



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**ABK v Republic (Criminal Appeal E028 of 2024)  
[2025] KEHC 18226 (KLR) (3 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18226 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL E028 OF 2024  
AK NDUNG'U, J  
DECEMBER 3, 2025**

**BETWEEN**

**ABK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Conviction and Sentence in Nanyuki CM  
Sexual Offences Case E016 of 2023– V Masivo-SRM)*

**JUDGMENT**

1. The Appellant, AMK was convicted after trial of sexual assault contrary to section 5(1)(a) as read with section 5 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 09/04/2023 at [Particulars Withheld] village in Kieni East subcounty, within Nyeri County unlawfully and intentionally penetrated the vagina of L.S.B with a finger, a child aged 6 years. On 29/04/2024, he was sentenced to ten (10) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he filed the petition of appeal on 07/05/2024 but also filed amended grounds of appeal alongside his submissions and begged the leave of this court pursuant to section 350(2)(v) of the Criminal Procedure Code. The conviction and the sentence are being challenged on the following grounds;
  - i. The learned magistrate erred by failing to note that the case was not proved beyond reasonable doubt.
  - ii. The learned magistrate failed to note that there was non disclosure of material evidence contrary to Article 50 of the *Constitution*.
  - iii. The learned magistrate erred by failing to adduce circumstantial evidence thereby contravening section 33 of *Sexual Offences Act*.



- iv. That his defence was quashed without cogent reasons.
  - v. The learned magistrate erred meting out the sentence that was manifestly harsh, excessive and unconstitutional.
3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the complainant made a report that she was defiled and the investigating officer testified that he inserted his male organ to the complainant female organ. However, her narrative changed from defilement in the first report to sexual assault as she testified that he inserted his finger between her legs which she also affirmed during cross examination. That she reported that he removed her clothes whereas PW3 testified that he ordered her to undress. The complainant testified that she asked her to accompany him for him to give her mandazi whereas PW3 testified that he served her with tea and ugali and the alleged snacks were not produced as exhibits. She therefore lacked credibility and she was dishonest as was revealed by PW2 who testified that she declined to diverge further information and thus fell under the category of a hostile witness who contradicts his/her former statements.
  4. The trial court failed to record the reasons for believing the complainant in the proceedings pursuant to section 124 of the *Evidence Act* and recorded the reason in the judgment, 10 months after the complainant had testified and going by how busy the magistrates are, the magistrate could not remember the reasons which were not recorded in the proceedings. Hence the reasons recorded in the judgement were an afterthought to cure a mistake committed earlier in the proceedings. Further, the trial court failed to record the complainant's demeanour pursuant to section 199 of the Criminal Procedure Code in the proceedings and recorded the same in the judgement which was also an afterthought.
  5. He submitted that the clinician filled the P3 form from the history she had been given of the sexual assault hence her result would have been different if she had not been given the history of the alleged sexual assault. The clinician testified that the complainant was penetrated by an object other than a penis but did not state what kind of object. Further, no proper investigations were done to scientifically link him to the offence since he was not examined. Additionally, the clinician relied on PRC to fill the P3 form which was filled by someone else thus contravening section 33 and 77 of the *Evidence Act* since she did not testify on familiarity of the handwriting and signature of the maker of PRC. That the complainant was a minor hence the court should have been extra careful as a child can be susceptible to coaching or coercion from adults. The complainant was coached as it was evident from lies in her narrative and contradictions from her former statement.
  6. He submitted that KK was a material witness as it was alleged that he was present when he allegedly picked the complainant from their home. That he was not supplied with medical officer statement and birth certificate which was a violation of his right under Article 50(2) of the *Constitution* which should vitiate the entire trial. That adducing circumstantial evidence would have been vital since there is no way he could have lured the complainant to his house for he was well known in the neighbourhood, he was a good friend to complainant's family, there was no evidence that he was intoxicated, that it beats logic how he could have taken her to his house without anyone noticing and also it beats logic how the complainant failed to raise any alarm. The complainant was calm when she was testifying and never shown any sign of trauma and he has never portrayed any guilty conscience.
  7. With respect to his defence, he submitted that the prosecution had an opportunity to rebut his defence but they failed to. That his defence was termed as an afterthought by the trial court raising a question at what time was he supposed to raise his defence other than during the defence case. The prosecution was required to call for evidence to rebut his defence and failure to do so, his defence went unchallenged. Hence the trial court absolved the prosecution from their legal burden. On the sentence, he submitted



that the sentence was harsh and excessive and failed to consider the mitigating factors he offered and non aggravating circumstance of the case. Further, mandatory minimum sentences have been frowned upon by our superior courts.

8. In rejoinder, the Respondent's counsel submitted that the Appellant failed to seek leave to amend his petition of appeal pursuant to section 350(2) of the Criminal Procedure Code and she urged the court to disregard the amended grounds of appeal filed. That PW1 testimony as to who sexually assaulted her was consistent and clear and was not shaken even during cross examination. There was also medical evidence which corroborated her testimony that there was penetration which was supported by PRC and P3 forms. PW4 testified that there was penetration and the object used was not a penis hence proving the assertion of penetration. On identification, she submitted that PW2 testified that he was their neighbour hence he was someone well known to them. PW1 identified him hence it was a case of recognition and therefore he was positively identified. On failure to record the demeanour of the complainant on record, she submitted that the court conducted voir dire and it was satisfied that the complainant possessed the requisite intelligence to tell the truth. Further, her evidence was corroborated by medical evidence hence court was satisfied that she was telling the truth and rightly relied on her evidence to convict.
9. On the allegation that PW4 was guided on what to fill in the medical report, she submitted that the doctor examining the victim will be looking out for evidence to prove the claims. On whether section 33 of *Sexual Offences Act* was invoked, she submitted that the evidence of surrounding circumstances showed that a sexual offence was committed. He lured her into his house by promising to give her mandazis and also warned her against telling anyone hence the provision of section 33 were proved. On whether his right under Article 50(2)(j) was violated, she submitted that experts including medical officers do not record statements and their testimonies are pegged on their report and in this case, the P3 and PRC forms which she produced and which were supplied to him and he was given a chance to cross examine PW4. On the supply of birth certificate, she submitted that the record shows that on the day it was produced, he was given an opportunity to contest its production but he stated that he had no objection. He did not inform the court that he was not supplied with the same neither did he request for supply or to be given a chance to go through it. Further, age is not a factor in proving sexual assault.
10. With respect to his defence, she submitted that he did not give any conflicting version of events and his assertions that the victim's mother was pursuing him for a romantic relationship was an afterthought as it was not raised during the prosecution's case. Hence his defence was a mere denial and afterthought. His defence failed to cast doubt on the prosecution's case. With respect to sentence, she submitted that sentencing is a matter of discretion and the court can only interfere where there is evidence that it was exercised injudiciously, the sentence was harsh, the court considered extrinsic factors while sentencing and omitted to consider material factors and none of these factors have been urged. The sentence was justifiable considering the aggravating circumstances of the case.
11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.
12. This duty was set out in *Okeno vs. Republic* [1972] EA by the Court of Appeal as follows;  

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was



some evidence to support the lower court's finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424."

13. Similarly, in *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

It is not the function 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; 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.

14. To this end a summary of the evidence at trial would be a suitable point of departure.

15. Complainant in her unsworn testimony testified that she was familiar with the Appellant and he did something to her. He asked her to accompany him to his house to give her mandazi. He took her to the house, laid her on bed, slept on her and inserted his fingers between her legs (pointed to her private part front). He smeared some substance on her thighs and he warned her not to tell anyone. She was dressed at the time but he undressed her. He wiped the substance and gave her mandazi and sent her home. This happened while at his house. She told her aunt what happened.

16. On cross examination, she testified that he invited her to give her mandazis after her parent had left. They used to go to his place to play and she maintained that he inserted his fingers into her genital organ.

17. PW2, complainant's aunt testified that on 09/04/2023, she went to visit the complainant's mother in hospital and so she left the children under the care of her husband. When she returned, her son informed her that uncle A picked the complainant to go and give her mandazis and they showed her the mandazis brought back by PW1. She questioned the complainant who informed her that the Appellant invited her for mandazis but she declined to tell her more. On 10/04/2023, the complainant informed her that she was feeling pain on her leg. She was also called from school that the complainant had a stomach ache and she went home. She checked her vagina and noticed that it had redness on the surface and the complainant informed her that the Appellant also offered her tea and ugali. He then took her to the bed, slept on her and inserted his finger in her genitalia and sent her back home with mandazis. She made a report the following day as it was getting dark and she was referred to hospital where the injuries were confirmed. She was familiar with the Appellant who was employed as a shamba boy and their homes were separated by a road.

18. On cross examination, she testified that this was the second time he had sexually assaulted the complainant as the first time happened when she had travelled to Karatina. She did not couch the complainant to falsify evidence. He had warned the complainant not to reveal hence the delay in discovery.

19. PW3, the investigating officer testified that the complainant informed her that the Appellant asked her to accompany him to his house where he served her with ugali and tea. He then ordered her to undress



- and inserted his male organ to her organ. She escorted the complainant to hospital. The complainant was six years old and she produced her birth certificate as Pexhibit3.
20. On cross examination, she testified that they did not find the piece of cloth that wiped the complainant at his home. That three days had passed hence he could not be taken for examination. They did not find the mandazis.
  21. PW4, the clinical officer testified that she filled the P3 form. She examined the complainant and her labia majora were reddish and tender at the entrance of the vagina. Her hymen was irregular with raw edges and it was tender broken with no bleeding. There were no spermatozoa and pus cells and she concluded that there was recent penetration not from an adult penis but other object. She produced the P3 form as Pexhibit1. She also produced the PRC form as Pexhibit2 and testified that it had similar findings with the P3 form.
  22. In his unsworn evidence, the Appellant testified that he was a shamba boy. That a six year old is unable to recall what occurred. That other witnesses said to be present did not testify and the piece of cloth said to have wiped the complainant was not produced. The police did not visit the scene. He was not examined and he was arrested on 15/04/2023 and the delay was explained to be further investigations which he was not involved in. That he did not sexually assault her and the child mother wanted a relationship with him which he declined. Her mother kept insisting for a relationship and demanded that he buy her clothes. He had a wife and she reported him to his wife that he was promiscuous hence the case was brought up for turning down her mother's love advances.
  23. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.
  24. Section 5 of the [Sexual Offences Act](#) provides for the offence of sexual assault as follows:
    - “5(1) Any person who unlawfully-
      - a. penetrates the genital organs of another person with-
        - i. any part of the body of another or that person; or
        - ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional medical hygiene or medical purposes;
      - b. 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.
    - (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”



25. The ingredients of the offence were discussed by the court of appeal in the case of *John Irungu v Republic*, [2016] eKLR where the court stated thus;
- “The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”
26. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard. As regards to proof of penetration, the complainant, PW1 testified that the Appellant lured her into his house with promise of giving her mandazis. While at his house, he laid her on the bed, undressed her, slept on her and inserted his fingers in between her legs which she pointed to the trial court. He smeared some substance on her thighs and wiped her and then gave her mandazis and sent her home. PW2, testified that when she returned home, she was informed by her son that the Appellant picked the complainant and gave her mandazis and she was shown the mandazis that she brought home. She questioned her and she informed her that the Appellant invited her for mandazis and failed to diverge more information. On the following day however, the complainant complained of pain on her leg and while at school, she was sent home as she complained of having a stomach ache. She examined her vagina and noticed that it was reddish and then the complainant revealed what the Appellant had done to her. She reported and she was taken to hospital and upon examination, PW4 confirmed that there was proof of penetration by an object other than an adult penis.
27. The trial court while convicting the Appellant found that the complainant was truthful as he observed her movement and posture while testifying. She was able to recall the happening of the material time and her evidence was with sufficient details. That he Observed her demeanour and she was able to answer in cross examination without fear. He also found corroboration in PW2 and medical evidence produced by PW4.
28. I also have no doubt that the case was proved through the complainant’s evidence which was corroborated by PW2 and PW4 who examined her and found that there was proof of penetration by an object since her labia majora were reddish and tender at the entrance of the vagina. Her hymen was irregular with raw edges, tender, broken with no bleeding. She testified that she examined the complainant and filled the P3 form.
29. The Appellant was also identified as the perpetrator. The complainant named him as the person who lured her to his house and sexually assaulted her and then gave her mandazis. She testified that she was familiar with him. Her aunt testified that he was a shamba boy and he was a neighbor and she identified him. Hence, there was positive identification.
30. Contrary to the allegation by the Appellant that the He alleged that the PRC form was filled by someone else, the evidence shows that the PRC form was also filled by PW4 who examined the complainant. Further, it is to be noted that experts do no record statements since, as correctly submitted by counsel for the respondent, their evidence is derived from their reports hence there was no material non-disclosure. Further, the ingredients that need to be proved in the case of sexual assault as seen earlier is penetration and identity of the perpetrator hence proof of age is not material and therefore, non supply of birth certificate is a non issue in this case.



31. The Appellant submitted that PW2's son, KK who informed her mother that he picked the complainant to go and give her mandazis was not called to testify and would have been a crucial witness. It is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with section 143 of the Evidence Act which provides that;

“In the absence of a provision of the law, no particular number of witnesses is required to prove a fact.”

32. In *Bukenya and Others V. Uganda* [1972] EA 349 it was held that;

“While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

33. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been in adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate.

34. The Appellant further claimed that the surrounding circumstances under section 33 of the Sexual Offences Act was not considered. The section provides:

“Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove –

- a) whether a sexual offence is likely to have been committed-
  - i) towards or in connection with the person concerned;
  - (ii) under coercive circumstances referred to in section 43; and
- b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.”

35. From a reading of section 124 of the Evidence Act, it is clear that a trial court can convict an accused person on the evidence of the victim alone if it believes the victim is truthful and the trial court records the reasons for that belief. In the instant case, the trial court convicted him after believing the testimony of the complainant and also found corroboration on medical evidence.

36. On the challenge of the trial court on the failure to record the reasons for believing the complainant in the proceedings pursuant to section 124 of the Evidence Act and also to record the demeanour of the complainant pursuant to section 199 of the Criminal Procedure Code, this point is not correctly taken. The contention that recording the reason and demeanour in the judgment was an afterthought since ten months had lapsed between the time the complainant testified and the time of writing the judgment hence the trial court could not remember her demeanour finds no support in law.

37. My view is that there is no way the trial magistrate would have forgotten the complainant's demeanour as he observed her while testifying. It is also to be noted that Section 124 of the Evidence Act does mandate the court to record the reasons for believing the complainant in the proceedings and judgment



is part of the proceedings. Section 199 of the Criminal Procedure Code also does not state that it is mandatory that the court must record the demeanour during the trial. The said section states;

“When a magistrate has recorded the evidence of a witness, he shall also record such remarks [if any] as he thinks material respecting the demeanour of the witness whilst under examination.”

38. The court in *KGy v Republic* [2020] KEHC 7813 [KLR] held that;

“Section 199 states that a magistrate shall in addition to recording evidence also record such remarks, if any, as he thinks material respecting the demeanour of a witness. It is clear from the wording of the provision that the recording of remarks respecting the demeanour of a witness is discretionary and not mandatory. As such it cannot be said that there was a miscarriage of justice or that the trial was a nullity because the learned Magistrate in the present case made no remarks respecting the demeanour of the witnesses.”

39. On alleged contradictions and inconsistencies, it is trite law as set out in numerous authorities that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case. (See *Erick Onyango Ondeng’ v Republic* [2014] eKLR, the Court of Appeal cited *Twehangane Alfred v Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6).

40. Further, it is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in *Njuki & Other Vs Republic* (2002) 1 KLR 771 held that:

“Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and inconsistencies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code”.

41. Also, the Court of Appeal in the case of *Richard Munene –v- R Cr. Appeal No. 74/2016* (2018) eKLR the court stated:-

“It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it.”

42. It therefore follows that the contradictions and inconsistencies must be so grave as to lead to a conclusion that the witness was not truthful and create doubt as to the guilt of the Appellant.

43. On the rejection of the defence, I note that in his unsworn defence, the Appellant testified that the complainant’s mother had made advances towards him since she wanted to have a relationship with him but he declined. That she even informed his wife of his promiscuous behavior and she demanded that he buy her clothes and the case was therefore brought up after turning down her love advances. As noted by the trial court, this issue was brought up for the very first time at the defence stage hence it was an afterthought as the same was not put across to the prosecution’s witnesses to be tested.



44. With respect to sentence, the Appellant submitted that it was harsh and excessive and that the court failed to consider the mitigating factors he offered and non- aggravating circumstances of the case. Further, mandatory minimum sentences have been frowned upon by our superior courts.
45. Section 5(2) of the [Sexual Offences Act](#) provides that;
- (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”
46. He was sentenced to 10 years as provided in law. While sentencing him, the trial court considered the mitigating factor to the effect that he was a first time offender. He did not offer any mitigation other than stating that he did not commit the offence. The trial court also considered the aggravating factor and the fact that he was not remorseful.
47. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (see *Ogolla S/o Owuor v R* {1954} EACA 270).
48. The Appellant did not demonstrate any of the above factors. He also submitted that minimum mandatory sentences have been frowned upon and he cited numerous cases to support this. It is however worthy of note that the Supreme court has now laid to rest the controversy on the legality of the mandatory minimum sentences provided in the [Sexual Offences Act](#) in its decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 others [Amicus Curiae] [Petition E018 of 2023] [2024] KESC 34 [KLR] [12 July 2024]* where the court stated;

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.....Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the [Sexual Offences Act](#) remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence”.

49. From the foregoing and for reasons stated, the appeal herein lacks merit and is dismissed in its entirety.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF DECEMBER 2025**

**A.K. NDUNG’U**

**JUDGE**

