Mwaganga v Republic (Criminal Appeal E057 of 2024)
[2025] KEHC 10684 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 10684 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E057 OF 2024

WM KAGENDO., J

JUNE 26, 2025

BETWEEN

MWARANGA MUNGA MWAGANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against conviction and sentence in Chief Magistrate's Courts at Shanzu S.ONo. 54 of 2020 delivered on 24/5/2024 by Hon. R.O. MBOGO (SRM.)

JUDGMENT

1. Mwaranga Munga Mwaganga, the appellant, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. Particulars of the offence are that the appellant on diverse dates of April, 2020 in Kisauni Sub County, within Mombasa County, intentionally caused his penis to penetrate the vagina of GH a child aged 10 years.

3. He was further charged under Count II for Sexual Assault contrary to section 5(1) (a) (l) (2) of the *Sexual Offences Act* No. 6 of 2006, particulars of which are that on diverse dates of April, 2020 in Kisauni Sub County, within Mombasa County, the appellant unlawfully used his fingers to penetrate the vagina of GH.

4. At the close of the prosecution's case, the trial court ruled that the appellant had a case to answer and was thereby put in his defence. After full trial he was found guilty of the Main Count whilst discharged of Count II and was thereby sentenced to life imprisonment.

5. After being aggrieved by the conviction and sentence of the trial court, the appellant preferred the present appeal. He based it on amended grounds that the learned trial magistrate erred in matters of both law and fact by failing to appreciate that the issue of facial identification was not proved. He

faulted the learned Trial Magistrate for failing to consider that the agent of the victim was not legally proved as some of the documents were not procedurally acquired.

6. Further, that no penetration or no supporting evidence was adduced in support of the fact of penetration. Summarily, that the learned magistrate erred in law and fact for not considering that the prosecution case was not proved beyond doubt and thereby failed to consider the appellant's defence evidence devoid of any legal basis.

The appeal was canvassed by way of written submissions.

Written Submissions.

7. The appellant contends that the evidence was not cogent to convict him. First, that the charges were defective as they were not established by evidence.

8. That, the critical ingredients of the offence, being age, penetration and identification, were not established against him as there was no corroborative evidence to support the prosecution's case.

9. As to the ingredient of penetration, he argues that the medical assessment established that the complainant's hymen was intact thus complete insertion was non-existent. Further, the swelling of the clitoris and vaginal abrasions do not amount to partial insertion. He relied on an excerpt by one Dr. Magara Patel a who lists the causes of vaginal abrasions as sexual intercourse without enough lubrication, use of sanitary pads, tight innerwear which causes friction, latex allergies due to condoms and intense scratching causing secondary infection.

10. On identification, he argues that PW1, PW3 and PW5 gave contradicting statements in respect of the identity of the 'known person'. That, PW1 testified that she did not know the name of her assailant at the time of the act and was only informed of his name by PW2. On the other hand, PW2 testified that PW1 informed her that one "Wamuto" inserted her *'dudu'* in her vagina, which is contrary to PW1's testimony.

11. On the age of the minor, the appellant contends that the prosecution relied on an 'immunization card' which was doctored on its face and neither its origin nor the maker was established and presented in court, respectively, to establish its legality.

12. Despite the state/respondent's assurances on the 29th of April, 2025, that their submissions were ready and would be accordingly filed. As at the making of this determination the same were not on record for this court's appreciation.

Determination.

13. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence to be submitted to a fresh and exhaustive examination. (See *Pandya vs. Republic* (1957) EA 336).

14. Whether the prosecution established its case against the appellant beyond reasonable doubt?

15. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *Sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. (See *George Opondo Olunga vs. Republic* [2016] eKLR.)

16. Section 8(1) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (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.
>
> (5) It is a defence to a charge under this section if –
>
> a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> b. the accused reasonably believed that the child was over the age of eighteen years."

17. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... 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 documents, 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 guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

18. The age of the minor was established by the production a copy of the minor's Child Health and Nutrition Card SN.xxx/12, Clinic No. xxx/12(Pexh3) which settled that the complainant was born on 26.1.2010, and therefore as at the time of the incidence she was 10 years.

19. The appellant's dissatisfaction is based on the argument that the particulars on the face of the minor's health and nutrition card appear doctored thus cannot be verified. I have perused the said nutrition card, and nothing can be further from the truth. It is noteworthy that the respondent/prosecution availed two (2) copies of the said cards, where on one if the copies names of the minor were re-written simply to improve legibility, but the primary copy remained intact both bearing the stamp of the Health Facility dated 10/7/2012. It would follow that the appellant's argument is accordingly dislodged. Simply put, the age of the minor was as at the time of the commission of the offence was established to be 10 years.

20. The second issue is whether the prosecution established proof of penetration of the complainant, beyond reasonable doubt. Penetration is proved through the evidence of the victim corroborated by medical evidence. Nevertheless, what this court requires is proof of facts that the offence was committed, the medical evidence, notwithstanding. The provisions of Section 124 of the *Evidence Act*, informative to the end that a conviction can rest squarely on the sole testimony of the victim. See *Daniel Maina Wambugu v Republic* [2018] KEHC 5656 (KLR).

21. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

22. The record before me, shows clearly that complainant was properly subjected to *voire dire* examination at the end of which, the learned Magistrate concluded that the complainant may give an unsworn testimony.

23. According to the appellant the prosecution failed in its undertaking to prove its case beyond reasonable doubt. He argued that as per the medical examination report dated 30th April, 2020, it was established that the complainant's hymen was intact thus the question of complete insertion was non-existent. Further, that the elements of the swelling of the clitoris and vaginal abrasions do not amount to partial insertion, as other factors may lead to similar injuries.

24. In her testimony, PW1 stated that she knew Mwaganga (appellant) who lived next to their home in Kadzodzo, who normally sent her to buy him cigarettes. Her narration of the ordeal as perpetrated by the appellant was that

> " He removed my panty and inserted his fingers on my 'part' (pointing at her private parts). He also put his *'dudu'* on me (points at her private parts). He took me to his house on the bed. I was lying on the bed. He did it several times."

25. The Complainant's testimony of the ordeal was corroborated by PW4; Dr. AbdulAziz Mohammed who produced the PRC report (P-exh2) and the P3 as (P-exh1). On genital examination it was evidenced that; her hymen was intact, but she had abrasions on her vagina and her clitoris was swollen.

26. During cross-examination PW4 clarified that the abrasions were bigger than normal fraction injuries and ruled out that they could be caused by innerwear.

27. Needless to add, in *Mark Ouiruri Moses v Republic* [2013] eKLR and *Eric Onyango Ondeng v Republic* [2014] eKLR it was held that penetration did not need to be deep inside a girl's organ or need for presence of spermatozoa and that it was sufficient that there was penetration only on the surface.

28. From the foregoing, there leaves no room for doubt that the indeed penetration sufficed. Simply put, I agree with the trial court that the second ingredient namely penetration was sufficiently proven based on the victim's evidence and the corroborating medical evidence.

29. On identification of the perpetrator, PW1's evidence is that the appellant is well known to her by dint that he was a neighbour living in the same 'plot'. Further, she positively identified the accused person in court as the perpetrator.

30. As to the alleged discrepancies in the purported naming of the appellant, where PW1 testified that she did not know the appellant's name as at the time of the ordeal, and that she got to learn his name

through her mother, PW2, who referred to him as 'Wamuto' I am of the view that PW1's testimony sufficed not only positively identification but actual recognition of the appellant.

31. The complainant's narration of the fateful events coupled with the positive identification and recognition of the appellant as their neighbor, who she had constant interactions with as he sent her on errands leave no room for doubt. I have considered the said discrepancies as alleged, and I deem them inconsequential in so far as it neither threatens the veracity of the prosecution witnesses' testimonies nor prejudices the appellant's defence.

32. Thus, I have no reason to deviate from the findings of the trial magistrate who had the opportunity to hear and see the complainant as she testified and weigh the same against the appellant's defence and tested both their demeanor.

Whether the Sentencing Was Grossly Harsh and Excessive?

33. It is trite that although sentencing is at the discretion of the trial court, that discretion must be exercised judiciously in accordance with the law considering the facts and circumstances of each case.

34. However, the strict principles guiding interference on sexual offences sentences by the appellate Court were recently considered by the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others* (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) which noted that minimum sentences unlike mandatory sentences set the floor rather than the ceiling when it comes to sentences under the *Sexual Offences Act*. Simply put, the statute prescribes the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence.

35. Guided by the above decision and weighing the same against the life sentence imposed on the appellant, I find the same inherently sound and guided by statute under Sec 8 (2) of the *Sexual Offences Act*, being the minimum sentence on the offence. And, as per the *Supreme Court decision above*, this court cannot alter or strike down the said statutorily provided sentence, arbitrary, whimsically or out of benevolence, but adjudicate based on the provisions of law, unless in the special circumstances of a declaration of its unconstitutionality.

36. For the above reasons, I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt. Accordingly, I uphold the conviction and sentence of the trial court. Consequently, the appeal is hereby dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 26TH DAY OF JUNE, 2025.

W. K. MICHENI JUDGE

In the presence of;

The Appellant

For the Respondent - Mr Sirima

Court Assistant - Bebora