



**Hamadi v Republic (Criminal Appeal E012 of 2024)
[2025] KEHC 6835 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E012 OF 2024
WM KAGENDO., J
APRIL 30, 2025**

BETWEEN

HAMISI HAMADI APPELLANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The appellant was charged before the Court with the offence of:

Charge: Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence are that accused person on diverse dates between 1st July 2016 and 5th February 2021 at Likoni Sub-County in Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of A.H, a child aged 15 years. Alternate charge: 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 are that the accused person on diverse dates between 1st July 2016 and 5th February 2021, at Likoni Sub-County in Mombasa County unlawfully and intentionally touched the vagina of A.H, a child of 15 years using his penis.
2. The Appellant was charged, he denied the charges and the trial court put down the case for hearing. The prosecution called four (4) witnesses and at the close of the prosecution's case, the trial court found the Appellant with a case to answer and put him to his defence. He elected to give sworn evidence.
3. The appellant was convicted.
4. The Appellant filed his memorandum of appeal on the following grounds:



- a. That the learned trial magistrate erred in law and fact by not considering the issue of identification under recognition was only based on prior familiarity but not on the said incident.
 - b. That the learned trial magistrate erred in law and fact by not appreciating that the issue of penetration was not confirmed as to who penetrated but only rested on the victim's narration.
 - c. That the learned trial magistrate erred in law and fact by failing to note that the age of the victim was said to be proven by a document which was not presented legally.
 - d. That the learned trial magistrate erred by failing to consider that there was altercation between the victim and his wife which turned to be the source of this matter in question
 - e. That the learned trial magistrate erred in law and fact for not considering the mass contradiction and inconsistency featured in the current case.
 - f. That the learned trial magistrate failed to appreciate that the prosecution case was not proved beyond reasonable doubt.
 - g. That the learned trial magistrate erred in law and fact by failing to take into consideration his unshaken defence.
5. For the reasons advanced in his petition of Appeal, the Appellant sought for the following orders:
- a. That this Appeal be allowed.
 - b. That an order that all the Proceedings, the Conviction and Sentencing of the Appellant be set aside in their entirety.
 - c. That this Honourable Court do find and declare that the entire proceedings herein were tantamount to a mistrial and thus set aside all the proceedings, judgment and sentencing of the Appellant in their entirety.
 - d. That the Appellant be set at liberty unconditionally.
 - e. That alternatively, this Honourable Court declares that the trial before the Subordinate Court was a mistrial and effectively the case against the Appellant be heard afresh and before any Magistrate, other than the trial magistrate.
 - f. That this Appeal be allowed with costs to the Appellant. The Prosecution's Case
6. The prosecution called four witnesses in support of its case. The complainant testified as PW1. A.H, the complainant testified that she is a 16-year-old. She identified the accused as Mwamaika. She has known him since she was 9 years old as they were neighbours. He is a mganga. She told the court that in 2016, the accused would call her into his house and insert his fingers in her vagina. He moved to another neighbourhood in 2018. He would insert his penis into her vagina while wearing a condom. This happened four times in his house. She informed the court that the wife to the accused warned her not to go to his house. The father later learnt of this incidence. She was taken to the hospital and later to the police station. She stated that they would have sex when she left school. On cross-examination, she confirmed that they had had sex for a long time. She stated that the accused had told her not to tell anyone of the incidences. She would go to his place every day apart from weekends.
7. PW2- Hassan Said confirmed that the victim is his daughter. On 3/2/2021, a neighbour informed him that his daughter had been involved with an altercation with someone's wife. She went to that house and the lady confirmed that his daughter frequented their house. He confronted the daughter



- about it, and she admitted that they had sex severally. He informed the court that he took the child to hospital and later reported the matter at Inuka Police Station. He produced the minors birth certificate as Exhibit 1. He told the court that he knew the accused since they were neighbours. On cross-examination, he stated that the accused's wife was fearful that the minor was sleeping with her husband.
8. PW3- Stephen Kelei is a clinical officer from Likoni Sub-County Hospital. He produced the Post Rape Care form of the complainant as Exhibit 4, P3 form as Exhibit 3 treatment notes as Exhibit 2 and the Consent form as Exhibit 5. He confirmed that the child had a broken hymen with an old scar. On cross-examination, he told the court that the child had not changed clothes when the PRC form was filled.
 9. PW4- No. 60192 CPL Fatuma Mbale was the investigating officer. She gave an account that the victim herein was taken to the police station by her father, Hassan, on the allegation that she had been defiled by a neighbour. She recorded the statement of the witnesses and took the victim to hospital where a P3 and PRC form were filled.

The Defence Case

10. The accused person testified that he knows the complainant as they are friends with his children. He gave her money together with his children so that they can go to school. He denied defiling the complainant and stated that he is HIV negative and could not have infected the victim.

Analysis and Determination

11. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This is a first appeal, and this court has a duty to analyse and evaluate the evidence which was adduced before the trial court and come up with its own independent finding.
12. The appellant has a legitimate expectation that the evidence will be subjected to an exhaustive evaluation by the appellate court and the appellate court's own independent finding. This principle has been considered in various decisions of this court and those of the Court of Appeal.
13. The leading authority on the subject is *Okeno - Versus - Republic* (1972) EA 32. In this case the court stated-

“The duty of the 1st appellate court is to analyse, reevaluate the evidence which was before the trial court and itself come up with its own conclusion on the evidence. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified and must leave room for that.

14. The Court of Appeal in the case of *David Njuguna Wairimu Versus Republic* (2010) while citing with approval the case of *Okeno Versus Republic* Supra, stated as follows: -

The duty of the first appellate court is to analyse, re-evaluate the evidence which was before the trial court and itself come up with its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellant court may depend on the fact and the circumstances of the case, come to the same conclusion as those of the lower court. It may reverse those conclusions. We do not think there is anything objectionable in doing so, provided 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 decision.”

The court of appeal further stated that – “an appellant on a 1st appeal is entitled to expect the evidence as whole to be subjected to a fresh exhaustive examination (*Padya Versus Republic* 1975 EA 336)



and that the appellate court's own decision on the evidence. the appellate court must itself weigh the conflicting evidence and draw its own conclusions.

15. In doing so it must make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter's Versus Sunday Post 1978 E.A 424".

16. In the case of Gabriel Kamau Njoroge – Versus - Republic, Criminal Appeal No.149 of 1986 [1987] eKLR Court of Appeal in Nairobi, Platt & Apaloo, JA. A. and Masime Ag. J.A reiterated the duty of a first appellate court as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court.”

17. It is, therefore, the duty of this court in this case to re-evaluate the evidence adduced by the prosecution in support of the charges and by the defence, and to make its conclusion on whether the commission of the offence by the appellant in the main charge of assault, with respect to the complainant, were proved and whether the appellant was responsible.

18. Having reviewed the trial Record, the grounds of appeal and the parties' submissions, the main issues for determination are as follows:

I. Age of the Child

19. PW2 produced a copy of the victim's birth certificate showing that her date of birth is 6/6/2006. This shows that the victim was 10 to 15 years when the offence occurred, as the offence occurred on diverse dates.

20. The Court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated that:

‘The question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence, among other credible forms of proof.’

The evidence on record is thus, found to be conclusive proof of the age of the complainant thereby fulfilling this element to the required standard.

II. Proof of Penetration

21. Penetration is defined under Section 2 of the [Sexual Offences Act](#) as: ‘...the partial or complete insertion of the genital organs of a person into the genital organs of another person.’

22. The Court of Appeal in Mark Oiruri Mose v Republic (2013) eKLR pronounced itself as follows, regarding penetration:

‘So long as there is penetration, whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not no be deep inside the girl's organ.’

23. The complainant testified that the appellant inserted his finger in her vagina in 2018. She also testified that the appellant inserted his penis in her vagina in 2018. The medical examination report from the examination conducted on her at Likoni Sub-County Hospital, the Post Rape Care and the P3 forms all revealed that her hymen was broken, with an old scar. The injuries are consistent with the evidence she gave.



III. Identification of the Perpetrator

24. The fact that the appellant and the complainant knew each other is not in dispute. In fact, the appellant corroborates the complainant's evidence that he is a herbalist and they are neighbours. The issue here is whether the appellant defiled the complainant.
25. From the evidence of PW1 and PW2, there is no bad blood between the appellant and the complainant. The appellant, however, claims that there was bad blood between the appellant's wife and the complainant which he claims led to the matter. Since the feud was in between the appellant's wife and the complainant, there is no reason for her to frame him.
26. There is no reason that the complainant would lie to the court or give false information against the appellant.

Conclusion

19. In the final analysis, I have come to the finding that the charge against the Appellant was proved beyond reasonable doubt. I confirm both the conviction and sentence. The appeal is consequently dismissed.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED
AT MOMBASA THIS 30TH DAY OF APRIL**

HON. LADY JUSTICE W. M. KAGENDO (JUDGE)

HIGH COURT OF KENYA AT MOMBASA (CRIMINAL DIVISION)

In the presence of:

M/s. Bebora Court Assistant. Mr Ngiri State Counsel Appellant in person

Signed By: HON. LADY JUSTICE WENDY MICHENI

