



**Director of Public Prosecutions v Mwenda (Criminal Case
E010 of 2022) [2022] KEMC 25 (KLR) (7 November 2022) (Judgment)**

Neutral citation: [2022] KEMC 25 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E010 OF 2022
ZK KAGENYO, RM
NOVEMBER 7, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

ABDALLA OMAR MWENDA ACCUSED

JUDGMENT

1. The accused person was arraigned on 31st January 2022 for the offence of Sexual assault contrary to section 5 (1)(b)(2) of the *Sexual Offences Act* No. 3 of 2006.
The particulars were that on the 28th day of January 2022 at [Particulars Withheld] in Kwale county within coast region, he intentionally and unlawfully used his fingers to penetrate the vagina of A.J.P a girl aged 4 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 were that on the 28th day of January 2022 at [Particulars Withheld] in Kwale county within coast region, he intentionally and unlawfully used his fingers to touch the vagina of A.J.P a girl aged 4 years.
3. The accused denied the charges and a full trial ensued.
4. The accused person was unrepresented. He was present in court all through the trial. The matter was conducted in Kiswahili Language or its interpretation, the language of choice by the accused. He conducted his case while on bond.
5. The DPP to prove their case lined up a total of 4 witnesses while upon being placed on his defence, the accused gave his sworn evidence without calling any witness for the defence.



The Prosecution's Case

6. It was the Prosecution's case that on 28th January 2022, PW 2 AJP, a minor and the complainant herein, while at school playing with her friends Y and D, the accused herein called her near the school store which is near the toilets, and required her to read "ROYCO." When the accused called her as such, he lifted her skirt and touched her vagina. It was said that PW 2 first informed her teacher namely Mwenda and later at night she informed her mother whereupon she was taken to hospital at the dead of the night and tests conducted on her which showed that her vagina had multiple lacerations which were bleeding and were extended to the labias and that the hymen was partially broken.

The Defence Case

7. DW 1, the accused person maintained his innocence. He told the court that on that 28th, he went to work as usual and carried his duties as required. He gave the school program of the day and challenged the DPP's case asking why no other person from the school such as the school Director, cooks and teachers ever noticed this complaint from the child.

Analysis And Determination.

8. Section 107 of the *Evidence Act* places the burden of proof of all the accusations against the accused person on the DPP. This burden hardly shifts to the accused who on the other hand is to be presumed innocent until the contrary is proven.
9. The standard to which the DPP is to discharge the burden of proof is beyond reasonable doubt as was restated in *Joan Chebichii Sawe -v- Republic* [2003] eKLR, that the prosecution must prove the guilt of the accused person beyond reasonable doubt. This Court however reminds itself that beyond reasonable doubt does not mean that the DPP must prove every single element or accusation to perfection beyond a shadow of doubt. In his undoubted wisdom, Lord Denning shed light in this in the case of *Miller -v- Minister of Pensions* [1947] 2 ALL ER 372 where he held that;

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt but nothing short of that will suffice.

10. The accused person has been charged with the offence of defilement of a child aged 4 years which is proscribed by section 5 (1)(b) as read together with section 5 (2) of the *Sexual Offences Act*, 2006 which states thus,

Any person who unlawfully 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 and is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.



11. In the alternative count he is charged with the offence of committing an indecent act with a child which is proscribed by section 11 (1) of the Sexual Offences which states that,

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.
12. From a reading of section 5 (1) (b) of the *Sexual Offences Act*, the DPP had therefore the burden to prove beyond reasonable doubt that penetration was occasioned on the genital organ of AJP, herein the vagina, and that the identity of the person so causing such penetration was positive without error.
13. However, I must point out at this stage that such penetration is not to be limited to the definition of penetration under the *Sexual Offences Act*, 2006. Section 2 of the Act defines penetration as,

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
14. Black’s Law Dictionary Eleventh Edition defines penetration to mean, the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice.
15. A reading of section 5 (1)(b) of the *Sexual Offences Act*, 2006, vis a vis the interpretation under section 2 (1) of the Act calls upon this Court to invoke the introductory part of the section 2 (1) of the Act thus, “unless the context otherwise requires,” contextualize and find that the use of the term penetration under section 5(1) (b) calls upon the court to adopt such definition as one provided in the Black’s Law Dictionary, which I do.

Penetration

16. The DPP presented evidence by way of medical evidence to prove the element of penetration. It was the DPP’s case that the medical tests conducted on the body of the child is in no doubt that there was an unusual interference of her vagina that led to the observation made by the medical practitioner that there was a bilateral labia laceration and that the hymen was partially open and bleeding.
17. Now the question this court is left to determine is on who caused the said interference.

Positive identification of the assailant

18. The substratum of the prosecution’s case was founded on the evidence of the complainant, child. The child gave unsworn evidence by virtue of being a child of tender age and the court, on the voire dire examination, formed an opinion that the child did not understand the nature of an oath.
19. Section 124 of the *Evidence Act* on the evidence of a child and corroboration requires that, 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. 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



20. The Court of Appeal in *John Otieno Oloo v Republic* [2009] eKLR guided this court by pronouncing itself thus, In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence. In the case of *Johnson Muiruri v. Republic* (supra) this Court held:- “Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.” In the earlier case of *Kibangeny Arap Kolil v. R.*, (1959) EA 92, the predecessor of this Court stated as follows:- “But even where the evidence of a child of tender years is sworn (or 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 so doing.” 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 in law but the Court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it. Evidence of a child of tender years not given on oath must in law be corroborated. (underline mine, bold in original text)
21. As such, in order to rely on the evidence of the complainant child, the court had to satisfy itself that there was corroborating evidence in order to safely make a finding of guilt against the accused. The corroborating evidence presented before court was in form of circumstantial evidence which had to meet the threshold that the inculpatory facts must be incompatible with the innocence of the accused and that there must be no other co-existing circumstances weakening the chain of circumstances relied on.
22. The court notes that it was said that the minor informed teacher Mwenda once she was sexually assaulted. All along the prosecution case, the accused kept on questioning why the school administration was in the dark on the whole complaint. His defence was not shaken by way of cross examination and it is only imperative that this court interrogates the same.
23. It would be naive of this court not to get interested in knowing why such an important witness in the chain as teacher Mwenda was not called. It would be justifiable that Y and D were equally minors but I find that there would be no justifiable excuse for not calling teacher Mwenda a fact that is to be adversely inferred against the prosecution case. If at all the complaint was lodged to this teacher by the complainant child, then she failed the innocence of this child by not taking the requisite steps, but if at all the same was not reported to her, the veracity and correctness of the statements by the complainant becomes shaken. Such are the facts that would lead the court to making a finding of a series of consistent facts that would inevitably lead to the guilt or innocence of the accused without a reasonable doubt.
24. It is not to be lost that when the child was taken to the hospital, it was said that she was bleeding. It would appear that since the child was taken to the hospital at midnight, she had been bleeding since the daytime to the time the mother noticed. However, there was no such blood-stained cloth that was shown before court in an effort to corroborate the minor’s evidence. I say so as the evidence by PW 1 and PW 4 were reported speeches from the narrative of PW 2 and hence could not be said to be corroborating pieces of evidence.
25. After examination of PW 2, PW 3 indicated that the age of the injuries was approximately 3 days. What could have been the cause of the injuries as the complainant says that she was assaulted a few hours before the examination? It was not enough to rule out other causes of such injuries such as child play or other causes of injuries.
26. The case before court is one that required the investigating officer to go out of her way to cover areas beyond the ordinary cases reported to the police. I say this because firstly on the nature and seriousness of the charges and secondly the nature of the complainant herein who is a child of very tender age. Such



expected diligence included but not limited to; cover evidence from the school fellow cooks, the context of the material day, the context of the scene of the incidence, collect the clothes she was wearing among other evidence that would help the court make a decision without a doubt in its mind. Such is the very important role an investigating officer plays in the criminal justice system and failure to execute their duties diligently can very easily lead to a miscarriage of justice either way as investigations are aimed at establishing the truthfulness and correctness of the facts surrounding a complaint.

Disposition

27. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits him under section 215 of the Criminal Procedure Code for both the main count of sexual assault proscribed by section 5 (1) (b) as read together with section 5 (2) of the *Sexual Offences Act*, 2006 and for the alternative count therein of committing an indecent act with a child proscribed under section 11 (1) of the *Sexual Offences Act*, 2006.
28. The accused person who has been on a bond pending trial of Ksh. 200, 000/= with one surety is hereby discharged. The surety one Kassim Mwinyifaki Mwazewe, admitted as a surety on the February 25, 2022 is equally discharged forthwith and the security documents deposited in court shall be returned to him.

DPP

1. I hereby give notice of my intention to appeal that decision and for that reason I pray for certified copies of the record. I will be appealing against the entirety of the judgment.

Accused

1. I am grateful of the acquittal. On appeal I just want to be free.

Court

1. Certified copies of the typed proceedings and of this judgment shall be supplied to the DPP.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 7TH DAY OF NOVEMBER 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of :

Mr. Felix- Court Assistant.

Ms. Faith Luseno, for the DPP

Abdalla Omar Mwenda -Accused

7th November, 2022

