Mukhalule v Republic (Criminal Appeal 108 of 2019)
[2025] KECA 1353 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1353 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 108 OF 2019

S OLE KANTAI, JW LESSIT & AO MUCHELULE, JJA

JULY 18, 2025

BETWEEN

JAPHET INYANYA MUKHALULE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nyeri (T. Matheka, J.) delivered on 24th day of April, 2018 in Criminal Appeal No. 26 of 2017)

JUDGMENT

1. There can be no doubt that the case by the prosecution was proved to the required standard. The nine-year-old defiled girl testified before the magistrate in very clear terms how the appellant Japhet Inyanya Mukhalule lured her into his house and defiled her after forcefully removing her clothes. The trial magistrate believed that the girl was telling the truth. The law allowed conviction on the basis of the child's evidence under section 124 of the *Evidence Act*. In the case before the magistrate there was additional evidence of her grandfather, teacher and head teacher, who confirmed seeing the girl walking with an abnormal gait or with difficulty. The Clinical Officer who examined her confirmed that she had been defiled. The girl knew the appellant who worked in a local school where she used to go and fetch milk every evening. It was during such one errand that he defiled her.

   The appellant was convicted and sentenced to life imprisonment and his appeal to the High Court of Kenya at Nyeri was dismissed.

   What is disturbing to us in this appeal is the way the Judge on first appeal (T. Matheka, J.) approached the legal issues that were before her. After identifying her duty as a first appellate court and after re-analyzing the evidence that had been given by the prosecution and the defence by the appellant she

found there were three possible scenarios of the case that had been before the magistrate. We quote the judgment verbatim here:

> " Scenario one:
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> The child and her cousin went to collect milk. The appellant kept her behind and defiled her. She went home, reported to her grandmother same day of 19th July, 2016, who informed her grandfather, who in turn took her to the head teacher, and told her to tell the head teacher what had happened. Then she was taken to hospital from where they were referred to the police.
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> Scenario two:
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> PW4 the class teacher notices that the child is walking abnormally. It is not the first time she is noticing this. Enquires from the child who says she was hurt by a stone on her leg, and she has a stomach ache. Teacher reports to the head teacher, who calls the grandfather and informs him. Grandfather does his own testing, tells the child to run, she is dragging her left foot, sends the child to a certain lady at the local market, who interrogates child and reports defilement.
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> Scenario three:
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> According to investigating officer the child was not walking properly for a period of one month. On 21st July, 2016 the head teacher instructed the grandfather to take her to hospital. The child is taken to the lady by name Mama Wangechi at Charity. She initially states the problem is that she fell on a stone but further investigations reveal the defilement."

2. The Judge in addition found that a story told by the child that a stone had hurt her leg ran through her testimony:

> "...It is unfortunate it was not interrogated further by the prosecution so as to get it out of the way. The child also said she told her grandmother the same day. It is alleged she was defiled. What happened to this information? How then did it come to be that it is the teachers who found out that there was a problem three days later, yet the child had already reported to her grandparents? Why was it necessary to send her to a stranger to interrogate her? Neither the grandmother nor Mama Wagechi testified to tell the court what the child told them. What is the purport of the investigating officer's statements that the child was sent to Mama Wagechi for interrogation because she could keep the family's secret? What family secrets needed to be kept? These are question that the trial magistrate did not interrogate yet the answers could have a bearing on the charges facing the appellant and whether or not they could affect the basis for conviction?"

3. The Judge then turns around and finds that the prosecution had proved its case to the required standards yet the Judge did not answer or resolve the questions or scenarios that she had posed or created.

   In the old classic English case of Woolmington vs. Director of Public Prosecutions 1935 AC 432 HL it was held that it is always the duty of the prosecution to prove its case beyond reasonable doubt and an accused person has no duty to disprove. This position has been adopted by our courts in various cases

such as Moses Nato Raphael vs. Republic [2015] eKLR, the Court stated the following regarding the burden of proof in criminal matters:

> "The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This principle is well captured in the time honored English case of Woolmington vs. DPP (1935) A. C 462 where the Court stated:-
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> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

4. This Court in a more recent case of Wafula vs. Republic (Criminal Appeal 110 of 2019) [2023] KECA 131 (KLR) (10 February 2023) stated:

> " It is trite law that the legal burden of proof in a criminal case rests throughout, with the prosecution. There was no burden whatsoever, on the appellant to prove his innocence. In Woolmington vs. DPP, (1935) AC462, the Court held:
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> But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence."

5. As the case stood with the scenarios or questions remaining hanging and unanswered the conviction could not stand. The learned Judge after creating scenarios had a duty to resolve them beyond reasonable doubt as the law required. It was therefore, in order that learned counsel for the Office of Director of Public Prosecutions Mr. Solomon Naulikha conceded this appeal. The conviction could not stand because any of those scenarios that were not resolved went to the benefit of the appellant. We resolve those scenarios paused by the judge by allowing this appeal. We quash the conviction and set aside the sentence.

The appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 18TH DAY OF JULY, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR