REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)
HCCRA E052 OF 2024

BETWEEN
ROBERT MONGARE...APPELLANT
AND
REPUBLIC..RESPONDENT

(Being an appeal from the judgment and sentence of Hon. B.J. Achieng (RM) in Nyamira MCSO E049 of 2023 delivered on 28th August 2024)

JUDGMENT

1. The Appellant, Robert Mongare, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 18th September 2023 at Township sublocation, Nyamira County, the accused person intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of BBO, a child aged 3 years. An alternative count of committing an indecent act with a child by touching the vagina of BBO contrary to Section 11(1) of the Sexual Offences Act was also preferred.

2. The prosecution called four witnesses: PW1, BBO, the Complainant testified through a *voire dire* testimony conducted in Kiswahili, and the court determined she was a competent witness. During her examination, PW1 identified the Appellant, pointing at him on the screen and calling him "shetani" (devil). When asked about what the Appellant did, she stated, pointing to her vaginal area, that "uncle Robert alinichapa hapa" (uncle Robert beat/hit me here) and the anal/buttocks area she confirmed touching there too.

3. PW2, Callen Bwari Onyancha, the Complainant's grandmother testified that on 18th September 2023, she took the complainant to school in the morning and returned home late at 5 PM due to heavy rain. Upon returning, she found the Appellant seated outside with the complainant near him. The child was crying and holding the Appellant's phone. The Appellant told PW2 the child had come from school crying. The complainant ran away from the Appellant and did not greet him as she normally would. That night, the child refused to eat and slept on a chair. At around 11:00 PM the child started screaming "baba" and at around 3:00 AM screamed again. The following morning, PW2 boiled bathing water and called the complainant to come to the bathing area. The child refused to sit in the basin saying it was

painful. Upon examination, PW2 observed the vagina was swollen and the anus was worse as it was black and swollen. The complainant told PW2 that "uncle Robert alinichapa hapa" while pointing to her vagina. PW2 immediately informed the grandfather and rushed the complainant to Nyamira County Referral Hospital. She also reported the matter at Nyamira Police Station and was issued a P3 form. Upon returning home she found the Appellant locked inside the house where he sleeps. He was subsequently arrested.

4. PW3 Joel Ongaro a Clinical Officer at Nyamira County Referral Hospital testified that on 19th September 2023, the Complainant was taken to hospital with a history of having been sodomised and defiled by a person known to her. On examination, the child had bruises on the labia, the hymen was intact and there were lacerations to the anal region. He stated that the HIV test was negative and no spermatozoa seen. He concluded that there was sodomy and defilement due to lacerations on the labia and anal region. The injuries were estimated to be approximately 2 days old at the time of examination on 19th September 2023. He tendered the P3 form, treatment notes and PRC form as exhibits.

5. PW4 PC Nancy Ochieng, the Investigating Officer testified she received Complainant’s report on 19th September 2023

and had the Appellant arrested on on the same day and arraigned in court on 21st September 2023 for the offence of defilement.

6. The Appellant gave sworn testimony and denied the charges. After a full trial, the learned Magistrate convicted the Appellant and on 11th September 2024 sentenced him to 40 years imprisonment, with the sentence to run from 21st September 2023, being the date, he was first arraigned in court.

7. The Appellant, being aggrieved and dissatisfied, filed an undated Petition of Appeal and written submissions dated 06th February 2026. The Respondent did not file any submissions.

8. This being a first appeal, this Court is duty bound to re-evaluate the entire evidence on record, subject it to a fresh and exhaustive analysis, and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. This duty was articulated by the former Court of Appeal for East Africa in **Okeno v Republic [1972] EA 32** and reiterated in **Kiilu & Another v Republic [2005] 1 KLR 174.**

9. From the evidence on record and the submission filed on behalf of the Appellant, I have identified the following issues for determination.

1) Whether the Age of the Complainant Was Proved

10. The birth certificate (Pex.1) produced by PW2 established that BBO was born on 03rd April 2020. The alleged offence occurred on 18th September 2023, making the complainant 3 years and approximately 5 months old at the time.

11. The law on proof of age of a victim in sexual offences cases is now settled. From the evidence on record, the complainant was clearly a child aged 3 years, satisfying the requirements of Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

2) Whether Penetration Was Proved

12. The Appellant's submissions question whether penetration was established, noting the absence of spermatozoa and the intact hymen. Section 2(1) of the Sexual Offences Act defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person. As held by the Court of Appeal in **Mark Oiruri Mose v Republic [2013] eKLR**:

penetration does not require the full release of sperms into the victim, nor does penetration need to be deep inside the girl's organ and contact on the surface is sufficient as long as there is penetration.

13. In the present case, the medical evidence from PW3 is instructive. The P3 form and PRC form (Pex.3 and Pex.4) demonstrate bruises on the labia minora and majora, lacerations to the anal region at 12 o'clock position. The conclusion of PW3 was that there was sodomy and defilement. The injuries are consistent with the alleged defilement.

14. The Appellant submitted that the medical evidence was unreliable on the ground that PW3 was not the actual examining doctor who first handled the complainant. The record, however, shows that PW3 testified that he was the Principal Clinical Officer present at the time of examination and that his name appears on the treatment notes and P3 Form produced in evidence. He explained the findings and the basis upon which he formed the medical opinion confirming defilement.

15. It is settled law that medical evidence may be produced by a competent medical practitioner who can identify and

explain the contents of the medical documents, even where he was not the initial examiner, provided the foundation for such production is properly laid under section 33 and 77 of the Evidence Act. In the present case, PW3 demonstrated familiarity with the examination and the documentation, and there was no objection raised at the time of production of the P3 Form and treatment notes.

16. The Appellant did not, during cross-examination, challenge the authenticity, authorship, or integrity of the medical exhibits. Nor did he seek to summon the maker or request that the documents be rejected. Having failed to raise objection at trial, he cannot successfully impeach the medical evidence on appeal in the absence of demonstrated prejudice.

17. Upon independent re-evaluation, I find that the medical evidence was properly admitted and was cogent. The argument that PW3 was not the initial examining doctor does not, in the circumstances of this case, dislodge the probative value of the medical findings tendered before the trial court.

18. The Appellant further contended that there existed a material discrepancy in the timeline of the alleged offence, arguing that if the medical evidence indicated that the injuries were “approximately two (2) days old,” then the

incident would have occurred on 17th September rather than 18th September as stated in the charge.

19. Upon re-evaluation of the record, it is clear that the medical officer described the injuries as being approximately two days old. It is a matter of common medical knowledge that estimation of the age of injuries is not an exact science but an approximation based on observable healing patterns. Such estimation inherently carries a margin of variance and cannot be reduced to a strict mathematical computation.

20. The use of the word "approximately" is significant. It denotes a reasonable estimate rather than a precise calculation. Minor discrepancies in dates or timelines which do not go to the root of the prosecution case are not fatal, particularly where the surrounding evidence consistently points to the occurrence of the offence within the stated period.

21. In the present case, the trial court was entitled to consider the medical estimation alongside the testimony of the complainant and the other prosecution witnesses. The slight variance suggested by the Appellant does not amount to a material contradiction capable of creating reasonable doubt. I therefore find that penetration was proved.

3) Whether the Appellant Was Identified as the Perpetrator

22. The identification of the Appellant by the complainant child is a central issue. During *voire dire*, PW1 was shown the screen where the accused was logged in and she identified him as "shetani" (the devil) and specifically named "uncle Robert," pointing to him. This court notes the holding in **Wachira v Republic [2024] KEHC 5972 (KLR)**, where Learned Ndung'u J. addressed the use of euphemisms by children in sexual offence cases, observing that the evidence of a child in a sexual offence case presents obvious discernible peculiarities and that one must have regard to the trauma arising from the incident and the child's stage of development. The court must be extra vigilant and put the child's description of acts in context.

23. The evidence on record demonstrates that the Appellant was not a stranger to the Complainant or to PW2. PW2 testified that the Appellant had worked for her as a shamba boy for approximately one month prior to the incident, resided within the family compound, and shared meals with the household. The Complainant was therefore well acquainted with him and referred to him by name as “Uncle Robert.”

24. The evidence further establishes that, at the material time, only four persons lived within the compound, namely PW2, the grandfather, the Complainant, and the Appellant. In those circumstances, the possibility of mistaken identity is effectively excluded. The Complainant’s identification of the Appellant was that of recognition, which in law is more reliable than identification of a stranger. The trial court cannot therefore be faulted for finding that the identification was positive, credible, and free from error.

4) Whether Alleged Inconsistencies and Contradictions in the Prosecution case

25. The Appellant raised several alleged inconsistencies the first being that PW1 stated that she was "beaten" rather than sexually assaulted. As addressed above, the child's use of the euphemism "alinichapa hapa" (he beat/hit me here) while pointing to her vagina is a well-recognised phenomenon in cases involving young children. The trial court's analysis of the Complainant’s evidence are consistent with the approach that courts should not reject a child's evidence merely because the child uses localised, euphemistic, or imprecise language to describe a sexual act.

26. The Court of Appeal has consistently held that only contradictions which touch on the substance of the charge or

the essential elements of the offence are material. Minor variances on peripheral matters do not vitiate a conviction. See **Njuki v Republic [2002] 1 KLR 771** and **Philip Nzaka Watu v Republic [2016] eKLR**.

27. Applying that principle to the present matter, the alleged discrepancies do not disclose any inconsistency capable of affecting the integrity of the prosecution case. Moreover, viewed in context and together with the medical findings, the complainant’s use of the phrase “alinichapa hapa,” coupled with her gesture, plainly conveyed a complaint of sexual violation as charged.

28. The second issue concerns the appellant's argument that PW2 did not witness the sexual assault. This argument, however, misapprehends the nature and purpose of corroborative evidence. PW2 testified to what she found upon her return — the child's condition, the child's statement, and the physical findings on examination. This evidence corroborates both the complainant's account and the medical findings. PW2 was not required to have been an eyewitness to the assault itself for her evidence to carry weight.

29. The Appellant's third complaint concerns the prosecution's failure to call the complainant's grandfather as a witness, which he contends was prejudicial to the case.

30. Under the provisions of Section 143 of the Evidence Act (Cap 80) no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. The prosecution therefore bears no obligation to call every possible witness, provided the evidence adduced is sufficient to establish the charge.

31. In the present case, the record does not disclose that the grandfather witnessed the incident or possessed material evidence relating to its commission. His absence did not occasion any evidentiary gap, nor did it weaken the proof of the essential elements of the offence. The contention is accordingly without merit.

32. The fourth issue concerns the alleged discrepancy between the date of arrest and the date reflected on the charge sheet. PW4 testified that the appellant was arrested on 19th September 2023. The charge sheet, on its face, shows that the appellant was arrested on 19th September 2023 and subsequently arraigned in court on 21st September 2023.

There is therefore no inconsistency between the oral testimony and the documentary record.

33. The fifth issue concerns the fact that the members of the public who effected the arrest of the appellant did not record statements. PW4 confirmed in his testimony that the appellant was apprehended by members of the public before being handed over to the police. In the present case, the arrest by members of the public was not the act constituting the offence; it was merely the manner in which the appellant was apprehended. The prosecution case rested on the substantive evidence proving the commission of the offence, which was tendered through the relevant witnesses and documentary exhibits. The absence of statements from the arresting members of the public does not create a gap in the evidentiary chain nor does it occasion any prejudice to the appellant.

34. The Court of Appeal in **Joseph Maina Mwangi v Republic [2000] eKLR** held that only material contradictions which cast doubt on the prosecution case are fatal, a position reaffirmed in **Twehangane Alfred v Uganda Criminal Appeal No. 139 of 2001 (CA) [2003] UGCA 6**.

35. Upon a fresh appraisal of the entire record, the alleged inconsistencies raised by the Appellant are not reflected in

the evidence. The testimony and documentary material align in all material respects and nothing emerges that detracts from the integrity of the prosecution's case or casts doubt on proof of the charge.

5) Alleged Violation of Article 49(1)(d) of the Constitution

36. The Appellant testified that the confession statement was written under duress after he was severely beaten by members of the public, and that he did not know what he was writing. Article 49(1)(d) of the Constitution of Kenya provides that an arrested person has the right not to be compelled to make a confession or admission that could be used in evidence against them.

37. This court notes that the trial court's judgment does not appear to have placed substantial reliance on any confession statement as the primary basis for conviction. The conviction was grounded on: the complainant's identification of the Appellant; PW2's evidence of the circumstances and the medical evidence.

38. Nonetheless, this court observes that the allegation of beating and coercion was raised by the Appellant both at trial and in his petition. Where an accused person raises such a challenge, the proper course is a trial within a trial to determine admissibility. However, the record shows the

Appellant raised this only during cross-examination at the defence stage, not through a formal application at the time the statement was sought to be tendered. In any event, as stated, the conviction does not rest on the confession.

6) **Whether the sentence of 40 years imprisonment is lawful**

39. Section 8(2) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

40. The learned Magistrate, while mindful that section 8(2) of the Sexual Offences Act prescribes life imprisonment where the child is aged eleven years or less, imposed a determinate sentence of forty (40) years' imprisonment. In doing so, the trial court relied on the emerging jurisprudence of the Court of Appeal, including **Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023)**, where the Court observed that indeterminate life sentences may, in appropriate cases, raise concerns relating to proportionality and human dignity and proceeded to substitute a lengthy determinate term.

41. It is noted that the Respondent has not filed a cross-appeal nor sought enhancement of the sentence to life

imprisonment. In the circumstances, and bearing in mind the ongoing jurisprudential discourse regarding the mandatory or indeterminate nature of life sentences under section 8(2), this Court is not called upon to interfere upward with the sentence imposed. The sentence of forty (40) years' imprisonment therefore falls for consideration only on the question of legality and proportionality, and I am satisfied that it remains within the bounds of prevailing appellate authority. The Appellant's request for reduction of sentence is declined.

42. From the foregoing analysis, it is hereby ordered:

1) **The appeal against conviction is dismissed.**
2) **The appeal against sentence is dismissed.**
3) **The conviction and sentence of 40 years imprisonment imposed on the Appellant are hereby upheld.**
4) **Pursuant to Section 333(2) of the Criminal Procedure Code, the sentence shall take effect from 19th September 2023, being the date on which the Appellant was arrested and placed in custody.**

DELIVERED AT NYAMIRA THIS 26th DAY OF February 2026

WAMAE.T. W. CHERERE
JUDGE

Appearances

Court Assistant - Anita

Accused - Present in person

For the DPP - Ms. Kiptanui