



**Mohamed v Republic (Criminal Appeal E007 of 2025)
[2026] KEHC 1019 (KLR) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 1019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E007 OF 2025
JN NJAGI, J
JANUARY 29, 2026**

BETWEEN

KOMBO MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon.D.
Wasike, Principal Magistrate, in Malindi Principal Magistrate's
Court Sexual Offence Case No. E068 of 2022 delivered on 10/8/2023)*

JUDGMENT

1. The Appellant herein was tried and convicted for the offence of sexual assault contrary to Section 5(1) (a) (i) (b) as read with Section 2 of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on 18th September 2022 at (name withheld) village in Malindi sub county within Kilifi county he intentionally and unlawfully caused his finger to penetrate the vagina of R.H.K. (herein referred to as the victim), a child aged 3 years.
2. The Appellant was sentenced to serve 8 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:
 1. The Honourable Trial Court erred in law in denying the Appellant his constitutional right to a fair hearing as enshrined in Article 50 (1), (2), (b), (c) ,(g) ,(h) , (j) & (k) and (3) of [The Constitution](#) of Kenya, 2010 by denying the Appellant the right to representation by an Advocate of his choice or at all and affording the Appellant adequate time to prepare and conduct his case.
 2. The Honourable Trial Court erred in law and fact in failing to appreciate that the charges the accused faced before court were not proved beyond reasonable doubt.



3. The Honourable Trial Court erred in law and fact in failing to appreciate that the evidence of PW4, the complainant, was not corroborated as required in law.
4. The Honourable Trial Court erred I law and fact in failing to take cognizance of the Appellant's evidence that the alleged offence was committed by one Hamza which evidence was also confirmed by PW1 and PW4.
5. The Honourable Trial Court did not explain why it wholly or majorly relied on the evidence of PW4, a minor, as prove of the alleged charges, whose evidence is not corroborated as to who the perpetrator of the alleged offence.
6. The Honourable Trial Court relied on extraneous evidence to ensure the Appellant's conviction to his detriment.
7. The Honourable Trial Court erred in law in completely failing to analyze and apply the principles already set out by superior courts in proving charge(s) of Sexual Assault Contrary to Sections 5(1) (a) (i) (b) as read with sub-section (2) and 11(1) of The Offences Act, No.3 of 2006.
8. The evidence tendered by the prosecution was far below the standard of proof of beyond reasonable doubt to form a basis for a conviction in the circumstances.
9. That the trial court erred in law and fact, and misapplied the law by literally shifting the burden of proof to the Appellant.
10. That the Learned Honourable Trial Magistrate erred in law in convicting the Appellant against the weight of evidence adduced.
11. The sentence of 8 years slapped on the Appellant is not only harsh and illegal but also unconstitutional and discriminative to the Appellant.

Case for the prosecution

3. The case for the prosecution is that the victim herein was at the material time aged 3 years. She was living with her mother PW2. The Appellant is a step-brother to the mother of the complainant. He was staying with the mother to the complainant at another village but he used to eat supper at the home of the victim's mother, PW2.
4. The evidence of the mother to the complainant was that on the 17th September 2022 she left home and went to Marereni. She left the victim under the care of Eisha PW3. She spent the night at Marereni and returned home on the following day at around 8pm. She found the Appellant in her house. The victim was asleep. At between 9-10 pm she was readying herself to sleep when she realized that the child was uncomfortable and was putting her hand on her private parts. She checked her vagina and realized that it had a cut and a bruise. She asked her sister who said that she was not aware. On the following morning she took the child to a private doctor who on checking her told her that the child had been defiled and advised her to take her to the general hospital. She took her there. Later the child told her that it is the Appellant who had inserted his finger into her vagina. She reported to the police.
5. Eisha PW2 testified that PW2 left her with their children and she went to Marereni. That she stayed with the children the entire day. In the evening she bathed the children. That on the following morning she was bathing the victim but she kept on placing her hand at her private parts to stop her from washing her down there. She did not wash her on the private parts. She went to her kiosk. She returned to the house in the evening and found the Appellant leaving the house. The complainant was in the



house. Thereafter on the same evening the complainant told her that the victim had been defiled and she had already taken her to hospital.

6. The victim herself PW4 testified that the Appellant put his finger into the place she uses to pass urine. He then told her not to tell her mother about it. Her mother then took her to hospital.
7. Moses Rimba, PW1, a clinical officer at Malindi sub county hospital testified that the victim herein was taken to the said hospital on 19/9/2022 when she was examined by a doctor and found with a cut wound on the upper labia majora and labia minora with redness and laceration. The hymen was found not to be intact. He PW1 filled her P3 form on 20/9/2022. He concluded that there was vaginal penetration.
8. The case was investigated by CPL Marian Hussein PW5 of Malindi police station. It was her evidence that the complainant was taken to the station by her mother on 20/9/2022. The mother reported that she had been defiled by her uncle, the Appellant, on 17/9/2022 and had been taken to hospital. She issued her with a P3 form and recorded statements of witnesses. She obtained the victim's birth certificate that showed that she was born on/4/2019. She later arrested the Appellant on 18/10/2022 and charged him with the offence. During the hearing of the case in court the clinical officer PW1 produced the victim's treatment notes, the P3 form and the birth certificate as exhibits, P.EXH.1- 3 respectively.

Defence case

9. When placed to his defence the Appellant stated in a sworn statement that he was living at his home but he used to eat food at the house of the complainant. That on the material day the victim's mother had gone to the shamba. That on that day he arrived home from work at 8pm. He found his nieces in the house. One of them told him that H had hurt the victim herein. He warned H not to hurt the victim and he left. He was later arrested and charged. He denied that he committed the offence.
10. The Appellant called 2 witnesses, DW2 and DW3, both of whom told the court that they were on the material day at work with the Appellant. That they worked from 8 am up to 8pm when they parted ways and each went to his home.

Submissions

11. The Appellant submitted through counsel that the ingredients of the offence of sexual assault as held in the case *David Odanga Wanyama v Republic (2012) eKLR* are proof of penetration and positive identification of the assailant. That the clinical officer who testified in the case PW1 stated that he did not personally attend to the victim. That though the person who attended to the victim noted that the victim had a broken hymen, the notes did not indicate how old the injuries were.
12. It was submitted that a broken hymen is not synonymous with penetration. The case of *PWK v Republic (2012) eKLR* was cited where the Court of Appeal held that it is erroneous to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is prove of defilement as medical evidence has proved that some girls are born without it. Therefore, that in this case there was no evidence to support the charge.
13. On the perpetrator of the offence, it was submitted that the mother to the complainant in her evidence stated that the Appellant told her that Hamza had hurt the victim. That she also stated that the victim told her that Hamza had inserted his finger in her. It was submitted that Hamza was the perpetrator and not the Appellant.



14. It was further submitted that the officer who issued the P3 form indicated in the P3 form that the report made to the police was that “she alleges to have been defiled by a person not known to her”. That the treatment notes dated 19/9/2022, P.EXH.1 indicate the officer who attended to her at the hospital to have remarked that, “child brought in by her mother with history of having been defiled by a person whom they are not sure of”. It was submitted that the Appellant was a person well known to the victim and her mother and therefore that if the Appellant was the perpetrator they would have mentioned him to the said officers.
15. It was submitted that when the victim first appeared in court on 17/11/2022 she did not mention of having been sexually assaulted by the Appellant only for her to be recalled on 13/4/2023 when she implicated him with the offence. The Appellant faulted the trial court for convicting the appellant of the offence by relying on the unsworn evidence of the victim without the court giving reasons for believing her evidence.
16. Counsel for the Appellant submitted that the allegations were based on suspicion but that suspicion cannot form the basis of a conviction.
17. On sentence it was submitted that the sentence of 8 years was harsh taking into consideration that the maximum sentence is 10 years.
18. It was further submitted that notice by the respondent for enhancement of the sentence was filed with the Respondent’s submission which was after the appellant had already filed their submissions. That even then, the notice not served on the counsel for the Appellant. That the law is that such notice ought to be served on the Appellant or in the alternative the court warns the appellant of the possibility of enhancement of the sentence during the appeal. In this respect the Appellant relied on the cases of *Sky v Republic*, (Criminal Appeal E045 of 2021) (2023) KEHC 20432 (KLR) (29 June 2023) (Judgment), *PGK v Republic* (Criminal Appeal 79 of 2018) (2024) KECA 1081 (2024) (Judgment), *MGK V Republic* (2020) eKLR and *EGK v Republic* (2018) eKLR. In the latter case the court held that it the court had no jurisdiction to enhance a sentence where there is no cross appeal or warning to the appellant. In the *PGK v Republic* case, the Court of Appeal held that:

The 1st appellate court proceeded to enhance the sentence of 20 years’ imprisonment to life imprisonment. It is notable that the respondent did not give a notice of enhancement or file a cross appeal. This Court in *Kesusa & another v Republic* (Criminal Appeal 235 of 2018) [2022] KECA 546 (KLR) (28 April 2022) (judgment) stated as follows:

“We think, with respect, that an appellant is entitled, as a matter of procedural and substantive due process or natural justice, if you like, to be given notice of the possibility of so grave a possibility as enhancement of a sentence, especially when it is as dire as converting a 14-year term to a death sentence. It is a matter of fairness and a recognition of the inherent dignity of the prisoner. It implicates fair trial rights more so where, as here, the appellants did not have the benefit of legal representation before the High Court. It cannot be right or fair, whichever way one looks at it, that so grave a consequence should be sprung upon an appellant by the court at judgment stage. It does seem to us to be an unfair tackle and a terrible ambush that cannot be countenanced. An appellant should be warned of the possibility of enhancement so that he makes an informed choice whether or not to take the risk by prosecuting the appeal. It matters not that the sentence is an illegal one – fairness demands notice and/or warning and this Court has said so in a consistent line of authorities.”



19. Counsel for the Appellant consequently submitted that this court has no jurisdiction in view of the above authorities to enhance the sentence. He urged the court to allow the appeal in its entirety.

Respondent's submissions

20. The Respondent made reliance of the definition of the offence of sexual assault stated by the Court of Appeal in the case of *John Irungu v Republic* (2016) eKLR that:

“..... 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 victims genital organs by any part of the body of the perpetrator of the offence, or of any other person or even objects manipulated for that purpose.”

21. It was submitted that the ingredients of the offence are proof of penetration and positive identification of the offender.
22. It was submitted that penetration was proved by the evidence of the victim PW4 that was corroborated by the medical evidence produced by the clinical officer PW1.
23. The Respondent submitted that the Appellant was positively identified by the victim as the person who committed the offence. That the victim knew him before. That the evidence of the victim was that of recognition which evidence is, as stated in the case of *Anjoni v Republic* (1980) KLR 59, more satisfactory and reassuring than that of identification of a stranger.
24. It was submitted that section 124 of the *Evidence Act* allows a court in sexual assault offences involving children to convict on the uncorroborated evidence of the child victim if the court is satisfied that the child is telling the truth. That the trial court in this case did state the reason why it disbelieved the evidence of the minor.
25. The Respondent submitted that the medical documents did not mention that the offence was committed by Hamza nor did the victim herself mention Hamza as the person who committed the offence.
26. The Respondent submitted that the Appellant was not denied any of his constitutional rights during the trial. The Respondent urged the court to dismiss the appeal.

Analysis and determination

27. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusions at the same time while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court. In *Okeno v Republic* [1972] EA 32, the Court of Appeal for East Africa had the following to say in this connection:

“ 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 whole 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; 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..."

28. The standard of proof in a criminal case is that of beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions (1947) 2 All ER, 372* stated as follows:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

29. The Appellant was facing a charge of sexual assault under section 5 of the *Sexual Offences Act* which provides as follows:

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 hygienic 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.

30. The trial court in its judgement correctly identified the ingredients of the offence of sexual assault as stated by the Court of Appeal in *Irungu v Republic (supra)* to be: proof of penetration and identity of the perpetrator.

31. There was no doubt from the evidence adduced before the trial court that the victim was penetrated into her vagina. The victim's mother saw injuries on the victim's genitalia which prompted her to take her to hospital. The injuries were corroborated by the evidence as contained in the treatment notes, P.Exh.1 and the evidence of the clinical officer PW1, to the effect that the victim had cuts and lacerations on both sides of the labia majoras and the hymen was broken. There was no reason to doubt this evidence. Penetration into the vagina of the victim was therefore proved. The question was whether the Appellant was the one who caused the penetration.

32. The trial court in its judgment stated that there was sufficient evidence that Appellant inserted his finger into the genitalia of the victim herein. That though the victim initially refused to tell her mother who had penetrated her, she later mentioned the Appellant when they were in Garissa to have been the one who did so.

33. I have carefully considered the evidence adduced at the trial court on penetration. The victim was aged 3 ½ years at the time she testified in court. She appeared in court on two occasions. On the first occasion on 17/11/2022, the trial court conducted a brief voir dire examination on her and formed the opinion



that she could not comprehend the meaning of an oath. The court accordingly allowed her to give unsworn evidence in which she stated as follows:

“Uncle Kombo provoked me when mum was away. He beat me on the hand...I told mum. I did not go with her to Garissa. Uncle Kombo hurt me with his hand. He hurt my hand. I was sleeping. He did not want me to go out to play with Sada. I still went out and played”.

34. At that stage the prosecutor requested the court for the minor to be stood down for her to undergo psychological counselling. When she next appeared in court on 16/2/2023 she testified that her uncle Kombo inserted his finger into the place she uses to pass urine. That he told her not to tell her mum about it.
35. It is clear from the above that when the victim appeared in court on the first occasion she did not mention anything to do with sexual assault on her by the appellant. The assault was mentioned on the second occasion when she appeared in court.
36. Section 124 of the *Evidence Act* allows a court in sexual offence cases to convict on the sole evidence of the child victim where the court is satisfied that the child is telling the truth. The section requires the court to give reasons as to why it believes the evidence of the child. The question is whether the evidence of the victim that the Appellant inserted his finger into her urinating hole (the vagina) was credible.
37. It is apparent that there was inconsistency between the evidence of the victim as given on the first occasion when she appeared in court and the second occasion. This was not, in my view, a minor inconsistency in the case but a substantial discrepancy that had to be properly explained. In *Richard Munene v Republic* [2018] eKLR, the Court of Appeal court as follows on such inconsistencies:

“It is a well settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to the case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial that an accused person will be entitled to benefit from it.”
38. In the case of *Ndungu Kimanyi v Republic* [1979] KLR 283, the same Court held as follows:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
39. The trial court in its judgment tried to explain the inconsistency on the evidence in that when the victim appeared in court on the first occasion she was agitated after seeing the appellant in court. However, there was no such record in the court file but the court was only relying on what was reported by the victim's mother in her evidence in court. That cannot have been the reason for the discrepancy.
40. It is to be noted that when the victim appeared in court on the second occasion she was not asked why she had not stated on the first occasion that the Appellant had inserted his finger into her vagina. Nor did she in her evidence on the second occasion give details of how the incident took place, such as the day it happened, the time and the place where she was when it happened, etc. It was not sufficient for her to only state that the Appellant inserted his finger into her vagina without offering further details such as to enable the court form a proper basis on her credibility. Without such evidence, there was no basis on the trial court believing her evidence. There was a possibility that the child was coached on her evidence in the guise of being given psychological counselling.



41. It was the evidence of the mother of the victim that the victim initially told her that it is Hamza who had inserted his finger into her vagina but that she was not convinced on that because Hamza is aged 4 years. That upon further inquiry the victim told her after 2 days or so that it is the Appellant who had done so. If then the victim never mentioned the Appellant on the first inquiry and only came to mention him later, there had to be an explanation on why the victim was hesitant to mention the Appellant.
42. The investigating officer PW5 testified that she was at the police station when the victim was brought to the station by her mother on 20/9/2022. That the report made to the police was that the victim had been defiled by her uncle. However, the P3 form that PW5 claims to have filled, P.Exh.2, indicates that the report made at the police station was that she alleged “to have been defiled by a person not physically known to her.” In addition, the treatment notes, P.Exh.1, prepared at T. dispensary where the victim was initially taken on 19/9/2022, indicate that the victim had been “defiled by a person whom they are not sure of yet”. If then by the time the victim was taken to the dispensary and to the police station the assailant had not been identified, did the complainant actually know who the assailant was.
43. The statement of the victim’s mother to the police indicated that the victim mentioned the Appellant on 25/9/2025 which was a week after the incident. Why would the victim have stayed for a week before mentioning the appellant?
44. The Appellant was staying in the same house with the Appellant and he was therefore a person well known to her. There is no reason for her to have stayed for a week before mentioning him. I find it surprising that a child of 3 years would have stayed that long before mentioning the assailant if she was sure who the assailant was. The failure to mention the Appellant in the earliest opportunity created doubt whether the victim was a credible witness.
45. It is apparent that the trial court failed to address critical aspect of the evidence that went to the credibility of the victim as a witness in the case. Consequently, I find that it was not safe to convict the Appellant on the basis of the evidence of the victim herein. The Appellant was entitled to the benefit of doubt.
46. The upshot is that I find the appeal to be merited and the same is allowed. The conviction is thereby quashed and the sentence set aside. I order that the Appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 29TH DAY OF JANUARY, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Absent: for Appellant

Ms. Ochola for Respondent

Court Assistant: Rahma

