Lekutai v Republic (Criminal Appeal E010 of 2025)
[2026] KEHC 715 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEHC 715 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

CRIMINAL APPEAL E010 OF 2025

AK NDUNG'U, J

JANUARY 29, 2026

BETWEEN

ABDALLA LEKUTAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in the SPM'S court at Maralal by Hon.T.A.Sitati)

JUDGMENT

1. The Appellant, Abdalla Lekutai, was charged with defilement contrary to Section 8(1)(3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 11th day of January, 2025 at Samburu East sub-county within Samburu County, intentionally and unlawfully caused his penis to penetrate the vagina of LL a child aged 13 years. He was tried, convicted and sentenced to twenty (20) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he lodged this appeal raising the following grounds;
    a. That, The learned trial magistrate erred in law and facts by failing to appreciate that the prosecution case was not proved beyond any reasonable doubt as prescribed by law.
    b. That, The learned trial magistrate erred in law and facts by relying on incredible evidence of single witness evidence not corroborate.
    c. That, The learned trial magistrate erred in law and in facts by failing to consider the appellant defense yet the same was not rebutted by the prosecution.
3. The appeal was canvassed by way of written submissions.

4. In his submissions, the Appellant correctly set out the issues for determination being age of the victim, proof of penetration and identify of the perpetrator.

5. The Appellant urges that the prosecution case was marred with contradictions and the trial magistrate erred for relying on the evidence of a single witness. He adds that penetration was solely proven by way of broken hymen and yet there are many other factors that can cause the breaking of a hymen.

6. For the prosecution, it was submitted that the prosecution availed direct and documentary evidence. The testimony of PWI was well corroborated by the testimony of PW2, PW3 & PW4. There was no inconsistencies or contradictions in the prosecution case. The ingredients of the offence were well proved in the trial.

7. Further that the trial court was right in relying on the testimony of PWI, which was credible and consistent. This direct evidence was well corroborated by PW2, PW3 and PW4.

8. Counsel cites S. 124 of the *Evidence Act* which provides that notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support there of implicating him:

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

9. On penetration, it is submitted that the medical evidence availed by the P3 form & PRC form (PEXH 1 & 2), truly indicates that the victim was defiled beyond reasonable doubt. The main ingredient for defilement, penetration was proved appropriately by the Prosecution.

10. Further, that the age of the minor was proved by the age assessment report on the victim produced as (Pexh 3) by PW4.

11. It is submitted that the appellant was properly identified by the victim as the perpetrator of the ill-fateful ordeal. She knew the appellant as the father to her friend (Nashami).

12. This being a first appeal, this court is obliged to reconsider and re-evaluate the entire evidence afresh, bearing in mind that it did not see or hear the witnesses testify. This guiding principle was laid down in *Okeno v Republic* [1972] EA 32.

13. The evidence on record is that PW1 went to the home of the Appellant in company of the Appellant's daughter sometime after 4pm. The Appellant came home riding his bicycle and sent the 2 to buy cabbages. Time passed by and when PW1 asked to go home, the Appellant prevailed upon her to spend over. She was asked to wash utensils.

14. The Appellant then ordered her to go to another house which Morans had been using. She declined and he pulled her to his main house and closed the door. He pushed her to his bed and smashed her head on the head board. She tried to scream but he muffled her mouth. He forcefully removed her blouse, trouser and pant. He applied Vaseline on her vagina and inserted his penis into her. He detained her and at about midnight he repeated the sexual intercourse.

15. With the help of the Appellant's daughter who opened for her in the morning after she had been locked in from outside, she escaped and reported to her aunt and matter was reported at Wamba police station and she was taken for medical examination.

16. PW2 saw PW1 bleeding when she returned home. PW1 reported that the Appellant had defiled her. PW3, a clinical officer observed that the victim's labia minora was lacerated. Hymen was broken. There were visible bruises on her face and in her mouth.

17. When placed on his defence, the Appellant stated that PW2 is his cousin who has had a long standing grudge with him and wished him in jail

18. The issues arising for determination are:1. Whether the age of the complainant was proved;2. Whether penetration was proved;3. Whether identification of the Appellant was proper;4. Whether section 124 of the *Evidence Act* was correctly applied;5. Whether the sentence was lawful.

19. The complainant's age was proved through the complainant's evidence, the observation of the court (a *voir dire* examination was conducted) and by way of an age assessment report. This evidence was not challenged.

20. The court is satisfied that the prosecution proved the element of age beyond reasonable doubt.

21. Regarding penetration, the complainant explained in specific details how the Appellant pulled her to his house, pushed her onto a bed in the process banging her against the head board of the bed, applied Vaseline on her vagina and inserted his penis into her and he repeated the act again in the night at around midnight. This account of events is corroborated in material details by the evidence of PW3, a medical officer, who examined the complainant and produced a P3 Form and treatment notes in which he observed injuries on the genitalia and on her head.

22. These findings were consistent with the complainant's account and corroborated the allegation of penetration, as defined under section 2 of the *Sexual Offences Act*.

23. The element of penetration was therefore proved.

24. Regarding the question whether the Appellant was identified as the perpetrator of the act, the complainant (PW1) testified that she knew the Appellant who was the father of her friend. She was at the home of the Appellant sometime after 4.00pm, was sent to buy cabbage in company of the Appellant's daughter, time passed by and when she sought to leave, the Appellant prevailed on her to spend over. After being told to wash utensils, the Appellant pulled her to his house where he forcefully removed her clothes, applied Vaseline on her vagina and inserted his penis into her.

25. The identification of the Appellant is one based on recognition. The Appellant was previously known to the complainant being the father of her friend. The subject encounter was at the Appellant's home. On the material day the complainant spent considerable time with the Appellant all the way from the time he arrived home on his bicycle and sent the complainant and Nashami (his own daughter) to buy cabbages to the time he pulled her to his house, during the incident and indeed overnight.

26. Even had the complainant not known the Appellant before, the opportunity and conditions of identification were 100% conducive and favourable for a positive identification free of error.

27. As it were, the Appellant was known to the complainant before. Recognition of a person previously known to a witness is more reliable than identification of a stranger, as held in *Anjononi & Others v Republic* [1980] KLR 59. Given the favourable conditions and prior familiarity, this court finds that the identification of the Appellant as the perpetrator of the heinous act was safe and free from error.

28. The Appellant argued that the trial court erred by relying on the evidence of a single witness. The record shows that the court was alive to and appreciated the law correctly on the treatment of evidence of a sexual offence victim in such circumstances. This court has stated before that, by its very nature, a sexual offence is not one that would ordinarily have eye witnesses. This for reason that it is done in secrecy, the victim always first isolated in a house or, at times, in the bush away from prying eyes. No wonder parliament in its wisdom enacted the clause in Section 124 of the *evidence Act* as an exception to the general rule on corroboration of evidence.

29. Section 124 of the *Evidence Act* allows a court to convict on the sole evidence of the victim in sexual offences, provided the court believes the victim and records the reasons for that belief.

30. The trial magistrate expressly stated that he found the complainant to be truthful, consistent and credible, and recorded reasons for believing her evidence.

31. This court finds that the trial court properly invoked and applied section 124 of the *Evidence Act*, and the conviction was not based on blind acceptance of the complainant's testimony.

32. The Appellant denied the offence and alleged that the complainant framed him due to a grudge against him held by one Patricia who wanted him in jail.

33. It is a settled principle that an accused person who alleges that criminal charges against him are motivated by a grudge, malice, or vendetta bears the burden of laying a factual basis for that allegation. Mere assertions from the dock, without supporting evidence, cannot displace an otherwise cogent prosecution case.

34. This is particularly crucial in a case like the one before court where serious injuries on the genetalia of the victim are shown to exist inviting the court to ponder whether the holder of the grudge went out of his/her way to inflict injuries akin to those in a sexual assault just to frame an accused person. More intriguing would be answers to the victim's acquiescence to such a scheme if at all. Hence the need, without shifting the burden of proof, for cogent evidence in support of allegations of a grudge.

35. The Court of Appeal in *Kiarie v Republic* [1984] KLR 739 held that an accused person's defence must be weighed against the prosecution evidence, and where the defence raises allegations such as fabrication, malice, or grudges, there must be some evidence to support such claims. A defence based on mere allegations, unsupported by evidence, does not raise a reasonable doubt.

36. Similarly, in *Muiruri v Republic* [1980] KLR 70, the court stated that where an accused alleges a frame-up or personal grudge, he must demonstrate circumstances showing motive, conduct, or prior hostility on the part of the complainant or investigators sufficient to suggest fabrication of charges.

37. Courts have further held that the prosecution is not required to disprove speculative claims of malice or grudges. In *Joseph Maina Mwangi v Republic* [2000] eKLR, the Court of Appeal emphasized that bare allegations of ill-will or grudges, without evidential backing, cannot be a basis for rejecting credible prosecution evidence.

38. The Appellant did not place before the court evidence demonstrating the existence and relevance of a grudge. In the absence of such proof, the court is entitled to treat the allegation as a mere afterthought and determine the case on the strength of the prosecution evidence.

39. Turning to sentence, the Appellant was sentenced to twenty (20) years' imprisonment.

40. The sentence provided in law for the offence is found in section 8(1)(3) of the *Sexual offences Act* which provides as follows;

> " A person who commits an offence of defilement with a child between the age of twelve and Fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years."

41. It readily emerges that the sentence meted out by the trial court was the sentence prescribed in law. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

42. Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

43. The Court of Appeal of East Africa in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

44. Where the sentence is manifestly excessive, an appellate court assumes the jurisdiction to interfere with the sentence of a trial court. (See *R v Shershowsky* (1912) CCA 28TLR 263).

45. Locally the law has been settled by the Court of Appeal in the case of *Shadrack Kipkoech Kogo v R*. Eldoret Criminal Appeal No.253 of 2003 where the court stated;

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R*. (1989 KLR 306)"

46. Further exposition of the applicable principles is found in *Bernard Kimani Gacheru v Republic* [2002] eKLR where the court of Appeal rendered itself thus;

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

47. The Supreme Court 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) while providing clarity on the legality on minimum sentences in the *Sexual Offences Act* and other laws arising from a misapprehension of the dicta in Muruatetu 1 and 2, confirmed that the minimum sentences imposed by the Act were not outlawed by the court's decision in Muruatetu case and are applicable.

48. The sentence imposed was thus legal and no grounds are laid that meet the threshold that is required for this court to interfere with the sentence.

49. The upshot is that the appeal herein lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY 2026

A.K. NDUNG'U

JUDGE