



REPUBLIC OF KENYA



**Mwita v Republic (Criminal Appeal E034 of 2024)  
[2025] KEHC 6695 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6695 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E034 OF 2024  
A. ONG'INJO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**ZAKAYO CHACHA MWITA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon.M.O Obiero Senior Principal Magistrate  
in Kehancha PM Court SO No E017 of 2023 delivered on 9th Day of April, 2024)*

**JUDGMENT**

1. The Appellant Zakayo Chacha Mwita was convicted and sentenced to serve life imprisonment for the offence of defilement of a child aged 9 years old contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars were that on the 10<sup>th</sup> Day of March 2023 at around 13.00hrs within Migori County the Appellant caused his penis to penetrate the vagina of MRR a child aged 9 years.
3. In the alternative the Appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.
4. The Appellant was aggrieved by the conviction and sentence and he filed the appeal herein vide Petition filed on 8.4.24 on the following grounds;
  1. That I pleaded not guilty to the charge herein.
  2. That the trial court erred in both law and facts by not complying with Article 50 (2) (g) (h) of the Kenyan Constitution 2010.
  3. That the learned magistrate erred in both law and facts by not considering that the ingredients of the offence were not proved as required in law



5. Reasons wherefore the Appellant prayed that;
  1. Conviction quashed and sentence set aside;
  2. Retrial or;
  3. Any other order the court may deem fit to grant on humanitarian grounds considering that I am an orphan and from a poor background;
  4. Leave of the court to amend or supplement more grounds after receiving the proceedings.
6. The Prosecution tendered evidence of 4 prosecution witnesses and the Appellant when called upon to defend himself elected to remain silent and wait for the court's verdict.
7. PW1 testified that she was a student at [Particulars Withheld] Primary School and that on 10.3.2023 at 1:00p.m she was from school when she met the Appellant who carried her and removed her clothes. That the Appellant did "tabia mbaya" and left her there and he went away. The Complainant went home and she was bleeding. That the Appellant told the Complainant not to disclose to any one.
8. When the Complainant reached home she went to sleep and when the mother PW2 returned at 6.00pm she reported to her what had happened. That PW2 took the complainant to the hospital and later they reported the matter to the Police Station. The Complainant further confirmed to the court that the Appellant was the person who defiled her by pointing at him in the dock and did not look into his eyes because she feared him.
9. PW2 MM the complainant's mother testified that the complainant aged 8 years old was her daughter and that she goes to school. That on 10.3.2023 the complainant went to school and she also went for a funeral and the complainant came back from school for lunch but she did not find her at home. PW2 came back at around 6:00p.m and found the complainant with her other sibling though was already asleep. PW2 woke her up to find if she was unwell and the Complainant told her that she was having headache. That when she looked at her leg and lifted the dress she was wearing she found dry blood on her thighs and private parts. She took her to bed and looked at her again and found that she was bleeding from her private parts. The complainant then told her that she was defiled by one Zakayo when she was from school. That she reported the matter to the village elder by the name Margaret and they took the complainant to Kegonga hospital and later to the Police Station where she recorded her statement.
10. PW3 PC Everlyne Abuga was the investigating officer based at Kegonga Police Station. She received instructions from the OCS about the complainant and the mother and the Clan elder. That the complainant narrated what happened to her on her way from school and she told them to come back the following day. That the following day she issued PW1 with P3 Form and later they went to Kegonga Sub County Hospital where the girl was examined and she recorded the witnesses' statements and later the Appellant was arrested. PW3 further confirmed that the complainant was born on 3.3.2024, and she produced the Health Card as Exhibit 1.
11. PW4 Allan Odhiambo the Clinical Officer examined the Complainant and filled P3 form, PRC Form and had the treatments notes in which he indicated that the Complainant had been traumatized, she had active bleeding from the genitalia and the hymen was torn. PW4 produced treatments notes as Exhibit 2, PRC Form as Exhibit 3 and P3 form as Exhibit 1.
12. When the Appellant was placed on defence he gave sworn statement and said that on 10<sup>th</sup> March 2023 at around 13.00hrs he was at his place of work herding cattle at Sakuri when a lady went and told him that he would see. That at about 4.00pm police officers went and arrested him. The Appellant said that



- he had earlier gone to look for work from the lady who told him that he would see. He said that he did not commit the offence and that the complainant had a grudge with him.
13. In cross examination the Appellant said it is true he was herding cattle and that the Complainant's mother told him that he would see. He said that at 1.00pm he was alone and that he was arrested at 4.00pm. The Appellant denied defiling the Complainant.
  14. This appeal was canvassed by way of written submissions.
  15. The Appellant in his submissions that the alleged defilement had no legible evidence and he faulted the Complainant's evidence of identification. He said there was no way the court would know that he is the one who committed the offence as there was no independent witness and the children who were said to know him were not identified and they did not testify. The Appellant also said that there was no identification parade to help in identifying the perpetrator and there was therefore no direct evidence linking him to the offence. The Appellant urged the court to treat the Complainant's uncorroborated evidence with caution as there was no independent evidence to corroborate it.
  16. The Appellant further submitted that the Prosecution relied on circumstantial evidence and that such evidence must be incompatible with the innocence of the accused person.
  17. The Appellant also submitted that the ingredients of the offence of defilement had not been proved by the prosecution as the blood stained clothes were not produced.
  18. The Appellant also contended that the Prosecution evidence was marred with incredible witnesses and that the Trial Magistrate should not have found that penetration was proved.
  19. Regarding sentence the Appellant submitted that life imprisonment is not appropriate and the same should be set aside as it is manifestly harsh and excessive. The Appellant argued that he was denied the right to mitigate and that he was not accorded fair trial as envisaged in *the Constitution*. He cited the Court of Appeal decision in Julius Kitsao Manyeso v Republic, Evans Wanjala Wnyonyi v Republic and Yawa Nyale v Republic to support his position that life imprisonment was unconstitutional.
  20. The Respondent filed submissions dated 12th November 2024. The Respondent submitted that all the ingredients of the offence of defilement had been proved beyond all reasonable doubt. It was submitted that PW1's evidence on penetration was corroborated by PW4 the Clinical Officer who examined the Complainant and filled P3 form. That PW4 found the Complainant had active bleeding from the genitalia and her hymen was broken.
  21. It was also submitted that the age of the Complainant was proved by production of Health Card showing the Complainant was born on 3<sup>rd</sup> March 2014.
  22. The Respondent also submitted that the Appellant was positively identified by the Complainant. That she was candid in her testimony.

### **Analysis And Determination.**

23. In a first appeal, the duty of the court was stated in Mark Oiruri Mose vs. R (2013) eKLR thus;  

... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”



24. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:-
- i. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
  - ii. Whether there were discrepancies in the prosecution evidence
  - iii. Whether the sentence was harsh and excessive.
25. 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 which provides:
- 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- 8(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.”
26. For the prosecution to prove the offence of defilement the ingredients to be established are:-
- a) the age of the victim;
  - b) penetration, and
  - c) the identification of the perpetrator.
27. The Court of Appeal in the case of Edwin Nyambogo Onsongo Vs Republic (2016 eKLR stated as follows on the proof of age-;
- ... the question of proof of age has finally been settled by recent decision of this court to the effect that it can be proved by documents, evidence such as birth certificate, baptism, card or by oral evidence of the parents or the guardian or medical evidence among other credible form of proof. We think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victims age it has to be credible and reliable.”
28. In the case of Joseph Kieti Sect Vs Republic, (Supra) it was stated that;
- it is trite law that the age of the victim can be determined by medical evidence and other cogent evidence.”
29. In the case of Francis Omuroni Vs Uganda Court of Appeal No. 2/2000, the court held that
- in defilement cases medical evidence is paramount in determining the age of the victim. The doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from Medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”
30. Proof of age is important in defilement cases as it determines the sentence to be imposed on the perpetrator upon conviction. The younger the victim the harsher the sentence. The appellant in this case has not challenged the age of the complainant that the age of the complainant is not in dispute.
31. The age of the complainant was proved by the production of the Health Card as exhibit – 1. It shows that the complainant was born on 3.03.2014. and therefore at the time the offence was committed she was 8 years old. The P.3 form also shows that the age of the complainant was 9 years. I find that the



prosecution adduced sufficient evidence to prove that the complainant was aged between 8 and 9 years at the time the offence was committed and therefore fell within the provision of Section 8(2) of the Act. The age of the complainant was proved beyond any reasonable doubt.

32. The Appellant did not dispute the Complainant's age during trial and this court views this ground as an afterthought.

### **Proof of penetration.**

33. Whether there was prove of penetration Section 2 (1) of the Sexual Offence Act defines penetration:-

As partial or complete insertion of the genital organs of a person into the genital organs of another person.”

34. PW1 testified that she was a student at [Particulars Withheld] Primary School and that on 10.3.2023 at 1:00p.m she was from school when she met the Appellant who carried her and removed her clothes. That the Appellant did “tabia mbaya” and left her there and he went away. The Complainant went home and she was bleeding. That the Appellant told the Complainant not to disclose to any one.
35. When the Complainant reached home she went to sleep and when the mother PW2 returned at 6.00pm she reported to her what had happened. PW2 examined the complainant and found she was bleeding from her private parts. That she took the complainant to the hospital and upon examination by PW4 it was established that she had active bleeding and the hymen was freshly broken and she was also in pain.

### **On Identification of the assailant.**

36. The offence herein occurred at 1.00pm when the Complainant was on her way from school and it was in broad daylight. The Complainant told her mother it was Zakayo who did bad manners to her after carrying and removed her clothes. The Complainant identified the Appellant to the arresting officer and he was arrested from where he was herding cows and he was charged. While determining the issue as to whether the perpetrator was positively identified the Trial Magistrate at page 8 of the judgment had this to say:-

The court had the opportunity of observing the demeanor of the Complainant during her testimony. The Complainant was firm and consistent and I did not observe anything that would have suggested that she was not saying the truth. As such I do find that the evidence of PW1 demonstrates that it was the Accused person who caused the penetration”

37. The Trial Magistrate having given reason for believing PW1's evidence this court not having had the opportunity to see and hear the Complainant testify will be reluctant in finding otherwise.
38. As to whether the sentence was harsh and excessive Section 8 (2) of the Sexual Offence Act provides for life imprisonment. The Trial Magistrate sentenced the Appellant life imprisonment as provided under Section 8(2) of the Act. However in the case of Julius Kitsao Manyeso vs. Republic in the Court of Appeal at Malindi where it was held that life imprisonment is unconstitutional being that it is indeterminate. In the Manyeso case where the facts were almost similar as the victim was aged below 11 years the Court of Appeal set aside life imprisonment and substituted it thereof with 40 years imprisonment. In Amin *Mohamed Igiro vs. Republic Criminal Appeal 41 of 2022* the Court of Appeal at Malindi again set aside life imprisonment and substituted thereof 35 years imprisonment where the Appellant was charged and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, Following the above precedents from the Court of



Appeal the sentence passed by the trial court is hereby set aside and substituted thereof with 30 years imprisonment.

39. Whether there were contradictions in the prosecution's evidence this court has re-evaluate the evidence in the trial court and found no material contradictions that would prejudice the Appellant in any way and the Appellant did not specifically refer to the alleged contradictions in his submissions.
40. This court therefore finds that the Appeal on conviction lacks merit and the same is dismissed. The appeal on sentence succeeds partially. Right of Appeal 14 days explained.

**DELIVERED, DATED AND SIGNED AT MIGORI BY THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**A. ONGINJO**

**JUDGE**

