



REPUBLIC OF KENYA



KENYA LAW
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**Godana alias Aftamu v Republic (Criminal Appeal E003 of 2015)
[2025] KEHC 11963 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E003 OF 2015**

**FR OLEL, J
JULY 24, 2025**

BETWEEN

ROB TARI GODANA ALIAS AFTAMU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the conviction dated 29.11.2024
and subsequent sentence delivered on 09.01.2025 delivered by Hon
Kombe Larry Matawi (RM) in Moyale PMCR (SO) No E008 of 2024)*

JUDGMENT

A. Introduction

1. 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* No 3 of 2006. The particulars of the offence were that on the 11th day of May 2024 at Moyale sub-county within Marsabit county, intentionally caused his penis to penetrate the vagina of N.G.B, a girl aged 10 years.
2. In the alternative, he 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. The particulars of the offence were that on the 11th day of May 2024, at Moyale sub-county within Marsabit county, intentionally touched the vagina of N.G.B a girl aged 10 years, with his penis.
3. The Appellant took plea and denied the charges faced. The prosecution called four witnesses, and on being placed on his defence, the Appellant gave sworn evidence and called one witness in support of his case.



4. The trial magistrate considered the evidence proffered and found the Appellant culpable of the offence of defilement contrary to section 8(1) as read with section 8(2) of the sexual offences Act No. 3 of 2006. He proceeded to convict and sentenced him to serve life imprisonment.

B. Evidence At Trial

5. PW1 N.G.B. underwent voir dire examination and gave sworn evidence. She testified that he was a grade 2 pupil at [Particulars Withheld] Academy and vividly recalled that on 11.05.2025, her mother left her at home to take care of her younger sibling, a toddler. The accused, who was well known to her, came to their home and, upon finding that there was no adult in the house, held her hand and forcefully placed her on the bed situated within the sitting room, where he proceeded to defile her, and once done, left her in distress.
6. Soon thereafter, her mother (PW2) returned back home from her errands and found her crying. she narrated to her what had transpired and PW2 called for help from neighbours who responded to the distress calls and assisted in apprehending the Appellant, called the police, and also had her taken to hospital for medical attention.
7. Under cross-examination, PW1 affirmed that the Appellant defiled her and that the incident had occurred within their dwelling house. During the incident, she could not scream as the Appellant had covered her mouth using his hand, and she was also not aware if other neighbours heard any commotion within their house during the incident. PW1 also affirmed that nobody witnessed the incident, but her mother found her crying, and upon explaining to her what had transpired, she had called for help from their neighbours.
8. PW2 HKR testified and stated that she was PW1's mother and recalled the events of 11.05.2024. She had PW1 with her toddler, as she had to step out to go milk her cows. When she came back, she found PW1 crying and also noticed that she was bleeding from her private part. Upon inquiry, PW1 narrated to her how the accused had come to their house and proceeded to defile her.
9. She screamed for help, which attracted her neighbours' attention, and they assisted in having the accused arrested and also in taking PW1 to the hospital. PW2 also confirmed that her daughter was 10years old, having been born on 17.10.2013. She also confirmed that her daughter knew and recognised her assailant and had mentioned him by name as the guilty person. She also knew who he was as they resided within the same Manyatta.
10. Under cross-examination, PW2 confirmed that the appellant was arrested by members of the public who handed him over to the police. She affirmed that she did not witness the defilement act, but PW1 had categorically stated that it was the Appellant who had defiled her.
11. PW3 Dr Hassan Adan stated that he was a qualified Medical officer stationed at Moyale Sub County Referral Hospital and confirmed that on 11.05.2024 at about 7.00 pm, while on duty examined PW1 who had been escorted to their facility by police officers and had given a history of having been defiled by a person known to her earlier in the day. She had injuries on her labia Majora and minora, lacerations on her vaginal perineum, which injury had extended to the part of her Anus. There was also the presence of blood discharge on her Vagina.
12. Vaginal swab showed the presence of spermatozoa, HIV test and pregnancy test both returned negative results, and the presence of blood was an indication that her hymen had been broken. As a result, they had to surgically repair the tear and placed the minor on medication. His professional opinion was that PW1 had been defiled due to the nature of injuries she sustained/ suffered. He proceeded to produce the P3 form, treatment notes, and PRC form, which he had signed as exhibits before the court.



13. Under cross-examination, PW3 confirmed that the police had brought both PW1 and the Appellant to the hospital and, while there, the accused had admitted to defiling PW1. He had also physically examined the Appellant to check if he had any blood on his private part, but did not find any, probably because he had bathed after the incident. He also did not take any DNA samples from the Appellant.
14. PW4 PC Jared Omondi stated that he was attached to Moyale police station and while on duty on 11.05.2024 had received a phone call from members of the public who informed him of a defilement incident, which had occurred at [Particulars Withheld], within Bori location. The public had arrested the suspect and they had requested for assistance in having him rearrested. Together with other colleagues, he proceeded to the said incident scene and while enroute, at Antutu village, they met both the Appellant being escorted to the station and the victim being escorted to the hospital. They took charge and proceeded to take the victim to hospital, while also detaining the Appellant.
15. During investigations he also recovered blood stained cloths, and later secured PW1 birth certificate (certificate No XXXXXXXX), both of which he presented to court as Exhibits. Under cross examination PW4 confirmed that PW1 had positively identified the Appellant as her assailant and informed her mother of the same. Thus even though nobody witnessed the incident, that did not matter based on the positive identification made. Further as per his investigation, he did not discover any family grudge between the two parties and positively identified the Appellant as the person he re-arrested on the material evening.
16. The prosecution closed their case, and the appellant was put on his defence. He gave sworn evidence denying the allegations made against him. He stated that he went to play football, after which he went home to relax under a tree. While there, two people came, one holding a gun and forcefully arrested him. His mother tried to intervene, but they waved her away and informed her that he had been arrested for defiling a minor. He denied committing the offence and insisted that he had been framed. Further, he stated that the complainant's family was also trying to blackmail their family, and they had already paid them 2 goats and Ksh.40,000/= to settle the case.
17. Under cross-examination, he emphasized that he was just a victim who had been wrongly accused and had not defiled PW1. Their family also had differences stemming from the goats' grazing area. DWII Liban Wakala testified and stated that on 11.05.2024, he was at home at [Particulars Withheld] and saw the accused go to play football at around 10.00 am and came back at 2.00 pm, shortly after which he was arrested by the police. After the said arrest, under guidance from the elders, they had tried to resolve the issue at hand, and as a result, the accused mother had paid the complainant's mother (PW2) a sum of Kshs.40,000/= plus one goat to have the complaint withdrawn.
18. The learned trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and, after mitigation, sentenced the Appellant to serve life in prison.

C. The Appeal

19. Dissatisfied by the conviction and sentence passed, the Appellant filed the following grounds of Appeal that;
 - a. That the learned trial magistrate erred in law and fact by failing to inform the appellant of his right of representation as enshrined under Article 50(2), (g) & (h) of *the Constitution*, thus the appellant was not accorded a fair trial.
 - b. That the learned magistrate erred in law and fact by failing to note that key witnesses were not called.



- c. That, the learned trial Magistrate erred in law and fact by failing to note that the prosecution had failed to prove their case beyond reasonable doubt according to the law.
- d. That, the learned trial Magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under Section 8(4) of the sexual offences Act denies a judicial officer their legitimate jurisdiction to exercise of discretion in sentence not to impose an inappropriate sentence based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair, thus in breach of Article 27(1),(2)&(4) of the constitution of Kenya, hence, the sentence imposed on the Appellant was unlawful.
- e. That, the trial Magistrate erred in both matters law and facts by failing to consider the appellant defence.

D. Analysis & Determination

- 20. The being the first appeal, this court is as a matter of law enjoined to analyse and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno versus Republic* (1072) EA 32, *Pandya versus Republic* (1957) EA 336 & *Shantital M Ruwala versus Republic* (1957) EA 570, where the court of appeal set out the duties of the first appellate court.
- 21. This court has examined the Record of Appeal, the grounds of appeal, and given due consideration to the submissions by the parties' respective Counsel and finds that the following issues arise for determination;
 - a. Whether the ingredients of the offence of defilement were proven.
 - b. Whether the Appellants rights under Article 50 (2) of the constitution of Kenya 2010 were breached.
 - c. Whether the sentence passed was harsh and unconscionable.

(A) Whether the ingredients of the offence of defilement were proven.

- 22. In criminal cases, the burden of proof lies with the prosecution, and they have to persuade the court either by preponderance of evidence or beyond reasonable doubt that the material facts that constitute their whole case are true, and consequently to have the case established and judgment given in their favour. See *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372, *Republic Vs Edward Kirui* (2014) eKLR, and *Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another* (2008) INSC 1688
- 23. Section 8 (1) and (2) of the sexual offence Act No 3 of 2006 provides that;
 - 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 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.
- 24. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration, and the proper identification of the perpetrator.



Age

25. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... 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.” (emphasis added)

26. From the evidence on record, the age of the minor was proved by production of her birth certificate (Serial No XXXXXXXX) produced as Exhibit by PW4. The minor was born on 17.10.2013 and at the time of the offence was ten (10) years old.

Penetration

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

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

28. The same section defines “genital organs” to include;

“the whole or part of male or female genital organs and for purposes of this Act includes the anus.”

29. The minor in her evidence in chief did testify and confirmed that the Appellant came to their home and found her taking care of her younger sibling/toddler. He forcefully dragged her to the bed situated within the sitting room, removed her clothes, covered her mouth with his hand, and forcefully had sex with her. Her mother (PW2) came back shortly thereafter and found her crying, and she explained to her what had transpired.

30. PW1 was rushed to Moyale Sub-County Hospital on the material day, where PW3 examined and treated her. PW3 observed that the PW1 had fresh injuries/ lacerations in her labia Majora/Minora and also had a perineal tear, which extended to her anus and required surgical intervention to repair. High vaginal swab also established the presence of Spermatozoa deposits within the victim’s vagina.

31. The evidence of PW1 was cogent, and she did confirm her sexual encounter with the Appellant, who was a person well known to her. Her evidence was corroborated by PW2 who found her daughter in distress and was bleeding from her private part, and PW3, who examined her and produced the P3 form, PRC form, and treatment notes, which affirmed the injuries sustained and established proof of penetration.

32. The evidence adduced to prove penetration was overwhelming, and the trial magistrate cannot be faulted for arriving at the finding that indeed penetration had been proved.



Identification.

33. On identification, PW1 knew the Appellant as he was a fellow village mate well known to her and in defence, the Appellant also acknowledged this fact. This incident occurred at about 10.00 a.m., and this was therefore a case of recognition as the victim knew the appellant by name and appearance.
34. In *James Murigu Karumba vs. Republic* [2016] eKLR, it was held by the Court of Appeal based, on *Suleiman Juma alias Tom – v- R* (2003) eKLR; (2003) KLR 386 that:
- “Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value.”
35. In defence, the Appellant alleged that he never visited the complainant’s home and was playing football with his friends at the material time. Further, he had been wrongly accused of committing this crime due to a family grudge which existed between their families. The trial Magistrate did consider the evidence adduced and correctly arrived at the right conclusion that the prosecution had ably discharged the burden of proof, making the Appellants’ conviction safe.
36. This court too has independently reviewed the said evidence and arrives at the same conclusion, that the burden of proof was properly established and proved.

Whether the Appellants’ rights under Article 50 (2) (g) of *the Constitution* of Kenya 2010 were breached.

37. The Appellant submitted that the trial court had failed to appreciate that he was not represented by counsel nor was his right to be represented explained to him, which substantially compromised the proceedings undertaken and rendered the same to be nugatory for being in breach of provisions of Article 50(2) of *the Constitution*, which provides for fair hearing of all matters.
38. Article 50 (2) (g) of *the Constitution* provides that: -
- (2) Every accused person has the right to a fair trial, which includes the right;-
- (g) To choose, and be represented by, an advocate, and to be informed of this right promptly;
- (h) To have an advocate assigned to the accused person by the state and at State expense. If substantial injustice would otherwise result, and to be informed of this right promptly.
39. Unfortunately for the Appellant, this issue is raised as an afterthought in his submissions and was not raised during the trial. He took his plea using Borana language, a language he stated he understood. Both PW1 and PW2 also testified using the same language, the Appellant understood their evidence and cross-examined both of the said witnesses extensively. The evidence of PW3 and PW4, the same was translated to him, and he cross-examined them too.
40. In addressing a similar issue, the court in *Katana & another v Republic* (Criminal Appeal 8 of 2019) [2022] KECA 1160 (KLR) (21 October 2022) stated as follows:
- “The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore could not be the basis for vitiating the High Court’s decision. Be that as it may, the record of the trial court showed that the appellants



indicated they were ready to proceed with the trial, actively participated in the trial and cross-examined all the witnesses, and it was not evident that they suffered any or any substantial injustice. There was no merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and (h) of *the Constitution* were violated.”

41. I do therefore find that the Appellant fully understood and appreciated the trial court proceedings. At no time during the said proceedings did he ask to be assisted with counsel, nor did he intimate to the court that he did not understand the proceeding and therefore was unable to cross-examine all witnesses and/or also call his witnesses in defence. He cannot late in the day, alleging to have been prejudiced when he did not raise this issue during trial. This ground of Appeal fails.

Sentencing

42. As regards the sentence, the Appellant was charged with the offence of defilement contrary to sections 8(1) and 8(2) of the *sexual offences Act* No 3 of 2006. Further, the said Section 8(2) of the *sexual offences Act* expressly provides that a person found guilty of defilement of a child aged eleven years or less shall, upon conviction, be sentenced to imprisonment for life.

43. The trial court, upon conviction, called for a pre-sentence report, allowed the Appellant to mitigate, and proceeded to sentence him to serve a life sentence.

44. The Court of Appeal in the case of Benard Kimani Gacheru Vs Republic (2002) eKLR stated;

“It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

45. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017) eKLR also cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph 70 – 71 where the court held;

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of the appropriate sentence.”



46. Whereas previous jurisprudence based on the decision of Francis Kariuki Muruatetu & Another Vrs Republic (2021) Eklr, gave the trial court latitude/discretion in sentencing, the Supreme court has recently held otherwise In Republic vs Joshua Gichuki Mwangi: Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), where the Supreme Court reiterated its decision in Muruatetu II that the sentences in the [Sexual Offences Act](#) were legal and went on to overturn a reduction of sentence imposed by the Court of Appeal. The said Court held;

“In the Muruatetu case, the Court solely considered the mandatory sentence of death under section 204 of the Penal Code as it was applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that applied for example to capital offences, were vastly different from minimum sentences such as those found in the [Sexual Offences Act](#), and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the legislature, took into consideration a number of issues including deterrences of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities. Stern sentences ensured that prejudicial myths and stereotypes no longer culminated in lenient sentences that did not reflect the gravity of sexual offences.”

“.....However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in he special circumstances of a declaration of unconstitutionality, the process is reversed.”

47. This decision was followed in Shitula v Republic [2025] KECA 12 (KLR) by the Court of Appeal recently (January 2025), based on the above Supreme Court decision, held that life imprisonment imposed by the court was a legal sentence and upheld it. It was observed that;

“The Supreme Court has spoken clearly through the Gichuki case (supra) and we are bound by that decision-age, rehabilitation and remorse notwithstanding, the minimum life sentence meted out was legal and must be upheld, as we hereby do. The appeal thus fails in its entirety and is dismissed”.

48. This court hands are tied by the doctrine of stare decisis and finds that the sentence passed against the Appellant was lawful.

Disposition

49. The upshot, having considered the evidence adduced at trial and submissions made, I do find that the Appeal against both Conviction and sentence fails and the same is dismissed.

50. Right of Appeal 14 days.

51. It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 24TH DAY OF JULY, 2025 .

FRANCIS RAYOLA OLEL

JUDGE



DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 24TH DAY OF JULY, 2025.

In the presence of:-

.....Appellant

.....For O.D.P.P

.....Court Assistant

