of the prosecution to prove the case to the required standards. The question that begs is what standards was the court referring to? In the analysis, the court combed through the prosecution witnesses' evidence and found that they safely satisfied the three elements required to prove the offense of defilement.

24. There were no inconsistencies nor evidence tabled by the Appellant during his defense that would raise doubt on the guilt of the Appellant. An objective reading of the judgment demonstrates that, given the said detailed analysis, when the court spoke of "required standards", the court was referring to the standard of beyond reasonable doubt doctrine. Reliance is made on the case AHM V. Republic (Criminal Appeal E043 of 2021) [2022] KEHC 12773 (KLR).

25. It was enough for the trial court, in its analysis section of the judgment, to provide a summary of the import of the Appellant's defenses and express itself, as it did, it did not speak to the events of the day of the offence in any manner as to exonerate the Appellant.

26. That expression removes any doubt that the court considered all the evidence adduced in the trial, including the defense evidence, in arriving at its judgment. As such we persuade this court to reject the Appellant's averment that his alibi defense was not considered. In fact, the Appellant never raised any alibi defense.

**Issues Analysis and Determination**

27. After going through the evidence on records and the submissions of the appellant and counsel for the respondent, I find the issues are; Whether the trial was fair and thus met the constitutional threshold of fair trial under the provisions of Articles 25 and 50, COK,2010? If the above is in positive, is the treatment warranted? If the trial was fair, did the prosecution prove the case beyond reasonable doubt? Was sentence excessive in the circumstances of the case?

**The duty of the first Appellate court.**

28. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

29. In the Case of Okeno Vs. Republic [1972] EA 32, the then court of Appeal for Eastern Africa, was succinct that in first appeal, it is the duty of this court to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the conviction while bearing in mind that the trial court had the advantage of seeing the witnesses.

30. The said duty had also been dealt with earlier by the former Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336, where they posited that: -"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

31. In a case of Mark Oiruri Mose v Republic [2013] eKLR, the Court of Appeal of held as hereunder: -"It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that. The well-known case of Okeno vs Republic (1977) EA 32 which sets out that principle has been referred to in several decisions of this Court and of the High Court. In our view, it does not appear that the learned Judge was alive to those legal requirements or if he was, then he did not apparently put them into practice."

**Whether The Appellant was Accorded Fair Trial**

32. The proceedings on record show that the appellant was presented in court for plea taking on 6/01/2020. The Appellant denied the charge and the state made an application for taking the evidence of the child immediately which the trial court acceded to on the ground that "The victim was a child of tender years and that, Due to her age and likelihood of interference. Thus ordered the evidence to be taken upfront and that Accused was given liberty to recall (if need be)."

33. This apparently demonstrate that the trial court fell into error by in ushering in the Appellant into hearing without inquiring whether he was ready or not. they do not indicate whether the prosecution had even provided the Appellant with the witness statements or other documentary evidence which the state was relying on. That not even a single pre-rial conference had been held. Then he was simply ambushed.

34. That the appellant was a lay man in matters law, was unrepresented and thus could not be expected to navigate the maze or labyrinth of trial with expertise. Reliance was made on the case of Pett v Greyhound Racing Assciation (1968) 2 ALL ER 545 at 549.

35. The record is very clear that the prosecution's duty of disclosure was not discharged as set out in the case of Thomas Patrick Gilbert Cholmondeley V. Republic, [2008] eKLR. Where the court noted that the prosecution is required to provide an accused person in advance of the trial with "all relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

36. The appellant contends that, PW 1, MC, gave detailed evidence but at the end of her evidence, there was no cross-examination, and no explanation was availed for that omission. The Appellant was not represented and hence would not have ensured his rights were honored. The provisions of Section 146(1) of the *Evidence Act* state that; Witness shall first be examined in chief, then if he adverse party so desires, cross examined, then if the party calling them so desire, re-examined. Thus, the court finds that, the omission by the prosecution and the trial court resulted in the violation of appellant's rights to a fair trial, thus violating the provisions of; Article 50(2)(j) as read with Sub-article (c) provides that: Every accused person has the right to a fair trial, which includes the right (j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.(c) to have adequate time and facilities to prepare a defence.

37. Thus, thus in sum the court finds that the failure to give appellant an opportunity to cross-examine PW 1 handicapped his ability to challenge the prosecution's evidence because PW 1's evidence was not tested for veracity. This greatly prejudiced him, resulting in his conviction unfairly.

38. The first issue having succeeded, which warrants nullification of the proceedings, the next issue is whether retrial should be ordered? There are authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are: - Ahmed Sumar v Republic, (1964) EA 481; Manji v The Republic, (1966) EA 343; Mujimba v Uganda, (1969); and Merali and Others v Republic, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial is defective, if the interests of justice require so and if no prejudice is caused to the accused. Whether an order for trial should be made ultimately depends on the particular facts and circumstances of each case.

39. In the instant case, the victim may be 13 or so years whereas the appellant may have served 5 years or thereabout. This is a case where appellant conviction could award him 20 years of sentence. Due to the gravity of the offence this court finds that the appellant will not be prejudiced, nor will the victim be disadvantaged as she still deserves justice. Thus ultimately, the court makes the orders;

    i. The proceedings are declared a nullity, conviction quashed, and sentence set aside.

    ii. The matter shall be heard De Novo (afresh) before another magistrate with jurisdiction save RM Ochanda PM (as he then) was.

    iii. The appellant shall appear before the Chief Magistrate court at Kilgoris on 9.7.2025 for directions.

**DATED AND DELIVERED AT KILGORIS THIS 4TH DAY OF JULY, 2025**

**................................**

**CHARLES KARIUKI**

**JUDGE**