



REPUBLIC OF KENYA



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**Republic v Munyaka (Criminal Appeal E078 of 2023)  
[2025] KEHC 9651 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9651 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E078 OF 2023  
JRA WANANDA, J  
JULY 4, 2025**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**CLINTON MUNYAKA ..... RESPONDENT**

*(Appeal from the Judgment delivered on 22/08/2023 in Eldoret Chief Magistrates  
Criminal Sexual Offences Case No. 146 of 2021 of Hon. M. Barasa-PM)*

**JUDGMENT**

1. This is an Appeal against acquittal of the Respondent by the trial Court.
2. The Respondent was charged in the said criminal case 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 were that on 18/04/2021 at Lugari sub-County within Kakamega County, he intentionally and unlawfully caused his penis to penetrate into the vagina of PN, a child aged 6 years old. The Respondent was also charged with the alternative 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 were that on the same date, time and place, he intentionally and unlawfully touched the vagina of the same child with his penis.
3. The Respondent pleaded not guilty to the charges and the case proceeded to full trial in which the Prosecution called 5 witnesses. At the close of the Prosecution case, the Court found the Respondent as having a case to answer and placed him on his defence. He then gave sworn testimony and called no other witness. By the Judgment delivered on 22/08/2023, he was acquitted of both counts under Section 215 of the *Criminal Procedure Code*.
4. Dissatisfied with the decision, the State, as the Appellant, filed this Appeal by way of the Petition of Appeal dated 22/08/2023. The grounds preferred are as follows:



- i. That the learned Magistrate erred in law and fact by acquitting the accused person whereas there was overwhelming evidence in support of the prosecution's case.
- ii. That the learned Magistrate erred in law and fact by holding that the accused person was not properly identified yet the accused persons was well known to the victim before the act and an eye witness found him in the act.
- iii. That the learned Magistrate erred in law and fact by holding that the victim did not properly identify the accused persons and yet she testified that she knew him before the offence occurred and he defiled her at 5 pm when she went to collect milk.
- iv. That the trial court failed in law and fact to consider the corroborating evidence of PW1 and PW2 on the issue of the victim knowing the Respondent through her routine picking of milk.
- v. That the trial court erred in law and fact to consider the PW4 indicated that she knew the Accused but rather proceeded to consider an extraneous fact that people said it was Clinton (the Accused) without stating which people.
- vi. That the trial court erred in law and fact in holding that the offence having happened at six in the evening then there should have been evidence of the type of lighting that was available yet no witness indicated that it was dark.
- vii. That the learned Magistrate erred in law and fact by not considering that even in the absence of an independent witness, it cannot disregard the provisions of sections 124 of the [evidence Act](#) Cap 80 Laws of Kenya.
- viii. That the learned Magistrate erred in law and in fact by failing to convict the accused person in-light of the overwhelming evidence proving that indeed the accused person defiled the victim.

### **Prosecution evidence before the trial Court**

5. PW1 was PW, the minor's mother who testified before Hon. D. Milimu, R.M. She stated that the minor was 6 years old and that on 18/04/2021, at around 6 pm, two women brought the minor and told her she had been defiled, that she had sent the minor to buy milk near the Respondent's house, and who he was a neighbour. She testified that two women, Nancy and Roselyne, returned with the minor carrying her and told her that she had been defiled, and that she therefore took the minor to hospital. She stated that she observed the minor's private parts and observed a lot of watery substance coming from her vagina and she tried questioning the minor who did not however talk and started crying. She stated that at the hospital, she was told to leave the minor and when she returned the next day, she was told that the minor had been defiled and infected. She stated that she then reported the matter to Lumakanda Police station where she also wrote a statement and was referred to the Moi Teaching and Referral Hospital (MTRH) where a P3 form was filled. She stated that the minor knew the Respondent as she used to pass near his home whenever she went to collect milk. In cross-examination, she stated that the minor also knew the Respondent because he had come to their home on several occasions. In re-examination, she stated that her house and the Respondents are about 10 minutes' walk apart.
6. PW2 was the minor, PN. The trial Court conducted a voire dire examination and held that she did not comprehend the nature and meaning of an oath and therefore directed that she gives unsworn evidence, which she did. In her testimony, the minor stated that she knew the Respondent and identified him seated in Court and also called him by name (Clinton). She stated that she remembered what he did to her. She stated that the Respondent removed her panty, made her sleep down and slept on top of her, that it was on the hill and that she had gone for milk at Sheila's home and was returning home with



- the milk, and there was no one else around. She stated that the Respondent told her not to tell anyone and that she returned home in the company of “Mama Maureen” and “Lillian” and the Respondent had run away. In cross-examination, she reiterated that it was the Respondent who defiled her.
7. PW3 was Dr. Michael Kibowen Kapkigen from Moi Teaching and Referral Hospital (MTRH) who testified before Hon. N. Barasa, PM, who had now taken over the hearing of the case, upon compliance with Section 200 of the *Criminal Procedure Code*. PW3 stated that he had worked with one Dr. Taban, who had examined the minor, but who had proceeded on further studies, and whose handwriting he was conversant with. Upon being allowed to testify on behalf of Dr. Taban, PW3 stated that the minor, a 6 years old girl, was seen at the hospital on 23/04/2021 at 11.52 am with a history of having been defiled by the Respondent whom she met beside the road as she was going home, and who promised to buy her mandazi but defiled her, and was found by a neighbour. He stated that according to the Report, the minor had fresh tears on her private parts, at 11.00 o'clock and 9.00 o'clock description, with a reddening tear that was abnormal, the vestibule was reddened, and laboratory tests revealed the presence of leucocytes 2+ in the urine, and also numerous pus cells. He added that the doctor concluded that the findings were consistent with defilement. He also stated that treatment notes from Lumakanda Hospital also detailed history of a sexual offence and also showed whitish discharge that was mild. In cross-examination, he stated that the P3 Form was filled on 26/04/2021 and that the doctor classified the injuries as “grievous harm”. He then produced the P3 Form and the treatment notes. In cross-examination he stated that the minor was seen at the facility on 23/04.2021 but the P3 Form was filled on 26/04/2021. He then described “grievous harm” as injury that would last time one’s life and he described the injury on the hymen as one such injury.
  8. PW4 was NM, who stated that on 18/04/2021 at 6.00 pm, on her way home from a neighbours’ home, she saw a young man lying facing down but who fled upon seeing her. She stated that the person’s lower clothing had moved down to near his knees, and that she followed to identify him but then saw a girl-child after the man had fled. She stated that she saw the man who had fled and even threw a stick at him which hit him, and that people said that it was “Clinton”. She testified that she knew the Respondent before but at the same also remarked that she had not seen the Respondent before and then insisted that it is the Respondent she saw with the child, that the child was beneath him, and that he was having sex with her. She stated further that she learnt that the child was her neighbours’, and that the grandmother took away the child from the scene. She then identified the Respondent seated in Court. She testified that darkness had not yet set in although the place was bushy and that she was about 30 metres away. In cross-examination, she reiterated that it is the Respondent she saw having sex with the child, and that she assisted the grandmother to take the child home. In re-examination, she stated that there was no need to interrogate the child.
  9. PW5 was Corporal Maureen Opiyo who stated that she was attached to Lumakanda Police Station. She stated that on 18/04/2021 at 7.30 pm, the minor, aged 6 years old, was brought by her parent and grandmother, who reported that on that date at 6.00 pm, the minor had been defiled by a known person who ran away. She stated that the minor had been seen at Lumakanda Hospital, that she (PW5) was assigned to investigate the matter, and that she took the minor to the Moi Teaching and Referral Hospital (MTRH) for examination, which was done, and the doctor concluded that she had been defiled. She testified that the Respondent had fled but she traced him on 31/05/2021 when he was brought to the police station by villagers for a different offence. She stated that she recognized his name to be related to the one in the defilement case and she therefore asked for the minor to be brought, who was then brought over and who identified the Respondent as the person who defiled her, upon which she charged the Respondent. She produced the minor’s clinic card indicating that she was born on 12/09/2014, and she also “clarified” that the minor’s description in the card as “PM” is because



“M” is her father’s name. She then stated that one of the witnesses caught the Respondent in the act and that the other witness is related to the Respondent by marriage.

10. As aforesaid, upon close of the trial, the trial Magistrate found the Respondent as having a case to answer and placed him on his defence. The Respondent, in his defence, gave sworn testimony and did not call any witness.

### **Defence testimony before the trial Court**

11. The Respondent testified as DW1. He denied committing the offence and stated that he was arrested in his house as he was sleeping. He testified that he did not know the minor and that he was also not issued with Witness Statements. He also stated that no medical evidence connected him to the offence. In cross-examination, he stated that the minor was not able to speak in Court and stated that he was framed as “they” wanted him out of the house.
12. As aforesaid, after close of the trial, the trial Court acquitted the Respondent upon finding that the case against the Respondent was not established beyond reasonable doubt, particularly on the issue of his identification.

### **Hearing of the Appeal**

13. The Appeal was canvassed by way of written Submissions. The Appellant, through Prosecution Counsel Claire Muriithi, filed the Submissions dated 6/05/2025, while the Respondent does not seem to have filed any Submissions as I could find any not even in the Judiciary Case Tracking System (CTS) online portal.

### **Appellant’s Submissions**

14. Prosecution Counsel restated that the offence of defilement is rooted on the 3 main ingredients of the age of the victim (must be a minor), penetration, and proper identification of the perpetrator, and cited the case of *George Opondo Olunga v Republic* [2016] eKLR. On the issue of the “age”, she submitted that the same was established through credible and reliable evidence, that PW1, the victim’s mother, testified that the minor was aged 6 years old, that PW5, the Investigating Officer, produced the minor’s clinic card proving that she was born on 12/09/2014. On “penetration”, she referred to Section 2 of the *Sexual Offences Act* which defines it as partial/complete insertion of the genital organs of a person into the genital organs of another. She then submitted that the minor testified that the Respondent removed her panty and made her sleep down and slept on top of her. She also referred to the testimony of PW4 who, witnessed the act and also referred the medical evidence. Counsel then submitted that even though the minor was not explicit on what the Respondent did to her, it is clear that she was defiled and that this was corroborated by the evidence of PW2 and the medical evidence. On “identification”, she submitted that the minor stated that she knew the name of the Respondent as Clinton, and that he is the one who removed her panty, made her sleep on the ground and slept on her. She stated further that PW1 testified that the minor knew the Respondent very well as she used to pass through his home when she went to take milk, and also that the Respondent had been to their home before the incident. According to her therefore, the minor’s evidence was corroborated by that of PW1 and PW4.
15. On the issue of recognition, she cited the case of *Peter Musau Mwanzia v Republic* [2008] eKLR and submitted that the trial Court misconstrued the prosecution evidence. She also submitted that although it was stated that the incident occurred around 6.00 pm, the fact that no evidence was led on whether the timing was favourable for her to see the assailant did not in any way challenge the fact that it was the Respondent that PW4 saw. She also urged that PW5, the Investigation Officer, testified



that when the Respondent was arrested, the minor was able to identify him at the police station, and again identified him in Court. According to Counsel therefore, the Prosecution proved its case beyond reasonable doubt.

### **Determination**

16. As a first appellate forum, this Court is obligated 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 demeanour of the witnesses (see *Okeno vs. Republic* [1972] E.A 32).
17. The issue that arises for determination in this Appeal is, “whether the trial Court erred in acquitting the Respondent of the offence of defilement on the ground of doubtful identification”.
18. Section 8(1) and 8(2) of the *Sexual Offences Act* under which the Appellant was charged provide as follows, respectively:

“ 8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

“8.

- (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.”

19. For the offence of defilement to be established, 3 ingredients must therefore be proved, namely, the age of the victim, penetration and positive identification of the offender. (see *George Opondo Olunga v Republic* [2016] eKLR).
20. In this Appeal, the trial Magistrate’s findings that the “age” of the victim (as being a child, and thus a minor), and “penetration” had been sufficiently proved, are not in contention. What is in contention is the trial Magistrate’s findings on the issue of “identification”, which is what led to the acquittal.
21. On this issue of identification, the Court of Appeal, in the case of *Cleophas Wamunga v Republic* [1989] eKLR cautioned as follows:

“What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of *R v Turnbull* [1976] 3 All E.R. 549 at page 552 where he said:

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”



22. In this matter, it was stated by the Investigating Officer that when the Respondent was arrested, the minor was brought to the Police Station and positively identified the Respondent as the person who defiled her. Further, during her testimony, which was unsworn, the minor again identified the Respondent as the perpetrator. The pointing out of the Respondent in Court is what is generally referred to as “dock identification”. This mode of identification has however been described by various Courts as unreliable and as the worst form of identification. For instance, the Court of Appeal, in the case of Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, observed as follows:
- “ A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”
23. In this case, there was no identification parade conducted. There is also no evidence that the minor gave any description of the assailant immediately after the incident when her memory was still fresh. Although, at the trial, the minor mentioned the Respondent by name, the minor’s mother (PW1), throughout her testimony, did not at any point state that the minor mentioned the name of the person who defiled her. It is not therefore clear at what point the minor “started” naming the Respondent as the perpetrator. Even for PW4, the minor’s mother never mentioned that PW4 at any time mentioned the Respondent. Although the minor identified the Respondent in the dock, she was never asked how she knows the Respondent and for how long she had known her or interacted with her. Although the mother stated that the minor knew the Respondent because she used to pass near his home when going to collect milk, this question was never put to the minor as well. PW4 herself admitted that she never interrogated the minor on who the assailant was, and what had transpired since, in her view, “there was no need to interrogate the child”. Clearly therefore, the minor never mentioned the Respondent to PW4, at least at that point. It appears that the minor first heard from PW4 that the assailant was a person by the name “Clinton” and thus took it up from there. It cannot therefore be ruled out that the minor was “influenced” in pointing at the Respondent as the perpetrator.
24. In fact, PW4 gave evidence that I found to be clearly contradictory. On one hand she stated that it was her first time to see the Respondent, and at the same time also remarked that she knew him before the incident. On one hand she testified that she followed the assailant after he fled to identify him, and that she did not go back, but on the other, she stated that she saw the child after the person had fled. She also stated that “people said it was Clinton” without giving further details as to who these people were since the Prosecution did not make any reference to there being other eye-witnesses. The statement that it is “people” who stated that it was “Clinton” severely diminishes PW4’s insistence that she positively identified the Respondent as the assailant. The statement that she was only 30 metres away does not clear this significant doubt considering that she also stated that the place was bushy.
25. The Investigating Officer, PW5, clearly did not sufficiently ensure that identification of the assailant was water-tight before charging the Respondent. She ought to have done more. She seems to have simply relied on the fact that villagers implicated the Respondent.
26. The question of identity of the perpetrator therefore remained in doubt. Although described as a neighbour in some instances, residing only 10 minutes’ walk from the Respondent’s house, it is surprising that PW4 seemed to be unsure whether she really knew the Respondent before. Perhaps, in a case like this, an identification parade ought to have been conducted. None was carried out and only the unreliable “dock identification” preferred.



27. The Appellant has also faulted the trial Magistrate for raising the issue of the time of occurrence of the incident but, upon perusing the record, I am convinced that the trial Magistrate was right to do so. The incident having been alleged to have occurred at around 6.00 pm in the evening, and in a rural setting where presumably there was no electricity lighting, and PW4 having stated that the place was bushy, I am in full agreement with the trial Magistrate that there was failure on the part of the Prosecution to lead evidence on the issue of whether there was sufficient lighting to facilitate easy identification of the assailant.
28. The Court of Appeal for East Africa in the case of *Roria vs Republic* 1967 EA 583 held 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.”
29. Further, the Court of Appeal, in the case of *Peter Musau Mwanzia v Republic* (2008) eKLR, expressed the following sentiments:
- “We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition”
30. In view of the foregoing, I find no ground to fault the trial Magistrate for reaching the finding that the Prosecution failed to discharge its burden of proving that the Respondent was sufficiently identified as the perpetrator or the person who committed the offence. With the state of evidence being as described above, it would clearly have been unsafe to convict the Respondent. Accordingly, I find no reason to interfere with the Judgement of the trial Court.
31. As I have found, as did the Magistrate, the minor was no doubt defiled. The perpetrator, whether it is the Respondent or somebody else, certainly deserves to be severely punished for the heinous act which will, no doubt, leave the child with serious psychological and psychological trauma that will last throughout her life. Unfortunately, the case was poorly investigated and the Respondent hurriedly charged before sufficient evidence of his participation in the crime, of the nature that can withstand Court scrutiny had been collected. Due to the bungling of the case by the police, the offence committed on the child may remain forever unpunished. The Prosecution must also take some blame for failing to notice the obvious loopholes and/or weaknesses apparent in its case, as highlighted as above. While the Respondent may as well be the perpetrator of the offence, because of insufficient evidence, he walks free. It is sad but that this ends up being the painful fate of this case.

## **Final Order**

32. In view of the foregoing, this Appeal is dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 4<sup>TH</sup> DAY OF JULY 2025**



**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of

The Appellant

Ms. Muriithi for the State

C/A: Brian Kimathi

**Eldoret High Court Criminal Appeal No. E078 of 2023**

