



REPUBLIC OF KENYA



KENYA LAW
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**Luka v Republic (Criminal Appeal E054 of 2023)
[2025] KEHC 5620 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E054 OF 2023**

EN MAINA, J

APRIL 24, 2025

BETWEEN

JOHN MUIA LUKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the judgment by Hon. P. Wechuli (PM) in Kithimani Principal Magistrate's Court in Cr. S.O No. E015 of 2022 Delivered on 15th August, 2023)

JUDGMENT

1. The Appellant herein John Luka Muia was charged with an offence of Defilement contrary to Section 8(1)(B) of the [Sexual offences Act](#) No.3 of 2006. The particulars of the offence were that on 15th April 2022 in Matungulu Sub-County Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of CMN, a child aged 11 years.
2. In the Alternative Charge the Appellant herein was charged with the offence of committing an indecent Act with a child contrary to Section 11(1) of the [Sexual offences Act](#) No.3 of 2006 and the particulars of the offence were that on the 15th April 2022 in Matungulu Sub-County Machakos County intentionally and unlawfully by the use of the genital organs namely penis caused contact to the genital organ namely the vagina, of CMN a child aged 11 years.
3. After hearing and analyzing the testimonies of the five prosecution witnesses and also that of the Appellant the trial Magistrate found the Appellant guilty on the charge of defilement, convicted him and sentenced him to life imprisonment.



4. Aggrieved by the Judgment the Appellant now appeals on the following grounds;
 - “ 1) That the Learned Magistrate erred in law and fact by convicting the appellant on the evidence which was full of material contradictions and inconsistencies without any reference to the same
 - 2) That the Learned Magistrate erred in law and fact by failing to make an independent opinion on the burden of proof as required by law.
 3. That the Learned Magistrate erred in law and fact by failing to comply with the provisions of section 169(1) in relation to his defence statement.
 4. That the Learned Magistrate erred in law and fact by failing to weigh the entire evidence adduced in light of the defence evidence.
 5. That the Learned Magistrate erred in law and fact by failing to observe that the evidence brought forward by the prosecution fell too short of the standard needed in law hence his conviction was manifestly unsafe.”
5. The Appeal was canvassed by way of written submissions.
6. The Appellant submitted on two issues. Firstly, that this court has the discretion to alter the sentence imposed by the trial court as that sentence was excessive and should be reduced. Secondly, he submitted that penetration had not been proved and that he should have been convicted on the alternative charge. He contended that the conviction on the charge of defilement was not safe and should be set aside.
7. For the Respondent it was submitted that there was sufficient evidence to convict the Appellant as the prosecution proved the three ingredients for the offence of defilement namely age of the victim, penetration and identification beyond reasonable doubt. The court was urged to dismiss the appeal, uphold the conviction and affirm the sentence.

Analysis and Determination

8. This is being the first appellate court, I have reconsidered and evaluated the evidence adduced in the trial court so as to arrive at my own independent findings while bearing in mind that I did not see or hear the witnesses. I have also considered the submissions filed by the parties and the law.
9. The Appellant was found guilty and convicted with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) as the victim of the offence was eleven years old.
10. Section 8 (1) and (3) of the Act provide as follows;
 - “ 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 a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
11. As correctly submitted by Counsel for the State, the elements of defilement are, that the victim is a child and the age of the child for purposes of sentencing; penetration and the proper identification of the accused as the perpetrator of the offence - See the case of *George Opondo Olunga vs. Republic* [2016] eKLR.



12. The first element of age was elucidated by the Court of Appeal in the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR where the court stated:- :

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

13. Further, in the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held that:

“... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”

14. In this case, that Pw1 was eleven (11) years of age at the time of the offence was proved by production of her birth certificate which indicates she was born on the 28th May, 2011. Her aged was therefore proved to the required standard.

15. The second ingredient is penetration. Penetration is defined as follows under Section 2 of the *Sexual Offences Act*:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

16. The proviso to Section 124 of the *Evidence Act*, the requirement for corroboration in the case of sexual offences by stating:

“Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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.”

17. In this case, the victim testified that on 15th April 2022 she was herding her parent’s livestock when a person held her from behind, removed all her clothes and did tambia mbaya to her. She stated that he used his penis which he inserted in her private area. A medical exam done on 18th April, 2022 showed there were bruises and presence of semen in her genital organ. Penetration has therefore been proved beyond reasonable doubt.

18. The last ingredient is identification. There is no doubt at all that this was identification by recognition. Although the victim in this case did not know the Appellant the testimony of PW2 who herself knew the Appellant places the appellant at the scene of the crime. There is no doubt that it was the Appellant who defiled the minor. PW.2 testified that she was going about her own business when she spotted the Appellant with the child in an incomplete house behind the fence where she was walking. She then saw another woman and beckoned to her and when that woman arrived, they went and questioned the Appellant as to what he was doing with the child. The Appellant was holding two sweaters which the child told them he had spread on the ground and told her to lie on before he had carnal knowledge of her. The Appellant did not give them a satisfactory explanation of what he had been doing with the child and so they took the child to Kyeleni Police Post and made a report. They also relayed



that information to the mother of the child. The Appellant was subsequently arrested and charged. According to the officer who investigated the case PW6, when they went to the scene they found the Appellant's jacket and a sweater belonging to the child there. The sweater was positively identified by the child as hers. It is my finding that this piece of evidence corroborates the evidence of PW3.

19. It is my finding that the element of identification of the Appellant as the perpetrator was also proved beyond reasonable doubt. The conviction for this offence was therefore safe and there is no reason to interfere with regard to the sentence.
20. It is trite that although sentencing is at the discretion of the trial court, that discretion must be exercised judicially in accordance with the law taking into account the facts and circumstances of each case.
21. The punishment prescribed by the law for the offence of defilement of a child below 11 years is a minimum sentence of life imprisonment. Accordingly, the sentence of life imprisonment meted by the trial court was lawful.
22. As for the constitutionality of that sentence for being a minimum sentence, the Supreme court has recently pronounced itself in the case of *Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition 18 of 2023) [2024] KESC 34 (KLR) 12th July 2024* (Judgment) and held that the minimum sentences prescribed in the *Sexual Offences Act* are lawful and the courts should not interfere by imposing lesser sentences.
23. The Supreme Court decision has also recently been followed by the Court of Appeal in the case of *Nyarigoti v Republic (Criminal Appeal 271 of 2019) [2025] KECA 156 (KLR) (7 February 2025)* (Judgment) where the court stated:-

“(22) 22] In the present appeal, the appellant was charged under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The only penalty under section 8(2) of the Act is life imprisonment. That is what the learned Judge imposed. By dint of the Supreme Court decision in the Joshua Gichuki Mwangi Case, that sentence was lawful”

24. The doctrine of stare decisis leaves this court with no option but to follow the above decisions. The Appeal is therefore dismissed save that so as to comply with Section 333(2) of the *Criminal Procedure Code* the sentence of life imprisonment shall be computed to run from the date of arrest which is April 19, 2022.

It is so ordered.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF APRIL, 2025.

E. N. MAINA

JUDGE

In the presence of:

Ms Nyauncho for the state

Appellant online from Kamiti Maximum prison

Geoffrey – Court Assistant

