



**Wairimu v Republic (Criminal Appeal E033 of 2023)
[2025] KEHC 269 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E033 OF 2023
AK NDUNG’U, J
JANUARY 22, 2025**

BETWEEN

DENNIS MBOGO WAIRIMU APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki CM
Sexual Offences Case No E016 of 2021– V. Masivo, SRM)*

JUDGMENT

1. The Appellant, Dennis Mbogo Wairimu, was convicted after trial of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between 21/02/2021 and 28/02/2021 in Meru County, intentionally caused his penis to penetrate the vagina of ENW a child aged 15 years. On 29/03/2023 he was sentenced to twenty (20) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, the Appellant filed the petition of appeal on 06/04/2023. He also filed supplementary grounds of appeal accompanying his submissions. The conviction and the sentence are being challenged on the following grounds;
 - i. The learned magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.
 - ii. The learned magistrate erred by failing to note that the hymen was old broken.
 - iii. The learned magistrate failed to note that there was no medical evidence linking him to the offence as he was not subjected to medical examination.
 - iv. The learned magistrate failed to note that the complainant gave conflicting evidence.



- v. The learned magistrate failed to note that his right to fair trial under Article 50 of *the Constitution* was infringed.
 - vi. The learned magistrate erred by failing to note that his right under Article 49(1)(f) of *the Constitution* was violated.
 - vii. The learned magistrate erred convicting him without appreciating that PW1 had denied being defiled by the Appellant before the police.
 - viii. That the learned magistrate failed to consider his defence.
3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that his right under Article 49(1)(f) of *the Constitution* to be arraigned in court within 24 hours was infringed. He submitted that this was a grave matter of law thus his conviction and sentence should be quashed. He further submitted that Sergeant Makena testified that the complainant vehemently denied any sexual interaction with him and thus she was coerced, threatened and intimidated to trump up charges against him. Further that, there can be no explanation why the medical examination was carried out 33 days from alleged material date and epithelial cells be detected.
 4. He argued that from the proceedings, the court did not comment on PW1's demeanour as soon as she testified. That the circumstantial evidence did not hold him culpable of defilement as PW1's behaviour as adduced in evidence clearly shows. That the question was why would a minor who is kidnapped run away from her rescuer, PW2, and why the minor was not examined the day she was found in his house as alleged and why it took 7 days to take her for medical examination. That the charges were trumped up by PW2 who wanted him to vacate his rental house so that she can neighbour her sister. That he testified in his defence that both PW2 and PW3 were neighbours in the same plot where they were alleging that PW1 had been kidnapped and defiled for a week. He urged the court to relook at the sentence as he is a young man at his prime, he was a first offender who was a hardworking citizen and that despite been remorseful, the trial court awarded him a harsh and excessive sentence.
 5. The Respondent's counsel filed written submissions. On allegation of violation of Article 49 of *the Constitution*, it is argued that this is not the forum nor the way to address alleged violation as the alleged violation is a separate matter from the charges facing the Appellant. Further, *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 requires a litigant to approach court by way of a petition seeking redress for constitutional violation. That the persons alleged as the violators are not party to this appeal and if the court allows the Appellant to canvass the alleged violation, those parties would have no way to respond and the court will reach a verdict against them without affording them the right to be heard. Further, the alleged violation is distinct from the matter that was subject to the trial proceedings and the victim cannot be left without justice. Reliance was placed on the case of Republic vs Benson Kimathi Marangu & another (2019) eKLR amongst other cases where it has been held that violation of Article 49 would not automatically result in acquittal.
 6. She submitted that age was proved through complainant's birth certificate. As to penetration, she submitted that the same was proved through the complainant's evidence. That the words she used described penetration even though she may not have used sensory details by specifically stating that the Appellant inserted his penis in her vagina. Reliance was placed on the case of Muganga Chilejo Saha v Republic (2017) eKLR and Wachira v Republic (2024) KLR where in the latter case the court appreciated the developmental stages in children and how the same may affect their willingness to describe sexual organs or acts. Penetration was also corroborated by PW4 who concluded that penetration had occurred. As to identification, she submitted that the Appellant and the complainant



knew each other and further that the Appellant was arrested in his house in company of the complainant.

7. She further submitted that the trial court in its proceedings and judgment noted the demeanour of the complainant contrary to the Appellant's allegation and that he could not hide behind the perceived errant behaviour of a child and hope it would excuse his culpability as he knew that the complainant was a school going child and a reasonable person would infer she was a minor. On the Appellant's defence, she submitted that it was properly rejected as he testified that PW2 had a grudge with him but also testified that PW2 was a stranger to him. As to sentence, she submitted that sentencing is a discretion of the court and that the court restricted it to the mandatory minimum sentence as the supreme court in *R v Joshua Gichuki Mwangi & Others* Petition No. E018 of 2023 clarified that the *Muruatetu* case does not apply to minimum sentences under the *Sexual Offences Act*.
8. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
9. A recap of the evidence at the trial court is essential to facilitate its re-evaluation.
10. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.
11. The evidence before the trial court was as follows. PW1 the complainant in her sworn testimony testified that she was from her grandmother's place when she met the Appellant whom she knew well since she used to see him in the village. He offered to ferry her home with his motorcycle which she boarded but he changed course to his house. While in his house, he undressed her. She stated that 'na akanifanyia tabia mbaya, we had sex, the penis and vagina were involved.' She tried leaving but he continued and warned her from leaving. She spent the night at his house and in the morning, he took her to school and in the evening, she found him waiting for her and he took her to his house. That she stayed with the Appellant from 21/02/2021 to 28/02/2021 and in all those days, they had sex without protection. On 28/02/2021, two police officers, her mom and aunty went for her and she was taken to hospital.
12. On cross examination, she testified that the Appellant had no neighbours and she did not know whether the place had a caretaker. That he threatened her with death if she revealed what had happened. She was recalled and on further cross examination by the Appellant's counsel, she testified that the Appellant was not her boyfriend but she would see him on her way to school. That he offered her a free ride on her way from school and he then took her to his home. She accepted to enter his house. That he forced her into his house. That when she was buying milk at the shop, she did not reveal his threats to the shopkeeper and that there were neighbours at his residence but the he did not allow her to go outside. That she did not reveal her age to him and that he would drop her and pick her from school and she did not report to the teachers due to his threats. That the Appellant locked the door when he saw the police officers.
13. PW2, the complainant's aunt testified that on 26/02/2021, she saw the complainant buying milk while in school uniform. She called her out but she flee and boarded a motorcycle. She saw the rider whose one eye was not okay. She called her sister and inquired of whereabouts of the complainant. The sister informed her that the complainant was in school. She narrated to her what she saw and she said she will make inquiries. On the following day, they waited for the complainant to go to school but she did not show up in school. She was informed that the Appellant's name was K by other boda boda riders



- and they started looking for him and they found him in a plot where he was staying. Inside the plot, they found the complainant's uniform on clothing line. They called the police and they were able to access his house where he was found sleeping while the complainant was cooking. She recognised him due to his eye which had a defect. That it was her first encounter with him.
14. She testified on cross examination that the Appellant was waiting for the complainant besides the road while she was buying milk and they left together. That he was the owner of the house where the complainant was found and his boda boda was beside the house. On further cross examination by the Appellant's counsel, she stated that she saw the complainant buying milk and a boda boda rider beside her and upon asking the complainant why she was buying milk at that shop yet her house was quite far, the Appellant called her and they drove away. She was referred to her statement and she stated that when the complainant saw her, she bent to avoid her and she had to lower the vehicle window to call her but she boarded the motor cycle and rode away.
 15. PW3, the complainant's mother testified that she gave the complainant permission to visit her grandmother over the weekend and on 22/02/2021 when she was required back to school, she did not go home. She called her teacher on 23/02/2021 who informed her that the complainant was in school. On Friday, PW2 informed her that she saw the complainant being ferried by a boda boda and on 25/02/21, they made a report of a missing child. That they visited the place where the complainant was seen and accessed the plot where they saw her clothes on the hanging line. They contacted the police and they accessed the house right in front the hanging lines with the complainant's clothes. They found the Appellant and the complainant inside the house. She testified that the Appellant used to be his neighbour and did not have any grudge with him. She produced the complainant's birth certificate as Pexhibit1.
 16. She testified on cross examination that it is the complainant who opened the door for them. That she did not know of her whereabouts as of 23/02/2021 and did not report her missing until 28/02/2021. That the plot had other occupants and none of the tenants was called to confirm that the house belonged to him. That she did not enter the house but saw them being removed from the house. That it was normal for the complainant not to return home from school. On further cross examination by Appellant's counsel, she testified that the complainant was to pass by her grandmother's after school but her grandmother reported to her on 23/02/21 that the complainant did not spend the night at her home. That she used to see the Appellant who was a boda boda rider and at no given time did she ask the complainant to cease his relationship with him.
 17. PW4, the clinical officer testified that on physical examination, there were no injuries. On vaginal examination, there was no injury on the genitalia, the hymen was old broken and the pregnancy test was negative, VDRL was negative. On high vaginal swab examination there were numerous epithelial cells seen. There were no spermatozoa, there was presence of pus cells and infection was noted. He concluded that there was evidence of penetration which was confirmed by absence of hymen and presence of infection.
 18. He testified on cross examination that the old broken hymen meant that the hymen was broken earlier on.
 19. PW5, the investigating officer testified that CPL Ileri informed him that the girl who was reported missing had been seen at Check centre where they met the complainant's mother and brother. They proceeded to the scene where they were shown a rental house and saw a girl standing outside the door and when she saw them, she returned back and locked the door. They knocked and they introduced themselves and they ordered the Appellant to open the door which he complied. They arrested him.



20. He testified on cross examination that the police section on the P3 form was not filled. That the Appellant was arrested at a residential area but he did not see the neighbours.
21. In his sworn defence, the Appellant testified that he is a casual worker and a boda boda operator and had stayed with the complainant's family as neighbours for 4 years. That he would ferry them using his motorcycle and would even sometimes be hired to take the complainant to school and to her grandmother's. That on 28/02/2021, the complainant's mother, her aunt and police visited his home and they found him cleaning his motorcycle. They asked him to accompany them to police post and the complainant was asked to follow. At the police post, he was accused of hosting the complainant in his house. That the complainant was forced by her mother to give false evidence against him. That at the said plot, he lived with his wife and child and on the material day, the complainant had visited her sister and if he had hosted her, the mother and the aunt would have noted since they were his neighbours and none of the neighbours was summoned to confirm that he had hosted the complainant.
22. He testified on cross examination that the complainant's aunt was interested in his rental house hence the false charges. That prior to the case, PW2 was a stranger to him.
23. That was the totality of the evidence before the trial court. I have read and considered the evidence above. I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have heard due regard to the applicable law, submissions made and authorities cited.
24. The Appellant raised a preliminary point of law whereby he argued that his right under Article 49(1) (f) of *the Constitution* to be arraigned in court within 24 hours was infringed and the trial court took judicial notice of that fact. He submitted that this was a grave matter of law thus his conviction and sentence should be quashed. The Respondent's counsel on the other hand argued that violation of a constitutional right should be argued in another forum and not in this appeal.
25. It is trite that not all cases of constitutional violations shall lead to an accused person being acquitted. In *Douglas Komu Mwangi V R* [2013] eKLR the Court of Appeal stated:

“There are many instance in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessary entitle the suspect to an acquittal. (See *Dominic Mutie Mwalimu – v – R* Criminal Appeal No. 217 of 2005; and *Evanson K. Chege –v- R* Criminal Appeal No. 722 of 2007). This court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In *Julius Kamau Mbugua –v – R* Criminal Appeal No. 50 of 2008, this court stated that:-

“A trial court takes cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of criminal court and which is by section 72(6) expressly compensatable by damages.’

In *Julius Kamau Mbugua –v- r* Criminal Appeal No. 50 of 2008, this court upheld the proposition that even where violation or right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and



that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrate that he has suffered a trial related prejudice to warrant an acquittal. This ground of appeal has no merit.”

26. Moving on, it is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the [Sexual Offences Act](#) No. 3 2006.
27. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.
28. Proof of age is important in a sexual offense. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

“Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
29. In the present appeal, the complainant’s age was not disputed. PW2, the complainant’s mother produced the complainant’s birth certificate as Pexhibit1 which shows that the complainant was born on 16/08/2006. The offence was committed on 21st to 28th February 2021 and therefore the complainant was a minor at the material time.
30. As regards to proof of penetration, the Appellant submitted that there can be no explanation why the medical examination was carried out 33 days from alleged material date and epithelial cells be detected. That from the proceedings, the court did not comment on PW’1 demeanour as soon as she testified. That the circumstantial evidence did not hold him culpable of defilement as PW1’s behaviour as adduced in evidence clearly shows.
31. The PRC form indicates that the complainant was examined on 28/02/2021. The P3 form was filled days later as it is dated 03/03/2021. PW4 testified that he filled the PRC form on 03/03/2021 and relied on the information on the PRC form to fill the P3 form. He produced the P3 and the PRC form as Pexhibit2 and 3 respectively. Therefore, the medical examination was not done 33 days after the ordeal as alleged by the Appellant.
32. As to whether penetration was proved, PW1 testified that the Appellant took her into his house, he undressed her and she testified that ‘akafanya tabia mbaya, we had sex, the penis and vagina were involved. She testified that she stayed with him from 21/02/2021 to 28/02/2021 when the police and her mother went for her. PW2, PW3 and PW5 corroborated her evidence that she was found in the Appellant’s house on the said date. The Appellant was also in the house and he was arrested.
33. PW4, the clinical officer testified that Upon examination of the complainant, there was presence of epithelial cells, pus cells and the hymen was broken. He concluded that there was proof of penetration due to the broken hymen and the presence of an infection. His findings were well captured in the PRC and the P3 form.
34. I have applied my mind to this evidence. Prove of penetration is essential in a charge of defilement. The challenge in prove of penetration in a sexual offence, be it a defilement or rape, is that there will seldom be an eye witness as the offence is done in hidden places or in seclusion. It becomes more arduous in a case like this where the victim appears from the evidence to have connived to the commission of the



- offence and the saving grace being that at her age that was immaterial as in law she had no capacity to consent to sexual intercourse.
35. The more the reason parliament in its wisdom enacted Section 124 of the *evidence Act* which provides that a court can convict on the evidence of the victim alone if the court is satisfied for reasons to be recorded that the witness is telling the truth.
 36. Further, penetration can also be proved through other means and this has been entrenched as a principle by the courts. In *Sammy Charo Kirao v Republic* [2020]eKLR the court cited the Decision of the Supreme court of Uganda in *Bassita v Uganda S.C Criminal Appeal No. 35 of 19995* where it was held;

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt”
 37. In the present case, the evidence of PW1 is corroborated by PW2, PW3 and PW5 (a police officer) who were all present at the Appellant’s house where he was found in company of PW1 after PW1 had gone missing for several days. The evidence of PW1 is further corroborated by the evidence of PW4 who on examination of PW1 found an old broken hymen, epithelial cells and infections. This examination was on 3/3/21.
 38. Looked at from all prisms, the direct evidence of PW1 and the circumstantial evidence of PW2, PW3 and PW5, coupled with the expert evidence of PW4 proves beyond doubt that the Appellant took PW1 to his house and had sexual intercourse with her for several days before he was smoked out. I have alluded to the fact that PW1 appears to have played ball in the whole ordeal but this was inconsequential as she had no legal capacity to consent to sexual intercourse.
 39. As to identity, it is worthy of note that the Appellant was caught red handed with the minor. The complainant knew the Appellant well. PW3 also testified that she knew the Appellant. The Appellant also testified that he knew the complainant and her family and he had known them for a period of four years. That they once lived in the same plot and they were his customers. At times, he would be hired to ferry the complainant to school and to her grandmother’s home. He however denied committing the offence and attributed the charges to a grudge between him and PW2, the complainant’s aunt who wanted his rental house so she could be near her sister.
 40. This line of defence was not put across PW2 during cross examination but was raised on his defence for the first time hence an afterthought. PW2 testified that she did not know the Appellant from before. The Appellant during his cross examination also admitted that PW2 was stranger to her and could not therefore claim that there was an issue of grudge between him and PW2.
 41. Having been arrested while in his house in company of the complainant, the identity of the Appellant as the perpetrator of the act becomes an open and shut case.
 42. As to sentence, the Appellant urged the court to relook at the sentence as he is a young man at his prime, he was a first offender who was a hardworking citizen and that despite been remorseful, the trial court awarded him a harsh and excessive sentence.



43. He was sentenced to twenty (20) years imprisonment as provided in law. The sentence finds support in the decision of the supreme court in R v Joshua Gichuki Mwangi & Others Petition No. E018 of 2023 where it is clarified that the Muruatetu case does not apply to minimum sentences under the *Sexual Offences Act*.
44. While sentencing him, the trial court noted his mitigation in that he was a first offender, and he was in his youthful stage. The court further noted the aggravating factors in that he took advantage of a school going child.
45. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270).
46. The Appellant did not demonstrate any of the above factors. Given the circumstances of this case, it is my view that the sentence meted out by the trial court was commensurate the offence.
47. From the foregoing, the appeal herein lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF JANUARY 2025

A.K. NDUNG’U

JUDGE

