



REPUBLIC OF KENYA



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**Msuo v Republic (Criminal Appeal E019 of 2023)  
[2025] KEHC 5637 (KLR) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E019 OF 2023**

**JN NJAGI, J**

**MAY 6, 2025**

**BETWEEN**

**MOHAMED AMIN MSUO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from original conviction and sentence by T. A. Sitati, SPM,  
in Lamu SPM's Court Criminal Case No. E018 of 2022 dated 15th June, 2023)*

**JUDGMENT**

1. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve 15 years imprisonment. The particulars of the offence were that on the 24<sup>th</sup> day of October, 2022 in Lamu Central Sub-County within Lamu County, he intentionally caused his penis to penetrate the vagina of FAA (herein referred to as the complainant), a child aged 16 years.
2. The appellant was sentenced to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal on the following amended grounds of appeal:
  1. That the learned trial magistrate erred both in law and fact by failing to consider that the prosecution case was never proved beyond reasonable doubt.
  2. That the learned trial magistrate erred in both law and fact by failing to appreciate the inconsistencies and contradictions in the prosecution witnesses.
  3. That the learned trial magistrate erred in both law and fact by failing to appreciate that the document exhibits by the prosecution were unreliable and questionable.



4. That the learned trial magistrate erred in failing to reach a finding that the case was never properly investigated.
  5. That the learned trial Magistrate erred in both law and fact by failing to appreciate and consider his defence.
3. The prosecution called 5 witnesses in the case while the appellant defended himself and called no witness.

### **Case for prosecution**

4. It was the evidence of the complainant who was PW4 in the case that she was at the material time aged 16 years and was staying with her mother PW1. Her father was staying in another house a distance away from her mother's house. That on the night of 25<sup>th</sup> day of October, 2022 at 10 pm she left her mother's house and went to her father's house to collect some money that her father had promised to give her. That upon arrival she found the door to her father's house locked and she turned to go back to her mother's house. That on the way she met a young man known as Badi, the appellant, who forcefully grabbed her right arm by the wrist and forced her to stop. That he dragged her to a thicket and started to fondle her breasts, touched her neck, buttocks and her back. He made her lie down on the ground and covered her mouth using his hand. He removed her panties and inserted his penis into her vagina. He took her to a second location close to the fence of [Particulars withheld] Primary School where he continued to have sex with her.
5. It was the evidence of the complainant that the appellant stayed with her for more than 4 hours from 11 pm to 5 am and he released her at 5 am when daylight was breaking. She then went to her mother's house. She found her mother at home who inquired as to where she had spent the night but she kept silent as she was in fear and shock. That later her mother took her to the police station where she was interviewed and a report filed. She then informed the police that she had been defiled by a person called Badi who was a close friend to her father and was a regular visitor at her father's house.
6. It was further evidence of the complainant that she met the appellant close to her father's building. That at the said place, there was lighting from 2 security light bulbs. That the appellant came directly in front of her and she could see his face.
7. The mother to the complainant, MMR, who was PW1 in the case testified that on 24<sup>th</sup> October, 2022 she was asleep. That electricity was out. She got up at 11 pm to try load up electricity tokens to restore power. She needed the assistance of her daughter, the complainant to load the tokens. She checked her in her room but did not find her. She loaded the tokens at a neighbor's house. She searched for the complainant with the neighbours but did not find her. That the complainant returned home at 5 am. She inquired from her where she had been but she did not answer. She later took her to the chief for questioning. The chief directed her to take her to the police station. She took her to the police station where she opened up and said that she had been defiled by the appellant. It was the evidence of PW1 that she did not know the appellant before that date.
8. The father to the complainant PW2, told the court that he lives in a separate house from the house where the complainant and her mother live. That on the 25<sup>th</sup> October, 2022 at 11 am he was at his house when two police officers arrived at his house. They informed him about a report filed by his wife and his daughter. He was asked to accompany them to Lamu Police Station. On arrival at the police station, he found his daughter detained and a report had been made that she had slept away from home with a young man. He testified that the complainant had initially claimed that she had slept in his house



- where the police found him but he disclosed that she had not slept in his house. That the complainant later stated that she had slept with the appellant, Badi, who was a regular visitor to his (PW2's) house.
9. It was the evidence of PW2 that the complainant was born on 10<sup>th</sup> August, 2006 as per her birth certificate and was hence aged 16 years.
  10. A clinical officer, Madi Sheyumba PW3, working at King Fahd Hospital testified that he examined the complainant on 25<sup>th</sup> October, 2022 at their medical facility. That the history was that on the night of 24<sup>th</sup> October, 2022 at 11pm, she was grabbed by a person known to her, taken to the thickets and defiled repeatedly. That upon examination he found her in fair general condition. The hymen was broken but not recent. The witness produced the following documents as exhibits: the treatment book; the Laboratory results; the P3 Form; the PRC form and the age assessment report, P.Exhibits 2 - 6 respectively.
  11. The case was investigated by Cpl Davline Kerubo PW5 of Lamu Police Station. It was her evidence that on 26<sup>th</sup> October, 2022 she perused the Occurrence Book and found a case minuted to her by the OCS for investigations. That she interrogated the complainant who informed her that she was walking towards her father's house early in the night hours to collect some items. That upon arrival she found no one there and made her way back. That she met the appellant who grabbed her by the arm and pulled her to the bush where he forced her to have sexual intercourse with her overnight. That the appellant only set her free in the early morning.
  12. It was further evidence of PW5 that later in the day, the complainant's father contacted her and informed her that the appellant was in his homestead. She went there in the company of three other police officers and arrested him. He denied having defiled the complainant. She charged him with the offence.

### **Defence case**

13. Upon being placed to his defence, the appellant stated in a sworn statement that the complainant was his next door neighbour and was well known to him. That she had been writing love letters to him but he had ignored them as she was under age. That on the material day he received information that she had been detained at the police station and she had named him as the culprit. He said that the case was fabricated by members of the complainant's family over an unpaid debt. That he had bought a parcel of land from the father of the complainant and remained with a balance of Ksh.10,000/= . That when he delayed in paying the money the complainant's family conspired against him and he was arrested.

### **Submissions**

14. The appeal was canvassed by way of written submissions. The appellant submitted that a birth certificate was produced that showed that the complainant was aged 16 years. That a P3 form produced in the case indicated that the complainant had been defiled. However, that the evidence of the complainant on penetration was not cogent. That the evidence adduced in the case was contradictory and investigations conducted thereto were shoddy.
15. The respondent on the other hand submitted that the case was proved beyond all reasonable doubt. That the age of the complainant was proved by production of a birth certificate. That the complainant narrated how she met the appellant who forcibly had sex with her in the bush which evidence was corroborated by the evidence contained in the P3 form. That the complainant recognised the appellant as the person who defiled her.
16. On sentence it was submitted that the sentence of 15 years was sufficient for defilement of a 16-year-old.



## Analysis and Determination

17. I have considered the grounds of appeal, the record of the trial court, the judgment and the submissions. As a first appellate court, this court is mandated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses, see *Okeno vs. Republic* [1972] E.A 32.
18. The issues that arise for determination in this appeal are whether the prosecution proved its case to the required standard of beyond reasonable doubt and if so, whether the sentence meted on the appellant was excessive, unreasonable or harsh.
19. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
  - a. Age of the complainant;
  - b. Proof of penetration; and
  - c. Positive identification of the assailant.
20. It was the duty of the prosecution to prove the age of the complainant beyond reasonable doubt. Under section 8(1) of the *Sexual Offences Act* a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. The definition of a child under section 2 (1) of the *Sexual Offences Act* is the one assigned to it in the *Children Act*. This entails any person under the age of eighteen years. *Mwilu J (as she then was) in the case of Hillary Nyongesa Vs Republic (Eldoret Criminal Appeal No.123 of 2000)* stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim.”
21. Similarly, in *Kaingu Elias Kasomo v Republic; Malindi Court of Appeal Criminal Case No. 504 of 2010*, the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depends on the victim’s age.
22. In the instant case, the complainant told the trial court that she was at the material time aged 16 years. She produced her birth certificate, PExh. 1, that indicated that she was born on 10/8/2006 which placed her age at 16 years. Her father PW2 similarly testified that the minor was at the time aged 16 years. He referred to her birth certificate, P.Exh. 1, which placed her age at the time at 16 years. The birth certificate, in my view, conclusively proved that the complainant was aged 16 years at the time of defilement. In the premises, I find that the age of the complainant was proved beyond reasonable doubt.
23. Penetration is defined under section 2 of the *Sexual Offences Act* as the “partial or complete insertion of the genital organs of a person into the genital organs of another person”.
24. Penetration can be proved by oral or circumstantial evidence that may, if available, be supported by medical evidence. In the case of *Kassim Ali v Republic (2021) eKLR* the Court of Appeal stated that;

“....absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.”



25. In this case there was no medical evidence to support the evidence of the complainant that the appellant defiled her. That leaves only the evidence of the complainant as the sole evidence that the appellant defiled her. Section 124 of the *Evidence Act* provides as follows:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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.”

26. The rider to this section is that the court can convict in a sexual offence case involving a child on the sole evidence of the child only if the court is satisfied on the credibility of the child that the child was truthful.

27. The Appellant argued that the evidence tendered by the prosecution on the issue of penetration was not reliable and credible. The trial magistrate in her judgment found that the complainant was telling the truth. That she knew the appellant very well and she identified him as the person who defiled her.

28. There is then the question whether the complainant identified the appellant as the person who dragged her into the bush and defiled her.

29. In *Francis Karuiki and 7 others vs. Republic Cr. Appeal No 6 of 2001* [200] eKLR it was held that;

“The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if satisfied that the identification is positive and free from possibility of error.”

30. In *Kimea v Republic (Criminal Appeal 010 of 2020)* [2022] KEHC 104 (KLR) (18 February 2022) (Judgment) the court enumerated the factors to be considered in identification to include such factors as the lighting conditions under which the witness made his/her observation; the distance between the witness; the period of time the witness actually observed the perpetrator and whether the witness had an unobstructed view of the perpetrator.

31. The offence in this case was committed at night and the complainant was the only identifying witness in the case. It is trite law that a court before convicting on the evidence of a single identifying witness, as in this case, should warn itself of the danger of basing a conviction on such evidence. In *Roria vs Republic* (1967) EA 583 the Court of Appeal stated at page 584 that:

“A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”



32. In *Kiilu & Another v Republic* [2005] eKLR, the Court of Appeal held that;

“Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error.”

33. The appellant in this case was a neighbor to the complainant and a person well known to her. There were 2 electric bulb lights at the place the complainant met the appellant and she saw him at close range. I therefore find that the complainant clearly saw the appellant as the person who confronted her and dragged her to some thickets where he defiled her. The appellant stayed with the complainant for a period of over 4 hours. There was then no possibility of mistaken identity. I find that there was sufficient lighting at the place the complainant met the appellant and she positively identified him.

34. The fact of the complainant sleeping out of her home on the material night was corroborated by her mother PW1 who found the complainant missing from her room at 11 pm and she did not come back home until 5 am.

35. The appellant alleged that the charges were fabricated by the complainant's family after he failed to pay a balance of a parcel of land he had bought from the complainant's father. The complainant and her parents, PW1 and PW2 testified in the case. The appellant did not raise the issue with them during their cross-examination that the charges were fabricated due to differences over a land transaction.

36. Besides that, it was the evidence of the complainant that the appellant was a close friend to her father. This was corroborated by her father who told the court that the appellant was a frequent visitor to his house. The investigating officer said that the appellant was in fact arrested at the house of the complainant's father. Why then would the appellant have continued to visit the complainant's father if there was any grudge between them over a land transaction? In my view the appellant's defence was a fabrication and an afterthought. There was no grudge between him and the complainant's family. There was no reason why the complainant would have picked on the appellant as the person she spent the night with if that was not true. I am therefore in agreement with the trial court that the complainant was telling the truth that the appellant defiled her.

37. I find the evidence adduced against the appellant to have been overwhelming and his conviction was supported by credible evidence. The conviction is thereby upheld.

38. Under the provisions of section 8(4) of the *Sexual Offences Act*, a person found guilty of defiling a child of between 16 and 18 years is liable to imprisonment for a period of not less than 15 years. The appellant was given the minimum sentence. In view of the Supreme Court decision in *Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi (Respondent) & Initiative for strategic litigation in Africa & 3 others (Amicus curia)*, delivered on 12<sup>th</sup> July, 2024 where the court said that a court has no discretion to impose anything less than the mandatory sentence provided by the law, this court has no basis of interfering with the sentence meted out on the appellant.

39. The upshot is that there is no merit in this appeal and the same is dismissed in its entirety.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 6<sup>TH</sup> DAY OF MAY 2025**

**J. N. NJAGI**



## **JUDGE**

In the presence of:

Miss Mkongo for Respondent

Appellant – present in person from G.K. Prison Malindi

Court Assistant - Nasra

