PMM v Republic (Criminal Appeal E021 of 2023)
[2026] KEHC 1999 (KLR) (17 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1999 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E021 OF 2023

CJ KENDAGOR, J

FEBRUARY 17, 2026

BETWEEN

PMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the Senior Principal Magistrates Court at Makindu dated 23rd February 2023 in CR Case No. 102 of 2019)

JUDGMENT

1. The Appellant was charged and convicted before the Magistrate's Court at Makindu with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the charge are that on diverse dates between January, 2019 to 1st October, 2019 at [particulars withheld], Makueni County, the appellant intentionally caused his penis to penetrate the vagina of VM, a child aged 9 years.

2. The particulars of the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* are that on diverse dates between January, 2019 to 1st October, 2019 at [particulars withheld], Makueni County, the Appellant intentionally and unlawfully touched the vagina of VM, a child aged 9 years with his penis.

3. The Appellant was, after trial, found guilty on the main charge of incest and was sentenced to fifty (50) years' imprisonment.

4. Being dissatisfied with that finding, he appealed against the whole Judgment of the trial Court on the following grounds:

    a. He pleaded not guilty to the charges during trial;

b. That the prosecution case is replete with monumental inconsistencies and contradictions which would have attracted acquittal verdict;

c. That the trial court erred both in law and fact by failing to conduct holistic scrutiny of the whole evidence on record to base its conviction and sentence;

d. That the learned magistrate erred in law and fact by making a finding that the prosecution had proved its case beyond reasonable doubt;

e. That the learned magistrate erred in law and fact by placing heavy reliance on the evidence of prosecution witnesses which was contradictory with inconsistencies and therefore not safe to rely on; and;

f. That the learned trial magistrate gravely erred in points of law and facts when he harshly convicted the appellant in this case while relying on the evidence as adduced by PW1 on identification without him considering that the same was just a mistaken identity as the circumstances prevailed at the locus-in-quo was not positive;

g. That the learned trial magistrate erred in law and in fact when he convicted the appellant in this case, when he relied on the adduced evidence by all of the testifying prosecution witnesses without him considering that the evidence was just full of contradictions and fell far from the truth of the case.

5. The appeal was canvassed by way of submissions. The Appellant submitted that the conviction was unsafe and ought to be quashed. He argued that the learned trial magistrate failed to properly evaluate and analyse the evidence on record and instead merely set out the witnesses' testimony before reaching a conclusory finding of guilt. It was submitted that the judgment did not demonstrate how the court resolved the material inconsistencies in the prosecution's case or how it weighed the defence against the prosecution's evidence.

6. The Appellant further submitted that the prosecution's case was riddled with material contradictions and inconsistencies, which went to the root of the charge. It was argued that whereas the charge sheet alleged that the offence was committed on diverse dates between January, 2019 and 1st October, 2019, the Complainant testified that the act occurred once, while other prosecution witnesses suggested that the Complainant had been defiled several times. The appellant contended that the trial Court never reconciled this inconsistency and that the charge was therefore not proved as framed.

7. On identification, the Appellant submitted that the learned trial magistrate erred in law and in fact by relying on unsafe identification evidence. He argued that the alleged offence occurred at night, when the Complainant was asleep, and that the circumstances were not conducive to positive identification. It was submitted that the Complainant's account regarding the conditions under which she allegedly identified the appellant was inconsistent and that the trial Court failed to warn itself of the dangers of night identification.

8. In support of this submission, the appellant relied on the decision in Wamunga v Republic (1989) KLR 426, where the Court of Appeal held that evidence of identification must be examined with great care and that a conviction should not be based on such evidence unless the Court is satisfied that the circumstances were favourable and free from the possibility of error. He also relied on Charles Amboko Anemba & another v Republic [2015] eKLR.

9. The Appellant further submitted that the trial Court improperly relied on alleged confession evidence attributed to the appellant by a local administrator, contrary to the law governing confessions. It was

argued that such evidence was inadmissible and should not have been considered in determining the Appellant's guilt.

10. It was also submitted that the Appellant's defence was dismissed summarily as a "sham" without any reasoned evaluation. The Appellant argued that even an unsworn defence must be considered and weighed against the prosecution case, and that the failure to do so amounted to an error of law.

11. On sentence, the Appellant submitted that the sentence imposed was harsh and excessive in the circumstances. He argued that the trial Court failed to consider mitigating factors and urged the Court to interfere with the sentence.

12. The Respondent opposed the appeal and submitted that the prosecution proved its case beyond reasonable doubt. t was argued that penetration was proved through the Complainant's testimony, which was corroborated by medical evidence. The Respondent submitted that the Complainant was a truthful witness and that the trial Court was entitled to believe her evidence.

13. The Respondent further submitted that corroboration was not required in sexual offence cases, provided the court believed the Complainant and recorded the reasons for such belief. In support of this proposition, the Respondent relied on Joseph Mwangi v Republic [2015] eKLR, where the Court held that under the proviso to Section 124 of the *Evidence Act*, a conviction may be based on the sole evidence of the complainant if the court is satisfied that the complainant is telling the truth.

14. On identification, the respondent submitted that this was a case of recognition rather than identification of a stranger, as the Appellant was well known to the Complainant. It was argued that the Complainant recognised the Appellant under moonlight and that her evidence on recognition was credible. TheRrespondent contended that recognition is more reliable than identification of a stranger and that the trial Court properly relied on the Complainant's testimony.

15. The Respondent further submitted that any inconsistencies in the prosecution case were minor and did not go to the root of the charge. It was argued that the Appellant had selectively picked portions of the evidence and considered them in isolation. In this regard, reliance was placed on Ali Mohamed Ibrahim v Republic [2016] eKLR, where the Court held that minor discrepancies which do not affect the substance of the prosecution case should be disregarded.

16. On sentence, the Respondent submitted that the complainant was aged nine years at the time of the offence and that the sentence imposed was lawful and within the discretion of the trial Court. TheRrespondent relied on Jacob Ntoiti v Republic [2021] eKLR and SKM v Republic [2021] eKLR for the proposition that sentencing is a matter of judicial discretion and that an appellate Court should not interfere with a sentence unless it is shown to be illegal or manifestly excessive.

17. The Respondent urged the Court to dismiss the appeal in its entirety.

Analysis & Determination:

18. This being a first appeal, this Court is under a duty to re-evaluate and reconsider the evidence adduced before the trial court and to arrive at its own independent conclusions, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify.

19. The duty of a first appellate Court was succinctly stated in Okeno v Republic (1972) EA 32, where the Court of Appeal held that:

> " 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 the appellate court's own decision on the

evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions, but it must always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

20. The accused was charged with defilement contrary to Section 8(3) of the *Sexual Offences Act*. Section 8(1) of the Act defines defilement as follows:

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

21. The ingredients for the offence were set out by the Court of Appeal in Charles Wamukoya Karani v Republic [2010] eKLR as follows:

> " The ingredients of the offence of defilement are three:
>
> a. the age of the complainant;
>
> b. proof of penetration; and
>
> c. positive identification of the assailant.
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> 1. On the age of the Complainant, the prosecution produced a birth certificate which indicated that the Complainant was born on 3rd April, 2010. There was no dispute that at the material time the Complainant was nine years old. The first ingredient was therefore proved.
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> 2. On the issue of penetration, the Complainant testified that the assailant removed her undergarment and inserted his penis into her vagina. She stated that she felt pain during the act. The Complainant descried the act as:
>
> > " put his thing for urinating into my thing for urinating"

24. The Complainant's evidence on penetration was supported by medical evidence. PW6, a medical officer, testified on behalf of the doctor who examined the Complainant and produced a P3 form dated 2nd October, 2019. The witness testified that the P3 form had been filled after the Complainant was examined at Kambu Sub-County Hospital.

25. Subsequently, PW7, the medical officer who personally examined the Complainant, testified that upon examination, the Complainant's labia majora were swollen and lacerated, the hymen was perforated, and there was a foul-smelling discharge from the vagina. She testified that these findings were consistent with recent sexual penetration. PW7 confirmed that she completed and signed the P3 form on 2nd October, 2019, a day after the alleged incident.

26. In addition to the P3 form, the prosecution produced treatment notes and a Post-Rape Care (PRC) form, both dated 2nd October, 2019, which similarly recorded injuries to the Complainant's genitalia and documented treatment administered following sexual assault.

27. The medical witnesses testified that the injuries observed were indicative of penetration. The medical evidence was not materially challenged in cross-examination.

28. Upon re-evaluating the Complainant's testimony together with the medical evidence, and noting the proximity in time between the alleged incident and the medical examination, this Court is satisfied that the prosecution proved the element of penetration.

29. The third ingredient for the offence is proof that it was the Appellant who committed the act complained of. The prosecution case on this aspect rested primarily on the evidence of the Complainant.

30. The Complainant testified that the incident occurred at night while she was asleep. She stated that the Appellant entered the house, committed the act, and that she identified him as he exited the house. She testified that it was dark but that there was moonlight which enabled her to see him as he walked out.

31. The Complainant further testified that her younger brother was asleep and did not wake up when she screamed, that the door to the house was damaged and not lockable, and that her grandmother was away from the homestead on that night. It was therefore common ground that the alleged identification occurred at night and in circumstances of darkness.

32. The law on identification in difficult conditions is settled. In Wamunga v Republic (1989) KLR 426, the Court of Appeal held that:

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

33. In Nzaro v Republic (1991) KAR 212, the Court cautioned as follows:

> " Evidence of identification at night must be absolutely watertight to justify conviction."

34. The classic guidance on how a trial court ought to approach identification evidence in general was set out in R v Turnbull & Others [1976] 3 All ER 549, where the court held:

> " The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

35. In Charles Amboko Anemba & another v Republic [2015] eKLR, the Court of Appeal reiterated the Turnbull caution and stated:

> " It is now trite law that where the only evidence against an accused person is that of identification or recognition, the trial court must examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

36. When the evidence in the present case is tested against the principles set out in Nzaro, Turnbull, and Anemba above, it becomes apparent that the trial Court did not subject the identification evidence

to the scrutiny required by law. Although the Complainant stated that she identified the assailant by moonlight as he exited the house, the learned trial magistrate did not inquire into the quality, intensity, or sufficiency of that lighting, nor did the Court make any finding as to whether the alleged moonlight was adequate to enable positive identification.

37. Further, the judgment does not disclose any consideration of the duration of the observation. The Complainant's evidence was that she identified the assailant as he walked out of the house. The trial Court did not analyze how long the assailant was within the Complainant's view, whether the observation was momentary or prolonged, or whether the Complainant had sufficient time to make a reliable visual impression.

38. Equally, the learned trial magistrate failed to take into account that the Complainant had been asleep immediately prior to the alleged identification.

39. There is no indication in the witness' testimony that the prevailing circumstances were free from the possibility of error. In addition, the evidence on identification was not supported by any prior description of the assailant given to the police at the earliest opportunity. No description was recorded, and no identification parade was conducted. These factors, which are relevant safeguards where identification is in issue, were not addressed by the trial Court.

40. In the absence of such analysis, the finding that the Complainant positively identified the Appellant was unsupported.

41. In addition to the unsafe identification evidence, the prosecution case was marked by material inconsistencies which were not addressed or reconciled by the trial court. The charge stated that the offence was committed on diverse dates between January 2019 and 1st October 2019.

42. However, the Complainant testified that the act occurred once. In contrast, the investigating officer testified that the Complainant informed her that she had been defiled severally, while PW2, a teacher at the Complainant's school, testified that the Complainant informed her that it was her first time engaging in sexual intercourse. These accounts were materially inconsistent with each other and with the particulars of the charge.

43. Further inconsistencies arose from the evidence regarding the circumstances under which the offence allegedly occurred. The Complainant's evidence on sleeping arrangements varied, including whether she slept alone or with her brother, and whether her brother was in the same house or a different house. There was also evidence that the door to the house was damaged, which directly affected the reliability of the Complainant's account and the possibility of access by other persons. Suspicion, however grave, cannot form a basis for conviction.

44. I find that reasonable doubt has been cast on the prosecution's case. The evidence does not irresistibly point to the guilt of the Appellant.

Disposition:

45. Accordingly, the appeal is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

46. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 17TH DAY OF FEBRUARY, 2026.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms Mutua, ODPP

Appellant present