



**Wanyonyi v Republic (Criminal Appeal E072 of 2024)
[2025] KEHC 12023 (KLR) (11 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E072 OF 2024
MS SHARIFF, J
AUGUST 11, 2025**

BETWEEN

BRIGHTON WANYONYI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the sentence of Hon. G. Adhiambo (SPM)
in Bungoma S.O Case No. E036 of 2023 on 4th June 2024)*

JUDGMENT

A. Background

1. This appeal is against the conviction and sentence of 10 years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 15th April 2023 in Bungoma North Sub-County, within Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AMK a child aged 13 years old.
2. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 15th April 2023 in Bungoma North Sub-County, within Bungoma County, the appellant intentionally and unlawfully touched the vagina of AMK a child aged 13 years old with his penis.

B. Evidence

B.1 Respondent's evidence

3. At the trial in the subordinate court, the prosecution called Four (4) witnesses. The defence called one witness; the Appellant.



4. After a brief voir dire examination, the trial Court established the victim did not understand the effect of oath taking but understood the importance of telling the truth wherefore she proceeded to give unsworn testimony.
5. PW1, the victim was born 4th April 2010. A copy of her Birth Certificate was marked as PMF1. She lived with her mother at [Particulars Withheld] within Bungoma County and she was at the time of the trial receiving education at [Particulars Withheld] Primary School in class 5.
6. It was the testimony of PW1 that on 14th April 2023, she was asleep with her younger siblings aged 11 and 8 respectively, as her mother had left to attend a funeral and her father resides in Narok. She then heard a knock on the door by a person who identified himself as “Vicky,” her brother whom she recalled had accompanied their mother to the funeral. The individual knocked the door again while shining the torchlight on the window and that prompted her to open the door. She then realized that she had been duped into opening the door by Elvis who then informed her that there was someone else larking by the shadows who wanted to see her. There was moon light so she clearly recognized Elvis. She then went to establish the identity of the person who was desirous of seeing her at that time and she realized that it was Brighton, the appellant herein. She regarded the appellant as a brother as he was a frequent visitor to her home where he was treated as a kinsman. The Appellant requested that she accompanies him to his home and she wondered aloud as to who was look over her siblings and their house only for the Appellant to tell her that Elvis would close the door. She told the Court that she also recognized the Appellant’s voice. The Appellant pulled her towards his home and into a kitchen, which also doubled as his bedroom. The Appellant then undressed her then placed her on his bed. He then removed his trousers as she laid on his bed naked, he laid on top of her then touched her breast and inserted his penis into her vagina. She told the Court that the Appellant did the act twice and when he was done, he opened the door and she remained at his home until midnight when the appellant escorted her out but they encountered her mother and the appellant escaped. That her mother later apprehended the appellant.
7. On cross-examination, she told the Court that it was Elvis who knocked on the door only for her to open it and find the Appellant waiting for her. She told the Court that Elvis did not record a statement and that when her mother found the Appellant escorting her she did not raise any alarm as the Appellant escaped when he saw her mother.
8. JEM, the victim’s mother testified as PW2. She told the trial court that on 14th April 2023, she had left her home at around 9-10 p.m and had gone to condole with the family of her deceased neighbor. That she stayed there until midnight whereafter while accompanied by one Mary, she headed back home to rest with a view of attending the burial the next day. She told the Court that she had left PW1 and her other children in the house. When she arrived at her door she called out for PW1 but there was no response. She then called out her son Ingandoli who then opened the door only for her to realize that PW1 was not sleeping in her usual the spot on the floor. She then checked her bedroom for PW1 to no avail. Ingandoli was equally astonished by the absence of PW1. She then went outside onto the road in search of PW1 and with the help of a neighbor and her other son. As they headed towards Elvis’s house which was opposite that of the Appellant herein, they saw someone coming out of Brighton’s home and she noticed that it was PW1. PW1 told her that the Appellant and Elvis gone to her house and Elvis pretended to be her older brother Victor and that when she opened the door the Appellant took her to his house. She told the Court that when she pursued the Appellant, he escaped into a nearby sugarcane plantation . She told the Court that all this happened when she was with her neighbor, Mary. She proceeded with PW1 to the police station to lodge a report and then to Naitiri Sub-County Hospital.



9. On cross-examination, she told the Court that she found PW1 leaving the house of the Appellant herein and she saw him with the aid of a torchlight.
10. PW3, Chrisantus Masinde, a Clinical Officer based at Naitiri Sub-County Hospital told the court that PW1 visited the facility with a report of her defilement by a person well known to her. On general examination he established that the victim's systems were normal and she was not under the influence of alcohol or drugs. On vaginal examination he established that the victim's hymen was broken with lacerations noted. He noted presence of dry whitish discharge on the labia. The doctor concluded that there was penetration due to the broken hymen and lacerations. He produced the Certificate of Birth of PW1, her treatment notes and P3 form signed on 26th May 2023, and as PEXH 1, PEXH2 and PEXH 3 respectively.
11. On cross-examination, he told the Court that PW1 was brought to the facility by PW2, her mother, and that on her examination they found dry whitish discharge but he did not examine the Appellant as he was not availed to the hospital. He noted that he did not conduct any DNA testing and did not avail any prove that the dry whitish discharge was from the Appellant.
12. PW4, No. 25xxx P.C Lynette Okodoi, testified that she was based at Mbakalo Police Station and that on 16th April 2023, on reporting to work as usual she found the Appellant in the cells having been transferred from Mitua Patrol Base on 15th April 2023. She told the Court that it was Sergeant Wanjala who rearrested the appellant after the mother of the victim had conducted a citizen's arrest. According to her, PW2 had lodged a report at Mitua Patrol Base on 15th April 2023 that her daughter, PW1 was defiled by the Appellant on the night leading to 15th April 2023. The report was booked and the same was moved to her station for further investigations. PW1 was taken to Naitiri Sub-County Hospital where several examination procedures and tests were conducted and she proceeded to investigate the incident. She established that PW1 was 13 years old at the time of the incident and she recorded the statements of both the victim and the mother. She identified the perpetrator of the offence as the Appellant, then in the dock.
13. On cross-examination, she told the Court that she was the investigating officer in this matter and that the doctor who examined PW1 established that she was defiled and that the Appellant was never taken to the hospital.

Appellant's evidence

B.2 Appellant's evidence

14. The Appellant denied the offence. He testified that on 14th April 2023, he had returned to his house from work, when at around 3 p.m., a lady and two young men went to his house and requested him to ferry them somewhere, as he sometimes operated a boda boda. That he then took out his motorbike and he carried the passengers but on their way the men alleged that they needed to detour for purposes of picking something at a certain place and he complied but on getting the place where his passengers had indicated they would be picking something, he was arrested and placed in a cell without been informed of his offence.
15. On cross-examination, he told the Court that the events occurred on 16th April 2023, as that was the date of his arrest. The appellant could not recall that a child had testified before the trial Court.
16. At the conclusion of the trial, the trial Court evaluated the evidence and made a finding that the respondent had proved it's case beyond reasonable doubt and convicted the Appellant on the main count. The Appellant was consequently sentenced to serve 10 years imprisonment.



C. Appeal

17. Dissatisfied with the conviction and sentence, the Appellant filed a petition of appeal listing seven (5) grounds of appeal:
- a. That he is a first offender and remorseful for the offence committed.
 - b. That, the sentence of 10 years as meted out is rather too harsh and excessive as per the circumstances, and also requests this Hon. Court to consider reducing the same in humanitarian grounds.
 - c. That he is a teenager who still needs to do a lot be it bringing up a responsible family as well as active participation in the nations prosperity.
 - d. That it pleases this Court to make a declaration that the time spent in remand awaiting trial be considered.
 - e. That the Appellant wishes to adduce more grounds at the hearing thereof.
18. Based on the above listed grounds of appeals, it is clear that the Appellant herein is only contesting his sentence of Ten (10) years as meted out on 4th June 2024.
19. The Appellant was convicted under the *Sexual Offences Act*. Section 8(3) of the Act provides:-
- “ 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 3. A person who commits an offence of defilement with child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
20. In this case, the Applicant contends that the sentence passed by the trial Court was erroneous as the learned trial magistrate failed to take into account the time he had spent in custody contrary to the dictates of Section 333 (2) of the Criminal Procedure Code. Section 333 (2) is in the following terms:
- “Subject to the provisions of section 38 of the Penal code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
21. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In *Ahamad Abolfathi Mohammed & Another V Republic*, [2018] eKLR, the Court of Appeal rendered itself as follows:-
- “By dint of section 333 (2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence



is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

22. A perusal of the trial court's record confirms the Appellant's contention is that the learned trial magistrate did not take into account the period the Appellant had spent in custody during the trial. Indeed, the record of the trial Court is silent on whether the sentence was to commence from the date of arrest or conviction given that the Appellant stood trial while in custody. Since Section 333(2) of the Criminal Procedure Code is couched in mandatory terms, then this ground has been satisfied by the Appellant and hence the period spent in custody must be factored in his sentence.
23. On the ground that the sentence is excessive and harsh, any person convicted under Section 8(3) of the *Sexual Offences Act* is liable upon conviction to imprisonment for a term of not less than twenty years. The Appellant was sentenced to 10 (Ten) years imprisonment for the said offence. Whereas sentencing is an exercise of discretion of the trial court, I do note that the trial court failed to comply with the provisions of section 8(3) of the *Sexual Offences Act* that prescribe a minimum mandatory sentence of 20 years. Trial court erred in that regard and had the Respondent issued a notice of enhancement of sentence I would have the Appellant's sentence to 20 years imprisonment in line with the Supreme Court's decision in Petition No18 of 2023 Republic Vs Joshua Gichuki Mwangi & Others.
24. Whereas the Appellant he alludes that he was a minor at the time of commission of the offence to be a teenager, an age assessment report confirmed otherwise, wherefore that ground of appeal fails.
25. On the balance the appellant's appeal succeeds to the extent that the pre- trial term served shall be factored in during the computation of his 10years sentence; the sentence shall commence from the date of the arrest of the Appellant herein, that is 15th April 2023.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF AUGUST 2025.

M.S. SHARIFF

JUDGE

In the presence of:

Ms Matere for the Respondent

Appellant (Virtually)

Peter Machoni – Court Assistant

