



**Ali v Republic (Criminal Appeal E083 of 2023)  
[2025] KEHC 12671 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12671 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E083 OF 2023**

**RK LIMO, J**

**SEPTEMBER 17, 2025**

**BETWEEN**

**FARUK ALI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Faruk Ali the appellant herein was charged with the offence of defilement contrary to section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars are that on diverse dates between the 2<sup>nd</sup> December 2021 and 4<sup>th</sup> December 2021 at xxxxx area within Trans Nzoia County he unlawfully caused his penis to penetrate the vagina of TWN a child aged 3 years old.  
He also faced an alternative count of committing and indecent act with a child.
2. The appellant denied committing the offence when he was presented for plea but upon trial he was found guilty on the main count and convicted.
3. Below is the summary of the evidence tendered before the trial court.
4. VA (PW1), the mother of the victim testified that on 21/12/21 she was arrested and placed in custody and that on Friday she left her child with the appellant and went to fetch firewood. She stated that on Saturday as she bathed her child, she noticed that pus was oozing from her vagina and the child told her she had been defiled. She stated she took the child for treatment. She further stated she used to live with the appellant as a family friend.
5. The minor (PW2) upon voir dire examination, gave unsworn statement and stated that the appellant pricked in between her thighs. According to the minor the appellant was not a good person because he used charcoal to prick in between her thighs.



6. Nelson Lusiola (PW3) a clinician who examined the minor, testified that he did so on 6/12/2021. According to him, the minor was penetrated because he observed reddening of the oryplygl clitoris and minora labia. He stated that the hymen was also torn and old looking. He tendered the P3 From as Pexhibit 2 and treatment chit as Pexhibit 3. He confirmed that he was the one who examined and treated the minor.
7. Corporal Kenster Anyona (PW4) testified on behalf of the previous investigating officer named Nasimiyu Audrey. Her evidence mainly touched on the action the police took upon receipt of the complaint of the offence.
8. When placed on his defence, the appellatant stated that the complainant's mother was arrested between 2/12/21 and 3/12/21. He stated that at the time he worked for her selling changaa. He stated that he had worked for her for a year and had not received a cent in wages.
9. He stated that when he asked her for his salary, she reportedly told him she would pay him on 4/12/21. He stated he waited for her only to see her coming with the police officers on 4/12/21 with allegation that he had defiled her child. He denied committing the offence.
10. He further conceded that he used to stay with the complainant's mother in one house but separate rooms. He stated that the complainant was with her grandmother when her mother was arrested. According to him, the minor was coached to frame him.
11. The trial court evaluated the evidence tendered and found that the prosecution had proved its case to the required standard and convicted the appellatant. He was sentenced to serve 40 years in jail.
12. The appellatant felt aggrieved and filed this appeal raising the following grounds namely;
  - i. That the medical evidence tendered was insufficient to render a conviction.
  - ii. That the sentence meted out was too harsh.
  - iii. That the trial magistrate erred by not noting that the prosecution's case was marred with contradictions which undermined credibility of witnesses.
  - iv. That the trial magistrate erred by finding that penetration was proved by relying solely of a broken hymen.
13. In his written submissions the appellatant introduced a new ground of violations of his rights by the trial court for failing to accord him legal representation. This ground was however introduced belatedly in written submissions without leave of this court. In any event, lack of legal representation in itself canto be a ground to vitiate proceedings unless the appellatant had sought for legal representation and was denied. I have looked at the proceedings from the lower court and the appellatant never sought for legal representation. Besides that he participated fully during trial by asking questions in cross-examination. He was therefore not subjected to unfair trial nor can he state with any justification that his fundamental rights as an accused person were infringed during trial.
14. He submits that there were contradictions in prosecution's case and has pointed out that PW1 stated that she left court when it had rained heavily on Thursday at 2pm and at the same time stated that she had left her child with the appellatant at 3pm. He submits that the trial court should have accorded him the benefit of doubt in view of the said contradiction.
15. He submits that penetration was not proved beyond reasonable doubt because no DNA examination was done.



16. He further faults the trial court for relying on medical evidence tendered submitting that the evidence was insufficient. He points out that everything in the vagina was found normal except the hymen which was found torn and old looking. He submits that there was no discharge noted and that the child had her clothes changed when taken for medical examination.
17. He submits that the prosecution failed to prove its case to the required standard. He submits that he was framed because of asking the mother for his salary. He insists that the allegations of defilement are false.
18. The State on the other hand has opposed this appeal stating that it proved all the ingredients of the offence to wit age, penetration and positive identification of the appellant.
19. Mr Mark Mugun Principal Counsel for State submits that the age of the minor was proved by a birth notification tendered as Pexhibit 1. He points out that the minor was born on 18/5/2018 while the incident occurred in December 2021 which means she was 3 years at the time and which brought the offence committed within the definition of Section 8(2) of Sexual Offences Act.
20. On penetration, the Respondent submits that the medical evidence tendered by PW3 (Nelson Lusiola) showed that the minor had been defiled noting that the clinician found her genitalia with a torn hymen and inflammation around the clitoris and labia minora. The State denies that its case at the trial was marred with inconsistencies.
21. On positive identification of the appellant, the respondent submits that the complainant knew the appellant by name and that the mother stated that she lived with him as a family friend. The State submits that the appellant was not a stranger to the complainant.
22. On sentence, the State submits that Section 8(2) prescribes life imprisonment and faults the trial court for sentencing the appellant to 40 years. The State seeks for enhancement of sentence under section 345(3) (b) of the Criminal Procedure Code.
23. This court has considered this appeal and the response by the State. The main issue arising from this appeal is whether the prosecution proved its case beyond reasonable doubt and whether inconsistencies pointed out by appellant affected the credibility of the prosecution's case.
24. The appellant has pointed out that the mother of the complainant stated she had been arrested for illicit brews on 2/12/21 and placed in cells at 2pm and at the same time stated that she left court and it had rained heavily. I have looked at the proceedings and found that the issue of being arrested and being placed in cells is not significant. PW1 stated that she left at 2pm and that she had left the minor at 3pm with the appellant. She did not explain clearly when she left the minor with the appellant but the appellant himself clearly stated that the mother of the victim was arrested between 2<sup>nd</sup> and 3<sup>rd</sup> December 2021. It is quite evident that during her absence he took advantage of the situation to defile the minor. He clearly conceded that he lived in the same house with the complainant's mother. PW1 on her part stated that she had lived with the appellant as a friend for a year prior to the incident.
25. The minor herself identified the appellant as the bad person who 'pricked' her between the thighs. The medical officer PW3 (Nelson Lusiola) put the issue of penetration to rest with his medical evidence. He stated that upon examination of the minor, he concluded that penetration was positive because the hymen was torn and old looking. That there was inflammation of clitoris and minora labia. He tendered P3 Form and treatment notes as Pexhibit 2 and 3 respectively. The fact of penetration therefore was proved beyond reasonable doubt and this court finds that the evidence of PW1 and PW2 were fully corroborated by the medical evidence tendered by PW3.



26. I also find that the issue of age of the minor is not contested in this appeal. The medical evidence (P3 Form and treatment notes) clearly demonstrate the minor was aged 3 years old at the time. The fact that the medical officer found that the hymen was broken and old looking can be explained by the fact that the medical examination was done on 6/12/21 while the actual incident took place on 2/12/21- a difference of 4 days. This court is satisfied that there was sufficient evidence tendered to support conviction and the trial magistrate was correct to render the same.
27. On sentence, it is true that Sect on 8(2) of the Sexual Offences Act prescribes a mandatory life sentence for a person found guilty of defiling a child of less than 11 years. The trial court meted out a sentence of 40 years but in light of the Supreme Court's decision of John Karioko Muruatetu (2), the hands of the trial court were tied to meting out the prescribed sentence. The trial court lacked the discretion or latitude to pass any other lesser sentence other than the mandatory sentence. The appellant says the sentence is harsh which could be true but the offence committed was grave. This court cautioned the appellant during the mention of this appeal on two occasions but he chose to proceed with it nevertheless. He had a right to do so of course but having found that the sentence meted out is not the prescribed sentence, this court under Sect ion 354(b) Criminal Procedure Code hereby dismisses this appeal, upholds conviction and enhances the sentence from 40 years to life imprisonment as prescribed under section 8(2) of Sexual Offences Act. The hands of this court are tied by the Statute and there is nothing I can do.

The appellant has 14 days Right of Appeal.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 17<sup>TH</sup> DAY OF SEPTEMBER , 2025.**

**HON JUSTICE R.K. LIMO**

**KITALE HIGH COURT**

Judgment delivered in open court

In the presence of;

Faruk Ali the appellant in person

Mr Mugun for the State

Duke/Chemosop – Court assistants

