Musembi alias Peter v Republic (Criminal Appeal E003 of 2024)
[2025] KECA 1846 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1846 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E003 OF 2024

AK MURGOR, F TUIYOTT & P NYAMWEYA, JJA

NOVEMBER 7, 2025

BETWEEN

ISSAC MUSEMBI ALIAS PETER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (A.Ongeri, J.) delivered on 14{{^th}} November 2017 in HCRA No. 67 of 2017)

JUDGMENT

1. The Appellant, Issac Musembi Alias Peter together with 3 others were each charged with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act*. In the Appellant's case, the particulars were that on diverse dates between January 2015 and April 2016 at Tudor area in Mombasa District within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the vagina of the complainant, v a child aged 10 years old.

2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* where it is alleged that on diverse dates between January 2015 and April 2016, he touched the vagina of v a girl aged 10 years old.

3. He pleaded not guilty and the matter proceeded to hearing where the prosecution called 4 witnesses.

4. PW1, the complainant a child aged 11 years old at that time she testified was living in a rescue home called Mahali pa Usalama, before being placed in the home she lived with her mother and siblings. Her mother who had separated from her father recalled that she had given v to one Mama Neema to look after her, but when her father learnt that she was not with her mother, he came and took her away. It was while staying with her father that one day, on a date she could not recall, she met Peter, the Appellant who convinced her to follow him to his house. When they got there, he showed her pornographic pictures and had sexual intercourse with her. She stated that the Appellant's house is

near a video shop in Mworoto. When she left his house she went back to her father's house, and then to her mother's house. She did not disclose to anyone what had happened to her. She further testified how the other co accused had sex with her and that after two days she told her mother she felt pain while passing urine. It was then that she was taken to hospital where she was examined and found to be HIV +. When she went back to school, her teachers noticed that she was withdrawn and looked troubled. Following their enquiries, she disclosed to them what the Appellant and co accused had done to her. The teachers took her to Makupa Police Station where she recorded her statement.

5. PW2, the complainant's mother testified that the complainant, her daughter was born on 24th June 2005 and produced her immunization card to prove her age. She stated that on 5th April 2016 she received a call from the complainant's father who informed her that the complainant had been taken to hospital by her teachers. She was later called by a member of the Nyumba Kumi and informed that the complainant had been taken to a rescue centre. It was at the rescue centre that she learnt of what had befallen her daughter. She recalled that at the time she was admitted in hospital for nine days and had left the complainant with a neighbor. The complainant later told her that because of the constant fighting between the couple she ran away and went to live with her father and that is where she was defiled.

6. Dr. Mohammed Monour PW3 a medical doctor at the Coast General Hospital produced the P3 Form and the PRC Form. He told the court that when the complainant was examined on 17th April 2016, she had healing abrasions at the fourchette and her hymen was ruptured. The examination also found that the complainant was HIV+. The PRC Form and the P3 form were produced in evidence.

7. Warda PW4 and Janet PW5 were teachers at the school where the complainant is a standard four pupil. It was their intervention which led the complainant to disclose what had happened to her, whereafter a report was made to the police.

8. PCW Joyce Okemo PW6, attached to Makupa Police Station was the investigating officer who received the report that the complainant had been defiled by the Appellant and co-accused. The Appellant and co-accused were subsequently arrested and charged with the offence.

9. When placed on his defence, the Appellant denied the offence. His entire evidence was captured as follows:

> " I am called Isaac Musembi from Bombolulu, Jobless. I know the charges l am facing, I was arrested and charged, l did not commit the offence, I have nothing else to say"

10. The trial magistrate upon considering the evidence convicted the Appellant and co accused for the offence of defilement. The Appellant was sentenced to serve life imprisonment.

11. Aggrieved, the Appellant filed an appeal to the High Court on the grounds that the charge sheet which was relied upon to convict the Appellant and co accused was fatally defective and contrary to Sections 89, 134, 137 (a) ii. (0), 214, 275(l) and 276(1) of the Criminal Procedure Code; that the age of the complainant was not ascertained beyond reasonable doubt to warrant the conviction which contravened Section 8(2) of the *Sexual Offences Act*; that the evidence adduced comprised of variances and contradictions that were irreconcilable and incapable of corroboration to warrant the conviction of the Appellant and co accused, and that the trial court did not consider their defence.

12. The first appellate Judge upon re-evaluating the evidence dismissed the Appellant's appeal and upheld both his conviction and sentence.

13. Once again the Appellant was aggrieved, and filed an appeal to this Court on grounds that; the learned trial magistrate and the 1st appellate court were in error in not appreciating that visual identification under recognition was not supported by the evidence; that the two courts failed to appreciate that the prosecution did not prove the age of the complainant and identification of the alleged perpetrator; in failing to appreciate that the prosecution's case was contradictory, inconsistent and unreliable; that the trial was unfairly conducted because Article 50 (2)(j) of the Constitution was not adhered to since he was not provided with the first report and penetration was not proved.

14. Both the Appellant and the Respondent filed written submission, and when the appeal came up for hearing, the Appellant who was in person submitted that he was not identified by the complainant who only stated his name as Peter, yet no evidence was adduced to show that he was the alleged Peter; that the age of the complainant was not proved, as the prosecution relied on an immunization card that was not signed, and nor did it bear the complainant's name, and in any event, it was only marked for identification; that the prosecution failed to prove its case to the required standards and as a result, his conviction was unsafe.

15. On their part, learned prosecution counsel for the Respondent, Ms. Mburu opposed the appeal and submitted that the prosecution had proved its case beyond reasonable doubt. It was argued that the essential ingredients of defilement under Section 8(1) of the *Sexual Offences Act* which are; the age of the victim, proof of penetration, and the identification of the perpetrator were all satisfied. Reliance was placed on the case of NjauvRepublic [2022] KEHC 14123 (KLR) where it was stated that to prove the offence of defilement the prosecution must establish: i) the age of the victim, ii) proof of penetration, and iii) positive identification of the perpetrator.

16. On the complainant's age, the Respondent pointed out that PW1 testified she was 11 years at the time of giving evidence in November 2016, meaning she was 10 years old at the material time. PW6, the investigating officer produced an immunization card confirming that PW1 was born on 24th June 2005, and PW2, her mother, corroborated this evidence. The prosecution therefore contended that the complainant's age was proved beyond doubt.

17. On penetration, reliance was placed on the statutory definition set out in Section 2 of the *Sexual Offences Act*, namely "...the partial or complete insertion of the genital organs of a person into the genital organs of another." It was submitted that PW1 narrated in detail how the Appellant lured her into his house, showed her pornographic material, and had sexual intercourse with her; that she repeated this evidence during cross-examination; that further, PW3, the doctor produced the P3 form and PRC form which confirmed that the complainant's hymen was broken and there were healing abrasions in the anus. It was submitted that this corroboration sufficiently established penetration, as correctly found by both the trial court and the High Court.

18. With respect to identification of the Appellant, the Respondent submitted that PW1 positively identified him by name, referring to him as "Peter" in her testimony and during cross-examination. She also informed her teacher, PW5, that one of her defilers was called Peter. Counsel submitted that there were no contradictions in the evidence, and that the Appellant's unsworn statement of defence did not give rise to any doubt.

19. As to the credibility of the complainant's testimony, the Respondent acknowledged that she was a child of tender years who gave unsworn evidence. Reliance was placed on the proviso to Section 124 of the *Evidence Act*, which allows a conviction on the sole evidence of a child victim in sexual offences where the court records reasons that it is satisfied the child is telling the truth. The case of Jacob Odhiambo Omumbo v Republic [2008] eKLR, was cited to support this proposition.

20. In conclusion, counsel submitted that the prosecution proved the complainant's age, the fact of penetration, and the identification of the appellant beyond reasonable doubt, and that the conviction was therefore safe.

21. This is a second appeal, where the Court's jurisdiction circumscribed by Section 361 of the Criminal Procedure Code, is limited to matters of law only. This principle was clearly stated inKaringovR [1982] KLR 213, where the

Court held that:

> " A second appeal must be confined to points of law, and this Court will not interfere with concurrent findings of fact made by the two courts below unless such findings are not supported by evidence. The guiding test is whether there was any evidence on which the trial court could have reached its decision (see Reuben Karari C/O Karanja v R (1956) 17 EACA 146)."

22. The same position was reaffirmed in Karani v R [2010] 1 KLR 73, where the Court emphasized that:

> " On a second appeal, by virtue of Section 361 of the Criminal Procedure Code, this Court only considers issues of law. It cannot disturb findings of fact unless it is demonstrated that the trial court and the first appellate court either considered matters they ought not to have considered, or failed to consider matters they should have considered, or that, on the totality of the evidence, the decisions reached were plainly wrong. In such circumstances, the omission or commission is treated as a point of law."

23. Having carefully reviewed the record, the grounds of appeal, and the submissions by both parties, the key issues that fall for determination in this appeal are:

i. whether the prosecution proved all the essential elements of the offence of defilement beyond reasonable doubt, to wit the identification, the complainant's age and penetration.

ii. whether the prosecution's evidence, notwithstanding alleged contradictions and inconsistencies, was adequate to sustain a safe conviction.

iii. whether the Appellant's trial was fair and in compliance with constitutional safeguards under Article 50 of *the Constitution*.

24. Turning to the first issue of whether defilement was proved, under Section 8(1) of the *Sexual Offences Act*, the prosecution must establish three key ingredients: the age of the victim, that there was penetration, and the identification of the perpetrator.

Section 8(1) of the *Sexual Offences Act* provides:

> 8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. 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.
>
> (3) ..."

25. In the case of CharlesKaranivRepublic, Criminal Appeal No 72 of 2013, this Court stated:

> " The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant."

26. Beginning with whether the complainant's age was proved. It is trite that the burden of proof regarding the age of the complainant lies with the prosecution. SeeSerem v Republic [2023] KECA 30 (KLR).

27. Having appreciated that the complainant stated that she was 10 years of age when the offence occurred, which evidence was corroborated by her mother as well as the complainant's immunization card, P3 form and the PRC form the 1st appellate court was satisfied that the age of the complainant was proved.

28. And concerning the question of proof of the victim's age, this Court in the case ofEdwin Nyambogo Onsongo v. Republic [2016] eKLR stated:

> " ... 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."

29. The evidence shows that the complainant was 10 years old when the offence was committed. This evidence was corroborated by her mother, PW2 who also produced an immunization card showing that the complainant was born on 24th June 2005. However, as observed by the Appellant, a consideration of the immunization card shows that the complainant's name was not indicated. This notwithstanding, the evidence concerning her age, clearly pointed to the complainant as being 10 years old at the time of the offence.

30. More particularly, in the case of Richard Wahome Chege v Republic,Criminal Appeal No 61 of 2014, it was held that:

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by the production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself."

31. From the above, the court was entitled to rely on the evidence of the mother and that of the medical expert to ascertain the complainant's age. If there was need for further evidence on the matter, it came from PW5, a teacher of the victim, referring to her, testified:

> " ...i noticed that one of my pupil in my class aged 10 years was always withdrawn.."

32. We are satisfied, as were the trial court and the High Court, contrary to the Appellant's contention, that the prosecution proved the age of the complainant.

33. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as, "The partial or complete insertion of the genital organ of a person into the genital organs of another person."

34. The testimony of the victim coupled with a medical report will ordinarily be sufficient to determine whether penetration occurred. Further, the proviso to Section 124 of the *Evidence Act*, allows a court to convict on the sole evidence of a child victim in sexual offences if the court records reasons that it is satisfied the child is telling the truth.

Section 124 of the *Evidence Act*, provides:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

35. Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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."

36. The trial magistrate having ascertained that the complainant was a competent and truthful witness was entitled to rely on Section 124 to reach a finding that there was penetration and convict the Appellant without the necessity of corroboration of her evidence.

37. In the instant case, in proving penetration, the complainant narrated to the court how, the Appellant took her to his house showed her some pornographic photos and then had sexual intercourse with her. This evidence was corroborated by her mother, PW2 and PW3, Dr. Mohammed Monour from the Coast General Hospital who examined the complainant and noted that there were abrasions and bruises on her vagina and that her hymen was ruptured. In his expert opinion, he concluded that there was penetration.

38. On the strength of this evidence, both the trial court and the High Court were satisfied that penetration was proved. For our part, given the concurrent findings of the fact of penetration by the two court below, we have no basis on which to fault the conclusions reached.

39. As regards the identity of the Appellant, the complainant stated that the Appellant was well known to her, and she repeatedly and firmly referred to him as Peter. In our view, the evidence satisfactorily proved that the Appellant was well-known to the complainant. So that, this was a case of recognition rather than identification of a stranger. In the case of Anjononi & others v Republic (1976-1980) KLR 1566, the court held that:

> " ...when it comes to identification, the recognition of an assailant is satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."

40. Without doubt, we are satisfied as were the two courts below that the Appellant was positively identified through recognition by the complainant which rendered this element of the offence as effectively proved.

41. When the evidence is considered in its totality, we find that the trial court and the High Court properly analysed the evidence and rightly concluded that the elements of the offence of defilement, that is the age of the complainant, penetration and that the person identified as the perpetrator was the Appellant were proved. Without doubt, the prosecution proved its case to the required standard and as a consequence we uphold the Appellant's conviction.

42. As concerns the complaint that the prosecution evidence was marred by contradictions and inconsistencies, we have been through the Appellant's grounds and submissions and find that no inconsistencies were identified or raised for this Court's consideration.

43. Now turning to the allegation that the trial was not fairly conducted because Article 50 (2)(j) of the Constitution was not adhered to, in that, he was not provided with the first report.

Article 50 (2) (j) provides that:

> " Every accused person has the right to a fair trial which includes the right – to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

44. In the case ofAhamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR) this Court held that;

> " Our reading of Article 50(2) (j) of *the Constitution* does not grant the appellants the blanket right to access all the information in possession of the police including intelligence reports. What the appellants were entitled to was the evidence that the police intended to rely on at the trial, and of course any other evidence in possession of the police that could have exonerated them from the charges they were facing, even though the police did not wish to use that evidence. Indeed, even the right to access the evidence that the police intend to rely on is not totally unfettered; it is qualified by the constitutional requirement that the access should be reasonable, the determination of which must depend on the circumstances of each case."

46. In the instant appeal, the Appellant during hearing requested to be supplied with the first report, the trial Magistrate in declining to allow the request held that the Appellant had been supplied with witness statements which was sufficient. The Record also showed that the Appellant was

47. supplied with the witness statements and proceeded with the case, and ably cross examined the prosecution witnesses. As held in the above case, and we agree, the failure to issue him with the first report was not prejudicial to him in any way and as such, this ground has no merit.

48. In the upshot, the appeal has no merit and is accordingly dismissed.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER, 2025.

A. K. MURGOR

JUDGE OF APPEAL

.....

F. TUIYOTT

JUDGE OF APPEAL

.....

NYAMWEYA

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR