ASK alias B v Republic (Criminal Appeal E033 of 2025) [2026] KEHC 3186 (KLR) (6 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3186 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E033 OF 2025

JN NJAGI, J

MARCH 6, 2026

BETWEEN

ASK ALIAS B .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. G. Mutemi, Resident Magistrate, in Malindi Magistrate's Court Sexual Offence Case No. E36 of 2024 delivered on 3/4/2025)

JUDGMENT

1. The Appellant herein was convicted in count 1 for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of May 2022 and 30th March 2023 at (name withheld) in Malindi sub county within Kilifi county he intentionally and unlawfully caused his penis to penetrate into the vagina of PPK (herein referred to as the complainant/victim), a girl aged 11 years who is to his knowledge his daughter.

2. He was also convicted in count 2 for the offence of sexual assault contrary to section 5 sub section (1) (a) (i) (b) as read with subsection (2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on diverse dates between the month of May 2023 and 30th March 2023 at (name withheld) in Malindi sub county within Kilifi county he willfully and unlawfully inserted his fingers into the vagina of PPK, a girl aged 11 years who is to his knowledge his daughter.

3. The Appellant was sentenced to serve life imprisonment in respect to count 1and 20 years imprisonment in respect to Count 2. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal as per his undated amended grounds of appeal are that:

1. The learned trial magistrate erred in law and facts by upholding the conviction failing to consider that the charge sheet as laid before the court was incurably defective contrary to section 134 and 137 of the CPC.
2. The learned trial magistrate erred in law and facts by upholding the conviction while failing to consider that voire dire examination was not properly conducted to the minor (PW1) contrary to Section 19(1) of the *Oaths and Statutory Declarations Act*, hence the resultant trial was a nullity.
3. The learned trial magistrate erred in law and facts by upholding the conviction while failing to consider that the Appellant was not issued with an interpreter and that the language used by the complainant is not clearly indicated in the coram.
4. The learned trial magistrate erred in law and facts by upholding the conviction while failing to consider that identification/recognition at the scene of crime was not proved according to the law.
5. The learned trial magistrate erred in law and facts by upholding the conviction while failing to consider that the defence of the appellant was not considered.
6. The learned trial magistrate erred in law and facts by upholding the conviction while failing to consider that the Sentencing Policy Guidelines while meting out the sentence.

Case for prosecution

4. The case for the prosecution was that the complainant was at the material time aged 11 years and was living with her parents - her father, the Appellant and her mother PW2.

5. It was the evidence of the complainant (PW1) that she was on the 5/5/2023 sleeping on her bed at night. Her mother was away in Mombasa. That the Appellant went to her bed and carried her to his bed. He removed her clothes and proceeded to insert his penis into her vagina. He threatened her with a knife. That from that date he made it a habit of doing that to her every day until when her mother returned from Mombasa in August 2024.

6. It was further evidence of the complainant that she was on the 26/3/2024 sleeping when her father went to her bed and inserted his finger into her vagina. That her mother saw him doing so. He took a torch and checked whether her mother was asleep but she pretended to be asleep. Her father returned to his bed. In the morning her mother asked her about the incident. She disclosed to her that the Appellant had been defiling her and that he had threatened to kill her if she disclosed it to anybody. They reported to the police at Malindi police station. She was examined at Malindi General Hospital.

7. The mother to the complainant PW2 testified that on 30/3/2024 she was in bed when she saw the Appellant go to the complainant`s bed and put his hand into her vagina. The Appellant then switched on his phone torch and checked whether she, PW2, was asleep. In the morning she asked the complainant about the incident. She told her that the Appellant had been doing it to her for almost a year. She said that he had threated her not to tell anybody. She took her daughter to her parents. They reported to the police. The appellant was arrested.

8. A doctor at Malindi sub county hospital PW4 testified that the complainant`s P3 form was completed by Dr. Ibrahim on 4/4/2024 who found her with injuries on the labia majora and a broken hymen and had a whitish discharge. The doctor concluded that the minor had ben defiled. During the hearing of the case in court he, PW4, produced the lab results, the treatment notes, the P3 form and the Gender Based Violence as exhibits, P.Exh.2-5 respectively.

9. The case was investigated by Cpl Marian Hussein PW3 of Malindi Police station. She recorded statements of witnesses. She obtained the birth certificate of the complainant that showed that she was born on 14/5/2012. She arrested the Appellant and charged him with the offences. During the hearing she produced the birth certificate as exhibit, P.Exh.1.

Defence case

10. In his defence the appellant stated in a sworn statement that he is a matatu driver. That the complainant is his daughter. That in October 2022 he left Malindi and went to Taveta. He stayed there upto March 2023 when he returned to Malindi. A few days later he caught his wife cheating and they fought. He left. After a month or so she made a report to the police. He went there and he was told that he had defiled his daughter. He was charged. He denied the charges.

11. The appeal was canvassed by way of written submissions.

Appellant`s submissions

12. The appellant submitted that the language used in the proceedings was not clearly stated.

13. It was submitted that the trial court allowed the complainant to give sworn evidence in court without conducting a proper voir dire examination.

14. It was submitted that the charge sheet was defective in that he was charged with defiling the complainant on diverse dates between the months of May 2023 and 30th March 2024. That the charges were too general in terms of dates and time that the want of specifics prejudiced him. That it is a principle in criminal law that the charge sheet must always be clear so that the accused understands what h is facing.

15. It was submitted that the appellant was accused of sexually assaulting the complainant at night. That there was no evidence on identification that he is the one who was seen doing so.

16. The appellant submitted that his defence of alibi was not considered.

17. It was submitted that the trial courts have discretion to impose lesser sentences than the mandatory sentences stipulated in the *Sexual Offences Act*.

Respondent`s submissions

18. The Respondent on the other hand submitted that the charges were proved beyond reasonable doubt. That the Appellant in his defence admitted that he was the father to the complainant. That the birth certificate produced in the case proved the age of the complainant which evidence was not challenged. That there was light in the room on the day the complainant said that the Appellant defiled her. That there is no evidence that the complainant fabricated the story. That she had no reason of doing so. That her evidence was consistent and was corroborated by medical evidence wherein she was found with broken hymen and injuries in her genitalia. That the trial court found that the complainant was telling the truth. That the Appellant`s defence did not controvert the prosecution evidence and was a mere denial. .

Analysis and determination

19. The Appellant alleged that the language the proceedings were conducted in was not clearly stated. I have perused the proceedings of the trial court. The court record indicates that there was a court clerk present in all the sittings of the court. The language of the court in the coram section in the sittings

was indicated as English/Kiswahili. The appellant cross-examined all the witnesses who testified in the case. There is no way he would have cross-examined the witnesses if he did not follow the proceedings of the court. I therefore do not find any substance in this ground of appeal.

20. The Appellant alleged that the charge sheet was defective in that he was charged with defiling the complainant on diverse dates between the months of May 2023 and 30th March 2024. That the charges were too general in terms of dates and time that the want of specifics prejudiced him. That it is a principle in criminal law that the charge sheet must always be clear so that the accused understands what he is facing.

21. I have considered the argument. Section 134 of the Criminal Procedure Code which deals with drafting of charges provides for what the charge sheet should comprise of as follows:-

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

22. A defective charge was considered in the case SIGILANI -VS- REPUBLIC (2004) 2 KLR, 480, where it was held that:-

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

23. In the present case the appellant was charged with two offences that are known in law. The offences alleged to have been committed were disclosed in the charge. The fact that the particulars of the charge stated that the offences were committed on diverse dates of which the period was stated did not make the charges defective. It was clear from the evidence that the complainant could not remember the specific dates when the offences were committed because the offences were reported many months later after they were committed. In such circumstances it was proper to describe the dates the offences were committed as "diverse dates". The appellant was not prejudiced by the way the charge sheet was drawn.

24. On voir dire examination, the trial court conducted the same as follows:

> Voir dire undertaken. The minor understands the concept of telling the truth and shall give sworn evidence.

25. The law requires voir dire examination be conducted on children of tender age before their evidence is taken in court. A child of tender age was defined in the case of Kibageny Arap Kolil v Republic [1959] EA 92 to mean a child under the age of fourteen years.

26. The purpose of voir dire was explained by the Court of Appeal in Johnson Muiruri vs Republic [1983] KLR 445 as follows:

    1. "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 even his sworn 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.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

27. In Maripett Loonkomok v Republic [2015] eKLR, the Court of Appeal had this to say in respect of voir dire examination:

> " Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...
>
> It follows from a long line of decisions that voire 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. But it is equally true, as this court recently found that;
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>> "In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction".

28. The complainant in this appeal was of the age of 11 years. The court record only indicated that voir dire was conducted but the record does not reflect the questions put to the minor or how the court arrived at the conclusion that she understood the concept of telling the truth. No questions were put to her to test whether she understood the meaning and nature of oath. I am of the view that voir dire was not properly conducted in this case. The law is that where voir dire is not properly conducted the court can convict if there is some other independent evidence to support the charge.

29. The evidence of the complainant was that the Appellant was penetrating her vagina with his penis between the months of May and August 2023 when her mother PW2 was staying in Mombasa. However, nowhere in her evidence did the complainant`s mother PW2 state that the complainant told her that the Appellant had been penetrating her vagina with his penis when she PW2 was in Mombasa. The evidence of PW2 was that the Appellant told her that the Appellant had been inserting his fingers into her vagina when she PW2 was in Mombasa. That she told her that he had done that for almost one year. It was the evidence of the complainant`s mother that she took that report to her parents. That the

Appellant was called and he denied the allegations. Her evidence shows that the report she took to her parents was one of the Appellant inserting his fingers into the complainant`s vagina. The issue of him penetrating the complainant into her vagina is not captured anywhere in her evidence. Her evidence indicates that the report she took to the police is one of the Appellant inserting his fingers into the complainant`s vagina. She even said that the Appellant told her that the Appellant used to apply oil on his fingers before inserting them into her vagina. If then the complainant`s mother never mentioned the Appellant penetrating the complainant into her vagina with his penis, when was the issue raised? How come that even when the matter was discussed by the parents of PW2 the complainant had not informed her mother of the sexual intercourse on her by the Appellant? Why would she hide it from her and only inform her of the sexual assault?

30. The complainant stated in her evidence that the first incident when the Appellant had sexual intercourse with her occurred on 5/5/2023. This was almost one year before the matter was reported to the police. How could she remember the date of an incident that had taken place one year ago"? Was she keeping dates of the incidents?

31. The Appellant in her evidence in court stated that the last incident of the Appellant inserting his fingers into her vagina took place on the Saturday night of 26th March 2024. The complainant`s mother PW2 on the other hand said that the incident took place on the night of 30th March 2024 at 10pm. Which of them is telling the truth on the day the incident took place? Why would the witnesses differ on the date the incident took place if at all the same took place? If the complainant is lying of having been sexually assaulted on 26/3/2024, are her allegations of having been sexually assaulted by the Appellant before that date true?

32. The investigating officer PW3 on her part stated that the report that the complainant made to the police was that she had been defiled by her father on several occasions and that the last time was on 30/3/2024. The complainant in her evidence in court never mentioned of her being defiled by the appellant on 30/3/2024. According to her the last incident was one of sexual assault on 26/3/2024. How come that the complainant could forget the incident of 30/3/2024 if at all it took place yet that is what triggered the report to the police?

33. It is surprising that the complainant`s mother saw the Appellant inserting his hand into the daughter`s private parts and failed to confront him there and then and ask him why he had done so. It is not normal that she did not even raise the issue with her daughter there and then but she just went back to sleep as if nothing had happened. I do not think that a mother would react that way when such a heinous act is committed to her own daughter.

34. The complainant`s P3 form as produced by PWW4 indicated that the hymen was perforated. PW4 is not the one who examined the complainant. He said that Dr. I brahim who filled the P3 form is not the one who did the actual examination on the complainant. Who then did the actual examination? There being no evidence of the person who did the actual examination, there was no medical evidence to support the defilement.

35. Having carefully evaluated the evidence of the complainant and her mother (PW2) in this case, I am not satisfied that they were credible witnesses. The trial court did not properly assess their credibility in face of the material discrepancies in their evidence. That no proper voir dire examination was conducted on the complainant makes her evidence insufficient to convict without some other independent evidence which was lacking in the case.

36. It is the duty of the prosecution to prove a criminal case against an accused person beyond reasonable doubt. Where there are doubts on whether or not the offence was committed, the benefit of doubt

is accorded to the accused. There was no sufficient evidence against the appellant in this case and he ought to have been accorded the benefit of doubt.

37. In view the forgoing, it is my finding that the appeal is merited. Consequently, the conviction entered by the trial court is quashed and the sentence thereof set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 6TH DAY OF MARCH 2026.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch holding brief for Miss Ochola for Republic

Appellant – present virtually at G.K. Prison Malindi

Cour Assistant - Rahma