Mukhwana v Republic (Criminal Appeal E113 of 2024)
[2025] KEHC 15241 (KLR) (27 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15241 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E113 OF 2024

S MBUNGI, J

OCTOBER 27, 2025

BETWEEN

ALFRED MUKHWANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background

1. The appellant was charged before the Resident Magistrate's Court at Butere with two counts, namely:
    a. Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006, in that on the 20th day of July 2020 at Mulwanda sub-location in Kakamega County, he intentionally caused his penis to penetrate the vagina of H.N, a child aged nine years.
    b. Indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, in that on the same date and place, he intentionally touched the vagina of H.N. with his penis.
2. The trial court convicted the appellant on the main count of defilement and sentenced him to life imprisonment pursuant to section 8(2) of the Act.
3. Aggrieved by both conviction and sentence, he filed this appeal.

    Grounds of Appeal

    a. The prosecution failed to prove its case beyond reasonable doubt;
    b. The learned magistrate disregarded inconsistencies in the prosecution's evidence;
    c. The court failed to consider his defence that the case was fabricated due to a grudge over children plucking fruits from his orchard;

d. The life sentence imposed was harsh, excessive, and unconstitutional; and

e. The trial court failed to consider the period spent in custody under section 333(2) of the Criminal Procedure Code.

4. This being an appeal, the duty of this court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. This was insisted in the case of Okeno v Republic (Criminal case No 26 of 2021). The court stated that, "It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify."

5. PW1, the mother of the complainant testified that upon returning home, one of her daughters informed her that the complainant, H.N was at the accused's house. When sent to fetch her, the sister reported that she had seen through the window the accused without trousers and the complainant lying on the bed. PW1 rushed to the house, found the accused half-dressed, and reported the matter to the village elder who escorted him to the police station.

6. PW3 stated that she and the complainant were on their way to the river when the accused called them to collect avocados. He requested PW3 to leave the complainant behind to assist in carrying the fruits.

7. PW4, the complainant aged 9, stated that the accused called them, asked them to pluck fruits, and when she was left behind, he closed the door, removed his trousers, and "did bad manners" to her by inserting his penis into her vagina.

8. PW5, a clinical officer at Mulwanda Health Centre, examined the complainant and filled the P3 form. She noted that the hymen was missing, there were bruises on the vaginal wall and swelling of the labia minora, accompanied by a brownish discharge and foul smell. She concluded that there was recent penetration.

9. The appellant gave an unsworn statement, claiming that the children used to steal fruits from his orchard, that he had complained to the village elder, and that the charge was fabricated out of malice.

10. The age of the complainant was established by the testimony of her mother and the medical evidence tendered by the clinical officer showing that she was born on 22nd February, making her 9 years old at the time of the commission of the offence.

11. The 2nd issue the prosecution was supposed to prove was penetration.

12. Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another. The complainant's clear and consistent testimony that the accused inserted his penis into her vagina, coupled with medical evidence showing missing hymen, bruises, and discharge, leaves no doubt that penetration occurred.

13. The third issue to prove was identification of the perpetrator.

14. The complainant and the accused were well known to each other as shown by both the prosecution and witness statements in the lower court. The offence occurred in the house of the accused. PW3 saw the complainant enter the accused's house, and later came back to peep and saw the accused half-dressed moments later. The evidence is direct and leaves no possibility of mistaken identity.

15. The appellant's defence that the case arose from a grudge about fruits was duly considered by the trial magistrate but did not displace the consistent and corroborated prosecution evidence. A bare denial cannot stand in the face of medical and eyewitness evidence. As held in Republic v Oyier [1985]

KLR 353, where it was explained that an accused's denial does not automatically render prosecution evidence unreliable. The alleged orchard dispute could not explain away the clinical findings or the fact that the accused was seen in compromising circumstances with the complainant by PW3.

16. The prosecution proved all the essential ingredients of defilement; age, penetration, and identity, beyond reasonable doubt.

17. The conviction was therefore well-founded.

Sentence

18. The appellant was sentenced to life imprisonment under section 8(3) of the *Sexual Offences Act*, which provides that:

> " A person who commits an act of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

19. The life sentence meted by the trial court against the Appellant is a lawful sentence no other sentence provided for by Section 8(3) on the *Sexual Offences Act*.

20. Regarding section 333(2) of the Criminal Procedure Code, while courts should credit the time spent in custody, such consideration has no practical effect on a life sentence. The request to consider the sentencing of this court as outlined in section 333(2) of the criminal procedure code on the fact that the appellant was in remand from 20th July 2020 to 24th March 2021 is immaterial. This is of no effect as Section 8(2) of the *Sexual Offences Act* demands that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

Conclusion

21. After re-evaluating all the evidence and the applicable law, I find that the prosecution proved its case beyond reasonable doubt. The defence raised no reasonable doubt. The conviction was right and the sentence lawful.

Orders

22. The appeal against conviction and sentence is dismissed in its entirety.

23. The conviction for defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* is affirmed.

24. The sentence of life imprisonment imposed by the trial court is upheld.

25. Right of Appeal within 14 days explained.

26. File closed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF OCTOBER, 2025.

S.N MBUNGI

JUDGE

In the Presence of:-

CA: Angong'a

Ms. Osoro for the ODPP present online.

Appellant present online.