Republic v Wambua (Sexual Offence E042 of 2021)
[2025] KEMC 71 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEMC 71 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

SEXUAL OFFENCE E042 OF 2021

YA SHIKANDA, SPM

APRIL 23, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JOSEPH MUTUA WAMBUA ..... ACCUSED

JUDGMENT

The Charge

1. Joseph Mutua Wambua (hereinafter referred to as the accused person) is charged with the offence of Sexual Assault contrary to section 5(1) (a) (i) as read with 5(2) of the *Sexual Offences Act*. The particulars of the offence are that on diverse dates between 19/12/2020 and 5/1/2021 at Makindu township in Makindu Sub-county, the accused person intentionally and unlawfully inserted his fingers into the anus of SM (name withheld), a child aged 14 years. The accused person was alternatively charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act*. The particulars of the offence are that during the same period and at the same place, the accused person intentionally and unlawfully touched the penis and anus of SK a child aged 14 years using his fingers. When the plea was taken, the accused person pleaded not guilty to both counts. The matter was then set down for hearing.

The Evidence

The Prosecution Case

2. The Prosecution case was substantially heard by another Magistrate who was subsequently transferred. Pursuant to section 200(3) of the *Criminal Procedure Code*, the court directed that the matter proceeds from where it had reached. I then heard the evidence of the last prosecution witness. The prosecution called a total of four (4) witnesses in a bid to prove their case. PW 1 SK (hereinafter referred to as the

complainant) gave evidence on oath after the court was satisfied that he was possessed of adequate intelligence, understood the duty to speak the truth as well as the meaning of an oath. The complainant testified that he knew the accused person as his neighbour. That on 19/12/2020 the complainant was on his way to the Barbershop at the Makindu lower market. The accused person who owned a Kiosk told the complainant that he wanted to buy the latter a Christmas gift.

3. The complainant informed the accused person that he would be going to his sister's home to celebrate Christmas and would return in January, 2021. The complainant testified that on 4/1/2021 at about 6:00 a.m he was on his way to school. That the accused person was outside sweeping and happened to see the complainant. The accused person then grabbed the complainant. He pushed his hand against the inside of the pair of shorts that the complainant was wearing then touched his buttocks. That the accused person also inserted his finger into the complainant's anus. The complainant asked the accused person to stop. The accused person asked the complainant how he felt and the latter stated that he had not felt anything.

4. The complainant further testified that the accused person asked him to go to his house when he returned from school so that they could sleep there. The complainant stated that he would not get time. The complainant then went to school. It was not until the school holidays that the complainant reported to his mother what the accused person had done. The complainant explained that the accused person had threatened to kill him if he revealed to anybody what had happened. The matter was reported to the police. The accused person was summoned by the police. The complainant was later taken to hospital for examination.

5. PW 2 EMN (name withheld) testified that the complainant was her son. That on 9/4/2021 the witness got out of her house at 6:00 am. She had left the complainant in the house. When she returned to the house, she did not find the complainant and her phone was missing. She looked around but did not find it. PW 2 suspected that it was the complainant who had stolen the phone. She went out to look for him and met the accused person who told her that he had seen the complainant going towards the market. The witness returned home and later reported to the police.

6. The complainant was later seen at a certain hotel. He was apprehended and taken to the police. The complainant returned the phone to his mother. On the way home, the complainant started crying and informed his mother that the accused person used to insert his fingers in the complainant's anus and also touch his penis. That the accused person did so on 19/12/2020. The complainant was returned to the police post and the matter was reported. PW 3 Doctor Josephine Maithya Mueni testified and produced in evidence the medical documents relating to the complainant. PW 4 Inspector of Police Oliver Mwandonyi testified that he took over the police file after the initial investigating officer retired. Investigations had already been concluded.

The Defence Case

7. When the accused person was placed on his defence, he opted to give an unsworn statement without calling any witness. The accused person stated that on 11/4/2021 the complainant's mother went to the accused person's shop and told him that the complainant had disappeared from home for two weeks but had been seen at a certain hotel. The accused person was a member of community policing then. PW 2 then asked the accused person to go and collect the complainant then take him to the police station. The accused person went and found the complainant. He then took him to Makindu police station. Later that evening, the child's mother went to the accused person's home and told him that he was required at the police station.

8. When he got to the police station, the accused person was placed in the cell. The complainant was asked to give the accused person a piece of paper. The accused person read the paper which indicated that he had touched the child's private parts. The accused person denied the allegations. Later, the village elder visited the accused person and stated that the child's mother had demanded Ksh. 15,000/= in order to settle the matter. The accused person declined the offer. The OCS summoned the complainant's mother and asked her what she wanted. When she stated, the OCS stated that the matter would be resolved in court. The accused person was then charged.

Facts not in Dispute

9. From the evidence of the prosecution and the accused person's statement in defence, the following facts are not in dispute:

   a. The accused person and the complainant were well known to each other;

   b. The accused person was the complainant's neighbour at the material time.

Main Issues for Determination

10. Having considered the nature of the charges and the evidence on record, I find that the main issues for determination are as follows:

   a. Whether the complainant was sexually assaulted on diverse dates between 19/12/2020 and 5/1/2021;

   b. If so, whether it was the accused person who sexually assaulted the complainant;

   c. Alternatively, whether an indecent act was committed against the complainant on diverse dates between 19/12/2020 and 5/1/2021;

   d. If so, whether it was the accused person who committed such act against the complainant;

   e. Whether the prosecution has proven its case against the accused person beyond reasonable doubt.

Analysis and Determination

11. I have carefully considered the evidence on record as well as the law applicable. Section 5 of the *Sexual Offences Act* provides as follows:

> "(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.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."

12. From the above provisions (section 5(1) (a) (i)), I gather that for the purposes of this case, the prosecution must prove the following elements:

    1. That there was unlawful penetration of the genital organ of the complainant herein;

    2. That the said penetration was done using a part of the body of the accused person;

    3. Positive identification of the accused person. The evidence of the prosecution must show that the accused person was positively identified as the person who committed the impugned act against the complainant.

Penetration

13. Section 2 of the *Sexual Offences Act* defines the term "penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another person. In my view, this definition is confusing since it restricts the act of penetration to insertion of a genital organ into another genital organ. The definition would not therefore strictly apply to the meaning of "penetration" as envisaged by section 5 of the *Sexual Offences Act*. I do not know whether it was an oversight on the part of the makers of the law or whether the legislature meant to restrict the definition of penetration to genital organs. In the circumstances, I am inclined to apply or adopt the ordinary and natural meaning of the word "penetrate" which implies to enter into; to make way into the interior of or to pierce.

14. The only direct evidence in respect of the offence is that of the complainant himself. The complainant testified on 15/9/2021 at the age of about 14 years. He gave evidence on oath after the court conducted a voire dire examination and was convinced that the complainant understood the importance of an oath. In his evidence in-chief, the complainant testified that on 4/1/2021 the accused person grabbed him then touched his penis. That the accused person also inserted his fingers in the complainant's anus. The complainant stated that the accused person did that to him on several occasions whenever he would meet him on the road. When the complainant was cross-examined by the accused person, he stated that there was nobody at the accused person's kiosk and that the accused person told him to sit on his lap.

15. As already indicated, there was no other eye witness to the incident. Indeed, majority of sexual offences are usually committed in secrecy and as such, it would be difficult to get an eye witness apart from the alleged victim. Section 124 of the *Evidence Act* provides as follows:

16. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

17. 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."

18. 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.

19. The question of who is a child of tender years for purposes of evidence was settled by the Court of Appeal. In the case of Maripett Loonkomok v Republic [2016] eKLR, the Court of Appeal held as follows:

20. 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 Karimi v 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-honoured 14 years remains the correct threshold for voir dire examination."

21. The complainant herein gave sworn testimony. His evidence does not therefore fall under the ambit of section 124 of the *Evidence Act*. This implies that the requirement of corroboration or giving reasons as to why the trial court is satisfied that the complainant is telling the truth does not arise. I am guided by the authority of Johnson Muiruri v Republic [1983] KLR 445, in which the Court of Appeal held that:

> In our view corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence".

22. The court however added that in such circumstances, the trial court should warn itself that it would be unsafe to convict without corroboration. Similarly, in the case of Kibageny Arap Kolil v R [1959] EA 82, the Court of Appeal for Eastern Africa held that

> But even where the evidence of a child of tender years is sworn (affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if uncorroborated without warning itself and the assessors if any of the danger of doing so.....In short we are of the view that, in law, evidence of a child of tender years given on oath after voire-dire examination requires no corroboration but the court must warn itself that it should in practice not base a conviction on it without looking for and finding corroboration for it."

23. The proviso to section 124 of the *Evidence Act* makes an exception for the requirement of corroboration of unsworn testimony of a child of tender years in criminal proceedings involving sexual offences where the only evidence is that of the alleged victim. The provision empowers the court to convict an accused person if, for reasons to be recorded, the court is satisfied that the alleged victim is telling the truth. In my considered view, one of the main reasons as to why a court would be satisfied that the alleged victim is telling the truth is the presence of corroborative evidence. Whether the testimony of the alleged victim of tender years is given on oath or not, the court must of necessity exercise great caution before convicting an accused person. The question as to whether there is corroborative

evidence becomes paramount. I say so because, in criminal proceedings, it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt. In view of the foregoing, I hereby warn myself that although the complainant herein gave evidence on oath, it would be unsafe to convict the accused in the absence of corroborative evidence. I will seek to be satisfied that indeed, the minor told the truth.

24. The complainant stated that the accused person inserted his fingers into his anus and also touched his penis. The complainant reported the incident to his mother in April, 2021 after he had been apprehended by the accused person for allegedly stealing his mother's phone.

25. In Bassita Hussein v Uganda, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held as follows:

> The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of Defilement to prove sexual intercourse or penetration. Whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".

26. The complainant was a minor at the time of incident and when he testified. I am of the view that when dealing with child witnesses, especially those of tender age, care must be taken to ensure that they are not re-traumatized by the manner in which questions are put to them during the hearing. However, effort must be made particularly by the prosecutor to ensure that the best evidence of what actually transpired is adduced.

27. From the complainant's evidence in-chief, it is not clear where the incidents occurred. The first incident appears to have occurred on 4/1/2021, contrary to what the charge sheet states. The complainant's evidence was that on that day he was going to school at 6:00 am when he saw the accused person outside while sweeping. That the accused person grabbed him then touched his penis and inserted his finger into the complainant's anus. The complainant did not state where exactly this act was committed but the indication is that it was done on the road. The complainant further stated that the accused person did the same thing to him "many times" whenever they met on the road. The complainant did not narrate how and where the subsequent acts were committed. It would appear that the prosecution did not bother to inquire on the same.

28. The complainant was firsts examined at the hospital on 12/4/2021. There is an indication that scars were found around the anal region. There was also a fungal infection on the anal region. He visited the hospital again on 13/4/2021 and 14/4/2021. This information is contained in the Patient card that was produced in evidence. The PRC form was filled on 14/4/2021. It indicates that when the complainant was examined, scars were found around the anal region and there was smelly mucoid discharge from the anus. It is not clear when the last act of sexual assault was allegedly done. When the doctor was cross-examined by counsel for the accused person, she stated that in case of infections, mucoid discharge can come from the anus. That the mucous could have been caused by an infection or other causes and not necessarily by sexual assault.

29. The only evidence on record is that of 4/1/2021. I have already pointed out that it is not clear where the incident took place. The complainant's mother stated that the complainant informed him that the accused person would sexually assault him then give him money ranging from Ksh. 20/= to 100/=. That the accused person would drag the complainant to his house. The complainant did not give such evidence. From the medical evidence on record as well as the testimony of the doctor, I find that it

would be unsafe to attribute the findings of the medical examination to sexual assault. Furthermore, without a clear account from the complainant on what really transpired and where, it would be difficult for the court to make a definite finding.

30. The evidence also shows that the information was revealed by the complainant after he had been apprehended by the accused person and taken to the police station on allegations that he had stolen his mother's phone. The court cannot rule out the possibility that the complainant was trying to get back at the accused person. Quite unfortunately, the police officer who conducted the investigations herein was not called to testify as he is said to have retired before giving his evidence. It is thus not known why he opted to believe the complainant and what he relied on. From the evidence of the complainant and that of his mother, it is not clear whether he was enticed with money or whether he was threatened by the accused person.

31. I did not take the complainant's testimony and that of his mother. In the circumstances, I am unable to comment on their demeanour during testimony. The prosecution counsel who led the evidence of the complainant left out glaring gaps. For instance, it is not clear where the incident took place. Was it on the road, at the Kiosk or the accused person's house? No evidence was led concerning the other incidents. In my opinion, where the evidence relied upon to prove a fact is that of the complainant alone, there must be corroborative evidence to show that the accused person had the opportunity to commit the offence. The circumstances of the case as can be derived from the prosecution case do not clearly show that the accused person had the opportunity to commit the offence. I say so because it is not known where the incidents occurred and whether the complainant was alone. I cannot say that the complainant lied to court but with the evidence on record, I am unable to hold with conviction that he told the truth. For purposes of clarity, there is insufficient evidence to prove that there was unlawful penetration of the complainant's anus on the material day or period.

Identification of the Assailant

32. It is not in dispute that the complainant and the accused person were well known to each other. However, there being no sufficient evidence of penetration, the question of identification becomes moot.

33. I have considered the accused person's defence. I am aware that an accused person is under no duty to prove his/her innocence. The onus is on the Prosecution to prove its case against the accused person beyond reasonable doubt. The standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918). Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged.

34. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based

upon a mere suspicion of guilt. The accused person gave an unsworn statement. What is the probative value of an unsworn statement by an accused person? In the case of Mercy Kajuju & 4 Others v Republic [2009] eKLR, Emukule J (as he then was) held as follows:

35. I will commence with the unsworn statement of all the accused persons. Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused person elects to make an unsworn statement he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross examination whose purpose is directed-

    (1) to test the credibility of the witness;

    (2) to the facts to which he has deposed in-chief including the cross-examiner's version thereof, and

    (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose,

    (4) failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.

36. In addition, the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement."

37. In May v Republic [1979] eKLR, the Court of Appeal observed that:

> The appellant did not give evidence on oath in her defence or call any witnesses. She contented herself with making a short unsworn statement to which reference will be made later. No adverse inference can be drawn against the appellant for electing to make an unsworn statement. She was exercising a right conferred upon her by statute (Section 211(1) of the *Criminal Procedure Code*); see also Wiston s/o Mbaza v Republic [1961] EA 274. No such adverse inference was in fact drawn by either court below.....From all this, we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence."

38. Having analysed the prosecution evidence, I find that the same amounts to mere suspicion. In the case of Sawe v Republic [2003] KECA 182 (KLR), the Court of Appeal held thus:

> The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No. 17 of 1998 (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence"

39. Suspicion, however grave, cannot form a basis for conviction. I find that reasonable doubt has been cast on the prosecution case. The evidence does not irresistibly point to the guilt of the accused person.

Disposition

40. In view of the foregoing, I hereby find that the prosecution has failed to prove its case against the accused person beyond reasonable doubt. Consequently, I make the following orders:

a. The accused person is found not guilty of the offence of Sexual Assault contrary to section 5(1)(a)(i) as read with section 5(2) of the *Sexual Offences Act*;

b. The accused person is hereby acquitted in respect thereof;

c. The alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* shall suffer the same fate for the same reasons. For avoidance of doubt, the accused person is equally acquitted of the alternative charge.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 23RD DAY OF APRIL, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.