



**Mwithuka v Republic (Criminal Appeal 68 of 2018)  
[2025] KECA 134 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 134 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 68 OF 2018  
MA WARSAME, S OLE KANTAI & WK KORIR, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**BENSON WAWERU MWITHUKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nakuru (Joel Ngugi, J.) delivered on 20th day of September 2018 in Criminal Appeal No. 97 of 2014)*

**JUDGMENT**

1. The appellant, Benson Waweru Mwithuka, is serving life imprisonment after he was convicted for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*. The particulars of the charge being that on 2<sup>nd</sup> December 2012 in Njoro District of the then Rift Valley Province, the appellant defiled MN who at the time was aged 4 years. In the alternative, the appellant was said to have at the date, place and time stated in the main charge to have committed an indecent act with MN, a child, contrary to section 11 (1) of the *Sexual Offences Act*.
2. The appellant unsuccessfully challenged the conviction and sentence issued by the trial court before the High Court. He is once more dissatisfied and is now before us on a second appeal mounting a challenge on both sentence and conviction. In his memorandum of appeal and supplementary grounds of appeal, the appellant challenges the impugned judgment on the grounds that the procedure was not followed in taking the evidence of PW1, a vulnerable witness; that the ingredients of the offence were not proved; that his defence was not considered; that he was denied a fair hearing; and that the sentence was harsh and excessive.
3. At this juncture, it is necessary to restate the evidence adduced at the trial. MN (PW1) was a minor aged 4 years. The trial court noted her inability to express herself and declared her a vulnerable witness. The magistrate proceeded to appoint her mother, MN (PW3) to be her intermediary. Through PW3,



PW1 stated that while she was at home on a day she couldn't recall, one, Waweru, went and picked her up on a motorcycle. The appellant would then ride her to his house where he defiled her and later gave her "githeri". She did not tell anyone of her ordeal as she feared the threats issued by the appellant. It was not until when the child and her mother went to visit the child's aunt in Molo that upon feeling pressed, she asked her mother to escort her to the toilet as she could not rise and was feeling pain in her abdomen. When her mother interrogated her, she told her of her

ordeal in the hands of the appellant. Her mother escorted her to the hospital and the police station.

4. Tabitha Ngugi (PW2) testified that PW1 and PW3 visited her clinic and informed her of the discomforts that PW1 had. She examined PW1 who informed her that the ordeal complained of happened about 3 weeks earlier. Her examination revealed that PW1's hymen was torn. She also conducted other numerous tests which all turned negative. She produced the P3 form, the post-rape care form and treatment sheets as exhibits.
5. PW3 on her part testified that PW1 was her 3<sup>rd</sup> born child aged 4 years. She recalled that on 23<sup>rd</sup> December 2012, while visiting her sister in Molo together with PW1, the daughter beseeched her to escort her to the loo. While at it, PW1 complained of pain in her private parts and was also not able to rise. Upon interrogating her, PW1 told her that while she was away for work, one Waweru picked her up on a motorbike and took her to his house, where he defiled her. Immediately, she took PW1 to Molo Dispensary and reported the incident to police who referred them to PGH Nakuru.
6. Peter Kamau (PW4) was the Chief of Bagaria Location. He gave an account of how he assisted in the arrest of the appellant after being requested to do so by PC Joseph Masese (PW5). PW5 who was attached to Naishi Police Station gave an account of how he investigated the matter, arrested the appellant and preferred the charges against him.
7. Called upon to tender his defence, the appellant gave sworn testimony stating that on 10<sup>th</sup> December 2012, he was invited for dinner by PW3 at her place. He obliged and after dinner, PW3 made advances on him to which he declined since they were not only blood relatives but also neighbours. He stated that two weeks later, on 24<sup>th</sup> December 2012, while going on with his daily routine, he was lured by the village elder to the police station where he met the area chief (PW4) and PW5. He was then arrested, booked, and charged with the offence. He denied the offence and attributed his predicament, to his declining to yield to the advances made by PW3.
8. When this appeal came up for hearing on 22<sup>nd</sup> July 2024, the appellant appeared in person while the respondent was represented by learned counsel Mr. Omutelema. Both the appellant and Mr. Omutelema having filed written submissions opted to wholly adopt them without any highlighting.
9. In his undated submissions, the appellant urged that sections 31 and 32 of the *Sexual Offences Act* were not complied with as PW1 was not informed by the trial court of the measures that had been taken to protect her. According to the appellant, this failure by the prosecution was prejudicial to him. In addition, he submitted that the evidence of PW1 was weak and did not establish the fact of penetration hence the trial court erred in convicting him. Attacking the medical evidence of PW2, the appellant submitted that the same did not conclusively establish that PW1 was defiled. According to the appellant, the absence of the hymen and abdominal pains could have been caused by other factors and that evidence could not be relied upon as corroborating or proving penetration. He also contended that PW2 having examined the complainant after three weeks, her evidence would not conclusively point to the occurrence of penetration.



10. Regarding his claim that his right to fair trial was violated, the appellant submitted that the failure to indicate on the record the language used in the proceedings and the language used by PW1 to testify was prejudicial to him and negatively impacted his right to a fair trial.
11. Finally, on the issue of the sentence, the appellant submitted that the life imprisonment did not only go against the constitutional values and principles but also affected his rights under *the Constitution* and was harsh and excessive in the circumstances of this case. He therefore urged us to allow his appeal.
12. In opposition to the appeal, Mr. Omutelema referred to sections 2 and 8 (1) of the *Sexual Offences Act* for the definition of penetration and the elements of defilement under the Act. Counsel proceeded to rehash the evidence and submitted that the evidence on record was sufficient to return a conviction. Mr. Omutelema also referred to section 31 of the *Sexual Offences Act* and Article 50 (7) of *the Constitution* to urge that the learned trial magistrate acted within the law by declaring PW1 a vulnerable witness. To buttress this submission, counsel referred to M. M. vs. Republic [2014] eKLR, where the Court approved the use of an intermediary where the witness is vulnerable or too young to tender evidence.
13. Still on the appellant's claim that the offence was not proved, learned counsel submitted that the evidence of PW1 was corroborated by that of PW2 and PW3 as required by section 124 of the *Evidence Act*. To this end, counsel referred to the case of Karanja & Another vs. Republic [1990] KLR to point out the need for corroboration of the evidence of PW1. Rejecting the appellant's assertion that his defence was not considered, counsel maintained that the evidence of the appellant was considered and dismissed. Regarding the appellant's allegation that his right to legal representation was violated, counsel submitted that the appellant was aware of this right, and had a counsel on record whose failure to attend court did not prejudice the appellant in any manner. On sentence, Mr. Omutelema urged that the appellant's mitigation notwithstanding, the circumstances of this case called for a severe sentence. In conclusion, it was the respondent's submission that the appeal should be dismissed.
14. As already stated, the appellant has invoked our jurisdiction as a second appellate Court. Under section 361(1) (a) of the Criminal Procedure Code, our restricted role requires us to consider issues of law only as opposed to matters of fact to which we are required to pay homage to the concurrent findings by the two courts below. This jurisdictional circumscription was reiterated in Alfayo Gombe Okello vs. Republic [2010] eKLR as follows:

“In view of section 361 of Criminal Procedure Code, only issues of law may be raised for consideration as this Court has stated times without number that it will not interfere with concurrent findings of fact by the two courts below unless such findings were made on no evidence at all or on a perversion of it, or if no tribunal properly directing itself on the evidence would make such findings. In such a case the decision would be said to be bad in law. See for example M' Riungu vs. Republic [1983] KLR 455.”
15. We have carefully reviewed the record and submissions by the parties to this appeal. In our view, the resolution of the following three questions determines this appeal: whether the trial court complied with section 31 of the *Sexual Offences Act* when taking the evidence of PW1; whether the offence was proved; and whether the appellant has established a case warranting our interference with his sentence.
16. The gist of the appellant's complaint is that the decision to declare PW1 a vulnerable witness was not communicated to PW1. It is his assertion that the failure to communicate this decision prejudiced him



as an accused person. The appellant's complaint stems from the provision of section 32 of the [Sexual Offences Act](#) which provides as follows:

- “(1) The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is a child, such child, his or her parent or guardian or a person in loco parentis, of the possibility that he or she may be declared a vulnerable witness in terms of section 31 and of the protective measures listed in paragraphs (a) to (e) of section 31(4) prior to such witness commencing his or her testimony at any stage of the proceedings.
- (2) The court shall, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in this section and the court shall note the witness's response on the record of the proceedings, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed.”

17. The learned Judge when dealing with this issue stated in the judgment that:

“10. I think this record is enough to pass muster under sections 31 and 32 of the [Sexual Offences Act](#). The Complainant was 4 years old and unable to comprehend many things. It would have been futile to try to explain to her more than the Court did that it was taking protective steps on her behalf. The Court record gives clear reasons for the Court's move.

11. In any event, I note that section 32 of the [Sexual Offences Act](#) is meant for the protection of the vulnerable witness. It would be otiose to make a finding that technical failure to follow it should be utilized for the benefit of the Accused Person. However, I would point out that in cases where an appointed intermediary is herself an independent witness in a case, good practice demands that the intermediary should give her testimony first before acting as an intermediary. See *M v R* (Court of Appeal at Nairobi Criminal Appeal No. 41 of 2013). However, though here the intermediary did not testify first, I find that there was no substantial prejudice to the Appellant.”

18. We cannot fault the learned Judge for reaching that conclusion. In addition, we wish to point out that section 32 has both substantive and procedural compliance issues. Regarding substantive compliance aspect, the question that begs an answer is who should be informed that a witness is likely to be declared vulnerable? It is to be noted that section 32(1) of the [Sexual Offences Act](#) refer to “a vulnerable witness in terms of section 31” of the Act. Under section 31 of the [Sexual Offences Act](#), subsections (1) and (2) expressly preclude an accused person from amongst persons who can be declared vulnerable. A reading of sections 31 and 32 of the [Sexual Offences Act](#) leads to the conclusion adopted by the learned Judge of the first appellate court that the communication referred to was with respect to and for the benefit of the vulnerable witness and not the appellant.

19. Turning to the procedural aspect, the same comes in two facets. First, under section 32(1) of the [Sexual Offences Act](#), the prosecution is required to inform the witness that he or she may be declared a vulnerable witness. Such information may be given, where the witness is a child, to the parent, guardian or the person in loco parentis. The second facet is under sub-section (2) which obligates the trial court



to enquire from the prosecutor whether the witness has been informed of the possibility of being declared vulnerable and, if not, ensure that the witness is informed.

20. In this case, the matter came up on 24<sup>th</sup> May 2013 and PW1 was ready to testify from 12.05 pm. The Court commenced by conducting a *voire dire* examination of the witness before ruling that the witness was a vulnerable witness. The mother of PW1 was then made the intermediary and the evidence was taken through her as an intermediary. The trial magistrate was empowered by section 31 to declare the witness vulnerable and to appoint an intermediary for the witness. In the process of doing so, the witness and her mother were informed that the witness was being declared vulnerable and an intermediary being her mother was being appointed for her. If one is in doubt, the evidence of PW1 speaks to the fact that the complainant's mother was aware of her task as an intermediary. She knew her assignment and appreciated why she had been called in to assist her daughter give evidence and to make her comfortable in court. As was held in *M.M. vs. Republic* [2014] eKLR:

“The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness.”

21. In the circumstances, despite lack of clear expression on the record that the provisions of sections 31 and 32 had been complied with, it is apparent from the testimony of PW3 that those provisions were complied with. As such, we find and hold that the evidence of PW1 was therefore properly taken and no prejudice was caused to the appellant at all.
22. Turning to the question of whether the offence was proved, the appellant's contention is twofold. First, that the evidence of PW1 was not corroborated and second, that the evidence in its totality did not prove penetration. Ordinarily, section 124 of the *Evidence Act* would permit a trial court to convict on the evidence of the uncorroborated evidence of the complainant. However, the evidence of PW1 was taken with the aid of an intermediary. In that circumstance, section 31 (10) of the *Sexual Offences Act* comes to play. The section provides as follows:

“A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.”

23. A two-Judge bench of the High Court (Trevelyan and Hancox, JJ.) in *Khalif Haret vs. Republic* [1979] eKLR defined corroboration as follows:

“What then, is corroboration? As was put succinctly in *R vs. Kilbourne* (at page 263) it means “no more than evidence tending to confirm other evidence”. It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration.”

24. We find the above excerpt persuasive as to what amounts to corroboration of evidence. Each element of the offence was therefore subject to corroboration. The first element was that of the age of the complainant. The same was not contested. However, we reiterate that both PW1 and PW3 testified that the complainant was 4 years old. In addition, PW3 produced the complainant's clinic card which confirmed that PW1 was born on 29<sup>th</sup> March 2009. The element of age was therefore corroborated and proved beyond reasonable doubt.



25. The next element is whether penetration was proved. In this regard, without further analysis, we concur with the findings of the learned Judge of the High Court as follows:

“26. Was there penetration? The Appellant argues that there is no evidence that proves beyond reasonable doubt that there was penetration since no such evidence came directly from the victim. I disagree. While, of course, the Complainant, who is four years old, did not use the word “penetration” or “defilement”, the context of her testimony is dripping with meaning that the Appellant defiled her. In her Examination-in-chief, she is clear that the Appellant came and took her in his motor bike. She relates this to the pain she was having in her stomach and while urinating. Then, in cross-examination by the Appellant, the Complainant says this:

She answer[s] that she did not tell anyone immediately because you threatened her. She say[s] that nobody witnessed the incident. She say[s] that you were alone in your house. She states that it is me who washes her when I come back from work. She says nobody told her to say what she has said before Court and that she is telling the truth to the Court.

27. From this account, I conclude that the Complainant is, in fact, testifying about being defiled given her earlier testimony during examination-in-chief. It is, therefore, not correct to say that the only evidence of penetration came from the Complainant’s mother hence making section 124 of the *Evidence Act* inapplicable. It is important to recall that the Complainant was merely four years old. Her testimony must be read with this in mind. If one does so, any fleeting doubts that she was, in fact, speaking about penetration vanishes.

28. Further, the evidence given by the Complainant tallies with that of her mother who testified how she discovered about the defilement. The medical evidence about the missing hymen, therefore, further reinforces the evidence that there was penetration.

29. The Learned Trial Magistrate who heard and saw the witnesses was categorical in her analysis about the demeanour of the Complainant. She found the Complainant candid and forthcoming in her evidence. She also recorded the impact seeing the Appellant had on the Complainant. This is a relevant factor to consider under section 33 of the *Sexual Offences Act*. Coupling this [with] her actual evidence and the evidence of the surrounding circumstances, I have no doubt that the Complainant was penetrated and defiled.”

We only need to add that the medical evidence from an independent witness corroborated the evidence of the intermediary.

26. The final element of the offence was the identity of the appellant. On this, both PW1 and PW3 were acquainted with the appellant. In fact, there was even a close relationship between PW3 and the appellant. We are therefore convinced that not only was the appellant’s identity ascertained but also that the evidence proving each element of the offence was corroborated. We therefore find that the offence of defilement was proved against the appellant.

27. The other complaint by the appellant relates to the sentence. The appellant attacks the sentence terming it not only unconstitutional but also harsh and excessive. By dint of section 361 (1) (b) of the



Criminal Procedure Code, we are barred from entertaining appeals against sentence unless the sentence so passed is one which was passed by the trial court without jurisdiction or enhanced by the High Court. The cited provision also states that the severity of a sentence is a matter of fact which is not within the remit of a second appeal. On the jurisdiction of the Court on a second appeal, the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR) held as follows:

“Thus, the Court of Appeal’s jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent’s appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal’s jurisdiction.”

28. In this case, despite the appellant raising the question of sentence as a ground in this appeal, we are barred from addressing the issue for the reasons that the question was not raised and addressed by the first appellate court and that the issue is one of fact thus falling outside our remit.

29. Consequently, this appeal lacks merit and is for dismissal. It is hereby dismissed.

**DATED AND DELIVERED AT NAKURU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

