Wanje v Republic (Criminal Appeal E079 of 2023)
[2025] KEHC 16971 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16971 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E079 OF 2023

M THANDE, J

NOVEMBER 21, 2025

BETWEEN

SHABAN KARISA WANJE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein, was charged in Malindi Sexual Offences Case No. E069 of 2022, with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (SOA). The particulars of the offence are that on diverse dates between 1.1.22 and 19.10.22, within Kilifi county, the Appellant intentionally caused his penis to penetrate the vagina of LSS, a child aged 15 years.

2. In her judgment, the trial Magistrate convicted the Appellant of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the SOA and sentenced him to 20 years imprisonment.

3. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence on grounds that the prosecution did not prove its case to the required standard.

4. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See Okeno v. Republic [1972] EA 32.

5. It is trite that the age of a victim of the offence of defilement is a critical element of the offence, as it determines the provision under which a person may be charged. In Kaingu Kasomo v Republic Criminal Appeal No. 504 of 2010 the Court of Appeal stated as follows:

> Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape

and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

6. In her testimony, the Complainant stated that she was 15 years old. This was confirmed by her mother PW2. Additionally, the birth certificate on record indicated that the Complainant was born on 23.7.07 thereby ascertaining her age as 15 years.

7. The Appellant was charged under Section 8(1) as read with Section 8(4) of the SOA which provide as follows:

> 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 between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

8. Section 8(4) relates to a victim between the age of 16 and 18 years. Clearly, the Appellant was charged under the wrong provisions of the law. The charge was therefore defective.

9. To aggravate the situation, the trial Magistrate made the following opening statement in her judgment:

> The accused person herein Shaban Karisa Wanje is charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

The trial Magistrate went on to conclude:

> It is my finding that the charge against the accused person has been proved beyond reasonable doubt. The evidence presented by the prosecution is sufficient to support the charge. I therefore make a finding of guilty and proceed to convict the accused person Shaban Karisa Wanje as charged with the offence of defilement contrary to Section 8(1) and 8(2) of the *Sexual Offences Act* No. 3 of 2006 and in accordance with Section 215 CPC.

10. Section 8(2) of the SOA provides:

> 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.

11. The circumstances herein are that the Appellant was charged under Section 8(4) and convicted of the offence under Section 8(2) of the SOA yet the Complainant was 15 years old. It is quite evident therefore that the charge was defective and was not supported by the evidence. Remarkably, neither the prosecution nor the trial court noted the defect in the charge. Additionally, the trial Magistrate convicted the Appellant of an offence with which he was not charged and based on evidence that was clearly at variance with the offence with which he was charged. It follows that the conviction of the Appellant stands vitiated.

12. The mistake leading to the vitiation of the conviction is that of both of the prosecution and of the trial court's making. This would call for a retrial.

13. In Muiruri v Republic [2003] eKLR, where the Court of Appeal stated as follows, regarding a retrial:

> What agonized our minds was the consequential order sought for retrial. Mr Kithi, learned counsel for the appellant, opposed the order for retrial and called for the appellant's acquittal, citing the long period elapsed between the appellant's arrest and the hearing of this

appeal which is about 15 years. Generally, whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (See Zededkiah Ojuondo Manyala v Republic (Criminal Appeal No 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the Court's.

14. The Appellant was arrested on 19.10.22 and arraigned on 21.10.22, over 3 years ago. The mistakes leading to the vitiation of the conviction are of both the prosecution and the trial court. Duly guided by the holding in the cited decision, I find that interests of justice do not require a retrial and the same would occasion injustice and prejudice to the Appellant.

15. For the reasons stated, the Court finds that the conviction of the Appellant was unsafe and the Appeal is allowed. Accordingly, the conviction is quashed and the sentence set aside. The Appellant is forthwith set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 21ST DAY OF NOVEMBER 2025

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M. THANDE

JUDGE