



REPUBLIC OF KENYA



**MMW v Republic (Criminal Appeal E002 of 2023)
[2026] KEHC 3460 (KLR) (Crim) (17 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E002 OF 2023
K MWAURA, J
MARCH 17, 2026**

BETWEEN

MMW APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E027 of 2022 of the Senior Principal Magistrate's Court at Engineer by Hon. H.O. Barasa)– Senior Principal Magistrate)

JUDGMENT

1. MMW, the appellant herein, was convicted for the offence of sexual assault contrary to section 5 (1) (a) (2) [sic] of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of the offence were that on diverse dates between 2021 and 2022 at [Particulars Withheld], Kipipiri subcounty, within Nyandarua County, unlawfully used his fingers to penetrate the vagina of M.N.M., a child aged 9 ½ years.
3. He was also convicted of the offence of assault causing actual bodily harm contrary to section 215 of the Penal Code.
4. The particulars of the offence were that on diverse dates between 2021 and 2022 at [Particulars Withheld], Kipipiri subcounty, within Nyandarua County, unlawfully injured S.W.M.
5. The appellant was sentenced to serve 10 years' imprisonment on each count. He has appealed against both conviction and sentence. He raised grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and fact by misapprehending the legal effect and application of section 11(1) of the [Sexual Offences Act](#) with regard to count 2.



- b. The learned trial magistrate erred in law and fact in finding that the evidence presented at the trial against the appellant was sufficient to prove the offences levelled against the appellant.
- c. The learned trial magistrate erred in law and fact in failing to apply his mind to the testimony tendered by the prosecution and appellant, which would inevitably have led to a different conclusion, with particular regard to the following matters.
 - i. That the appellant was involved in the commission of the offences levelled against him.
 - ii. That the appellant was being implicated due to a campaign of falsehoods perpetrated by PW 4 to incarcerate the appellant.
 - iii. The medical evidence clearly absolved the appellant.
 - iv. That no single corroborating evidence was available.
- d. The learned trial magistrate erred in law and fact by applying the circumstantial evidence as the best evidence in the circumstances of the present case. Yet, the magistrate did not consider applying other first-tier tests, such as medical/clinical findings of fact (scientific/empirical proof), which were adverse to the prosecution's case, or the lack of forensic evidence connecting the appellant to the offences.
- e. The learned trial magistrate erred in law and fact in finding as he did that the prosecution had discharged its burden and that there was sufficient evidence to support the charges levelled against the appellant in view of the following glaring hiatuses in the prosecution's case, namely;
 - i. The evidence tendered by PW 3 that he was indeed assaulted (tearing of flesh using fingernails and/or whips) by PW4, his mother.
 - ii. No shred of evidence was adduced to place the appellant at the scene of the crime because there was no indication in the charges or the testimonies about any specifics as to the dates, times or hours of commission of any of the offences.
 - iii. The witch-hunt against the appellant on several occasions in the past, with the accused being dragged in and out of Kipipiri and Miharati police stations on trumped-up charges that led to frustration and anxiety by PW 4 that things were not working out to her desire, and readily admitted by PW 4 during the trial.
- f. The learned trial magistrate erred in law and fact in finding as he did that the prosecution had established its case beyond a reasonable doubt in view of the fundamental misapprehension of the facts as well as the law, in that;
 - i. The standard of proof of beyond a reasonable doubt was never attained because the appellant was convicted on a whim that the appellant may have had something to do with the cries, and not on any concrete facts pointing to the guilt of the appellant.
 - ii. This is a classic case of shifting the burden of proof to the appellant as opposed to looking for inculpatory facts from the prosecution's case, as there were none.
- g. The learned trial magistrate erred in law and fact in failing to appreciate the fact that the police failed and/or neglected to investigate the circumstances surrounding the prosecution of the case against the appellant, leading to a witch-hunt of the appellant and gravely curtailing his right to freedom of movement, liberty and fair administrative process.



- h. The learned trial magistrate erred in law and fact in dealing with the matters before him arbitrarily, casually and on whim rather than on analysis of evidence and the law.
 - i. The conviction is dangerous, shambolic and against the weight of the evidence tendered by the defence and ought to be overturned in earnest.
6. The respondent did not file any grounds of opposition or submissions.
7. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses testify. Therefore, I will follow the well-known case of *Okeno vs the Republic* [1972] E. A 32 to guide my decision-making process.
8. The charge in count one was incorrectly drafted. Under the Act, there is no section described as 5 (1) (a) (1) (2) of the *Sexual Offences Act*. It should have read:

Contrary to section 5 (1) (a) (i) as read with section 5 (2) of the *Sexual Offences Act*.
9. Section 382 of the Criminal Procedure Code provides:

Subject to the provisions hereinbefore contained, no finding, sentence, or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission, or irregularity has occasioned a failure of justice, the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings.
10. Since the appellant was fully aware of the complaint and actively participated in the trial, I conclude that he was not prejudiced in any way, and the error can be corrected under section 382 of the Criminal Procedure Code.
11. Section 5 (1) (a) (i) of the *Sexual Offences Act* states:

Any person who unlawfully—

 - (a) penetrates the genital organs of another person with—
 - (i) any part of the body of another or that person;

is guilty of an offence termed sexual assault.
12. M.N.M (PW1) testified that at the time of her testimony, she was a girl aged nine years. She claimed that the sexual assault commenced in 2019. In 2019, she was about six years old. Her evidence was that the appellant, who is her father, used to insert his fingers into her genitalia. She said that when he did this, she experienced pain but did not scream. She later reported to her mother what was happening, but she dismissed her.
13. The first legal challenge we encounter is the variance between the particulars of the charge and the evidence. It is trite law that where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of *John Brown Shilenje vs the Republic*,



High Court (NBI) Criminal Appeal No 181 of 1981 (unreported). Not all variance will entitle an accused to an acquittal.

14. The key question is whether the charge is fatally flawed due to the variance and whether the accused was prejudiced. Usually, discrepancies in specific times and dates are not considered fatal if they are within the specified time limit. In this case, the charge alleged that the offences occurred on different dates between 2021 and 2022, but emerging evidence indicated that the offences started in 2019. Once the prosecution became aware of this, they should have moved to amend the charges to reflect the correct timeframe. This would have allowed the appellant to prepare an appropriate defence. The failure to do so was prejudicial to the appellant.
15. E.N.N. (PW3) is the complainant's mother. Her evidence was that, on January 25, 2019, the complainant reported to her what the appellant had been doing to her while she was away. When she asked the appellant about it, he denied. During cross-examination, she conceded that the dates she mentioned were not included in the statement she had recorded with the police.
16. Dr. Joseph Mburu (PW4) examined the complainant on 15 March 2022. He observed that the hymen was absent and noted redness of both the labia minora and majora, indicating inflammation. There was no bleeding or vaginal discharge. During cross-examination, he mentioned the girl had a recent injury but also acknowledged that it could have happened weeks or months earlier.
17. The evidence of S.W.M. (PW2) was that his name was D.W., also known as M.W. At the time of voir dire examination, he informed the court that he was in class five, but immediately changed his statement when testifying, stating that he was in class two. He testified that the appellant removed his trousers and took him to the bedroom. In the bedroom, he touched him around the genitalia. He also pinched him on the thighs. His evidence during cross-examination was that both his parents beat him on different occasions with a cane on the thighs. He also stated that his mother used to pinch him with her fingernails.
18. This (PW2's) witness's testimony contradicted that of M.N.M. (PW1). He stated that the appellant removed his shorts and those of S.W.M. (PW2) before lying on top of PW2. During cross-examination, he claimed he told the doctor that the appellant had pierced him with a knife. Their mother's testimony on this matter conflicted with that of M.N.M. (PW1). She stated that PW1 told her the appellant made PW2 adopt a dog position and lie on him. She also contradicted PW2 by testifying that the appellant used to lick the boy's genitalia, which PW2 did not mention.
19. MMW, the appellant, contended that he was falsely implicated due to domestic differences between him and his wife.
20. During cross-examination, both complainants described the appellant as very harsh and unloving towards them. PW1 also mentioned that he did not pay school fees or buy clothes and food for them. Given their young age, understanding the responsibility of providing necessities, especially if it did not come from their mother, would have been difficult for them. This should have raised a red flag.
21. PW3 in her evidence stated that the appellant has attempted to marry another wife on several occasions.
22. The prosecution's case was rife with material contradictions. The Court of Appeal in the case of *Ndungu Kimanyi vs Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a



person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

23. E.N.N. (PW3) informed the court that she was a nurse by profession. Her professional training would have prompted her to check whether the complaint was genuine. Secondly, when her daughter complained to her, a mother's instinct would have been to check her genitalia. There was no evidence to show that she did this. This was an omission that ought to have drawn the court's attention.
24. The cumulative effect of this analysis of the evidence on record is that there was no basis for the appellant's conviction. The conviction is therefore quashed, and the sentences are set aside. The appellant is at liberty unless otherwise lawfully detained.

DELIVERED AND SIGNED AT NYANDARUA, THIS 17TH DAY OF MARCH 2026

KIARIE WAWERU KIARIE

JUDGE

