



**PMN v Republic (Criminal Appeal E069 of 2024)
[2025] KEHC 14393 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 14393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E069 OF 2024
NIO ADAGI, J
SEPTEMBER 23, 2025**

BETWEEN

PMN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence of Hon D. Kioko,
RM in Kangundo Magistrate's Court Sexual Offence Case No.
E005 of 2022 delivered on 12.6.2024 and sentenced on 12.8.2024)*

JUDGMENT

1. The Appellant Paul Musyoka Ndiku was charged with the offence of Sexual Assault contrary to Section 5(1)(a) (i) as read with Section 5(2) of the Sexual Offence Act No. 3 of 2006. The particulars are that on diverse dates between 1st and 18th day of February 2022 at Sengani village in Matungulu Sub-County within Machakos County unlawfully and intentionally used his fingers to penetrate the vagina of R.M.M. (name withheld) who is his daughter a child aged 5 years.
2. In the alternative he was 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 are that on diverse dates between 1st and 18th day of February 2022 at Sengani village in Matungulu Sub-County within Machakos County intentionally and unlawfully touched vagina of R.M.M a child aged 5 years.
3. The Appellant pleaded not guilty to the main charge and the alternative charge and the matter was set down for hearing. The prosecution called five witnesses in proving its case. The Appellant was convicted of the offence of sexual assault contrary to Section 5(1) (a) (i) as read with Section 5(2) of the Sexual Offences Act and sentenced to 20 years imprisonment on 12th August 2024.
4. In his undated Petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence of



prosecution witnesses that did not meet the threshold to uphold a conviction. In particular, he faulted the trial court for not considering his sworn defence. He was aggrieved that he had been sentenced to a harsh and excessive sentence. He took issue with the fact that the trial court had not taken into account the time he spent in remand custody pursuant to Section 333(2) of the CPC Cap 75 Laws of Kenya. In the premises therefore, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

5. During the hearing of the appeal, the Appellant presented to the court written submissions dated 15/05/2025 and filed on 20/05/2025 as well as rebuttal submissions dated 28/05/2025 and filed on 11/06/2025 through the Officer in Charge Kamiti Main prison. He also raised two amended grounds of appeal in his submissions, first was that, the trial court failed to observe that he was not properly identified as the perpetrator of the offence charged and second was that penetration as alleged by the witnesses was not proved by the medical document produced in court. The Appellant urged the court to allow his appeal by quashing the conviction, setting aside the sentence and setting him at liberty.
6. Ms. Agatha Abang, prosecution counsel for the State opposed the appeal. She filed submissions dated 07/03/2025 and submitted that the prosecution had adduced sufficient cogent evidence which established the charge of Sexual Assault to the required standard of proof. The sentence meted on the Appellant was legal. She urged the court to dismiss the appeal.

Prosecution's Case

7. The facts of the case according to prosecution witnesses are as follows:
8. PW1 was RMM (Complainant), a minor who stated that she was five years old was taken through voire dire and after the court established that she understood the importance of telling the truth, she proceeded with unsworn evidence and stated that she was in court because there was a case. She stated that her dad touched her "aliningiza vidole mahali pangu pa kukojoa". That she was at home with her mother. She told her mother who took her to Sengani hospital. She stated that she was not taken to the police station. Her mother went to the police station alone. She further stated that her father is the one that touched her and positively identified him by pointing at the Appellant.
9. PW2 was EM who stated that she was 14 years old. On 18/2/2022 she came home from school and her sister PW1, RMM told her that "baba alimuingiza vidole kwa private parts, mahali pa kukojoa". She then informed her mother and they went to another woman Winfred who advised that they go to Sengani police post and they further proceeded to Sengani hospital where RM was checked. The doctor told them to go to Tala police post. They were told to go to Kangundo hospital where RM was checked out. They asked for RM's urine but she said she would provide in the morning. She stated that an officer called Gabriel arrested the Appellant. She confirmed the Appellant was their father. She stated that her sister RM had told her that it had occurred on another day. She positively identified the accused in court by pointing at him.
10. On cross examination she stated that her father normally left the house in the morning. She stated that the act was committed at around 8.00am. She confirmed the Appellant was her father and that he says he is a pastor. She further stated that it is RM who told them of the act but she had never seen him play around with her. She testified that she is the one that cleans urinated mattress and she was not sure whether the Appellant cleans the victim.
11. PW3- Faith Wanjiku Museimi testified on oath and stated that on 18/2/2024she went to work. The accused was touching the victim. She was told by the victim that her father had inserted his fingers "kwa sehemu yake ya siri". She felt embarrassed and rushed to Sengani hospital. She further stated that she took the minor to Kangundo hospital where she was checked. She reported the matter at Sengani



- police post and went to Tala police station. She confirmed that the accused is the father to her children and that they were living together. She positively identified the accused person. She stated that PW1 was 5 years old.
12. On cross examination she confirmed the accused was the father to the victim. She stated that she used to love him but not anymore. She testified that the minor was 5 years old. She testified that act was done in the morning after she had left the house. The act was done before the accused went to the market. She further stated that she came back at around 3.00pm and that is when the victim informed her. She stated that she found the accused at home about to boil githeri. She testified that she did not talk to the accused because the information disappointed her. She stated that she is the one that cleans PW1 and that the minor did not urinate on herself and that she didn't scratch herself.
 13. PW4 was Maureen Musili who stated that she is a Clinical Officer at Kangundo level 4 hospital. She stated that she prepared the P3 form for RM 5 year's old. She examined her on the 18th of February 2022 after she was brought by her mother and police with a history of being sexually assaulted. She stated that the patient said that fingers had been inserted in her.
 14. On examination the patient was calm. She conducted a vagina examination and there was swelling on labia majora. The hymen was old torn. The external genitalia was hyperemic/reddening. No much discharge/bleeding. They took samples for urinalysis.
 15. According to her prognosis, there was attempted penetration as there was swelling of labia and reddening of genitalia. She stated that the occurrence must have been in 2 days or less. She also produced the P3 form, medical notes, lab requests.
 16. On cross examination she stated that she had 7 years experience and had encountered many similar cases. According to her examination the minor had swelling which in her opinion had been very recent. She could not ascertain whose fingers had been inserted but her duty was to examine the patient. There was attempted penetration. There was no tear but there was a swelling. She testified that they look at the history and come to a finding. The hymen was torn but there was no bleeding however, there was swelling and reddening and she testified that it was impossible the same was caused by playing.
 17. On the 6th December 2023 the accused was informed of his right under Section 200(3) of the Criminal Procedure Code and he opted to proceed at the point the matter had been heard by the previous magistrate. The matter proceeded on the 20th December 2023 where the final prosecution witness was called.
 18. PW5 was No.94864 PC Truphonia Mwanyolo who stated that she is attached to Tala Police station and that on 18th February 2022 a case of sexual assault was reported from Sengani. She stated that the matter was that where the victim had been assaulted by her father sexually by inserting his fingers in her vagina and that it had happened when she had been left home with her father.
 19. She testified that when the complainant started feeling pain the accused stopped the act. It was not the first time happening but the 3rd time. The victim in the evening told her sister what had happened after she came from school. When her mother also arrived, she told her mother. The victim was sent to Sengani dispensary and that is when they were referred to visit Tala Police station. They then sent the victim to Kangundo level 4 hospital. The accused was arrested by police from Sengani police post and then officers from Tala police station rearrested him. The scene was also visited by police from Sengani police post. She testified that she knew the victim was a minor through a birth certificate and at the time of the offence she was 5 years old. She produced the birth certificate.



20. On cross examination she stated the matter was reported at 2013hours on 18th February 2022. She further stated that the mother of the victim was in the company of members of the public. She testified that she could not differentiate the fingers of the mother, a child and the father.
21. The previous sexual assaults had not been reported and that she only recorded the statements of the minor who confirmed it was not the first time.
22. On the 31st January 2024, a ruling was made on a case to answer after which the accused was placed on his defence and he chose to proceed on sworn evidence and call witnesses. On the date of defence hearing, the Appellant did not have any witness and he testified as the only defence witness.

Appellant's Defence Case

23. DW1 was Paul Musyoka Ndiku, the Appellant, he stated that on the 18th February,2024 he left the house at 9.00am and went to see his brother who was extremely sick. He stated that at around 5.00pm he went back home and found his wife was not there. He said that he took care of family matters and found his other children and prepared how they would cook githeri. He testified that he found his son DMM and EMM had come from school. At around 6.15pm his wife came home and was not talking to him. She called RMM and EMM and then left together. They never spoke to him. At around 8.00pm he tried to call his wife and she wasn't picking his calls.
24. At around 9.00pm he heard the door being knocked and on asking who it was he was told "pastor". On opening he saw 2 police officers from Sengani police post. They told him that they wanted him and on asking why, they would tell him they handcuffed him 2 metres from the house.
25. On asking why that was happening he was told that his wife had reported him for defiling their daughter RMM. He further testified that he was informed his wife and daughter were at Kangundo level 4 hospital. He testified that before the arrest he had warned his wife against having a friendship with a neighbour after getting rumours from around. He further testified that his wife had previously told him that she would frame him with something that he could not get out of. He stated that he is a father of 6 children.
26. On cross examination he stated that he left the house at 9.00am and went to Tala where he met with his brother Daniel Mwanzia until 1.00pm. He testified that he had not brought Daniel to corroborate his story. He stated that he met with pastors from 1pm-5pm and had not brought any pastors to corroborate the same. He stated that he had been with his wife for 25 years and that they had 6 children and it was the first time he was being charged with such an offence. He said he had never been reported to Embakasi police vide OB/26/20/10/2012. He confirmed the victim was 5 years at the time he was being charged. He stated he was in the house with his son Dennis and Stephen at the time of arrest and they were not witnesses in the case. He testified that he had not brought any of them to corroborate his events.
27. He stated that he was not aware of any case in Embakasi of defilement. That since he was arrested, he had not communicated with his witnesses and therefore he was unable to avail them. He prayed that the court does consider his evidence and that he was a pastor.

Analysis and Determination

28. This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In re-evaluating the evidence, this court is required to always have in mind the fact that it neither saw nor heard the witnesses as they



testified and therefore cannot make any comment regarding their demeanour (see *Okeno v Republic* [1972] EA 32).

29. Upon carefully re-evaluating the evidence on record and considering the parties' respective written submissions on the appeal, I form the issue for determination as to whether the prosecution proved its case beyond reasonable doubt;

The offence of sexual assault is created by Section 5 of the *Sexual Offences Act* which provides that:

- “(1) Any person who unlawfully:
- (a) penetrates the genital organs of another person with—
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
 - (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.”

30. The Court of Appeal in the case of *John Irungu V Republic*, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows:

“... Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”

31. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.

32. The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.

i. proof of penetration

33. In the present appeal, the prosecution was to prove that indeed the complainant was sexually assaulted and that the Appellant was the assailant of the sexual assault against the complainant herein. According to the Complainant, PW1, she stated that the Appellant (his Dad) touched her “aliningiza vidole mahali pangu pa kukojoa..... I was home with my mother. I told her and she took me to Sengani Hospital”.

34. According to PW2 who is the Complainant's sister, she stated that she came from school and the Complainant told her that “Baba alimuingiza vidole kwa private parts, mahali pa kukojoa”. PW2 then told their mother and they went to another woman Winfred who advised that they go to Sengani Police Post and they proceeded to Sengani hospital where PW1 was checked. The doctor asked them to go to Tala Police and after interrogations they were advised to go to Kangundo hospital. PW2 confirmed that it is PW1 who told them about the incident but she had not seen the Appellant playing around with PW1.



35. PW3, the mother to PW1 and PW2 testified that on 18/2/2022, she was going to work. The Appellant was touching PW1, he would insert his fingers. PW1 told her that “the father had inserted his fingers kwa sehemu yake ya siri”. PW3 felt embarrassed, rushed to Sengani hospital. She took PW1 to Kangundo hospital where she was checked. She reported the matter at Sengani police post and later she went to Tala police station.
36. PW4 the clinical officer also testified that she examined PW1 on the same date of the offence. She stated that they did a vaginal examination and there was swelling on labia majora, the hymen was old torn, the external genitalia as hyperemic/reddening and there was no much discharge/bleeding. PW4 concluded that there was attempted penetration as there was swelling of labia and reddening of genitalia. She stated that the incident must have occurred in 2 or less days. PW4 produced the P3 Form as PExt.1. In cross examination she stated that the minor had swelling which was very recent and that there was attempted penetration. She also stated in cross-examination that a finger can penetrate a minor but there could be tear which wasn't but there was a swelling.
37. PW5, the investigating officer testified that on 18th February 2022 a case of sexual assault was reported from Sengani. She stated that the matter was that where the victim had been assaulted by her father sexually by inserting his fingers in her vagina and that it had happened when she had been left home with her father.
- She testified that when the complainant started feeling pain the accused stopped the act. It was not the first time happening but the 3rd time. The victim in the evening told her sister what had happened after she came from school. When her mother also arrived, she told her mother.
- The victim was sent to Sengani dispensary and that is when they were referred to visit Tala Police station. They then sent the victim to Kangundo level 4 hospital. The accused was arrested by police from Sengani police post and then officers from Tala police station rearrested him. The scene was also visited by police from Sengani police post.
38. This court has keenly considered the witnesses' evidence adduced touching on the alleged incident herein. The court can observe that there are glaring contradictions and inconsistencies in the testimonies of PW1, PW2, PW3 and PW4. Whereas PW1 stated that when the incident occurred, she was home with her mother. She told her mother about the incident and she took her to Sengani Hospital.
39. PW2 stated that she came from school and PW1 told her about the incident. PW2 then told their mother and they went to another woman Winfred who advised that they go to Sengani Police Post and they proceeded to Sengani hospital where PW1 was checked. She stated that the act was committed at around 8.00am
40. On the other hand, PW3, the mother to PW1 and PW2 testified that on 18/2/2022, she was going to work. The Appellant was touching PW1, he would insert his fingers. PW1 told her that “the father had inserted his fingers kwa sehemu yake ya siri”. PW3 felt embarrassed, rushed to Sengani hospital. She took PW1 to Kangundo hospital where she was checked. She reported the matter at Sengani police post and later she went to Tala police station.
41. From the evidence of PW1, PW2 and PW3, it not clear when the incident occurred, PW1 stated that she was at home with her mother whom she informed about it and the mother then took her to Sengani Hospital while PW2 stated that when she came from school PW1 told her about the incident and PW2 then told their mother and they went to another woman Winfred who advised that they go to Sengani Police Post. PW2 stated that the act happened at 8.00am when she was not present and had not shown how she arrived at that exact time. PW3 stated that on 18/02/2022, she was going to work and the Appellant was touching PW1 and he would insert his fingers and that PW1 told her that “the



father had inserted his fingers kwa sehemu yake ya siri” for which PW3 felt embarrassed and rushed to Sengani hospital. Does this mean that as PW3, (the mother) was going to work, she saw the Appellant touch PW1 and he would insert his fingers and that PW1 told her that “the father had inserted his fingers kwa sehemu yake ya siri”, which is which.

42. Further to the above, a perusal at the medical evidence adduced by PW4, the Clinical Officer, she testified that a vaginal examination was done on PW1, Complainant which showed there was swelling on libia majora. The hymen was old torn; the external genitalia was hyperemic/reddening and there was no much discharge/bleeding. PW4 concluded that there was attempted penetration as there was swelling of labia and reddening of genitalia. She stated that the incident must have occurred in 2 or less days. PW4 produced the P3 Form as PExt.1. In cross examination she stated that the minor had swelling which was very recent and that there was attempted penetration. She also stated in cross-examination that a finger can penetrate a minor but there could be tear which wasn't but there was a swelling.
43. From the foregoing evidence of PW4, this court is struggling to understand how the vaginal examination established an old torn hymen when PW4's conclusion was that there was attempted penetration which must have occurred very recently in 2 or less days. Further, to contradict her testimony on the old torn hymen, PW4 also went ahead in cross-examination to state that a finger can penetrate a minor but there could be tear which wasn't but there was a swelling. Could the swelling have been causing by something else other than the alleged penetration in this case?
44. The interpretation section of the *Sexual Offences Act* “penetration” is defined as:
- “penetration” -means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
- Section 5 (1) (a) (i) of the Act provides that:
- “(1) Any person who unlawfully:
- (a) penetrates the genital organs of another person with—
- (i) any part of the body of another or that person;..
45. PW4, the Clinical Officer concluded that there was attempted penetration which must have occurred very recently in 2 or less days. She further stated that a finger can penetrate a minor but there could be a tear which wasn't but there was a swelling. Clearly, from PW4's evidence she stated that a finger could penetrate a minor and there could be a tear which was not present in this case but there was a swelling. This court is meant to understand PW4 to have confirmed that there was no tear of the PW1's hymen which contradicts her testimony that there was old torn hymen and or attempted penetration. The truth according to PW4's evidence and as this court can ascertain is that there was no penetration on the complainant by the Appellant as charged. See *Gonjobe v Republic (Criminal Appeal E015 of 2022) [2023] KEHC 18079 (KLR) (25 May 2023) (Judgment)* where it was succinctly held that:-
- “The standard of proof in a criminal case is that of beyond reasonable doubt. This burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. The burden is discharged by availing by the prosecution of evidence that will prove an accused person guilty of the commission of the offence beyond any reasonable doubt.”
46. In *JMN v Republic (Criminal Appeal E017 of 2021) [2022] KEHC 279 (KLR)*, the court held that:
- “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.”

47. In the premises therefore, this court holds that the evidence of PW1, PW2, PW3 and PW4 was marred with glaring inconsistencies and contradictions. I have very carefully perused the trial Court's judgment and note that the trial Magistrate found that there were no contradictions on the evidence. It is my view that, had the trial court adequately considered or evaluated and analysed the prosecution's case, it would have noted the inconsistencies and contradictions. It is my further view and finding that the prosecution's evidence was riddled with glaring inconsistencies and contradictions that go to the root of the charge and were fatal to the case thus it prejudiced the Appellant. The same should not have been relied upon to convict the Appellant. The prosecution failed to establish beyond reasonable doubt that the Appellant committed the offence as charged.
- ii. Positive identification of the assailant
48. As regards positive identification of the Appellant as the assailant, it is not disputed that the Appellant was the father to PW1 and PW2 and also the husband to PW3. Identification was therefore by recognition. However, having found that the prosecution failed to establish beyond reasonable doubt that the Appellant committed the offence as charged, he cannot be said to have been positively identified in the circumstances of this case.
49. On the whole, I find that the trial court failed to consider the effect of the glaring inconsistencies and contradictions on the overall evidence of the prosecution's witnesses in the case whereby the conviction and sentence of the Appellant was unsafe.

Disposition

50. In conclusion, the appeal is allowed, the finding of guilt by the trial court and the consequential conviction is quashed and sentence set aside. The Appellant is acquitted and discharged forthwith unless otherwise lawfully held.
51. It is so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 23RD SEPTEMBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 23RD SEPTEMBER 2025

In the presence of:

In person..... for Appellant

Ms. Agatha..... for Respondent

Millygrace..... Court Assistant

