THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. E050 OF 2024

MORRIS WAKABA WANGUI.....1ST APPELLANT

PATRICK KAMANDE NJOKI.....2ND APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

(Being an Appeal against the Judgment, conviction and sentence of the Hon. J. IRURA (SPM), in Kigumo Senior Principal Magistrate's Court Criminal Case SO No. 02 of 2020, Republic - VS - Kennedy Gachiri Mwangi, Patrick Kamande Njoki and Morris Wakaba Wangui delivered on 9th July, 2024).)

1. The appellants herein were jointly charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 11th August 2019 and 1st January 2020 at Kangari in Kigumo sub county within Murang'a County, the accused persons intentionally caused their penises to penetrate the anus of NK, a child aged 11 years.
2. They faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of

2006. The particulars of the offence were that on diverse dated between 11th August 2019 and 1st January 2020 at Kangari in Kigumo sub county within Murang'a County, the accused persons intentionally touched the anus of NK, a child aged 11 years with their penises.

Facts at Trial.

3. The accused persons pleaded not guilty to both charges and the prosecution set out to prove its case by calling three witnesses.

Prosecution Case

4. PW1 was NK, the complainant. He recalled that on 4th August 2019 at about 2:00 pm, while going to collect milk, he met one Kennedy Gachiri Mwangi riding a motorcycle. He knew him since he was the school head boy. Kennedy asked him to board the motorcycle, which he did. They rode to Kangari, then to Ikumbi area where Kennedy bought him two mandazis. They picked up an unknown girl, later dropped her, and Kennedy took PW1 to his house. Kennedy asked PW1 to remove his trousers, also removed his own trousers, and inserted his penis into PW1's anus. After finishing, Kennedy gave PW1 Kshs 100/-, took him partway home, and left him at Gichagi in the dark.
5. He testified that on 11th August 2019 he had gone for a haircut. After shaving, Kennedy arrived with the 2nd appellant (Patrick Kamande Njoki) and the 3rd appellant (Morris Wakaba Wangui). Kennedy asked PW1 to board the motorcycle. They went to Kennedy's room. Kamande

removed some paper-like items (which PW1 later learned were condoms). They asked PW1 to lie on the bed. That when he sat, Kennedy lay on him. All three removed PW1's trousers and underwear. Kennedy penetrated PW1's anus first, then Morris, then Kamande. That each used a condom. After finishing, they gave PW1 money (Kennedy 100/-, Morris 50/-, Kamande 100/-) and told him not to tell anyone. They also made him bathe. Kennedy's younger brother was present at the house. On 25th August 2019, PW1 met Kamande while going to borrow a book. Kamande forced PW1 to go to his (Kamande's) home, where Kamande had sexual intercourse with PW1, and PW1 spent the night. In December 2019, PW1 met Kennedy, who took him to Morris's home. Kennedy left PW1 there, and Morris had sexual intercourse with him. PW1 did not go home that night.

6. On 31st December 2019, PW1 went to a church kesha. He met Kennedy at church. Kennedy asked him to go outside, then to board the motorcycle. They had an accident, injuring PW1's leg. Kennedy helped him back on the motorcycle, took him to his (Kennedy's) home, and had sexual intercourse with him. Kennedy then took PW1 to his aunt's home. The following day (1st January 2020), PW1's sister found him at the aunt's home. PW1 could not sit properly. When asked, he disclosed everything. They reported to Kangari Police Station and later went to hospital. PW1 was issued with a P3 form and treated at Kigumo Hospital and Maragua Hospital.

7. On cross-examination, PW1 confirmed the dates, locations, and details of each incident. He stated that the 1st appellant was head boy in 2012, that a spray was used in the room on the first occasion, and that a Maasai blanket was used to cover his mouth on the second occasion. He also confirmed that Kamande was known to him physically because his home is on the opposite ridge, and that Morris had a separate house where the acts occurred. He stated that he only washed his anus when asked to bathe. PW1 identified each appellant in court. He produced the P3 form, treatment notes, birth certificate, and other medical documents as exhibits.
8. PW2 was No. 227940 PC Silas Saha Mwinga, attached to Kiambu Police Station then. He recalled that on 1st January 2020 at about 5:00–6:00 pm, while at the report office at Kangari Police Station in company of other officers, a woman accompanied by her young son came in. The woman was crying. Upon inquiry, she reported that her son had been defiled by three men. PW2 booked the report and referred the complainant to hospital. When the complainant returned, PW2 issued a P3 form to be filled to enable investigations. The complainant (NK) stated that he could identify the perpetrators. With the help of members of the public and the complainant, police arrested one suspect, Kennedy.
9. That the suspects were subsequently charged. The victim explained that the 1st accused (Kennedy, not an appellant herein) was a *boda*

boda rider who gave him a lift but instead of taking him home, took him to his house, where the victim found the other two accused persons (the appellants herein). The 1st accused was well known within Kangari as a *boda boda* rider, which made it easy to arrest him. Thereafter, the other two suspects were arrested.

10. On cross-examination, PW2 stated that they confirmed the complainant's age using his birth certificate. According to the report, the incident of defilement could have taken place on the eve of the new year as the report was made on 1st January 2020. PW2 did not visit the scene. The complainant reported that he could identify the perpetrators. The victim informed them of the first perpetrator, whom they first arrested, and that perpetrator assisted in arresting the others. Defilement was confirmed after the victim was examined at hospital, and the P3 form was conclusive evidence.

11. On cross-examination by the 3rd accused (Morris Wakaba Wangui, now 1st Appellant), PW2 stated that the victim was accompanied by his mother when reporting, the victim had first reported to his sister what had happened, and it was not reported that the victim had gone missing for three days.

12. PW3 was James Mwangi Karuga, a clinical officer at Kandara Sub-County Hospital. He testified that the 11-year-old complainant was examined on 1st January 2020 at Kigumo Sub-County Hospital following a report of sodomy by three known persons between late

2019 and 30th December 2019. The victim reported being seduced with money and that the perpetrators used condoms. Clinical examination revealed a perineal laceration, anal tenderness, and loose anal sphincter muscle tone, leading to a diagnosis of sodomy. PW3 assessed the injury as harm and produced the P3 form (Exhibit 1) and treatment notes (Exhibit 2). Under cross-examination, PW3 clarified that while no spermatozoa were found, consistent with the reported use of condoms and the victim having bathed, the physical findings of trauma and muscle laxity were conclusive of the offense.

13. The court considered the evidence adduced and ruled that the prosecution had made a *prima facie* case sufficient to warrant the accused persons to be placed on his defence.

Defence Case.

14. DW1 was Patrick Kamande Njoki. He gave his sworn evidence and denied all charges of sodomy and claimed he did not know the complainant. He offered an alibi, stating that during August 2019, he was attending volleyball training at Karega for three weeks. While he admitted his grandfather lived near the complainant's home in Mathaithi and that the complainant might have seen him there, he maintained he never met or colluded with the other accused persons to commit the offense. On cross-examination, he admitted he had no documentary evidence to support his alibi. He confirmed his date of

birth as 24th June 2003, placing him at approximately 16 years old at the time of the alleged offenses.

15. DW2 was Morris Wakaba Wangui. He gave his sworn evidence and denied the charges and claimed he did not know his co-accused or the complainant prior to his arrest. He alleged that after being held for three days, police officers demanded Ksh 400,000 to drop the case, a sum his family could not afford. He acknowledged that his home in Kianguruwe neighbors the complainant's village of Mathaithi but denied any involvement in the crime. He confirmed being at home for school holidays during the period the offenses were alleged to have occurred. He stated his date of birth was 23rd April 2003, making him 16 years old at the time of the incident.

16. The trial court convicted and sentenced the accused persons to an imprisonment term of ten (10) years.

The Appeal.

17. Having been dissatisfied by both the conviction and sentence by the trial court, the appellants lodged a petition of appeal dated 16th July 2024 citing the following eleven grounds:

a. **THAT the learned trial magistrate erred in law and fact in finding that the prosecution had proved it's case beyond reasonable doubt in circumstances**

where the evidence presented was clearly inconsistent and inadequate to sustain and prove the charges preferred.

b. **THAT the learned magistrate erred in law and fact in relying on and giving due credence to the prosecutions evidence which was full of contradictions and loose ends incapable of proving the charges against the appellants.**

c. **THAT the learned magistrate erred in Law and fact in finding that the prosecution witnesses' testimonies had been consistent when in fact there were glaring contradictions, exaggerations and misinformation in the whole case and evidence.**

d. **THAT the learned magistrate erred in Law and in fact in convicting the appellants on the sole evidence of the complainant that was not corroborated independently.**

e. **THAT the learned magistrate erred in law and fact by reaching conclusions on facts and giving opinions not founded in or supported by the evidence tendered by any witnesses.**

f. THAT the learned magistrate erred in law and in fact in convicting the appellants despite deliberate concealment and suppression of crucial evidence and witnesses by the respondent (Prosecution) thereby arriving at an erroneous judgment.

g. THAT the learned magistrate erred in law and fact by disregarding and failing to consider the sworn testimony of the appellants which testimony was unshaken by the prosecution which testimony absolved the appellant of any wrong doing.

h. THAT the learned magistrate erred in Law by shifting the burden of disapproving the charges to the appellants before the discharge of the burden by the prosecution.

i. THAT the learned magistrate erred in law and fact by convicting the appellant of the charges by largely misconstruing the medical evidence to imagine an offence where none existed.

j. THAT the learned magistrate erred in law and fact by disregarding the defence of the appellants which

absolved the appellants of the crimes they were charged with.

k. **THAT without prejudice to all the foregoing the learned Magistrate erred in law and fact by imposing an excessive sentence.**

18. Consequently, the appellants prayed that the appeal be allowed, the learned magistrate's finding and conviction be quashed, the sentence be set-aside and the appellants be set at liberty, and that the record of the appellants be declared untainted by any criminal conviction.

19. The parties agreed that the appeal be canvassed by way of written submissions. On record are submissions dated 18th November 2025, filed by the appellants and submissions dated 11th December 2025, filed by the respondent; both of which this court has carefully considered.

Appellants' Case.

20. The appellants submitted that the prosecution bore the burden of proving all the ingredients of the offences charged beyond reasonable doubt, and that the evidence tendered before the trial court fell short of that threshold. They also pointed out that at the time of the alleged

commission of the offences, they were minors aged about sixteen years.

21. It was their submission that the trial was fundamentally defective for failure to conduct a *voire dire* examination before receiving the evidence of the complainant, who was then aged fourteen years. Counsel argued that no inquiry was undertaken by the trial court to ascertain whether the complainant understood the nature of an oath or the duty to speak the truth, yet his testimony formed the foundation of the conviction. On that basis, the appellants contended that the evidence of the complainant ought to have been excluded, and that once excluded, the conviction could not stand. The appellants further submitted that even if the complainant's evidence were to be considered, the same was not corroborated and did not meet the requirements of the proviso to **Section 124 of the Evidence Act**. They argued that the trial magistrate neither recorded reasons for believing the complainant nor expressly satisfied herself that he was telling the truth before proceeding to convict on his sole evidence. In their view, the absence of such reasons rendered the conviction unsafe.

22. The appellants also challenged the credibility and consistency of the complainant's account. They submitted that the narrative given by the complainant was improbable and unsupported by surrounding circumstances, particularly the allegations that he was repeatedly

assaulted, spent nights away from home, and yet there was no evidence from his parents, guardians, or other relatives to confirm that he had gone missing, exhibited unusual behavior, or made any complaint during the material period. They also pointed to the absence of evidence regarding an alleged leg injury and argued that the story as narrated contained glaring gaps and inconsistencies.

23. It was further submitted that the prosecution failed to call crucial witnesses whose evidence would have shed light on the allegations. In particular, the appellants referred to the complainant's parents, his sister, his aunt, and the brother of the first accused, contending that these were material witnesses whose testimony would have clarified whether the complainant had in fact spent nights away from home or whether there existed circumstances supporting the prosecution case. According to the appellants, the failure to call those witnesses entitled the court to draw an adverse inference against the prosecution.

Respondent's Case.

24. In response, the respondent submitted that the prosecution proved the charge against the appellants beyond reasonable doubt. It was argued that the evidence on record established all the essential ingredients of the offence, namely the age of the complainant, penetration, proper identification of the perpetrators, and the fact that the offence was committed in association with others.

25. The respondent pointed out that the complainant's birth certificate showed that he was born on 6th July 2008 and was therefore a child at the time of the alleged acts. The respondent further relied on the complainant's testimony and the medical evidence of the clinical officer, who noted anal lacerations, tenderness as proof of penetration.

26. The respondent further submitted that the complainant consistently identified the appellants as persons known to him from neighboring villages, and gave a detailed account of the different occasions on which he was assaulted by them together with the co-accused person. On that basis, the respondent contended that both identification and the element of common intention or joint participation were sufficiently proved.

27. On the complaint that the conviction was based on uncorroborated evidence, the respondent submitted that the complainant's account was in any event corroborated by the medical evidence on record. Further, it was argued that under the proviso to **Section 124 of the Evidence Act**, a court is entitled to convict on the sole evidence of a victim in a sexual offence if it is satisfied that the victim is truthful. According to the respondent, the trial court believed the complainant and was entitled to do so in the circumstances of the case.

28. With regard to the alleged failure to call crucial witnesses, the respondent maintained that the witnesses called were sufficient to

prove the case and that the law does not require any particular number of witnesses to establish a fact. In that regard, reliance was placed on **Section 143 of the Evidence Act**, and the respondent argued that the complainant's sister and mother were not indispensable witnesses since the evidence adduced was adequate to establish the offence charged.

29. On the issue of *voire dire* examination, the respondent submitted that although the complainant was a child, the trial court had the opportunity to observe him and was satisfied that he understood the nature of an oath, hence the reason why he testified on oath. It was contended that **Section 125 of the Evidence Act** rendered him competent to testify, and that the omission to conduct a formal *voire dire* examination did not vitiate the trial. The respondent argued that the complainant gave clear and coherent evidence, remained firm in cross-examination, and that in any event there was independent medical evidence supporting his testimony.

30. Lastly, the respondent submitted that the trial court did consider the appellants' defenses but correctly found that they did not cast any doubt on the prosecution case. It was argued that the second appellant merely denied the allegations and raised an uncorroborated *alibi*, while the first appellant also denied the offence though he acknowledged the proximity of his residence to that of the complainant. The respondent maintained that the trial court properly

rejected the defenses as implausible and found no reason why the complainant would falsely implicate the appellants.

Analysis and Determination.

31. This being first appellate court, it is guided by principles set out by the court of appeal in the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the court stated as follows:

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

32. I have looked at the grounds of appeal, the submissions filed by the parties, the lower court proceedings and the trial court's judgment.

33. The main issues for determinations are:

i. **Whether the prosecution proved the offence against the appellants beyond reasonable doubt.**

ii. **Whether the failure to conduct a *voire dire* examination vitiated the trial.**

iii. **Whether the conviction was improperly founded on uncorroborated evidence, inconsistent testimony, or inadequate investigations**

iv. **Whether the appellants' defences were disregarded or the burden of proof shifted to them**

v. **Whether the sentence imposed was lawful and proper, particularly in view of the appellants' age at the time of the offence.**

34. On the first issue, the law is settled that to sustain a conviction for gang rape under **Section 10 of the Sexual Offences Act**, the prosecution must prove penetration, the identity of the offenders, and that the offence was committed in association with another or others

35. The age of the complainant was not in dispute. His birth certificate showed that he was born on 6th July 2008, and he was therefore eleven years old at the material time. That evidence sufficiently established that he was a child within the meaning of the **Sexual Offences Act**.

36. On penetration, PW1 gave a detailed account of repeated acts of anal penetration by the three accused persons on different dates. He described how Kennedy first penetrated him on 4th August 2019, and later, on 11th August 2019, all three accused persons penetrated him in turns while using condoms. He also described further separate acts by the 2nd and 3rd appellants. That evidence was not vague or generalized. It was direct evidence from the victim of the sexual assault. That account was materially corroborated by the medical evidence. PW3 examined the complainant and found perineal laceration, anal tenderness, and loose anal sphincter tone, and formed the opinion that those findings were consistent with sodomy. He clarified in cross-examination that the absence of spermatozoa was explicable by the reported use of condoms and the complainant having bathed. In my view, the medical evidence lent strong support to the complainant's testimony and firmly established penetration.

37. The appellants argued that the medical evidence was misconstrued and that no offence was proved. I am unable to agree. The fact that no spermatozoa were recovered did not negate the offence, absence of spermatozoa is not decisive where there is credible testimony by the complainant supported by medical findings showing trauma consistent with. As provided **in Section 2 of the Act** penetration need not be complete. As was held by the Court of Appeal in the case of **Mark Oiruri Mose vs R (2013) eKLR** -

"…. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep…."

38. As regards identification, this was a case of recognition. PW1 knew Kennedy beforehand, knew the 2nd appellant physically as a neighbor, and knew the 3rd appellant. He gave a coherent account of the role played by each participant and identified them in court. PW2 also testified that the complainant reported that he could identify the perpetrators and indeed led to the arrest of Kennedy, after which the others were arrested. The possibility of mistaken identity was therefore remote.

39. The element of joint participation was likewise established. PW1's evidence was that on 11th August 2019 the three accused persons acted together, removed his clothes, and each penetrated him in turn. That evidence, if believed, was sufficient to prove commission of the offence in association with others, which is the gravamen of the offence under **Section 10 of the Sexual Offences Act**.

40. I now turn to the complaint regarding *voire dire* examination. The complainant was born on 6th July 2008. The incidents began in August

2019, when he was eleven years old. However, what matters for purposes of reception of evidence is his age at the time he testified. The record as summarized before this court shows that PW1 testified on 05.04.2022, by which time he was older, and in the parties' own submissions he was described as being aged fourteen years. For purposes **of Section 19 of the Oaths and Statutory Declarations Act**, a child of tender years is one aged fourteen years and below, **Section 19** is concerned with reception of evidence from such a child.

41. Even assuming that a formal *voire dire* inquiry ought to have been conducted, the omission did not in the circumstances vitiate the trial. The complainant testified on oath, gave a clear and detailed narrative, and remained firm in cross-examination. More importantly, his evidence was not standing alone; it was corroborated by medical e-vidence of anal injury. To me failure to conduct a formal voire dire examination is not invariably fatal where the witness gave coherent evidence and there exists other supporting evidence on record.

42. The appellants further argued that the conviction was based on uncorroborated evidence contrary to **section 124 of the Evidence Act**. That submission is not borne out by the record. First, the complainant's testimony was corroborated by the medical findings of PW3. Second, the proviso to section 124 permits a conviction in a sexual offence on the sole evidence of the victim if the court believes the victim and records reasons.

43. I have also considered the attack mounted on the complainant's credibility, including the complaint that there was no evidence from his parents, sister, aunt, or the brother of Kennedy to confirm that he spent nights away from home or made early reports**. Section 143 of the Evidence Act** is clear that no particular number of witnesses is required to prove a fact. The prosecution is only obliged to call such witnesses as are necessary to establish the truth. An adverse inference arises only where the evidence called is barely adequate and it appears that material witnesses were withheld. In the present case, the evidence of PW1, PW2 and PW3 was not barely adequate; it was direct, consistent in material respects, and corroborated by medical evidence.

44. The inconsistencies pointed out by the appellants do not, in my view, go to the root of the case. The complainant's account was detailed because it related to several separate incidents over time. Minor variations in surrounding detail can be expected. The substance of his evidence remained steady that he was lured by Kennedy, repeatedly subjected to anal sexual assault, the appellants herein were known to him, and the medical examination confirmed anal trauma consistent with his narrative. Such minor discrepancies do not render a conviction unsafe.

45. I now address the appellants' contention that their sworn defences were disregarded and that the burden of proof was shifted to

them. The 2nd appellant raised an *alibi* that he had been away at volleyball training, while the 1st appellant denied the offence and raised a complaint about alleged demands for money by the police. The law is that an accused person bears no burden of proving an *alibi*; the burden always remains on the prosecution. However, once the prosecution evidence places an accused person at the scene and identifies him positively, the trial court is entitled to reject an alibi that does not raise reasonable doubt.

46. Having re-evaluated the record, I am satisfied that the trial court did consider the appellants' defences but found, correctly in my view, that they did not dislodge the prosecution case. The 2nd appellant's alibi was unsupported by any evidence. The 1st appellant admitted that his home neighbored the complainant's village, which accorded with the complainant's evidence that he knew him. There is nothing on the record to suggest that the trial court shifted the burden of proof.

47. On the issue of sentence, the appellants herein raised the ground that the sentence imposed was harsh and excessive. the trial court sentenced each appellant to ten years' imprisonment. It is clear from the record that after conviction, the learned trial magistrate deferred sentencing, called for pre-sentence reports, and considered the same before passing sentence on 9th July 2024. The court correctly appreciated that the offenders were minors at the time of commission of the offence but had since attained the age of majority. It then relied

on **Amos Kipchirchir Cheruiyot v Republic [2020] eKLR** and **JKK v Republic [2013] eKLR** in concluding that where a minor offender has attained the age of majority, and particularly where the offence is grave, the court may impose a custodial sentence in a lawful manner. Moreover, an appellate court ought not interfere with sentence unless it is shown that the trial court acted on a wrong principle, overlooked a material factor, considered an irrelevant matter, or imposed a sentence that is manifestly excessive. No such error has been demonstrated here. In view of the gravity of the offence, the age of the complainant, and the fact that the trial court considered the appellants' age, mitigation, and the pre-sentence reports, the sentence of ten years' imprisonment was neither harsh nor excessive.

48. In the result, the appeal is dismissed on both conviction and sentence.

49. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED ONLINE AT KAKAMEGA THIS 24TH DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the Presence of:-

CA: Velma

Mr. Muturi holding brief for MR. Kungu for the Accused present online.

Mr. Mwako for ODPP present online.