Karani v Republic (Criminal Appeal E045 of 2025)
[2026] KEHC 3799 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E045 OF 2025

RM MWONGO, J

MARCH 25, 2026

BETWEEN

ANTONY KARANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. C. Kisiangani in the Runyenjes MCSO No. E017 of 2024 delivered on 23 rd July 2025)

JUDGMENT

The Charges

1. The appellant herein was charged with 2 counts of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act*, as follows:

    1. Count 1: Particulars are that on 08th August 2024, between 1200hrs and 1600hrs at Runyenjes sublocation in Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MNK, a child aged 5 years. The alternative to the first count was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 08th August 2024, between 1200hrs and 1600hrs at Runyenjes sublocation in Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of MNK, a child aged 5 years.

    2. Count 2: Particulars are that on 08th August 2024, between 1200hrs and 1600hrs at Runyenjes sublocation in Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PWM, a child aged 5 years. The alternative to the second count was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 08th August 2024, between 1200hrs and 1600hrs at Runyenjes

sublocation in Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of PWM, a child aged 5 years.

2. The appellant pleaded 'not guilty' to both counts and the plea was entered for each of the counts. The matter proceeded to full hearing after which the trial court convicted him of both counts. He was sentenced to 25 years imprisonment on each count.

The Appeal

3. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 05th August 2025 seeking that the appeal be allowed and the conviction and sentence be set aside.

4. The appeal is premised on the grounds that:

    1. The learned Magistrate erred in law and fact by delivery judgment against the weight of the evidence;

    2. The learned Magistrate erred in law by failing to uphold the appellant's right to fair trial and by allowing two serious counts to be joined in one charge sheet which eventually led to miscarriage of justice;

    3. The trial Magistrate erred in law and fact by failing to find that the elements of the offence (penetration) were not conclusively proved to warrant a conviction;

    4. The learned trial Magistrate erred in law and fact in relying on the evidence of PW1 whose integrity was questionable;

    5. The learned Magistrate erred in law and fact by failing to set out in her judgment the issues of determination, the finding on each issue and the reasons for such findings;

    6. The learned Magistrate erred in law by meting out excessive punishment on the appellant considering that the appellant was a first offender;

    7. The learned Magistrate erred in law by deciding the case on a balance of probability instead of the standard of "beyond reasonable doubt" while convicting the appellant; and

    8. The trial Magistrate erred in law and fact by failing to find that the voire dire was badly conducted in the present case in violation of law.

The Evidence at the Trial Court

5. PW1 was FMN, the mother to the victim in count 1. She stated that she noticed that her daughter was wearing her trouser inside out. Upon enquiry, the child told her that the appellant had called her and her cousin to his house and he had removed their clothes and laid on top of them. Her daughter's cousin lived next door with her grandmother. So, she called both victims and put them both on the bed and checked their private parts. She saw white discharge coming out of their private part.

6. She informed the second victim's grandmother and then took both victims to Runyenjes Police Station where she reported the matter, then went to Runyenjes Hospital for their examination and treatment. She stated that the appellant is her husband's cousin. The distance between the homes of the 2 victims is short. On cross-examination, she stated that on 08th August 2024, both victims had returned home from playing at 7pm and they had fallen asleep on the sofa. She did not bathe them because they fell fast asleep.

7. She stated that the victims were both 5 years old at the time of the incident. That when she noticed her child's trouser was inside out, she called the second victim and they described to her what the appellant had done to them. She knew the appellant well because he is a family member. That she sent someone to watch and make sure that he does not run away.

8. PW2 was MNK the victim in count 1. Following a voire dire examination, she gave unsworn evidence. She stated that the appellant took her to his house, told her to remove her trouser and then inserted his penis into her vagina which she pointed to with her hand. She stated that while doing so, the appellant was lying on top of her. Afterwards, he gave her Kshs.10/= and told her not to tell anyone about that incident. The appellant also told her cousin to remove her trouser and he slept on top of her. After that, he warned them against telling anyone or else they would go to hell.

9. Together, they bought biscuits with the money he gave them and then they went home. She stated that her mother noticed that she was wearing her trouser the wrong side out and she asked about it. After she told her mother what had happened, she and her cousin were taken to the police station and the hospital. She identified her assailant as the appellant in the dock

10. PW3 was the victim in count 2. She also gave unsworn evidence following voire dire examination. She stated that something bad happened to her when the appellant called her into his house and made her to lie on his bed. He told her to remove her trouser and panty. He then lay on top of her and inserted his penis into her private parts which she pointed at with her finger. She was in the company of PW2 who was sitting on the chair as the appellant defiled her.

11. She said that after the appellant had defiled both of them, he gave them Kshs.5/= each which money they used to buy biscuits. She stated that she lives with her grandmother not so far from the appellant's house and the incident happened after they had eaten lunch. She also identified her assailant as the appellant in the dock.

12. PW4 was the investigating officer, PC Cicily Muthoni Kariuki of Runyenjes Police Station. She stated that the case was reported on 13th August 2024. She was informed that the minors were plying outside when the appellant called them into his house and took them to his bed where he defiled them. When PW1 noticed that her child, one of the victims, was wearing her trouser inside out, she questioned the child and that is how she learned of the incident. The children were escorted to Runyenjes Level 4 Hospital for examination and treatment.

13. She stated that the children led her to the place where the incident occurred and they identified their assailant who was the appellant. She arrested the appellant and ascertained the ages of the victims through birth certificates. On cross-examination, she stated that the report was made on 13th August 2024 but the appellant was arrested on 16th August 2024. That she was in the company of her colleagues and they found the appellant sitting outside his house. That the victims are the ones who identified him before he was arrested. She stated that she interrogated each child and their parent separately and the stories they gave were consistent. That from investigations, the children said that it was not the first time that the appellant had defiled them but they did not remember the exact time when it had happened earlier.

14. PW5 was Ann Githinji, a clinical officer at Runyenjes Level 4 Hospital. She testified that she examined PW2 and observed that she had injuries on her vagina, and redness on labia minora and majora at the vaginal opening. Her hymen was freshly broken. She filled the P3 and PRC forms which she produced as evidence.

15. She also testified that she examined PW3 and found injuries on her labia minora and majora, the vagina and the urethral opening. Her hymen was also recently broken. Similarly, she filled out P3 and PRC forms and which she produced as evidence. On cross-examination, she stated that the standard HIV and STI tests were done on the victims and they were negative. She stated that the appellant was not examined as the police did not present him for such examination.

16. In his defence, DW1 the appellant, tendered sworn evidence. He `stated that on 09th August 2024, PW1 went to him and told him what PW2 and PW3 had reported to her. He denied it. She returned after 2 days and he still denied it. Since he had denied PW1 from fetching water at his home, she told him that she would do something that would make him regret. He did not know that PW1 would report to the police and the time between the alleged incident and the date of reporting is too long. He stated that if he was guilty, he would have run away when PW1 approached him but he did not. On cross-examination, he stated that the victims are his uncles' children but they are not siblings. That he heard the testimony of PW5 and he did not know whether or not the victims, at their ages, would still be virgins.

Parties' Submissions

17. In his submissions, the appellant argued that he was denied the right to a fair hearing stating that he was not given witness statements before the hearing began. That the court did not conduct a pretrial conference as it ought to have done. He also challenged the testimonies of the prosecution witnesses stating that there was no clarity as to when the incident was reported since the date indicated in the P3 forms is different from what PW1 stated. He also questioned the lapse in time between the occurrence of the incident and the date of reporting, because a lot could have been done to interfere with the case. He took issue with the testimony of PW1 as to the whereabouts of the children when they returned home that evening and what they told her. According to him, the testimonies of the victims were inconsistent. He urged the court to allow the appeal because there is reasonable doubt in the matter.

18. The respondent relied on sections 2 and 8(1 &2) of the *Sexual Offences Act*, Rule 4 of the Sexual Offences Rules 2024 and the cases of Moses Mwarimbo Dau v Republic [2018] KECA 91 (KLR) and Mwalango Chichoro Mwanjembe v Republic [2016] KECA 183 (KLR). It stated that the offences in each case were proved beyond reasonable doubt. It relied on section 109 of the *Evidence Act* and stated that onus was on the appellant to show that there was bad blood between him and the victim's families yet he failed to do so. It urged the court to uphold the convictions.

Issues for Determination

19. The issues for determination are as follows:

    1. Whether the voire dire examination conducted by the trial court were proper;

    2. Where or not the offence was proved beyond reasonable doubt;

    3. Whether or not the sentence should be set aside.

Analysis and Determination

20. This Court's duty is to determine the appeal herein through re-evaluation of the evidence adduced before the trial court. In the case of Kiilu & Another v. Republic [2005]1 KLR 174, the Court of Appeal expressed this duty thus:

> " 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

21. On the first issue, the appellant contends that the court did not conduct proper voire dire examination. Section 19 of the *Oaths and Statutory Declarations Act* provides that:

> " (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.
>
> (2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."

22. According to the 9th Edition Black's Law Dictionary, voire dire or voir dire, in terms of a witness means:

> " A preliminary examination to test the competence of a witness or evidence."

23. In conducting a voire dire examination the trial court is required to give its opinion on whether the witness understands the proceedings, the meaning of an oath and whether they are possessed of intelligence to testify under oath. A Voire dire is conducted through the court asking a series of questions at its discretion, to the witness to test their intelligence and understanding of an oath. If through this examination, the court is of the opinion that the witness does not understand the meaning of an oath, the court may direct that unsworn evidence is recorded. There is no standard way of conducting a voire dire examination because all cases are different, no 2 witnesses are identical, and the examination is conducted at the discretion of the trial court. (see Paragraph 91 of the Judiciary Criminal Procedure Bench Book, February 2018)

24. Additionally, Section 125(1) of the *Evidence Act* provides:

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."
>
> (See also the case of Maripett Loonkomok v Republic [2016] KECA 520 (KLR))

25. The second issue is whether the offence was proved beyond reasonable doubt. Section 8(1) and (2) of the *Sexual Offences Act* provides as follows:

> " (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) 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." (Emphasis added)

26. Therefore, the elements of the offence may be broken down as follows:

1. The age of the complainant - Proof that the complainant was a child;
2. Penetration as defined under section 2(1) of the *Sexual Offences Act* is proved to have occurred to the child;
3. The perpetrator was positively identified.

27. PExhb 5 and PExhb 6 are copies of birth certificates for PW2 and PW3, respectively. PW2 was born in July 2019 while PW3 was born in October 2018. At the time of the incident, both children were 5 years old and a few days/months. This is sufficient proof of age of the victims.

28. PW1 testified that PW2 and PW3 returned home from playing at 7pm. PW2 fell asleep on the chair and they did not wake her up. The next morning, she noticed that PW2 was wearing her trouser inside out. When she asked about this, the child told her that she and her cousin had been to the appellant's house where he had told them to remove their trousers. He had then defiled them by sleeping on them. That she had been in the company of PW3. PW1 therefore checked the children's private parts and noticed discharge coming out of them. She took the children to the hospital via the police station where the matter was reported. When the children were taken to a medical facility PW5 examined and treated them. PW5 then produced P3 and PRC forms indicating that there were signs of penetration in both children. This evidence by PW5 corroborates the testimonies of PW2 and PW3 as to their assailant who is a person known to them and a close relative.

29. The appellant submitted that there is a contradiction on the date of reporting the incident since PW1 said that it was reported on 09th August 2024 while the P3 forms indicate that the incident was reported on 13th August 2024. Where there exists a contradiction in evidence in a criminal case, that contradiction should have the potential of creating reasonable doubt in the mind of the court and the accused person should be able to benefit from that doubt. In the case of Richard Munene v Republic [2018] KECA 186 (KLR), the court held:

> " It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only

when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

30. With regard to reporting the incident in this case, it is not in doubt that the matter was reported at the police station, and promptly so, whether within a few days or on the following day. The contradiction in dates has no substantive effect on whether or not the elements of the offence occurred.

31. Following conviction on both counts, the appellant was sentenced to the 25 years imprisonment on each count. That sentence was a departure from the sentence prescribed under section 8(2) of the *Sexual Offences Act*, which is couched in mandatory terms, as follows:

> "(2) 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." (Emphasis added)

32. The sentence meted had been pronounced at a time when the jurisprudence from superior courts applied the principle in Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR) that suggested that the Court's discretion could temper mandatory sentences following mitigation.

33. However, the sentence of life imprisonment should have been meted out by the trial court as obliged by statute without any alterations. The Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) rendered itself on the sentences prescribed under the *Sexual Offences Act* as follows:

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

34. The Supreme Court reiterated its findings in that case through its recent decision in the cases of Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) and Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR). There, the Appex Court held that until Parliament reviews the sentences imposed in statute, the court has no mandate to review them through sentencing discretion.

35. To that end, the trial court erred in law by disregarding the mandatory prescribed sentence under section 8(2) of the *Sexual Offences Act*.

Disposition

36. In light of the foregoing discussion, the appeal lacks merit and is hereby dismissed with orders as follows:

    1. The trial court's finding on conviction on both counts is upheld:

    2. The trial court's determination on sentence is upheld as having not been determined to be jurisprudentially unlawful at the time it was meted. The sentence of 25 years imprisonment in respect of each count is upheld.

3. The twenty-five (25) year imprisonment sentence following conviction on the second count shall be held in abeyance.

37. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 25TH DAY OF MARCH, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

Appellant Present in Court

Ms. Kithinji for Appellant

No Representation for DPP

Francis Munyao - Court Assistant