**Mugunyi v Republic (Criminal Appeal E021 of 2023)**
**[2025] KEHC 10104 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 10104 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**CRIMINAL APPEAL E021 OF 2023**

**GL NZIOKA, J**

**JUNE 19, 2025**

**BETWEEN**

**JOHN GACHERU MUGUNYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the decision of Hon. Nathan Shiundu Lutta Chief Magistrate (CM) delivered on; 20th April, 2023, vide Chief Magistrate's Criminal Case S/O No. 63 of 2016)***

## JUDGMENT

1. The appellant was arraigned before the Chief Magistrate court charged vide Chief Magistrate Criminal Case No. S/O 63 of 2016, with the offence of defilement contrary to Section 8 (1), as read with Section 8(2) of *Sexual Offences Act* No. 3 of 2006 (herein "the Act").

2. The particulars of the offence are that, on diverse dates between 28th September 2016 and 19th October 2016 in Gilgil Sub-county within Nakuru County, he intentionally and unlawfully caused penetration of his male genital organ (penis) into the female genital organ vagina of DW a child aged eight (8) years.

3. He was also charged in the alternative count 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 particulars there of the alternative count are that, on the diverse date between 28th d September 2016 and 19th October 2016 in Gilgil Sub-county within Nakuru County, committed an indecent act with DW child agedeight (8) years by touching her private parts (vagina) with his private parts (penis).

5. The charges were read to the appellant who pleaded not guilty to both counts and the case proceeded to full hearing. The prosecution case is that, at the time of the offence (PW1) DW (herein "the complainant") was a student at [Particulars withheld] School while the appellant was a teacher

in the same school. That, the complainant first met the appellant when the appellant taught the complainant's class a math lesson about the clock.

6. The complainant testified that, the appellant called her out of the class and led her to a building under construction within the school premises. That, he informed her that he would be doing bad manners to her every wednesday and threatened her that if she told anyone he would cut her into pieces with a panga. That he then ordered her to go back to class.

7. That on the following Wednesday, as the complainant was going to the toilet the appellant called her and took her to the fourth house in a plot that was near the school. That he ordered her to remove her uniform and removed his clothes, then placed her on the bed and inserted his penis in "her behind" and she felt pain. That once done, the appellant gave her a lollipop and gave her the keys to open the gate and told her to go back to class. That later he went to confirm if she had returned to class.

8. The complainant stated that she wanted to tell her classmate Brenda what had happened but she was afraid that Brenda would inform the appellant. Similarly she feared that the appellant wouldl hurt her if she informed her teacher Agnes and her mother.

9. That on the second occasion, the appellant instructed her to go the toilet when she arrives in school and the next Wednesday, she arrived in school, left her bag in class and went to the toilet. That, the appellant called her and they went to the same house and the appellant defiled her again. After defiling her she beld and the appellant wiped her with a tissue which he threw into the toilet. Further that the appellant offered her a soda but she refused and he gave her the keys for the gate and ordered her to go back to class which she did.

10. That the defilement went on for two weeks. Later on he told her if the defilement was discovered she should inform her mother and grandmother that it was Peter who did it, and if they still did not believe her, she should blame it on Mwangi, Teresia and Virginia.

11. However, on 16th October 2016, (PW3) MW, the complainant's grandmother, while washing the complainant's clothes noticed that her pant was soiled with a substance that looked like semen, she decided not wash the pant.

12. On 20th October 2016, PW3 W informed (PW2) JMK, the complainant's mother her suspicions. That when PW2 JMK was washing the complainant, she noticed that her private part was reddish and looked open. PW2 JMK called PW3 W and the interrogated the complainant. That at first the complainant alleged that it was Peter but later blamed Virginia and Teresia. However, she later stated that it was the appellant.

13. That on 26th October 2017, PW2 JMK visited the complainant's school for further investigations, and learnt that the appellant used to defile the complainant. PW2 JMK reported that matter at Gilgil Police Station and investigation commenced.

14. PW6 No. 23xxxx Inspector Hillary Ndungu the Investigating officer testified that when the matter was first reported on 26th October 2016, it was alleged that Mwangi and Peter had defiled the complainant. However as the police officers tried to find out who Mwangi was, a further report was made where the complainant accused the appellant for defiling her.

15. PW4 Dr. Salim Seif produced the PRC form and the P3 form on behalf of the Dr. Manga and Dr. Masinde respectively. That the P3 form indicated that the complainant's hymen was broken but she had no infections. The degree of injury was classified as maim.

16. Subsequently PW6 IP Ndungu visited the school and after meeting with the owner, Mr. Chege, the appellant was arrested her. That the house where the complainant alleged she was defiled was also visited but there was no one occupying tit with information received that a pastor used to live there but had since moved out. At the conclusion of the investigations, the appellant was charged accordingly

17. At the close of the prosecution case, the appellant was placed on his defence vide a sworn statement, he admitted that at the time of the offence he was a class 4 teacher at [Particulars Withheld] Academy. That he was called to the Director's office and met with police officer, who called the complainant and alleged that he had defiled her. That he was interrogated in the presence of other teachers and subsequently arrested and arraigned in court charged with the offence herein.

18. He denied committing the offence and alleged that he was being framed by a teacher whom he had disagreed with and who had stated that he would ensure that he suffered. Further, that he could not defile one pupil as the students to relieve themselves in groups, further, no single witness saw him commit the offence.

19. At the close of the entire case, the trial court in its judgment dated 20th April 2023 found the appellant guilty, convicted him and sentenced him to serve twenty (20) years imprisonment.

20. However, the appellant is aggrieved by the decision of the trial court and appeal against it on the following grounds:

    a. That the learned trial Magistrate erred in law and facts in convicting and sentencing the appellant on inconclusive and insufficient evidence.

    b. That the learned trial Magistrate erred in law and facts in finding that there was evidence of penetration in this case when the evidence that was adduced was insufficient and did not proof the case a required.

    c. That the learned trial Magistrate erred in law and facts in failing to consider that the conviction and sentence against the appellant were unsafe in the circumstances.

    d. That the learned trial Magistrate erred in law and facts in not finding that the evidence of the complainant contained material contradictions and therefore unsafe to rely to convict the appellant.

    e. That the learned trial Magistrate erred in law and facts in not finding that the learned trial Magistrate placed the Burden of proof to the appellant against the requirement of the law.

21. However, on the 13th December 2023, the appellant filed an amended petition of appeal on the following grounds as verbatim reproduced: -

    a. That the learned trial Magistrate erred in law and facts in convicting and sentencing the appellant on inconclusive and insufficient evidence.

    b. That the learned trial Magistrate erred in law and in facts in finding that there was evidence of penetration in this case when the evidence that was adduced was insufficient and did not proof the case a required.

    c. That the learned trial Magistrate erred in law and facts in failing to consider that the conviction and sentence against the appellant were unsafe in the circumstances.

d. That the learned trial Magistrate erred in law and facts in not finding that the evidence of the complainant contained material contradictions and therefore unsafe to rely to convict the appellant.

e. That the learned trial Magistrate erred in law and facts in not finding that the learned trial Magistrate placed the burden of proof to the appellant against the requirement of the law.

f. That the learned trial Magistrate erred in law and in fact in failing to find that the Prosecution failed to call the evidence of pastor and a caretaker who were alleged to have been giving the keys of the gate to the appellant herein and their evidence would have been favourable to the appellants case.

g. That the learned trial Magistrate erred in law and in fact in failing to consider the fact that the complainant/victim had mentioned several persons as the perpetrators of the offence and there was no sufficient evidence that was adduced to clear the fact that these mentioned persons were not the persons who committed the alleged offence.

h. That the learned trial Magistrate erred in law and facts in failing to find that the complainant/victim may have been coached to give the evidence that she gave in court.

i. That the learned trial Magistrate erred in law and in fact in failing to find that the complainant/victim lied in pointing to the appellant as the perpetrator of the offence having admitted in her evidence that she lied to the Investigators, her mother and grandmother over crucial acts regarding the commission of offence.

j. That the learned trial Magistrate erred in law and in facts in failing to find that the evidence of Dr. Salim who produced the P3 Form and the PRC Form which were heavily relied upon by the court to find there was penetration was hearsay for failure to give the qualifications of Dr. Masinde and Dr. Manga who had filled these two documents.

k. That the learned trial Magistrate erred in law and facts in failing to find that the credibility of the complainant/victim was shaken the moment she admitted in court that she lied in her evidence in court.

l. That the learned trial Magistrate erred in law and facts in failing to find that the complainant/victim was likely to give misleading facts as to the actual perpetrator of the offence as whatever she chose to say was after being seriously beaten by her mother.

22. As a result the appellant prays for the following orders: -

a. That the conviction and sentence be quashed and set aside.

b. That the Appellant be acquitted accordingly.

23. The appeal was opposed by the respondent vide grounds of appeal dated 9th October 2023 which states as follows:-

a. That age of the complainant was sufficiently proved as provided for under the Sexual Offence Act and birth certificate produced as an exhibit.

b. That penetration was proved under the Sexual Offence Act through the evidence of the Doctor examination the complainant and produced P3 form and Post Rape Care form.

c. That in the judgment the trial court noted that the complainant evidence was cogent and the court noted that she was a truthful witness whose evidence was unshakeable despite the defence adduced by the appellant.

d. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with Section 215 of the *Criminal Procedure Code*.

e. That the sentence imposed by the trial court was proper and in line with the Sexual Offence Act. Further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant.

f. That the appeal is misconceived and devoid of merit and ought to be dismissed forthwith.

24. The appeal was disposed of vide filling of submission. The appellant in submissions dated 8th July 2024, argued that the medical evidence to the effectthat the complainant's hymen was torn and missing and that the vagina was red was not enough to prove penetration. That the Court of Appeal in the case of P.K.W vs Rep (2012) eKLR stated that it is erroneous to assume that the absence of the hymen is proof that a girl child has been defiled as there is scientific evidence that there are girls not born with hymen while there are times the hymen is broken by other factors apart from intercourse.

25. The appellant further submitted that the medical evidence was hearsay and inadmissible. That PW4 Dr. Salim never informed the court of his qualifications nor did he state the qualifications of Dr. Masinde and Dr. Manga who examined the complainant and filled the P3 form and PRC form respectively.

26. Further, the prosecution failed to lay a basis for PW4 Dr. Salim to produce the medical documents on behalf of Dr. Masinde and Dr. Manga as required under section 33 of the *Evidence Act*. Additionally, Dr. Salim did not state whether he worked with the two doctors, whether he knew their handwriting and signatures, and whether the handwriting and signature in the medical documents belonged to him.

27. The appellant relied on the case of, Ndiki Senze vs Republic [2022] eKLR where the High Court found that the medical evidence was inadmissible and hearsay as the trial court and the prosecution did not lay the basis PW3 qualified to testify as an expert under section 48(2) of the *Evidence Act*. Furthermore, PW3 never gave the qualifications of Benjamin, the author of the P3 form, nor did he state whether he had worked with him and for how long.

28. The appellant submitted that, the evidence of the complainant was unreliable, incredible and unsafe. That, the complainant was not a truthful witness as she lied during the investigations on who defiled her stating that it was Peter from St. Peters and Mwangi. Similarly, the appellant lied about the house she was defiled in and as a result PW6 IP Ndungu went to the wrong house.

29. Further, the complainant's evidence was procured by threats as she testified that she stated the truth after being beaten by her mother and teacher Mary and referred the court to the case of Michael Mugo Musyoka vs Republic [2015] eKLR .

30. The appellant argued that the evidence of the complainant revealed that she was a coached witness, firstly, the length of the testimony for an eight-year-old child was telling. Secondly, the statements such as "On Thursday, no Sunday", "the one who gave him the house", "she checked my vagina and saw it was red", and "my mum saw there was a gap" were not words she was capable of using. That, when testifying the complainant was pointing to where the appellant put his thing for urinating raising doubt as to whether she knew what a vagina was.

31. The appellant further submitted that the trial court did not in its judgment state the reason it believed that the complainant was telling the truth. That in the case of, Ndiki Senze vs Republic (Supra) the High Court citing section 124 of the *Evidence Act* noted that the trial court did not state in its judgment why it was of the opinion that the victim was telling the truth and held that the conviction was unsafe.

32. However, the respondent in response submissions argued that the prosecution had proved beyond reasonable doubt the elements of the offence being; proof of age, identification of the perpetrator and penetration.

33. That the age of the complainant was proved through her evidence that she was born on 21st October 2008 and was eight (8) years old at the time of the offence. Further, the prosecution produced the complainant's birth notification as (Pexhibit 4) and birth certificate (Pwxhibit 5) to confirm that she was eight (8) years old.

34. Further, the complainant positively identified the appellant who was a class 4 teacher in the school she attended. Additionally, the appellant defiled her on four occasions at his friend's house.

35. The respondent relied on the definition of penetration under section 2 of the Act and the case of Mark Oiruri Mose vs R (2013) eKLR where the Court of Appeal stated that penetration will be proved whether it is only on the surface and does not need to be deep inside a girl's organ. That penetration was proved through PW4 Dr. Salim who produced the P3 form and PRC form which indicated that the complainant's hymen was torn and had loose tone in terms elasticity.

36. Finally, the respondent submitted that the trial court meted out the sentence after considering the appellant's mitigation and it was in accordance in the law. The respondent urged the court to uphold both conviction and sentence.

37. At the conclusion of the case, I recognized that, in considering the appeal herein, the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion taking into account the fact that this court did not have the benefit of the demeanor of the witness.

38. In that regard, the court stated in the case of Okeno vs. Republic (1972) EA 32 that;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

39. To revert back to the matter herein, I note that the appellant was convicted of the offence of defilement provided for under Section 8(1) of the Act as follows;

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

40. Pursuant to the aforesaid provisions and case law, the ingredients of the offence of defilement were settled in the case of; Agaya Roberts vs. Uganda, Criminal no. 18 of 2002, and Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved:

    (i) the facts of the sexual intercourse

    (ii) the age of the victim being under 18 years

    (iii) participation by the accused in the alleged sexual intercourse.

41. As regards the element of age, it was proved by the birth certificate produced as Pexh 5. The age of the complainant was thus established to be eight (8) years at the time of the offence, as she was born on 21st October 2008 and the offence is stated to have occurred on 29th September 2016.

42. The next ingredient to determine is whether penetration was proved. In that regard, penetration is defined under section 2 of the Act as follows;

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

43. PW1 testified that, the accused defiled her on several occasions. Notablt there was no eye witness to the offence. However, there is evidence by other witness. (PW3) W stated that, she noted the complainant's pants was soiled with something that looked like semen. She also noticed that her vagina was reddish and enlarged. (PW2) JMK also stated that she checked the complainant and noticed that, her private were reddish and quite open.

44. In addition (PW4) Dr. Salim produced the P3 form and PRC form. I note the appellant faults the production thereof on the ground that it was produced someone who is not the maker. However, the court notes that, the doctor proceeded under section 77(3) of the *Evidence Act*, although it does appear that the appellant was not asked whether, he conceded to (PW4) producing the documents. It is always proper and should be the case that an accused person be asked and recorded as to whether the document(s) can be produced by someone else than the maker.

45. Be that as it were, the appellant raised no objection to the production of the subject documents during the trial. Taking into account the fact that, these are documents by an expert, the content thereof can only be rebutted by another medical document. In this case, I therefore don't find that, the failure of the court to establish whether the document could be produced by (PW4) was prejudicial to the appellant.

46. To revert back to those documents, they indicated that PW1's hymen was broken and the private parts had loose tone (elasticity). Dr. Masinde who filed the P3 form indicated penetration took place. I therefore find that there is adequate evidence that, the complainant was defiled.

47. As regards the last element on who defiled the complainant, PW1 has identified the appellant as the perpetrator. The evidence of (PW1) the complainant was quite detailed. She narrated how the accused lured her off the school to a deserted house and defiled her on several occasions. The defilement on several occasion is supported by the evidence that he private parts were "reddish, loose, enlarge and/or open".

48. Furthermore, the appellant was her teacher. She also explained clearly why she was hesitatant to tell the truth from the beginning as she feared the appellant would hurt her, as he threatened her with a panga, and told her, he would kill her if she exposed him. Furthermore, it is in evidence that he even told her

to implicate other persons, Peter, Mwangi and Virginia. All these evidence in deep details cannot have been fabricated by the complainant.

49. In fact several questions arise. Why would the child give such a detailed account if it is not true. Indeed there is no evidence of a grudge between the child, her parents and the appellant. To the contrary the appellant shifted the grudge to a fellow teacher. If the teacher used the complainant to fix him, then who defiled the complainant.

50. The court also notes that, the appellant did not advance the defence of a grudge throughout the prosecution's case. Therefore, the same is an afterthought. Even moreso, the appellant did not even name the teacher whom he alleges swore to fix him.

51. In the given circumstances the appeal has no merit and I dismiss the same on conviction.

52. On sentence I note the appellant was sentenced to serve twenty (20) years imprisonment. Yet section 8(2) provides for a life imprisonment for defilement of a child aged eleven (11) years and below. The sentence imposed herein is thus unlawful. In that case I invoke the provisions of section 362 and 364 of the *Criminal Procedure Code* and revise the appellant's sentence by setting aside the sentence of twenty (20) years and substituting if with a sentence of life imprisonment. Right of appeal of fourteen (14) days explained.

53. It is so ordered

**DATED, DELIVERED AND SINGED ON 19TH DAY OF JUNE 2025**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of

The appellant present virtually

Mr. Gichuki for appellant

Ms. Chepkonga for respondent

Ms. Hannah: court assistant