



**CO v Republic (Criminal Appeal E081 of 2023)
[2025] KEHC 14207 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E081 OF 2023
WM KAGENDO., J
OCTOBER 9, 2025**

BETWEEN

CO APPELLANT

AND

THE REPUBLIC RESPONDENT

(Appeal against the conviction and sentence of 15 years in Sexual Offence Case No. 40 of 2020 for the Offence of Sexual Assault by SRM’S Court at Shanzu before Honorable Nelly W. Kariuki PM dated and delivered on 10th August 2023)

JUDGMENT

Charges And Proceedings

1. The appellant was charged with the offence of sexual assault contrary to Section 5(1)(a)(i) as read with Section 5(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 14th March 2020 at XXXXX area within XXXX location, Mombasa County, he unlawfully and intentionally caused his fingers to penetrate the vagina of NNC, a child aged five years.
2. In the alternative, he was charged with 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 same date and location, the accused unlawfully and intentionally touched the vagina of NNC, a child aged five years.
3. After a full trial , he was convicted and sentenced to 15 years imprisonment. He filled this appeal and my duty is to re evaluate the evidence afresh.



Prosecution Case

4. The State called four witnesses. A summary of the prosecution's case is as follows:

On 14th March 2020, SA (PW3) travelled to visit her mother accompanied by her daughter NN (the minor complainant). NN fell and began bleeding from her private parts. SA took her to Mlaleo Hospital for treatment, where a doctor informed her that NN had been defiled. Upon inquiry, NN disclosed that a person she referred to as "Omera" or "Uncle," who used to escort her to school, had picked her late one day and taken her to a shamba where he inserted his fingers into her vagina twice. He warned her not to tell anyone.

SA reported the matter to Kiembeni Police Station, where PC Elizabeth Kanze (PW4) booked the report and referred them to Coast General Hospital. There, both the PRC and P3 forms were filled.

The Charge And Evidence

5. The charge and its particulars raise the first issue. NN disclosed to her mother that the accused inserted his fingers into her vagina twice, following the doctor's alert. Dr. Muzila Ali (PW3) produced the PRC and P3 forms on behalf of Nurse Saida Mwinyi and Dr. Fahima Swaleh, who had filled them. Upon examination, the child's hymen was found broken with an old scar, and both medics concluded defilement had occurred.
6. Notably, Nurse Saida recorded in the patient's history that the child stated the accused penetrated her vagina with his penis. Part A of the P3 form indicated sexual assault as the alleged offence.
7. The trial court addressed these discrepancies as follows:

"The question in the Court's mind is if this inconsistency is significant? The Court of Appeal in *Tyson George Ngowa V Republic* [2017] Eklr Cited *Erick Onyango Ondeng' v R* [2014] eKLR:

'The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.'

And *Philip Nzaka Watu v R* [2016] eKLR:

"Some discrepancies must be expected because human recollection is not infallible... Ultimately, whether discrepancies render evidence believable must turn on the circumstances of each case and the nature and extent of the inconsistencies."

8. The trial court concluded:

"The discrepancy arises from the definition of the act and the ingredients of each offence, as well as the age of the key witness. The offences of sexual assault and defilement have distinct elements under Sections 5(1) and 8(1) of the *Sexual Offences Act*. The framing of charges is the purview of the prosecutor based on the investigating officer's recommendation. The doctor's findings do not depart from the offence as framed. NN was five years old, thus a child of tender years."



Analysis Of Discrepancies

9. While minor inconsistencies may not affect the outcome, in this case, they touch on the core of the matter.
10. First, when did the offence occur? The charge sheet states 14/03/2020, yet the child did not mention a specific date. She referred to an incident occurring two days prior to their travel.
11. In such cases, charges are typically framed as occurring “on an unknown date” or “on diverse dates.”
12. Here, 14/03/2020 is the date the mother (PW3) said the child fell and began bleeding, prompting the hospital visit. It was then that the doctor allegedly informed her of defilement.
13. Unfortunately, the initial notes from Mlaleo Dispensary are missing. We do not know the exact observations made or when the child was taken there. Dr. Muzila Ali (PW3) did not state that defilement occurred on 14/03/2020.
14. The PRC form, dated 30/03/2020, records the child stating that “Uncle Omera” inserted his penis into her private parts. It also notes:
 - “Vaginal orifice half open”
 - “Broken old scar at the hymen” “No other abnormalities”
 1. The P3 form was filled on 08/04/2021- over a year later. It lacks an OB number and records the date of report to police as 18/04/2020.
 2. Why such discrepancies? What transpired during the year-long gap? Neither the doctor nor the investigating officer offered any explanation.

Conclusion

15. While a minor may confuse certain details, when nearly all aspects are inconsistent, caution is warranted.
16. Under Section 124 of the *Evidence Act*, a court may rely on uncorroborated evidence from a child of such tender years only if it records reasons for believing the witness.
17. In this case, Hon. N. Kariuki (PM), who delivered the judgment, did not take the complainant’s evidence. She took over at the defence stage and thus did not observe the demeanor of the witnesses.
18. This highlights a key limitation of proceeding under Section 200 of the Criminal Procedure Code. While it expedites trials and avoids re-traumatizing survivors, the court loses the benefit of firsthand observation, which is crucial in assessing credibility.
19. It is often said that children do not lie. However, that is not an absolute truth. People do lie, and demeanor is essential in assessing veracity.
20. Given the inconsistencies and lack of clarity in the charge and supporting evidence, I find it unnecessary to delve into the other grounds of appeal. While the age of the complainant was proved, the charge itself was not sufficiently established.
21. When faced with conflicting evidence such as in this case, the benefit of doubt must go to the appellant, who stands to lose a significant portion of his life -15 years.



22. I find no need to delve into the other grounds of appeal relating to the evidence. Although the age of the complainant was established, the actual charge was neither clearly set out nor sufficiently proved.
23. There was a material discrepancy regarding what transpired and when. The child was found bleeding and was not in the immediate vicinity of the accused. It is plausible that the defilement occurred on 14/3/2020, which may explain the bleeding. The initial medical notes could have clarified this issue. These contradictions, coupled with the accused's defense that there was an existing dispute between him and the parents of PW1, raised red flags that ought not to have been disregarded.
24. The prosecution bore the burden of closing all evidentiary gaps. In this instance, I find that the evidence fell short of the required threshold-proof beyond reasonable doubt.
25. Accordingly, I find that the conviction was unsafe. It is hereby quashed, and the sentence set aside. The appeal is allowed.
26. The appellant shall be set at liberty forthwith unless otherwise lawfully held.
27. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 9TH DAY OF OCTOBER 2025**

HON. LADY JUSTICE W. K. MICHENI JUDGE

THE JUDICIARY OF KENYA.

In the presence of:

Appellant In Person Mr Ngiri For The State

Ms Bebora Court Assistant

