Wirunda v Republic (Criminal Appeal 209 of 2020)
[2026] KECA 588 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KECA 588 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 209 OF 2020

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MARCH 13, 2026

BETWEEN

RODGERS LITIEMO WIRUNDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Migori (Mrima, J.) delivered on 6th February, 2020 in HCCRA. No. 10 of 2019)

JUDGMENT

1. The appellant, Rodgers Litiemo Wirunda, has preferred this second appeal against the decision of the High Court which upheld his conviction and sentence for the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act*. The particulars of the offence were that on 10th December, 2018, at about 16.00 hours in xxxx Village in xxxxx Sub- County of Migori County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of L.A.O., a child aged 13 years.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and at the same place, he committed an indecent act with L.A.O., a child aged 13 years, by touching her vagina.

3. The appellant was tried before the Senior Resident Magistrate's Court at Rongo. In brief, it was the complainant's testimony (unsworn) that she was born in the year 2005. She told the court that on 10th December, 2018, she was outside her home, playing with her cousin AA on the verandah. It was about 3. 00 p.m. The appellant, who lived in her grandmother's house which was nearby, called her. He was inside the house, standing by the window. She went to the house. The appellant locked the door behind her. He then took her to the bedroom and placed her on the bed. He removed her skirt and underwear. He afterwards undressed, got on top of her, and inserted his penis in her vagina. The complainant stated that she raised an alarm. After he was done, they both dressed up. She went back to

play with AA . She did not inform AA what had happened as the appellant had threatened to kill her if she told a soul. It was her evidence that her mother later found out about the incident after about a week. Her mother took her to the hospital for medical examination. They then reported the matter to the police. The complainant stated that it was not the first time she had sexual intercourse with the appellant. He had assaulted her on another occasion.

4. PW3, POO (minor), told the court that on 10th December, 2018, he returned from the posho mill and found the door to his grandmother's house locked. He stated that the appellant lived in the said house. He heard the complainant's voice saying in Dholuo 'you are hurting me'. The complainant said it twice. He stepped away from the house and saw the door open. He saw the appellant leave the house, and later the complainant emerged and went away. PW3 testified that he went home and informed some children he was playing with what he had seen. The said children informed the complainant's mother.

5. The complainant's mother, MAO (PW4), told the court that the complainant was born on 5th August, 2005. It was her testimony that on 19th December, 2018, the appellant's employer, AO (PW5), informed her that the appellant may have sexually assaulted the complainant on 10th December, 2018. PW5 was informed of the same by her relative, who had been told by her children. PW4 called the complainant and inquired whether the allegations were true. The complainant told her that indeed the appellant defiled her on the said date. PW3 stated that she took the complainant to Awendo Sub-County Hospital for treatment, and later reported the incident at Awendo Police Station. The appellant was subsequently apprehended by members of the public on 20th December, 2018.

6. PW1, Caleb Okeyo, a clinical officer at Awendo Sub-County Hospital, examined the complainant on 20th December, 2018, and filled out a P3 form. The complainant was alleged to have been defiled by a person known to her on 10th December, 2018. PW1 observed that the complainant's hymen was not intact. He stated that she had bruises on her posterior fourchette, which injuries were estimated to be ten days old. Her vaginal walls and cervix were normal. PW1 formed the opinion that there was penetration, which was forced, due to the nature of the injuries. He produced the P3 form, Post Rape Care form and treatment notes in evidence.

7. The investigating officer (PW6), Corporal Catherine Nelima, told the court that she was assigned the case on 20th December, 2018. The appellant was already in custody. It was her evidence that she escorted both the complainant and the appellant to hospital for medical examination. She stated that the medical evidence established that the complainant had been defiled. She recorded witnesses' statements and established that on 10th December, 2018, the complainant was sexually assaulted by the appellant at a house where he was employed as a farmhand by PW5. She visited the scene of crime and discovered that the house where the appellant lived was in the same homestead as the complainant's home. After concluding her investigations, she preferred the charges against the appellant.

8. The appellant, in his unsworn statement, denied the facts as narrated by the complainant. He testified that the allegations were fabricated and stated that he was being framed.

9. After full trial, the appellant was found guilty as charged in the main charge of defilement. He was thereafter sentenced to serve twenty (20) years' imprisonment.

10. The appellant, dissatisfied by this decision, filed an appeal before the High Court. His petition of appeal challenged his conviction and sentence on the grounds that: the trial court concluded his trial within a month, and that he was not given ample time to prepare for the trial; his conviction was founded on uncorroborated hearsay evidence and the unsworn evidence of the complainant; the absence of hymen was not conclusive proof of the alleged offence, that the complainant had engaged in sexual intercourse prior to the material date; and, that the sentence meted by the trial court was

excessive, as the learned magistrate failed to consider his mitigating circumstances, and the fact that he was a first offender.

11. During the hearing of the appeal, the appellant argued his appeal on the sole ground that the trial was undertaken speedily, and that it violated his right to a fair trial. The first appellate court held the view that all witnesses' statements were availed to the appellant, and that he was given ample time to prepare for the trial. The learned Judge accordingly dismissed and upheld the conviction and sentence imposed by the trial court.

12. The appellant is before us on a second appeal. He has proffered three (3) grounds of appeal. The appellant was aggrieved that the element of penetration was not sufficiently proved. He faulted the trial court for relying on unsworn and uncorroborated evidence of the complainant, which fell short of the required standard of proof beyond any reasonable doubt. He faulted the learned Judge for failing to find that the evidence identifying him as the person who defiled the appellant was insufficient, and that lack of DNA testing was fatal to the prosecution's case. Lastly, the appellant urged that his sentence ought to run from the date of his arrest, as he was in remand custody during the pendency of his trial, in line with the provisions of Section 333(2) of the Criminal Procedure Code.

13. The appeal was heard by way of written submissions. The appellant appeared in person. It was his submission that the prosecution did not prove the element of penetration beyond reasonable doubt. He stated that the complainant gave unsworn testimony, and that her evidence that penetration occurred was not corroborated. The appellant asserted that the evidence of PW3 was also unsworn, and it therefore could not corroborate that of the complainant. He urged that the medical evidence on record failed to support the complainant's claim on penetration. He pointed out that though the clinical officer (PW1) told the court that he had observed bruises on the appellant's penile shaft upon examination, the P3 form indicated that no injuries were noted on the appellant. It was his submission that the lack of hymen was not conclusive proof of defilement, and that there existed evidential gaps as to what caused the injuries observed on the complainant's vagina. He submitted that failure by the prosecution to provide DNA evidence proving that indeed the appellant defiled the complainant was fatal to its case. He noted that according to the complainant's evidence, it was not the first time that she had engaged in penetrative sexual intercourse. The appellant urged us to allow the appeal and acquit him.

14. In response, Ms. Ikol, learned Assistant Director of Public Prosecutions on behalf of the respondent submitted that penetration was sufficiently proved by the cogent evidence of the complainant which was corroborated by the medical evidence. She urged that the appellant was well known to the complainant, as they lived in close proximity. His identification by the complainant was that of recognition. On sentence, learned prosecution counsel reiterated that the sentence meted by the trial court was sound in law. She however conceded that the two courts below failed to consider the period spent by the appellant in remand custody in computing the custodial sentence that he was to serve.

15. This being a second appeal, the mandate of this Court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this Court expressed itself in the following terms;

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

16. We have carefully considered the record of appeal, the submissions by both parties, and the law. We form the opinion that the issues arising for our determination are:

    i. Whether the element of penetration was proved by the prosecution beyond any reasonable doubt;

    ii. Whether in the absence of DNA testing, the prosecution failed to conclusively establish that the appellant was the person who defiled the victim; and,

    iii. Whether the period spent by the appellant in remand custody was taken into account in computation of his sentence.

17. Starting with the first issue, Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " the partial or complete insertion of the genital organ of a person into the genital organ of another person."

18. It was the appellant's submission that the complainant's evidence regarding penile penetration was not corroborated in material evidence. He stated that the evidence of the clinical officer (PW1) only proved penetration, but not penile penetration, and that the instrument causing the injuries observed on the complainant's vagina was unknown. He submitted that the absence of a hymen was not conclusive proof of penetration. He urged that the two courts below fell into error by convicting the appellant on the basis of the complainant's unsworn evidence alone, which was contrary to the provisions of Section 124 of the *Evidence Act*.

19. The complainant, in her unsworn testimony, narrated to the court how the appellant lured her into his house, undressed her and inserted his penis in her vagina. She stated that she raised an alarm. PW3, who was outside the appellant's house at the material time, heard the complainant utter words in Dholuo expressing that she was being hurt. PW3 further witnessed the appellant and the complainant leaving the said house shortly thereafter. PW1, who examined the complainant told the court that he observed bruises on her posterior fourchette, which injuries he estimated to be ten days old, and that her hymen was not intact.

20. Although unsworn evidence of one minor generally cannot effectively corroborate the unsworn evidence of another minor to satisfy the legal requirement for what constitutes admissible corroboration, it is our finding that the medical evidence on record effectively corroborated the complainant's testimony. The findings of bruises on the posterior fourchette and a torn hymen, the bruises having been estimated to be about ten days old, were consistent with, and corroborated the complainant's evidence on penetration. We are not persuaded by the appellant's assertion that the injuries could have been caused by another object. The nature and location of the injuries, taken together with the medical evidence and the complainant's evidence, were consistent with penile penetration, and no other evidence was tendered to support the appellant's suggestion of injury by any other instrument.

21. We note that the trial court, in its judgment, observed that the complainant's testimony was candid. Although the court did not expressly invoke the proviso to Section 124 of the *Evidence Act*, its finding aligns with the established principle that corroboration of the testimony of a victim of tender years in sexual offence cases is not mandatory. The trial court's assessment of the complainant's demeanour and candour supports the conclusion that her evidence was credible and sufficient to establish the elements of the offence.

22. The appellant's complaint that no DNA test was conducted to prove that he was the person who penetrated the complainant is without merit. Section 36(1) of the *Sexual Offences Act* is couched in discretionary rather than mandatory terms. A trial court is not obliged in every case to order DNA test to establish linkage between an accused and the commission of a sexual offence. In Evans Wamalwa Simiyu v Republic [2016] KECA 571 (KLR), this Court emphasized that the power to order a DNA test is discretionary, and that there is no mandatory obligation on the court to direct such test in each case. This was the holding of this Court in the said case:

> " In AML v Republic 2012 eKLR (Mombasa), this Court upheld the view that:
>
> "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."
>
> ...Section 36 of the *Sexual Offences Act* that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant, DNA testing
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> was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her."

23. In the instant appeal, the incident took place in broad daylight.

The appellant was well known to the complainant as they lived in the same homestead. Accordingly, the absence of a DNA test, in this case, did not render the prosecution's case fatally deficient, as penetration and the appellant's identity were otherwise established to the required standard of proof beyond any reasonable doubt.

24. The last issue pertains to the appellant's sentence. The appellant was sentenced to serve twenty (20) years imprisonment upon conviction, in line with the provisions of Section 8(3) of the *Sexual Offences Act*. It was the appellant's contention that he was in remand custody during the pendency of his trial before the magistrate's court, and that this period was not computed in his sentence. The prosecution did not oppose the appellant's submission in that regard.

25. Section 333(2) of the Criminal Procedure Code provides that any period an accused spends in lawful custody pending trial, or pending the determination of the case, must be credited towards the term of imprisonment imposed upon conviction. Accordingly, the appeal on sentence is allowed to the extent that the period the appellant spent in remand custody shall be taken into account in the computation of his 20-year sentence.

26. In conclusion, having carefully examined the evidence on record, we are satisfied that the conviction of the appellant, as affirmed by the first appellate court, was proper and safe. The appeal is hereby dismissed and appellant's conviction and sentence are hereby upheld, save that his sentence shall run from the date of his arrest, 20th December 2018, to reflect the period he spent in remand custody.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH,2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR