



REPUBLIC OF KENYA



KENYA LAW
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**Buya v Republic (Criminal Appeal E015 of 2024)
[2025] KEHC 16577 (KLR) (14 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E015 OF 2024
JN NJAGI, J
NOVEMBER 14, 2025**

BETWEEN

JOHN LIVINGSTONE BUYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction & sentence by Hon. L.W. Wasige, Principal Magistrate, in Garsen PM's Court Sexual Offence Case No. E019 of 2021 delivered on 31/8/2022)

JUDGMENT

1. The Appellant herein was facing a charge of defilement contrary to section 8(1) (2) of the [Sexual Offences Act](#) No.3 of 2006 and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). He was convicted of the alternative charge whose particulars were that on the 7th August 2021 at about 1300 hours in Tana Delta sub county coast region he intentionally touched the vagina of C. F. J. (herein referred to as the complainant/victim) a child aged 2 ½ years with his finger.
2. The appellant was sentenced to serve ten (10) years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal as per his amended grounds of appeal are;
 - (1) That the trial magistrate erred in law and facts in failing to find that the prosecution case was marred with inconsistencies, contradictions and discrepancies.
 - (2) That the trial magistrate erred in law and facts in failing to consider that the ingredients of the offence of indecent act contrary to section 11(1) of the [Sexual Offences Act](#) were not proved beyond reasonable doubt.



- (3) That the trial magistrate erred in law and facts by convicting and sentencing the appellant to the mandatory sentence of 10 years without considering the circumstances pertaining during the commission of the offence.

Prosecution case

3. The case for the prosecution is that the victim herein was at the material time aged 2 ½ years as per her birth certificate, P.Exh.3 and was living with her parents PW1 and PW2. That on the material day, the victim's mother PW2 was attending a funeral while her father was away from home.
4. It was the evidence of the complainant's father PW1 that he on that day returned home and did not find the victim at home. He started to look for her at the houses of his neighbours. He reached the house of the appellant about 50 meters away from his home and found the door to his house unlocked. He knocked the door but there was no response. That as he left the victim came out of the Appellant's house. She told him that she had been with the appellant on his bed. He entered into the appellant's house and found him asleep on his bed. He called him but he did not respond. He left. That on the following day at 5 pm he informed his wife PW2 of the incident. Later in the day his wife told him that the victim had difficulty in passing urine. His daughter started pointing at her private parts. They took her to hospital and she was found to have been defiled. They reported to the police. The appellant was arrested and charged.
5. The mother to the victim PW2 testified that she was on the material day attending a funeral. That on the following day her husband told her that he had on the previous day found the victim in the house of the appellant. That on 8/8/2021 she prepared her children to go to church. That after coming back home from church, the victim was unable to pass urine. That while she was bathing her she noticed some swellings on her private parts. She confronted the appellant but he denied defiling the girl. She and the mother to the appellant took the girl to Wema hospital. On 10/8/2021 they reported at Gamba police station. They were issued with a P3 form. The girl was examined by a clinical officer, PW4 at Garsen Health centre who completed her P3 form. The clinical officer found scratches on the vagina of the girl on the right labia. The hymen was torn and the vaginal orifice could accommodate the small finger. There were signs of mild penetration. He concluded that the child had been defiled.
6. The case was investigated by Cpl Daniel Mwendwa PW5 of Gamba police station. It was his evidence that the report was made at their station on 10/8/2021. He issued the parents to the girl with a P3 form that was completed at Garsen Health centre where medical examination revealed that she had been defiled. He recorded statements of witnesses. They arrested the appellant and he was charged with the offence. During the hearing of the case in court the victim's father PW1 produced the victim's birth certificate in court as exhibit, P.Exh.3. It indicated that the girl was born on 13/11/2018. The clinical officer PW4 produced the treatment notes and the P3 form as exhibits, P.Exh.1 and 2 respectively.

Defence case

7. When placed to his defence the appellant stated in a sworn statement that the complainant was his neighbor. That the case was fabricated by the complainant's mother arising from a debt that she owed him. That in the month of October 2020 he had planted maize for her but she paid him half of the money and remained with a balance of which she promised to pay but she did not. That in June 2021 he warned her not to step at his home again. She vowed to teach him a lesson.
8. Further that on a certain date in the month of August 2021 he found the complainant's mother beating his younger brother while alleging that he had inserted his fingers into the private parts of her daughter. Later he heard her telling his neighbour that he, the appellant, is the one who had done so. She went



and reported to the chief with whom he had a grudge. The chief advised her to report to the police. It was his evidence that he was at school on 7/8/2021 when the offence is said to have taken place.

Submissions

9. The appellant submitted that there was no evidence that he committed the offence he was convicted of. That there were contradictions in the evidence of the prosecution witnesses. That the evidence of the clinical officer who examined the complainant was also contradictory. That it was unsafe to convict on the evidence.
10. The respondent on the other hand submitted that elements of the offence of indecent assault are proof of the age of the complainant, proof that there was contact between any part of the appellant and the genital organs of the child and proof of identification of the appellant.
11. It was submitted that the age of the complainant was proved by way of birth certificate that was produced in court showing that she was at the time aged 2½ years. That unlawful contact was proved by the evidence of the victim who testified through an intermediary that the appellant penetrated her vagina by use of his finger which evidence was corroborated by the clinical officer PW4 who upon examining the girl found her with scratches on the right labia. That the appellant was identified by the victim as he was her neighbor. Additionally, that the girl's father PW2 had found the girl in the house of the appellant who when confronted by PW2 pretended to be asleep. That in view of the tender age of the girl she could not be lying. Further that the defence offered by the appellant did not cast any doubt into the prosecution case. That his evidence that the case was a fabrication by the mother to the complainant was a lie as he did not raise the issue when the complainant's mother testified in court. More so that there was no reason for the clinical officer PW4 and the investigating officer PW5 to lie against him. The respondent urged the court to dismiss the appeal.

Analysis and determination

12. This court being a first appellate court in this matter, I am alive to and is cognizant of the principles laid down in the case of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated the following on the duty of a first appellate court:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters V Sunday Post* 1978) E.A. 424.”
13. The appellant was convicted for the offence of committing an indecent act with a child. The ingredients for the offence that the prosecution needed to prove are: proof of the age of the complainant, identity of the perpetrator and the indecent act itself.



14. The age of a victim of defilement may be proved in various ways as was stated by the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR that:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”
15. The age of the victim in this case was proved by production of a birth certificate that showed that the complainant was aged 2 ½ years. The age of the complainant was sufficiently proved.
16. The identity of the appellant was not in doubt because he was a neighbour to the victim. The question was whether he indecently assaulted her.
17. The offence of indecent act is defined under Section 2 of the *Sexual Offences Act* as an unlawful intentional act which causes;
 - a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.
 - b)
18. The trial court did a voir dire examination on the victim and found her not possessed of enough intelligence to enable her give evidence on oath. The court then ordered the victim to give her evidence through an intermediary. The court appointed a Garsen lady probation officer as the intermediary. The child then stated through the intermediary that the appellant had removed her clothes and he also removed his clothes. That he smeared her private parts with oil. He then inserted his hand inside.
19. In convicting the appellant of the offence, the trial magistrate said that she was convinced that the victim was telling the truth as there was no reason for a 2½ year old child to lie against him. That her father had found her in the house of the appellant on the material day. That the appellant’s defence was a sham and an afterthought.
20. I have anxiously considered the evidence adduced before the trial court. It was the evidence of the clinical officer PW5 that he examined the girl and found her not very coherent as she could only talk one word after another.
21. What perturbs me in this case is that till the time the victim testified in court, she does not seem to have told anybody on what the appellant did to her. Whereas she told the trial court that the appellant removed her clothes and smeared her private parts with oil, she does not seem to have told her parents, PW1 and PW2, of such a thing as none of them mentioned it when they testified in court. It is surprising that the child would have failed to tell her mother of such a thing if at all it had taken place. Going by the evidence of the clinical officer that the child was not very coherent in her speech, it is most likely that it is her mother who understood her speech better than anybody else. Her mother told the court that she noticed that her private parts were swollen when she was bathing her. If the child could talk, why is it that she never told her mother what happened the appellant did to her? Why would she tell the court that the appellant removed her clothes and smeared her private parts with oil when she had not told such a thing even to her own mother?



22. Similarly, the police officer who investigated the case never mentioned the girl telling him that the appellant did any indecent act to her. The father to the victim told the trial court that the child kept on pointing at her private parts. He however did not say that the child told them of the appellant smearing her private parts with oil.
23. I am alive to the provisions of section 124 of the *Evidence Act* which allows the court in sexual offence cases involving children to convict on the sole evidence of a child victim if the court is satisfied that the child is telling the truth. The complainant was the sole witness that the appellant removed her clothes and smeared her private parts with oil. The trial court in convicting the appellant did not consider the fact that the child was stating the said evidence for the first time in court. Failure to have disclosed the evidence to anybody before her evidence was taken in court made the evidence doubtful. Had the trial magistrate considered this aspect of the case, she would most likely have come to the conclusion that the evidence of the child was not sufficient to prove the case against the appellant beyond reasonable doubt. Consequently, it is my finding that there was no sufficient evidence to convict the appellant for the offence committing an indecent act with a child.
24. The upshot is that the conviction of the appellant for the offence committing an indecent act with a child was not safe. The conviction is consequently quashed and the sentence set aside. I order the appellant to be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 14TH DAY OF NOVEMBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant present virtually at G.K. Prison Hola

Court Assistant: Jumaa

