Mbugua v Republic (Criminal Appeal E042 of 2023)
[2025] KEHC 12908 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12908 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E042 OF 2023

JN NJAGI, J

SEPTEMBER 18, 2025

BETWEEN

MICHAEL MBUGUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. P. E. Nabwana, SRM in Mpeketoni Senior Resident Magistrate's Court Sexual Offence Case No.18 of 2020 delivered on 15/12/2022)

JUDGMENT

1. The Appellant was charged with the offence of Attempted defilement contrary to Section 9(1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 5th day of September, 2020 at around 1300 hours at [Particulars withheld] village within Tewe Sub location in Mpeketoni Sub County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of GWS (herein referred to as the complainant), a child aged 11 years.

2. The appellant was facing an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the same day, time and place as in the main charge he intentionally and unlawfully touched with his penis the vagina of the above said complainant, a child aged 11 years.

3. The Appellant pleaded not guilty to the charge and the alternative charge. The case went to full trial in which the prosecution called 5 witnesses at the end of which the appellant was placed to his defence. The appellant defended himself and called one witness. The appellant was acquitted of the main charge of attempted defilement and convicted on the alternative charge of committing an indecent act with a minor. He was sentenced to serve 10 years imprisonment.

4. Aggrieved by the conviction and sentence of the trial court, the Appellant lodged an appeal on the following amended grounds of appeal:

    1. The Learned trial Magistrate erred in law and in fact in convicting the Appellant for a charge whose particulars did not match the evidence tendered before court.

    2. The Learned trial Magistrate erred in law and in fact in convicting the Appellant based on evidence that was contradictory, inconsistent and insufficient.

    3. The Learned trial Magistrate erred in law and in fact in relying on circumstantial evidence without warning herself on the dangers of doing do.

    4. The Learned trial Magistrate erred in law and fact in failing to find that the prosecution had not established its case beyond reasonable doubt.

    5. The Learned trial Magistrate erred in law and in fact in convicting and sentencing the Appellant based on charges that were not proved by the prosecution.

    6. That the learned trial magistrate erred in law and in fact in that, he gave undue weight to the Prosecution's case and least weight to the defence case.

The evidence before the trial court

5. The case for the prosecution was that the complainant was at the material time aged 11 years. She was living with her mother PW2 and a sister PW3 at [Particulars withheld] village. The appellant was their neighbour.

6. That on the morning of the material day, the complainant`s mother PW2 left her home and went to her shamba away from home. She left the complainant, her sister PW3 and their father at home. The appellant was engaged by the parents to the complainant to do some casual work at the home.

7. That at about 1 pm the complainant`s sister, PW3, went to fetch water. The complainant then took food to the appellant in the house of her brother. After he finished eating the food he told her to take water to him. When she did so he locked the door to the house and inserted his penis into her vagina. PW3 returned home and did not find the complainant. She called at her and she came out of her brother`s house. She asked the complainant what she had been doing in the house with the appellant but she did not tell her. Two days later the complainant revealed to PW3 what the appellant had done to her. PW3 reported to her mother. The matter was reported to the police. The complainant was taken to Tewe Dispensary where she was examined. They reported the matter at Baharini police station. She was sent to Mpeketoni sub county hospital where she was examined by a clinical officer PW4 who found her with a broken hymen but there were no injuries, bruises or laceration. The clinical officer concluded that there was no evidence of penetration.

8. The case was investigated by Cpl Abdulswamad Salim PW5 then of Baharini police station. He issued the complainant with a P3 form which was completed by PW4. PW5 obtained the complainant`s birth certificate from her mother PW2. It indicated that she was born on 2/6/2009. Later the appellant was arrested by a police reservist and taken to the police station. PW5 charged him with the offence. During the hearing the clinical officer PW4 produced the P3 form as exhibit, P.Exh.2. The investigating officer produced the birth certificate as exhibit, PExh.3.

9. When placed to his defence, the appellant stated in a sworn statement that he was on the 5/9/2022 at his home with his two children when the father to the complainant called him at 6am and asked him to go and harvest maize for him. He proceeded to the home of the father to the complainant at 7am. He

found his wife having left but the father to the complainant was at home with his two daughters. He told him to harvest maize up to 11 am. He started the work. Later the father to the complainant left to look for change for him to pay him his wages. He came back at noon and paid him Kshs. 300/-. He went to the home of his uncle where he stayed up to around 6pm and then went home. That on the 13/9/2020 he was at his home when the was arrested by a Kenya police reservist officer in the company of the father to the complainant. He was taken to Baharini police station. He was charged.

10. The appellant called one witness, his uncle DW2 who told the court that on 5/9/2020 the appellant was working at the village elder`s home as a casual labourer of harvesting maize. That the village elder went to his (DW2`s) home and borrowed his son's motorcycle to go and change a large currency note into small ones in order to pay the appellant his wages. That at 11 am, DW 2`s son went and called the appellant from DW2`s home to go and collect his pay. The two went together and returned to his home together. The appellant then left his home at around 11 am.

Submissions on Appeal

11. The appeal was canvassed by way of written submissions. The appellant submitted that the charges were not proved beyond reasonable doubt. That there is no alternative charge sheet indicating a charge under section 11(1) of the *Sexual Offences Act*.

12. The appellant faulted the trial court for relying on hearsay evidence and particularly the testimony of the complainant without scrutinizing it yet the evidence was not corroborated. In this regard he cited the cases of Sawe –v- Republic (2013) eKLR, Ndungu Kimani-v-Republic (1979) eKLR and that of Mwangi v Republic (2012) eKLR.

13. It was submitted that no one witnessed the complainant being touched anywhere. That the complainant did not raise any alarm and she did not report the incident to anybody for 2 days. It was submitted that the charge was a fabrication by the family of the complainant so as avoid paying him the money he had worked for.

14. It was submitted that the mother to the complainant alleged that the incident occurred on 8/9/2020 while the complainant said it was 5/9/2020.

15. The appellant submitted that the learned trial magistrate failed to consider his defence that he was framed by the complainant's family. The appellant submitted that there were inconsistences in the evidence of the witnesses. He urged this court to find that the trial magistrate failed to take into account his defence and that of his witness.

16. The appellant submitted that the evidence of the prosecution witnesses was taken by Hon. R. G. Mundia, Principal Magistrate. That when Hon. Nabwana took over the case he did not explain to him his rights under section 200 (3) and (4) which was a violation of his right to fair trial. He submitted that he was prejudiced by the said act and therefore that he should be re-tried of the offence.

17. The Respondent on the other hand opposed the appeal and submitted that the charges were proved to the required standard. That the age of the complainant was proved by her birth certificate that showed that she was born on 2/6/2009, thereby placing her age at 11 years. The Respondent urged that this court be guided by the evidence of PW1 and those of the other prosecution witnesses to find that the offence of committing an indecent act with a child was committed by the appellant.

18. It was submitted that though the medical report indicated that the hymen was missing and that there was no evidence of penetration, the evidence of the complainant did prove that an offence of indecent assault with a child was proved.

19. The respondent submitted that the appellant was identified by the complainant. That the appellant himself admitted that he was on the material day engaged by the father to the complainant to harvest a crop in his field.

20. On sentence, the respondent submitted that the appellant was sentenced to the minimum sentence of 10 years for the offence of indecent assault with a child.

Analysis and determination

21. It is trite that the duty of a first appellate court is to examine afresh the evidence adduced before the trial court and arrive at its own findings. This principle was restated by the Court of Appeal in David Njuguna Wairimu v Republic [2010] eKLR thus: -

> " 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 decisions."

22. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.
>
> 2. 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; 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."

23. The offence of committing an indecent act with a child is provided under the section 11(1) of the *Sexual Offences Act* as follows:

> " 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."
>
> Section 2 of the same Act defines "indecent act" as:
>
> > "'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"

24. The trial court found no evidence to support the charge of attempted defilement but convicted the appellant for the offence of committing an indecent act with a child. The trial magistrate stated that the evidence of the complainant`s sister PW3 was that she gave lunch to the appellant at their home at 1 pm. That the appellant`s uncle DW 2 said that the appellant had collected his wages from the complainant`s father at noon and went back to his home where he stayed until 6pm. The court found the defence of the appellant an afterthought and hence concluded that he was at the home of the complainant at the time he was accused of committing the offence.

25. The court found that the appellant tried to penetrate the complainant with his penis but that she tightened her legs in an attempt to stop the penetration. The court concluded that the offence of indecent act crystalized at that point as his penis had touched the complainant`s vagina.

26. The evidence of the complainant is that the appellant inserted his penis into her vagina and that she felt a lot of pain. If that was the case, the offence committed would have been defilement and not indecent assault. This is so because "indecent act" does not by definition of the law include an act that causes penetration. The Appellant was thus convicted of indecent act with a child when the evidence adduced against him was that of penetration. The trial court altogether ignored the evidence of the complainant that the appellant inserted his penis into her vagina. Was it then proper for the appellant to be convicted of committing an indecent act when the evidence adduced against him was of defilement?

27. In John Irungu v Republic [2016] eKLR where the Appellant was charged with defilement but was convicted of indecent act with a child, the Court of Appeal stated the following:

> On the last issue pertaining to the appellant's conviction for the offence of indecent act with a child contrary to section 11(1) of the Act, we agree that it is a minor offence compared to the offence of defilement of a child contrary to section 8(1) and (2), under which the appellant was charged and whose prescribed punishment is life imprisonment. However, with respect the appellant could not have been convicted of indecent act with a child simply because of the definition of that offence under the Act. Section 2 of the Act defines "indecent 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." (Emphasis added).

The evidence on record, in particular the evidence of NW and the medical evidence adduced by PW2 which was accepted by the two courts below was that the appellant had caused his penis to penetrate the vagina of NW. Accordingly, with penetration having been proved, the appellant could not be convicted of committing an indecent act with NW as the High Court did.

28. In view of the above authority, the Appellant could not be convicted of indecent act with a child when the evidence adduced against him was penetration into her vagina.

29. Section 124 of the *Evidence Act* allows the court in sexual offences involving children to convict on the sole evidence of the child if the court is satisfied that the child is telling the truth.

30. The general history as taken by the clinical officer PW4 as contained in the P3 form was that the complainant was lured by a casual worker into her brother`s house where he started fondling her breast and later fondling her vagina with his penis. If the complainant had maintained that evidence in court, then there would have been a strong basis for the conviction on indecent assault with a child. However, the complainant told her mother that the appellant inserted his penis into her vagina. She maintained the same position in court that the Appellant inserted his penis into her vagina. So, what is it that the appellant did to the complainant? Is it that he fondled her breast and vagina as reported to the clinical officer who completed the P3 form or that he inserted his penis into her vagina as claimed by the complainant in court? Was the complainant a credible witness? In the case of Ndungu Kimani v Republic 979 KLR the court stated the following on credibility of a witness:

> A witness whose evidence the court is to rely on should not create an impression in the mind of the court that he/she is not a straight forward person or a witness of doubtful integrity.

31. Considering that the complainant told the clinical officer a different story to that which she told the trial court, I am not convinced that she was a credible witness.

32. There was further contradiction in the case on the date the offence was alleged to have been committed. The complainant said that the incident took place on the 5/9/2020 while her mother PW2 said that it took place on 8/9/2020. Which of them was to be believed as telling the truth on the date the incident took place?

33. The complainant told the court that she reported the incident to her mother after 2 days, which would be on 7/9/2020. The complainant was not taken to hospital and to the police until 10/9/2020. The treatment notes, P.Exh.1, indicate that the complainant was taken to the dispensary 6 days after the incident. Why was there delay in taking the complainant to hospital even after she reported the incident to her parents?

34. The contradictions on what the Appellant did to the complainant, the date the offence was committed and the delay in taking her to hospital and reporting to the police can only mean that the prosecution evidence was not credible.

35. In view of the foregoing, I am not satisfied that the conviction on the appellant was safe. I thereby quash the conviction and set aside the sentence. I order the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 18TH DAY OF SEPTEMBER 2025.

J.N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Respondent

Appellant- present virtually from GK Prison Manyani

Court Assistant – Rahma