Okondo v Republic (Criminal Appeal E115 of 2024)
[2026] KEHC 1031 (KLR) (3 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1031 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E115 OF 2024

NIO ADAGI, J

FEBRUARY 3, 2026

BETWEEN

ENOCK NDEGE OKONDO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and judgment in Criminal Case No. E034 of 2024 at Chief Magistrate 's Court at Machakos delivered on 1/12/2024 by Hon/ V. Ochanda, SRM)

JUDGMENT

1. The Appellant, Enock Ndege Okondo was on 1/7/2024 charged at Chief Magistrate's Court at Machakos with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The Appellant further faced an alternative Count of Committing an Indecent Act with a Child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The particulars of the offence were that on 26th June 2024 in Kathiani Sub-county within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of RNS (name withheld) a girl aged 14 years.

3. The Appellant pleaded not guilty to the main and the alternative charges and the matter was set down for hearing. The Prosecution adduced evidence through seven (7) witnesses.

4. The Appellant gave sworn defence evidence and did not call a witness.

5. Upon considering the evidence adduced in support of the charge, the trial court on the 16th December 2024 convicted and sentenced the Appellant on the main charge and was sentenced to serve 20 years in prison.

6. Being aggrieved by the trial court's conviction and sentence, the Appellant filed an Amended Petition of Appeal raising three (3) grounds of appeal as follows:-

i. That the learned trial magistrate erred in law and fact by permitting the 14 year old complainant to testify on oath without first conducting a voir dire examination to assess her cognitive competence.

ii. That the learned trial magistrate erred in law and fact by imposing the mandatory sentence of twenty (20) years imprisonment notwithstanding that the evidence on identification and penetration was doubtful, unreliable and incapable of sustaining a safe conviction.

iii. That the learned trial magistrate erred in law and fact by disregarding the Appellant's defence which was plausible and credible and by imposing a fettered mandatory sentence of twenty (20) years thereby undermining the exercise of judicial discretion contrary to Article 160 of *the Constitution*.

Analysis and Determination.

7. Having perused the entire record herein, the proceedings and the two rival submissions, the duty of the first appellate court was clearly spelt out in the case of OKENO V.REP 1972 E.A. 32. The Court of Appeal stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) 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 (Shantilal M Ruwala v 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 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, see Peters v Sunday Post [1958] EA 424."

8. The appeal proceeded by way of written submissions.

9. The Appellant faulted the trial the trial magistrate forpermitting the 14-year-old complainant to testify on oath without first conducting a voir dire examination to assess her cognitive competence; for by imposing the mandatory sentence of twenty (20) years imprisonment notwithstanding that the evidence on identification and penetration was doubtful, unreliable and incapable of sustaining a safe conviction and lastly for disregarding the Appellant's defence which was plausible and credible and by imposing a fettered mandatory sentence of twenty (20) years thereby undermining the exercise of judicial discretion contrary to Article 160 of *the Constitution*..

10. The State submitted that the lack of voir dire in this case did not vitiate the trial. The complainant-PW1 was able to narrate the evidence in a truthful manner and she was equally cross examined on the issues she laid before the court. She understood she was on oath and said the truth. That the Appellant's defence was an afterthought and was not strong enough to rebut the prosecution evidence as against the Appellant thus the trial court was right in rejecting the Appellant's defence. Lastly, the State submitted that Section 8(3) provides that:

> " 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 twenty years".

11. The State further submitted that the sentence was legal and proper as prescribed by law. Reliance was placed on Republic v Joshua Gichuki Mwangi SC Petition No. E018 of 2023.

12. I wish to first deal with an issue of voire dire examination which is an issue of law which is raised by the Appellant as a ground of appeal and which might determine the appeal at the onset.

13. In considering the matter of evidence by a child, the Court of Appeal in Johnson Muiruri v. R. (1983) KLR 445 held as follows:

> " Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which [case] his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."

14. The court record reveals that the complainant (PW1) was a child aged 14 years. The said witness was not subjected to voire dire examination to determine if she was possessed of sufficient intelligent to understand the importance of telling the truth as this aspect seems to have eluded the trial court.

15. Subjecting a witness of tender age to voire dire examination is founded under Section 125 (1) of the *Evidence Act*, which states: -

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

16. Section 19 (1) of the *Oaths and Statutory Declarations Act* provides the procedure of receiving evidence of a child in the following terms:

> " Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

17. In a recent decision of; Patrick Kathurima v Republic, [2015] eKLR, the Court of Appeal held:

> " We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

18. In addressing what age would be appropriate for a trial court to conduct a voire dire examination, this court has also considered the holding in the case of Maripett Loonkomok v Republic [2016] eKLR where the Court of Appeal reiterated that children under the age of fourteen (14) ought to be taken through a voire dire examination and held that:

> " The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. The court reiterated the holding in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 where it categorically stated that the definition in the *Children Act* is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify.
>
> The court additionally stated that:
>
> > "It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

19. From the foregoing decisions supported by the definition of a child of tender years to be 14 years, I have no good reason to depart from this well-trodden path, as I am persuaded that the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was a minor and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances I find the evidence by the Complainant was not properly received thus, the conviction of the Appellant becomes unsafe to sustain.

20. I have considered whether to make an order of retrial. In so doing, I have considered that Appellant was convicted on the ground that the trial court did not believe that the Appellant was not with the complainant that night and also not persuaded that the complainant picked out another man and was slapped to pick him. That PW7 saw them together that evening and even the chain of events corroborated the complainant's account as analysed in evidence in the judgement.

21. The trial court concluded that the Appellant's innocence was compatible with the facts and evidence.

22. A cursory perusal of the proceedings before the trial court regarding the evidence of PW7 show that on 26/6/2024, PW7 went to the house and when he came out, he did not see the girl but saw Enock going down the road. He went about his business and the next day they were summoned at the parade. The girl's parent was there and they said she had disappeared at night. He heard Enock had the girl.

23. From the above testimony it is not clear which girl PW7 was referring to. Was it the complainant herein or any other girl? PW7 denied seeing the girl enter Enock's house. The girl was missing when he came from the house. He heard Enock had the girl and to me this was hearsay and not admissible evidence.

24. I have also keenly analysed the evidence of the Doctor (PW4) in regard to proof of defilement of the complainant herein. The Doctor stated that the complainant was brought with allegations of having been defiled on 26/6/2024. Upon examination, there were no tares/stains on the clothes. Internally, there were three tares on the hymen at 12 O'clock, 5 O'clock and 7 O'clock (This court fails to understand what this means. No explanation is given in the trial court record). They conducted a urine test and high vaginal swab. Pregnancy test was negative. He filled the P3 Form and the PRC Form.

25. My observation of the Doctor's evidence is that having noted that there were three tares on the hymen, the Doctor did not endeavour to state the age of the tares. This would have assisted to determine whether they were fresh or old. The fact that the age of the tares could not be determined can only mean that they were not fresh and that explains why there was no vaginal bleeding with the high vaginal swab. The complainant was examined just a day after the date that the offence was allegedly committed and had the injuries been fresh, the Doctor could clearly have stated so. From the foregoing, I find that the tears on complainant's hymen were not caused on the date of the alleged offence.

26. It is my view that the trial court was wrong in finding that the history coupled by the tear on the hymen was a clear indication that there was penetration but failed to link the same to the Appellant.

27. From the foregoing analysis, I find that this appeal has merit. The Appellant's conviction is quashed, the sentence set aside and it is hereby ordered that the Appellant be forthwith set free unless he is otherwise lawfully held.

    It is to be noted that had this court disallowed the appeal, the sentence of 20 years imprisonment would have been affirmed as the same was legal and proper as prescribed by law. See Republic v Joshua Gichuki Mwangi SC Petition No. E018 of 2023.

    Orders accordingly.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 3RD FEBRUARY 2026.

NOEL I. ADAGI

JUDGE

Delivered Virtually On Teams At Machakos This 3Rd FebruarY 2026

In the presence of: