



REPUBLIC OF KENYA



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**Waithaka v Republic (Criminal Appeal E001 of 2023)  
[2025] KEHC 12283 (KLR) (27 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL E001 OF 2023  
RC RUTTO, J  
AUGUST 27, 2025**

**BETWEEN**

**MARGARET WANGARI WAITHAKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment delivered by Hon. V Asiyo  
Principal Magistrate in Thika Criminal Case No MCSO/E002 of 2022)*

**JUDGMENT**

1. The appellant, was charged with the offence of sexual assault contrary to section 5(1)(a) of the [Sexual Offences Act](#). The particulars of the offence were that on 22<sup>nd</sup> January 2022 at Gwa Kairu area, Theta Location, Juja Sub-County, Kiambu County, she intentionally caused her fingers and tongue to penetrate the vagina of J.K.K., a child aged two years and nine months old. In the alternative, she faced a charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the offence were that on the same day and place, she intentionally touched the vagina of J.K.K. a child aged two years and nine months old with her fingers.
2. She pleaded not guilty to both counts and after a full trial, the trial magistrate acquitted her of the main charge but convicted her on the alternative charge of committing an indecent act with a child. She was sentenced to three years imprisonment.
3. Dissatisfied with that decision, she filed this appeal before this Court. In her petition of appeal, dated 2<sup>nd</sup> October 2023 she raised the following summarized grounds:
  - i. That she was denied the right to a fair trial, as section 200 of the CPC was not directly explained to her by the court and instead to her Counsel;



- ii. That the victim ought to have been subjected to a voir dire as on two occasions, she was hesitant to talk;
- iii. That the court did not specify whether the appellant had a case to answer on the main charge or alternative charge;
- iv. That the trial court shifted the burden of proof when it failed to consider her defence;
- v. That the trial magistrate’s opinion of the victim having undergone some trauma was not backed up by any justification; and
- vi. That the evidence of the prosecution was marred with contradictions, gaps and inconsistencies.

### **Appellant’s Submissions**

4. The appeal was disposed of by way of written submissions. Though the respondent informed the court that it had filed its written submissions, I was not in receipt of them as at the time of writing this judgment. The appellant on the other hand filed its written submissions dated 24<sup>th</sup> May 2024. She submitted that section 200 of CPC was not complied with as the court did not directly address her. She was emphatic that a voir dire was necessary to establish that the complainant was truthful. She lamented that the trial court did not exactly state on what circumstance she was found to have a case to answer, was it on the main charge or on the alternative charge? She urged that the prosecution failed to discharge its burden of proof beyond reasonable doubt. For these reasons, she prayed that the appeal be allowed.

### **Duty of the Court**

5. The duty of this court sitting as a first appellate court was articulated by the Court of Appeal in the case of *Okeno vs. Republic* [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya versus Republic* [1957] EA36) and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (*Shantilal M. Ruwala versus Republic* [1957] EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.”

### **Prosecution Evidence**

6. Before the trial court, the prosecution called seven witnesses in a bid to prove its case. PW1, the Complainant, testified that someone touched her by inserting a finger into her “susu” and she felt pain. That she only inserted her fingers. She recognized the assailant as Auntie Maggie.
7. PW2, Dr. Dennis Odhiambo Omondi, testified that the Complainant was brought to Ruiru Level 4 Hospital by her father and grandmother on 23<sup>rd</sup> January 2022. She complained that she had been defiled on 22<sup>nd</sup> January 2022. The Complainant was seen by Clinician Koki. On observation, her



external genitalia was normal and no discharge. The hymen partially tampered with. The urinalysis revealed there was an infection.

8. PW2 also stated that the P3 form was filled on 25<sup>th</sup> January 2022. It was explained that it took longer than expected to fill the P3 form because their hospital policy was to fill those forms on Tuesdays and Thursdays. That he is the one who examined the child at this point, there was bruising on the left labia minora and broken hymen. His conclusion was that there was evidence of penetration as the hymen was broken. However, he clarified that according to the clinician, the hymen was present but partially tampered with.
9. PW3, Beatrice Martha a clinician at Thika Level 5 Hospital, the author of the Complainant's medical report dated 11<sup>th</sup> March 2022, informed the court that she examined the minor at the behest of the Prosecution pursuant to a letter dated 7<sup>th</sup> March 2022. On observation of the minor, she noted that there was a foul-smelling discharge. Her vulva was bruised and appeared inflamed. The vagina was partnered (see through) and tender. On touching the said part, the Complainant was protective and mincing. The hymen was torn. She also had an infection. Based on these findings, PW3's conclusion was that there was vagina penetration. She produced her report in evidence.
10. PW4, Dr. Joel Lesang a consultant pediatric surgeon at Kenyatta National Hospital, testified that he was summoned to come to court after reviewing the Complainant on 4<sup>th</sup> May 2022. He prepared a medical report dated 23<sup>rd</sup> May 2022. After obtaining the history from PW1's mother, PW4 conducted a physical examination. He found that the minor had no physical symptoms. His observations were that the genitalia were normal. Her hymen was intact thereby revealing no signs of trauma. The perineal body and anus were normal. The annular ring was present. PW4 explained that a partnered hymen means that it has a hole. He observed that though there was an abnormal opening of the vagina, there was no significant violent entry or trauma to the vagina. He also did not see the presence of any scars.
11. PW5 JWG, the Complainant's mother testified that on the fateful day, the appellant visited her home. She was with her cousin JW (PW6) and her children, the Complainant included. She confirmed that from the birth certificate, the complainant was born on 21<sup>st</sup> March 2019. She recognized the appellant as her neighbor. While the appellant was at her home, the Complainant sat on her lap. PW5 was breastfeeding her infant child at that time. Five minutes later, the appellant asked PW5 if she could take the Complainant to visit her husband. Shortly after they had left, PW6 informed her that the appellant was clandestinely licking the Complainant's face when she was seated on her lap.
12. Fearing for the Complainant's safety, PW5 immediately followed the appellant to her home. She met her cousin AM on her way. She asked him to collect the Complainant from the appellant's home on her behalf. PW5 returned back home to breastfeed. Immediately, AM returned with the Complainant, PW5 noticed that her skintight clothing had been lowered, contrary to how it was before she left the house. She was also walking with a funny gait. The Complainant then informed PW5 what had transpired. That the appellant placed her fingers and tongue in her private parts and silenced her with a slap. This information was narrated to the Complainant's father the following day.
13. On Sunday, after coming from church, PW5 was accompanied by her mother to report the incident at Juja Police Station. She narrated that the Complainant graphically demonstrated what the appellant had done to her. They were later referred to Ruiru Level 4 Hospital. Later on, they proceeded to Ruiru Sub-County Hospital. She admitted that on observing the Complainant, she neither saw bruises nor hollowness on her vagina. She was also advised that the Complainant developed an infection. She then cooperated with police officers that eventually led to the appellant's arrest. Finally, she recalled that she was interviewed on television concerning the offences.



14. PW6, JW reiterated the evidence of PW5 in totality adding that she saw the appellant lick PW1's cheeks with her tongue but only raised an alarm when she left the house. She witnessed that on return, PW1's pants had been lowered. She was present when PW1 informed her mother what had occurred. She discouraged PW5 from confronting the appellant and instead advised her to inform her husband first before taking any further action.
15. PW7, PC Molly Maina attached to Murera Police Post was the investigating officer. She received the report of the incident on 23<sup>rd</sup> January 2022 from PW5. She conducted investigations, interrogated witnesses and gathered the evidence. She then arrested the appellant and charged her accordingly.

### **The defence**

16. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. She was placed on her defence. Her sworn testimony was that PW5 was her best friend and treated her like a sister. She stated that she visited her on 22<sup>nd</sup> January 2022 at her home where she was cooking. She denied that the minor sat on her lap. That as she was leaving to head to her home, PW1 asked to accompany her. She took her and on arrival, served her juice. Soon thereafter, she heard a knock on the door. A gentleman informed her that the minor's grandmother wanted to speak to her on phone. He left with her.
17. She recalled that during that week, she occasionally saw PW5 who on one occasion, borrowed hair spray. On the Friday of that week, PW5 deceptively visited her saying that she had brought her phones. She was in the company of a man and a woman. It is these people who escorted her to the police station. At the station, the appellant was asked to cut her nails with her teeth. She was then informed of the charges and arraigned in court the following Tuesday where she denied committing the offences. She maintained that the charges were framed against her out of jealousy from PW5 because she wanted to purchase a matatu. She recalled that PW5 admitted in an interview that she was apprehensive that she would not get justice in court. She accused PW5 of spiraling lies against her.

### **Analysis and Determination**

18. Upon evaluation of the appeal herein, the following issues emerges for determination:
  - a. Whether the Respondent proved its case to the required standard;
  - b. Whether the prosecution evidence was marred by contradictions and inconsistencies;
  - c. Whether section 200 of the CPC was complied with; and
  - d. Whether the Appellant's defence was considered.
19. On the first issue, while the Appellant was charged with the offence of sexual assault, she was acquitted of the same but convicted of committing an indecent act with a child. In *Dwalo v Republic (Criminal Appeal E027 of 2023) [2024] KEHC 2219 (KLR) (5 March 2024) (Judgment)*, the court delimited the ingredients of the offence as follow:

“Therefore, the main ingredients of the offence of committing an indecent act with a child are: -

  - a. The victim is a child, as prescribed in law;
  - b. Intentional contact by the accused with the genital organ, breast or buttocks of the child victim. The act must not be an act that caused penetration; or



- c. exposure or display of any pornographic material to a child; and
  - d. Absence of any lawful justification for the act(s) complained of.”
20. The evidence laid out before the trial court was that the appellant touched the Complainant’s genitalia with her tongue and finger. This is what the victim stated in her testimony. Her evidence was corroborated by PW5 and PW6 who were the first people to be informed of the offence. Crucially, PW5 and PW6 also noticed that the Complainant’s clothing had been sagged.
21. PW2, PW3 and PW4 were medical practitioners who also gave their evidence in this regard. PW2’s evidence was that the Complainant was seen by clinician Koki. His observations were that her external genitalia were not normal as they were bruised. However, there was no discharge. The hymen was broken. The Complainant had also developed an infection. His conclusion was that there was evidence of penetration as the hymen was broken. Though PW2 was the first medical officer to see the Complainant, his findings were not in tandem with PW3 who found that the Complainant’s hymen was present but partially tampered with. The clinician in her treatment notes did not observe any bruising of the hymen.
22. PW3 authored the medical report dated 11<sup>th</sup> March 2022. Her observations of the minor were that there was a foul-smelling discharge. Her vulva was bruised and appeared inflamed. The vagina was partnered (see through) and tender. On touching the said part, the Complainant was protective and mincing. The hymen was torn. She also had an infection. Based on these findings, PW3’s conclusion was that there was penetration.
23. PW2 and PW3 appeared to have similar conclusions on the Complainant. However, PW4 who saw the Complainant on 4<sup>th</sup> May 2022, found that the minor had no physical symptoms. His observations were that her genitalia were normal. Her hymen was intact thereby revealing no signs of trauma. The perennial body and anus were normal. The annular ring was present. PW4 explained that a partnered hymen means that it has a hole. He observed that though there was an abnormal opening of the vagina, there was no significant violent entry or trauma to the vagina. He also did not see the presence of any scars.
24. The above reports posed significant contradictions in the prosecution’s case. Given that these three were expert witness, the contradictions in their testimonies raised a lot of doubt on the veracity of the prosecution case. It is no wonder that the trial court found that the main charge of sexual assault was not proved. The question that follows then, is whether this “contradictory evidence” proved the alternative charge of committing an indecent act with a child?
25. I have examined the record and the testimony of PW1 was that the appellant inserted her fingers into her private parts. Having discounted the testimony of PW2, 3 and 4 the only other evidence is that of the mother, PW5 and PW6. Did these two corroborate PW1’s evidence so as to prove the offence of committing an indecent act with a child? I do not think so for the following reasons:
26. Turning to the testimony, PW1 stated that the Appellant inserted fingers into her private parts. However, PW5 testified that PW1 told her the Appellant had inserted both her fingers and tongue into PW1’s private parts and also slapped her. Notably, PW1 never mentioned the use of the tongue or being slapped. PW5’s account was corroborated by PW6, who claimed to have seen the Appellant lick the complainant before leaving with her. Additionally, PW5 stated that PW1 was walking with a “funny gait.” This observation contradicts the medical evidence and the overall record, which as previously found did not establish penetration of any kind.



27. More fundamentally, the question arises whether the prosecution proved beyond reasonable doubt that the Appellant committed an indecent act with the child, to the exclusion of all other possible perpetrators. This is critical, as there are material gaps in the prosecution's case that could only have been addressed by key witnesses who were mentioned but never called. Most notably, the whereabouts and role of AM remain unclear. PW5 stated that she met A on her way to pick up the complainant and sent him to do so. It was A who allegedly picked the complainant from the Appellant's house and returned her to PW5. Yet, A never testified. His testimony would have been vital in clarifying where he found the complainant and in what condition she was. Furthermore, the Appellant claimed she handed over the complainant to a gentleman sent by the grandmother. This raises the possibility that the complainant may have been sexually assaulted or indecently touched during the time between being handed over and returned to PW5. Such doubt must be resolved in the Appellant's favour.
28. Another unexplored angle involves the Appellant's husband. PW5 stated that the Appellant had requested the complainant to accompany her while visiting her husband. Was the husband present when they arrived? Could he have been the one who indecently touched the complainant? These questions remain unanswered, as A who allegedly picked up the complainant did not testify to clarify who was with the child at the time.
29. There is also a contradiction regarding the alleged graphic demonstration of the assault. PW5 stated that when they went to the police station, PW1 graphically demonstrated how she was sexually assaulted. However, no details of this demonstration were provided, and PW7 the investigating officer to whom this demonstration was allegedly made did not mention it in her testimony. This omission casts further doubt on the reliability of the prosecution's case.
30. Additionally, PW5 and PW6 claimed they immediately informed the complainant's father about what had happened. Yet, the father never testified to corroborate their account. Overall, the prosecution's case was riddled with contradictions, inconsistencies, and significant evidentiary gaps. It failed to establish the offence for which the Appellant was convicted. Notably, the Respondent did not file submissions in this matter, leaving the Court without any explanation for these gaps. Nonetheless, it is a well-established principle of law that such gaps must be interpreted in favour of the accused. Accordingly, the first and second issues in this appeal are determined in favour of the Appellant.
31. This finding renders the remaining issues academic, as the appeal does not turn on them. However, regarding the allegation that Section 200 of the Criminal Procedure Code was not complied with, the record shows that directions were taken under that provision on 5th June 2023. The Appellant elected to proceed with the case from where it had reached. While it is unclear whether the court addressed the Appellant directly or through her counsel, her counsel was present and ably represented her throughout the proceedings.
32. In conclusion, based on the foregoing findings, this appeal is allowed. The Appellant's conviction and sentence of three years' imprisonment are hereby set aside. She is to be released forthwith unless otherwise lawfully held.
33. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 27<sup>TH</sup> DAY OF AUGUST, 2025**

**RHODA RUTTO**

**JUDGE**

In the presence of;

Ms Waithera for Appellant



Ms Torosi for Respondent

Wabwire Court Assistant

