Makunda v Republic (Criminal Appeal E037 of 2024)
[2025] KEHC 11834 (KLR) (6 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11834 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E037 OF 2024

HI ONG'UDI, J

AUGUST 6, 2025

BETWEEN

JUSTUS MOI MAKUNDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment delivered on 22nd October 2024 by Hon. Yvonne Inyama Khatambi Principal Magistrate in Naivasha CM's Criminal Case MCSO/E040/2023)

JUDGMENT

1. Justus Moi Makunda hereinafter referred to as the appellant was charged with defilement contrary to section 8(1) as read with sections 8 (2) of the *Sexual Offences Act*. The particulars being that the appellant on 3rd June 2023 at [Particulars Withheld] in Naivasha sub-county within Nakuru County intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of PWN a child aged 6 years.

2. The appellant equally faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the appellant on 3rd June 2023 at [Particulars Withheld] in Naivasha sub-county within Nakuru County intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of PWN a child aged 6 years.

3. He denied both counts and the matter proceeded to full hearing with the prosecution presenting four (4) witnesses. In his defence the appellant gave a sworn statement and called no witness.

4. After hearing the case, the trial Magistrate found the appellant guilty and convicted him on 9th October 2024. Later on 22nd October 2024 the appellant was sentenced to serve imprisonment for a period of 30 years.

5. Being aggrieved with both conviction and sentence the appellant filed this appeal on the following grounds:-

   i. The Learned magistrate erred in law and fact in finding that the prosecution had proved their case beyond reasonable doubt.

   ii. The Learned magistrate erred in law and fact in relying on contradictory evidence of the prosecution in convicting the appellant.

   iii. The Learned magistrate erred in law and fact in finding that the ingredients of defilement and indecent act had been proved by the prosecution against the appellant.

   iv. The Learned magistrate erred in law and fact in relying on the evidence of PW1 who was at home while he was in his errands as a matatu conductor/squad driver from 5:00 am to 9:00 pm and the disregard of his defense of alibi.

   v. The learned magistrate erred in law and fact in meting harsh and excessive sentence against the Appellant in the circumstances.

6. The respondent filed grounds of opposition dated 25th February 2025 stating that the conviction was according to law while the sentence was lawful and merited in the circumstances.Further, that the trial magistrate evaluated the evidence of the prosecution which was credible, consistent and corroborative. Additionally, that the defense of the appellant was weak and full of lies.

7. A summary of the case before the trial court is that on the material day PW1, (PWN) then aged 6 years was in their house alone watching cartoons when baba Yvette(appellant) knocked the door. He took her to his house where he removed his trouser and inserted his penis in her vigina causing her to bleed. The appellant used a towel to wipe the blood and she wore her trouser and went back to their house. When her mother came back she did not tell her anything because she feared the appellant would kill her. She was later taken to the hospital after her mother while bathing her noticed that she was smelling. Later she was taken to the police station and the matter was reported.

8. PW2 - Dr. Benjamin Kuria produced the P3 form filled by him and the post rape care form filled by one Stephen Malakwen, a clinical officer who was away for further studies. He stated that PW1 had healing wounds/scars in the vaginal area some due to infection, the hymen was broken and no discharge was noted. The P3 form and the Post Pape Care form both dated 19th June 2023 were produced as P. Exhibit 2 and 3 respectively.

9. When placed on his defence the appellant in his sworn statement stated that he was a driver. On 3rd June 2023 he went to work at 5:00 a.m and remained there till 9.00 pm when he went back home. He stated that the PW1's mother (PW3) was framing him because he refused to have a sexual relationship with her. He claimed that PW3 was the one who had put salty water in PW1's private part which caused the injuries and she also failed to take her to the hospital. He further stated that the towel mentioned by PW1 was not presented as an exhibit and that the investigating officer failed to tie him to the offence. He added that he was being framed due to the grudge with PW3 and that his brother was at his house.

10. The appeal was canvassed through written submissions.

Appellant's Submissions

11. These were filed by Achero Mufuayia advocates and they are dated 17th February 2025. Counsel gave a summary of the case and identified five (5) issues for determination.

12. The first issue is whether the prosecution proved the offences of defilment and indecent act beyond reasonable doubt. Counsel while relying on section 8 (1) and (2) of the *Sexual Offence Act* No. 3 of 2006 submitted that the appellant was not genuinely and legally found to be guilty by the trial court specifically on the ingredients of penetration and identification. He further submitted that the prosecution failed to avail an independent witness such as neighbours to testify despite the fact that he had proved to the court that he lived elsewhere.

13. The second issue is whether the trial court relied on inconsistent and non-cogent evidences to convict the appellant. Counsel submitted that while it was alleged that the incident took place on 3rd June 2023, the records showed that the incident was reported on 9th June 2023.He stated that the date when the incident occurred was not known and therefore the same raised the question of how PW3 and PW4 came up with 3rd of June 2024. He further submitted that when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the trial court that can create some doubt in its mind and the appellant is entitled to benefit from it.

14. He placed reliance on the decision in *David Ojeabuo v Federal Republic of Nigeria* [2014] LEPR 22555 where the Court of Appeal held as follows:

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepandes in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of z evidence says or contains".

15. The third issue is whether the trial court disregarged the defence of alibi. Counsel submitted that the trial court did not address the issue of alibi despite the fact that it came out strongly in the appellant's defence, which to him was an eye opener and seriously omitted by the trial court. Reference on this was made to the case of *Kiarie v R* [1984]KLR where the Court of Appeal laid down the following principles;

> "An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons".

16. On the fourth issue whether the sentence meted on the appellant was excessive and/or harsh, counsel submitted that assuming the appellant was guilty the court ought to have been guided by the provision of section 8 (2) of the *Sexual Offences Act*. He placed reliance on the decision in *Francis Karioko Muruatetu & Another v Republic* [2021] eKLR and the Judiciary Sentencing Policy Guidelines.

17. Lastly, on whether the appellant should be acquitted counsel submitted in the affirmative and his reason was that the prosecution had failed to prove its case against the respondent beyond reasonable doubt. Further, that the prosecution failed to place the appellant at the crime scene or to avail an independent witness who lived in the same plot with PW1 to testify.

18. In conclusion, he urged the court to overturn the judgment of the trial court and allow the appeal.

Respondent's submissions

19. These were filed by Denis Atika prosecution counsel and are dated 25th March 2025. It is counsel's submission that the prosecution proved all the three ingredients of defilement. On age he submitted that the birth certificate was produced as P. Exhibit 1 and the same showed that PW1 was aged 6 years. On penetration he relied on the evidence of PW1 and submitted that the child said the appellant had defiled her. Further that the evidence by the doctor (PW2) in P Exhibit 2 and 3 confirmed that the child had been defiled.

20. On identification he submitted that PW1 knew the appellant as baba Yvette, and identified him as the defiler.

21. Regarding the defence by the appellant, counsel submitted that the same was weak and full of lies. Further, there was no grudge between PW1 and the appellant and PW3 confirmed the same. Additionally, that the appellant raised an alibi but failed to call a witness to corroborate the said evidence. Counsel submitted that the appellant claimed to be a driver but he could not tell the registration number of the motor vehicle that he drove or call a collegue to confirm his allegations.

22. On sentence, counsel submitted that the same is within the Law as provided for under the *Sexual Offences Act*. He urged the court to dismiss the appeal in its entirety.

Analysis and Determination

23. As a first appellate court, this court has a duty to re-consider and re-evaluate all the material before it and arrive at its own independent conclusion. It must bear in mind that unlike the trial court it did not have the opportunity to see and hear the witnesses and must give an allowance for that. This has been stated in a number of cases. See *Okeno v Republic* (1972) E.A. 32; *Pandya v Republic* (1975) E.A. 336;

24. In *Simiyu & Another v Republic* [2005] I KLR 192 the Court of Appeal on the same issue stated thus:-

> " It is the duty of the first Appellant court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions."

25. I have carefully considered the evidence on record, grounds of appeal, submissions by both parties, cited authorities and the Law. I find the main issue for determination to be whether the charge of defilement was proved against the appellant beyond reasonable doubt.

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

> " A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement"

27. Section 8(2) of the same Act provides as follows:

> " 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."

28. For this offence to be proved the following ingredients must be established by the prosecution.Age of the victimPenetration of the victim's genital organIdentification of the culprit.

Age of the victim

29. The charge sheet shows that PW1 was aged 6 years as at 3rd June 2023. She told the court that she was 6 years old and the court took her through a voire dire examination. The P3 form (P.EXB2), PRC Form (P.EXB3) show that PW1 was 6 years and finally the birth certificate (P.EXB1) confirms the date of birth to be 13th February 2017. It was therefore confirmed that PW1 was at the time of the alleged offence aged 6 years plus 4 months. Age was therefore proved.

Penetration of the victims genital organs

30. Section 2 of the *Sexual Offences Act* defines "penetration" as follows:

> " Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person"

31. The evidence by PW1 is that the appellant took her to his house where he removed his trouser and inserted his penis in her vigina causing her to bleed. PW3 who examined the minor confirmed that she had healing wounds/scars in the vaginal area some due to infection and the hymen was broken. I am thus satisfied that the medical evidence confirmed PW1's evidence that indeed there had been penetration of her genital organ, by a male organ.

Identification of the culprit

32. PW1 testified and identified the appellant as Uncle Yvette who is the person who defiled her. PW3, the minor's mother told the court that the appellant was their neighbor and that there was no grudge between them. She stated that she even used to wash his clothes for a pay and had not demanded sex from him. The appellant in his defence denied the offence claiming that he was framed by PW3 since he had refused a sexual relationship with her. He explained his movements on the date of incident but never called his alleged brother who was at his house to come and support his story. The appellant also argued that he was not PW3's neighbor but PW4 confirmed that the appellant had moved to another plot after the incident.

33. There was no eye witness to this incident. The court had to weigh PW1's evidence to see if it was reliable. Section 124 of the *Evidence Act* provides:

Corroboration required in criminal cases

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 offence, 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".

34. The learned trial Magistrate in her Judgment noted that the incident took place in broad daylight. Further, that the complainant stated that she knew the perpetrator whom she identified as "baba Y". That it was her testimony that Yvettewas her friend and that they played together and would see each other on a daily basis. The learned trial magistrate also noted that the minor remained consistent in

her examination in chief and cross examination. Thus, her finding was that the chances of mistaken identity were minimal and therefore, she was inclined to believe the complainant.

35. The learned trial magistrate stated that the burden of proving whether an offence occurred or not lay with the prosecution. However, that not notwithstanding an accused person had a duty to raise a strong defence in order to cast doubt on the prosecution case. That the accused person failed to do so since his defence was never corroborated.

36. From the above evidence I find that PW1 and the appellant are well known to each other. The child was not coached to fix him and there was no evidence adduced revealing any grudges or enemity between PW1, PW3 and the appellant to make the minor lie against him. Putting all these pieces of evidence together leads me to the conclusion that the appellant was properly identified as the culprit and there is no doubt about that.Therefore, I am satisfied that the trial Magistrate assessed the evidence well and arrived at the correct finding in convicting the appellant. I will therefore not interfere with the conviction.

37. On sentence Section 8(2) of the *Sexual Offences Act* is very clear as cited at paragraph 27 of this Judgment.

38. The imprisonment for life sentence is the minimum sentence for defilement of a 6 year old and is not negotiable. The Supreme Court in *Republic v Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amiecus Curiae)* (Petition Bo. E018) of 2023 [2024] KESC 34 (KLR) recently spoke to this, and made the position very clear on minimum sentences. This is what the said court stated at paragraph 57 of the Judgment.

> " Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor or rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the court to impose a harsher sentence. Infact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term "mandatory minimum" can be found used in different jurisdictions including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances"

39. This court is bound by the said decision. In my view, life imprisoment sentence translates to 30 years imprisonment as held by the Court of Appeal in *Ayako v Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) where the court stated:

> " On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.

40. I therefore find no merit in the Appeal which I hereby dismiss. The conviction and sentence by the trial court are upheld. The sentence shall run from 5th July, 2023 as ordered by the trial court.

41. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6 TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE