Kahindi v Republic (Criminal Appeal E129 of 2024)
[2026] KEHC 1478 (KLR) (16 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E129 OF 2024

JN NJAGI, J

FEBRUARY 16, 2026

BETWEEN

SIRYA THOYA KAHINDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.E.K. Usiu, Chief Magistrate, in Malindi CM`s Court Sexual Offence Case No.46 of 2020 delivered on 30/1/ 2024)

JUDGMENT

1. The Appellant herein was convicted for the offence of sexual assault Contrary to Section 5 Subsection (1)(a) as read with Section 5(2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on the 3rd July 2020 at (name withheld) in Malindi sub county within Kilifi County he unlawfully inserted his finger into the vagina of A.S.K. (herein referred to as the victim), a child aged 3 years.

2. The appellant was sentenced to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:

    1. That the learned trial magistrate erred in law and facts by failing to find that the evidence of PW1 was doubtful.

    2. That the learned trial magistrate erred in law and facts by failing to find that the prosecution failed to prove the ingredient of penetration.

    3. That the learned trial magistrate erred in law and facts by failing to consider the strong defence evidence.

3. The case for the prosecution was that the victim who was PW1 in the case was at the material time aged 3 years. She gave unsworn evidence in court and stated that she knew the Appellant as Babu. That the appellant inserted his finger into her vagina. She reported the incident to her mother who gave her medicine.

4. The next witness was a doctor at Malindi sub county hospital, PW2, whose evidence was that the victim was seen at Malindi sub county hospital on 2/7/2020 and upon examination she was found with injuries and tenderness on the vulva and a broken hymen. She was sent to the laboratory but the results were negative. PW2 completed her P3 form on 3/7/2020.The conclusion was that there was penetration on the victim.

5. The case was investigated by PC Marian Hussein PW3 of Malindi police station. It was her testimony that the victim and her mother went to the police station on 3/7/2020 and reported that the child had been assaulted by a person who had inserted his finger into her vagina. She had been treated at hospital. The officer issued the girl with a P3 form and recorded her statement. The child said in her statement that a person called Babu inserted his finger into her vagina. The person, the Appellant, was arrested and charged.

6. The victim's mother did not testify in the case.

7 . During the hearing of the case in court, the doctor, PW3, produced the complainant`s P3 form, treatment notes, laboratory request form and report and birth notification card as exhibits, P.Exh. 1, 2, 3(a) and (b) and 4 respectively.

8. When placed to his defence, the Appellant opted to remain silent and called no evidence.

Submissions

9. The appeal was canvassed by way of written submissions. The Appellant submitted that the charge against him was not proved beyond reasonable doubt. He submitted that there was no corroborative evidence in the case and neither was there evidence that pointed to him as the person who inserted his finger into the vagina of the victim. More so that the victim`s mother did not testify in the case.

10. It was submitted that the investigating officer told the trial court that she was informed by the village elder that there was bad blood between the family of the Appellant and the family of the victim. That the prosecution did not call the village elder in the case and the only reason could only be that had he been called his evidence would have been adverse to the prosecution evidence.

11. The Appellant submitted that the evidence adduced by the prosecution was weak and unsafe to convict on.

11. The Respondent on the other hand submitted that the evidence adduced by the prosecution was consistent and corroborated. That the evidence of the victim that the Appellant inserted his finger into her vagina was corroborated by the evidence of the doctor who confirmed that the minor had injuries in her vagina and her hymen was broken. That the Appellant was a person well known to the minor and she identified him as he perpetrator.

12. It was submitted that the ground of appeal that the trial court did not consider the appellant`s alibi has no basis as the appellant did not offer any defence and exercised his right to remain silent. However, that the trial court did not consider that the Appellant was in custody for over 3 years while awaiting trial and the court ought to have put this into consideration when sentencing the appellant as required by section 333(2) of the Criminal Procedure Code. That the court may consider the time spent in custody. Save for that, the Respondent urged the court to uphold the conviction.

Analysis and determination

13. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of Kiilu & another v Republic [2005]1 KLR 174, 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. The offence of sexual assault is created by Section 5 of the *Sexual Offences Act* which provides that:

> " (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."

15. The Court of Appeal in the case of John Irungu V Republic, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows:

> " .... 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."

16. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.

17. The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.

18. Penetration may be proved by oral evidence of the victim or by circumstantial evidence that may be corroborated by medical evidence. The victim in this case having been of the age of 3 years at the time

of the commission of the offence and having given unsworn evidence, her evidence has to be considered in the context of section 124 of the *Evidence Act* which provides as follows:

> Not withstanding the Provisions of Section 19 of the *Oaths and Statutory Declarations Act* which the evidence of a child of tender years 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 thereof implicating him.
>
> Provided that in criminal cases involving a sexual 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.

19. The victim herein was the sole witness to the evidence that the Appellant inserted his finger into her vagina. The question was whether she was a truthfull witness.

20. The victim gave brief evidence in court and stated as follows:

> " My name is Aisha Samuel. My mother is called Salome. My father is called Samuel Karisa. I got to school academy. My teacher is called Babu put fingers inside (child points at her vagina). I told my mother. She put medicine. This is Babu (accused identified by pointing. That's all.
>
> Cross-examination by accused
>
> I just call you Babu. My mother knows you as Babu. That's all."

21. The trial court in convicting the Appellant of the offence stated that the Appellant was well known to the complainant as they came from the same locality and she had interacted with him previously and knew him as Babu. That she identified the Appellant as the perpetrator. That her evidence that the appellant penetrated her with his finger was corroborated by the medical evidence as captured in the treatment notes and the P3 form.

22. For a conviction to be sustained under section 124 of the *evidence Act*, the court must record reasons as to why it is convinced that the child is telling the truth.

23. There was no doubt that the Appellant was well known to the complainant as they were staying in the same locality. She knew him as Babu. She said that her mother used to call the Appellant Babu. The Appellant was properly known to the victim. The question was whether she was telling the truth that he sexually assaulted her.

24. It is clear from the court record that the victim gave scanty details of the incident. There was no evidence as to the day, the time and place where the offence was committed. There were no details as to what the appellant did to her before inserting his finger into her vagina or what he did after doing so. It is such details that would have led the court into forming a candid demeanor of the witness. This court cannot tell from the scanty evidence of the victim as to what led the trial court into believing that she was telling the truth.

25. The trial court found the evidence of the victim was corroborated by the medical evidence. I have keenly examined the medical evidence adduced before the trial court and find it wanting. The doctor who

produced the medical documents in court PW2 did not say that he examined the victim. He instead stated as follows:

> "she was treated at the hospital on 2/7/2020....at hospital she was interrogated....she was sent for lab examination...she was put on treatment....she was placed on counselling...I completed the P3 form and signed it. The conclusion was that there was vaginal penetration on 3 ½ year old girl."

26. It is clear from the above that the doctor PW2 did not attend to the victim. He only filled the P3 form on 3/7/2020 while making reliance on documents made on the preceding day by a person he did not identify. He never stated that he re-examined the victim and confirmed the correctness of the examination when he completed the P3 form on 3/7/2020. Even the conclusion that there was penetration does not appear to be his own conclusion but that of the person who examined the victim. He did not identify the person who made that conclusion.

27. The procedure of producing documents in court that were made by another expert is provided for under section 33 of the *Evidence Act*. The prosecution has to lay basis why the maker of the documents cannot be availed to produce the documents. The person wishing to produce the documents has to show that he knows the maker of the documents and is acquainted with his/her handwriting and signature. In this case no such basis was laid out. PW2 never said he knew the person who made the documents. It is then clear that the documents were un procedurally admitted as evidence in the case and were thus of no probative value. The finding of the trial court that there was medical evidence supporting sexual assault was made out of inadmissible evidence. Consequently, I find no medical evidence in support of penetration.

28. The investigating officer in his evidence stated thats he was informed by a village elder that there was bad blood between the families of the victim and the Appellant. The trial court dismissed the allegation because the appellant did not raise it in his defence. Whereas that could be the case, it is surprising that the mother to the complainant did not testify in this case, despite the fact that she is the one who made the report to the police. This is unusual. A mother failing to turn up in court in a case where her own daughter has been sexually assaulted? This needed an explanation. Was she guilty of something?

29. In view of the foregoing, I am not satisfied that the evidence adduced against the Appellant was sufficient to prove the charge of sexual assault. It was not safe to convict on the evidence of the minor herein. The Appellant was entitled to the benefit of doubt. Consequently, the conviction is quashed and the sentence set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 16TH FEBRUARY 2026

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch HB

Miss Ochola for Respondent

Appellant – present virtually at G.K. Prison Malindi

Court Assistant – Rahma