



**Mwango v Republic (Criminal Appeal E016 of 2022)
[2025] KEHC 9732 (KLR) (1 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E016 OF 2022
CM KARIUKI, J
JULY 1, 2025**

BETWEEN

DAVID ONYANGO MWANGO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with offence of defilement contrary to Section 8[1] as read with Section 8[3] of the *Sexual Offences Act* of 2006. That on 13/1/2022 at [particulars withheld] Transmara West-sublocation Narok County, internationally and unlawfully caused his penis to penetrate vagina of C.A. a child aged 13 years.
 - I. He was convicted and sentenced to 20 years imprisonment. He has filed appeal against conviction and lenience essentially covering 3 issues.
 - II. Whether the prosecution proved their case beyond reasonable doubt.
 - III. Whether the trial was raised under Article 50 2[1] Laws of Kenya, 2010 as Appellant claims he was not furnished with witness statements.
 - IV. He also seeks sentence of 20 years to be set aside/quashed.
 - V. Parties were directed to argue their appeal via submissions.

Appellant Submissions

2. He submitted that the case was not proved beyond reasonable doubt as required by law. He argued that all along PW 1 evidence was that ,she was walking but didn't say that she did not see anybody following her from behind? Nor that Appellant come out of the sugar plantation, took his thing and put it into her thing. The appellant has alleged how that act was committed.



3. The Appellant was presented before the court on 17th January 2022 and on 18th January 2022 the trial process commenced violating the Appellants rights to fair and impartial trial as enshrined in our constitution. The trial court failed to note that the charges the Appellant was facing were serious and she ought to have given the Appellant enough time to prepare for the trial process.
4. He poses a as to whether, the analysis on the samples and findings were the male DNA profile generated from the seminal fluids on item B1 – B9 and stains of pant item C belonged to a single unknown male person. Which is not the Appellant herein. He further said that DNA profile from David Onyango [Appellant] did not match with the DNA samples that were brought.
5. He relies on the case of OKethi Okale and others verses Republic [1965] EA 555, where the court held that failure to consider the defense case is contrary to natural justice.
6. On the enhanced 20 years imprisonment metered out to the Appellant by the court, he submits that the constitutionality of mandatory minimum sentence metered out to the Appellant raises a question of law.

Respondent's Submissions

7. The ingredients of the offence of defilement are: - the age of the victim, penetration and proper identification of the perpetrator. That has been held in several cases including O v Republic [Criminal Appeal E011 of 2024] KEHC 7872 [KLR] [14 June 2024].
8. PW 1, the complainant, testified in voir dire, that she was 13 years. She was a pupil in class 5 at Ebenezer Academy. [see page 3 para 4 and page 4 para 3 of the typed proceedings.] PW 2 was the clinical officer. She produced the age assessment form of the complainant as prosecution exhibit 6. [See page 10 paragraph 2 of the proceedings]. It indicates that she was 13 years of age. PW 3 was the complainant's mother. She stated that the complainant was her first-born child, she was 13 years old and was in class 5 in school. [See page 12 paragraph 6 of the typed proceedings].
9. In Francis OMuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, quoted with approval in Kefa Nyang'au v Republic [2018] eKLR, the court rendered itself as follows, "in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only one 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."
10. The age was not challenged by the defense, so the prosecution proved this element beyond any reasonable doubt.
11. The complainant stated that the Appellant covered her mouth, dragged her to a nearby sugarcane plantation, he removed his trouser, he removed her under pant and left her with her top and skirt and he took his thing and put into her thing. When asked, she clarified that that it was the thing the Appellant uses to urinate that he inserted into the thing she uses to urinate. She pointed out an image, in the P3 form, of a penis and vagina as the things she was referring to. [See page 5 paragraph 5-7 of the typed proceedings.] She identified the clothes she was wearing on that day in court.
12. Her testimony was corroborated by other material evidence. According to PW 3, her mother, the complainant, took an unusually longer time to arrive home from the river and when she finally returned, she was walking abnormally and wasn't carrying any water. She interrogated her and the complainant revealed that she had been defiled. She took her to the scene of the incident, a sugarcane plantation on a path leading to the river where she was fetching water. PW 2, the clinical officer,



- confirmed upon examination that the complainant had the following significant signs: -Difficulty in walking.Clothes were dirty with dry soil.White creamish discharge at the perineum and vaginal office.Presence of spermatozoa and epithelial cells on her urinalysis.The hymen was missing.
13. The test was done a few hours after the act and the clinical officer made an impression of sexual assault.
 14. The court in *Onzare V. Republic* [2024] eKLR, held as follows: -
 - i. “Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:
 - ii. “The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
 - iii. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.”
 15. As a starting point, the respondent refers to this court to the judgment of the trial court where the court noted that upon observation, it had reasons to believe that the complainant was telling the truth. The reasons included, among others, the absence of any manifest grudges, ill-will and/or any other motivating factor for the complainant to lie as against the Appellant. [see page 32 paragraph 6].
 16. The Appellant was well known to the complainant as a barber. On Christmas day, on 25th December 2021, the complainant had gone to the Appellant’s barber shop to get her hair shaved but it wasn’t due to a power outage. The suspect made sexual advances at her then, by asking her to sleep with him, but she declined. Since then, she usually passed by the barber shop and saw him inside. [See page 6 paragraph 2 and 3 of the typed proceedings]. Therefore, the Appellant was known to the complainant for over a year.
 17. The incident occurred in the morning hours before lunch. During the incident, the Appellant and the complainant were near each other. The Appellant even talked to the complainant when they were parting ways, when he informed her not to tell her mother and to collect Kshs.100.00 from his barber shop later that day. [See page 5 paragraph 4 and 8 and page 6 paragraph 2 and 4 of the typed proceedings]. It was just the two of them together the whole time. In cross examination she described the clothes that the Appellant was wearing and gave further details of their encounter on Christmas day, the 25th of December 2021.
 18. *Madan J.A. in Anjononi and Others v the Republic* [1980] KLR, quoted in *Daniel Muthomi Marigu & 4 Others v Republic* [2021] eKLR, held: “.....this however was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”
 19. Surely, she could not have mistaken the Appellant’s identity given the familiarity.
 20. The Appellant was served with statements of prosecution witnesses in advance of the hearing.
 21. A scrutiny of the remainder of the entire proceedings reveals no occasion where the Appellant raised the issue of non-service of the statements of any witness nor any document relied upon by the state. Moreover, the Appellant was able to extensively cross-examine all prosecution witnesses as a result. To raise this issue for the first time in this appeal raises more questions [like can he be heard to blame court for unfair hearing, for being heard while not having been served with statements, when he himself told



court that he had the statements?] and suspicion as to the truthfulness of the Appellants own rival submissions to this court, vis a vis to the trial court, on the status of whether or not he was supplied with prosecution witness statements and documents, let alone the prosecutor's confirmation of service of the said documents on the Appellant, to the trial court, as an officer of the court.

Issues Analysis And Determination

22. The primary duty of a first appellate court in Kenya is to re-evaluate the evidence presented in the lower court and make its own independent conclusions on both facts and law. This involves reconsidering the evidence, bearing in mind that the trial court had the advantage of observing witness demeanor, and then forming its own opinion.
23. Key aspects of the first appellate court's duty:

Re-evaluation of evidence:

24. The court must go through all the evidence presented in the lower court, both oral testimonies and documents, and assess it to form its own independent judgment.

Consideration of trial court's findings:

25. While re-evaluating, the first appellate court must acknowledge that the trial court had the opportunity to see and hear witnesses, which the appellate court did not.

Drawing own conclusions:

26. The appellate court is not bound by the trial court's findings and must arrive at its own conclusions based on the evidence.

Not bound by trial court's interpretation:

27. The appellate court can overturn the trial court's decision if it finds that the trial court erred in its interpretation of the law or application of the facts. In essence, the first appellate court acts as a fresh pair of eyes, reviewing the entire case and ensuring that justice is served based on a thorough examination of the evidence and the applicable law.
28. The ingredients of the offence of defilement are: - the age of the victim, penetration and proper identification of the perpetrator. That has been held in several cases including *O v Republic* [Criminal Appeal E011 of 2024] KEHC 7872 [KLR] [14 June 2024].
29. PW 1, the complainant, testified in voir dire, that she was 13 years. She was a pupil in class 5 at Ebenezer Academy. [See page 3 para 4 and page 4 para 3 of the typed proceedings.] PW 2 was the clinical officer. She produced the age assessment form of the complainant as prosecution exhibit 6. [See page 10 paragraph 2 of the proceedings]. It indicates that she was 13 years of age. PW 3 was the complainant's mother. She stated that the complainant was her first-born child, she was 13 years old and was in class 5 in school. [See page 12 paragraph 6 of the typed proceedings].
30. In *Francis OMuroni v Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000, quoted with approval in *Kefa Nyang'au v Republic* [2018] eKLR, the court rendered itself as follows, "in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only one 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."



31. The age was not challenged by the defense, so the prosecution proved this element beyond any reasonable doubt.
32. On penetration, the complainant stated that the Appellant covered her mouth, dragged her to a nearby sugarcane plantation, he removed his trouser, he removed her under pant and left her with her top and skirt and he took his thing and put into her thing. When asked, she clarified that that it was the thing the Appellant uses to urinate that he inserted into the thing she uses to urinate. She pointed out an image, in the P3 form, of a penis and vagina as the things she was referring to. [See page 5 paragraph 5-7 of the typed proceedings.] She identified the clothes she was wearing on that day in court.
33. Her testimony was corroborated by other material evidence. According to PW 3, her mother, the complainant, took an unusually longer time to arrive home from the river and when she finally returned, she was walking abnormally and wasn't carrying any water. She interrogated her and the complainant revealed that she had been defiled. She took her to the scene of the incident, a sugarcane plantation on a path leading to the river where she was fetching water.
34. PW 2, the clinical officer, confirmed upon examination that the complainant had the following significant signs: -Difficulty in walking.Clothes were dirty with dry soil.White creamish discharge at the perineum and vaginal office.Presence of spermatozoa and epithelial cells on her urinalysis.The hymen was missing.
35. The test was done a few hours after the act and the clinical officer made an impression of sexual assault. The court in *Onzare V. Republic* [2024] eKLR, held as follows: -
 - i. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:
 - ii. "The partial or complete insertion of the genital organ of a person into the genital organs of another person."
 - iii. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."
36. As a starting point, the respondent refers to this court to the judgment of the trial court where the court noted that upon observation, it had reasons to believe that the complainant was telling the truth. The reasons included, among others, the absence of any manifest grudges, ill-will and/or any other motivating factor for the complainant to lie as against the Appellant. [see page 32 paragraph 6].
37. On identification of the defiler, the Appellant was well known to the complainant as a barber. On Christmas day, on 25th December 2021, the complainant had gone to the Appellant's barber shop to get her hair shaved but it wasn't due to a power outage. The suspect made sexual advances at her then, by asking her to sleep with him, but she declined. Since then, she usually passed by the barber shop and saw him inside. [See page 6 paragraph 2 and 3 of the typed proceedings]. Therefore, the Appellant was known to the complainant for over a year.
38. The incident occurred in the morning hours before lunch. During the incident, the Appellant and the complainant were in close proximity to each other. The Appellant even talked to the complainant when they were parting ways, when he informed her not to tell her mother and to collect Kshs.100.00 from his barber shop later that day. [See page 5 paragraph 4 and 8 and page 6 paragraph 2 and 4 of



the typed proceedings]. It was just the two of them together the whole time. In cross examination she described the clothes that the Appellant was wearing, and gave further details of their encounter on Christmas day, the 25th of December 2021.

39. Madan J.A. in *Anjononi and Others v the Republic* [1980] KLR, quoted in *Daniel Muthomi Marigu & 4 Others v Republic* [2021] eKLR, held: “.....this however was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”
40. Surely, she could not have mistaken the Appellant’s identity given the familiarity.
41. The Appellant was served with statements of prosecution witnesses in advance of the hearing.
42. The proceedings of 17th January 2022 and 18th January 2022 are illuminative of the fact that the Appellant, contrary to the grounds of his petition of appeal, was served with a copy of the charge sheet and the statements of witnesses intended for the prosecution case in advance of the hearing. The prosecution, on 18th January 2022 informed court that statements and documents had been supplied and the Appellant himself confirmed to the court that he had received the statements. [See page 2 para 3 para 2 and 3 of the typed proceedings].
43. A scrutiny of the remainder of the entire proceedings reveals no occasion where the Appellant raised the issue of non-service of the statements of any witness nor any document relied upon by the state. Moreover, the Appellant was able to extensively cross-examine all prosecution witnesses as a result. To raise this issue for the first time in this appeal raises more questions [like can he be heard to blame court for unfair hearing, for being heard while not having been served with statements, when he himself told court that he had the statements?] and suspicion as to the truthfulness of the Appellants own rival submissions to this court, vis a vis to the trial court, on the status of whether or not he was supplied with prosecution witness statements and documents, let alone the prosecutor’s confirmation of service of the said documents on the Appellant, to the trial court, as an officer of the court.
 - i. On sentence, the Kenyan [Sexual Offences Act](#) outlines several offences that carry minimum mandatory sentences upon conviction. Defilement of a child aged 11 or under carries a mandatory life sentence. Defilement of a child between 12 and 15 carries a minimum sentence of 20 years. Abuse of position of trust, where someone in a position of trust induces a person in their care to have sexual intercourse or commit another sexual offence, carries a minimum sentence of 10 years. In *Petition case No E018 of 2023*, Supreme Court of Kenya held mandatory minimum sentences under the [Sexual Offences Act](#) are constitutional and do not infringe upon judicial discretion.
 - ii. In sum, the appellant appeal fails and is dismissed against conviction and sentence and both are upheld.

JUDGMENT DELIVERED DATED AND SIGNED THIS 1ST DAY OF JULY, 2025.

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JUSTICE CHARLES KARIUKI

JUDGE

