



REPUBLIC OF KENYA



**Kariuki v Republic (Criminal Appeal E091 of 2024)
[2025] KEHC 13216 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E091 OF 2024
RM MWONGO, J
SEPTEMBER 24, 2025**

BETWEEN

DAVID MUNYI KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. R. Njoki Kahara in
Runyenjes MCSO No. E004 of 2022 delivered on 28th October 2024)*

JUDGMENT

The Charge

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. The particulars were that on 01st March 2022 in Mbeere North Subcounty within Embu County, the appellant intentionally caused his penis to penetrate the vagina of LWN a child aged 16 years.
2. The alternative charge was that of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 01st March 2022 in Mbeere North Subcounty within Embu County, the appellant intentionally caused his penis to touch the vagina of LWN a child aged 16 years.
3. The appellant pleaded not guilty to the charges and a plea of not guilty was duly entered. The matter went to full hearing and the prosecution called witnesses in support of its case. The appellant was convicted of the main count and was sentenced to 15 years imprisonment.



The Appeal

4. Dissatisfied with the decision of the trial court, the appellant filed a petition of appeal dated 11th November 2024. In it he seeks that the appeal be allowed, conviction and sentence be set aside and he be set free. The appeal is premised on the grounds that:
 1. The learned trial Magistrate erred in both law and fact by convicting and sentencing the appellant based on insufficient evidence that did not meet the standard of proof;
 2. The learned trial Magistrate did not give regard to the appellant's defense which raised reasonable doubts regarding the prosecution's case;
 3. The learned Magistrate erred in law and fact by convicting and sentencing the appellant on insufficient evidence; and
 4. The sentence of 15 years imprisonment is manifestly excessive given the circumstances of the case including the appellant's lack of previous criminal records.

The Evidence at the trial Court

5. PW1 was the victim. She stated that she had seen the appellant in her neighborhood on several occasions but they had never interacted, and she did not know his name. On the day of the incident, she stated that she met the appellant on the road and he asked her if she knew one Jane Muthoni. She told him that she did not know the person he was asking about. Immediately, he removed a knife from his pocket, placed it on her neck and dragged her into a nearby bush. He threatened to kill her if she screamed. He then defiled her by inserting his penis into her vagina.
6. After he was done, he told the victim to go home and take a shower and not tell anyone about it or he would kill her. The appellant left her there and when she emerged from the bush, she met a teacher known as Mama Monica whom she told about the occurrence. The victim's grandmother and father were informed and the victim was taken to the hospital. The matter was also reported at the police station. She stated that after 1 week, she saw the appellant at a barber shop and she alerted the police. The police arrested the appellant and the victim was called to identify her assailant through an identification parade at the police station. She was able to positively identify the appellant.
7. PW2 was the victim's father. He stated that on the day of the incident, the victim left for school and after sometime, he was informed that the victim was found screaming. He followed up on the issue and found out that his daughter had been defiled while on her way to school. He asked her grandmother to escort her to the hospital and the matter was reported at the police station. The appellant was arrested in connection with the incident.
8. PW2 said he did not know the appellant but, had been seeing him around the village. He produced PW1's birth certificate to show that she was a minor at the time of the incident. On cross-examination, he stated that PW1 was not feeling well on that day but she insisted on going to school. That she returned home shortly after leaving for school and she said that the appellant had defiled her. He tried tracing the appellant but he was unsuccessful.
9. PW3 was the victim's grandmother. She stated that on the day of the incident, she spoke to PW1 as she prepared to go to school. Shortly after she had left, a neighbor told her that PW1 was crying by the roadside. She went to the road and asked PW1 what happened, and she said that the appellant had defiled her. They reported the matter at Siakago Police Station, and she was taken to Siakago level 4 Hospital for treatment. In cross-examination she stated that PW1 identified the appellant as her



assailant through an identification parade. By the time the incident was reported, PW1 was still wearing the same clothes she was defiled in.

10. PW4 was Martin Murimi, a clinical officer at Siakago Level 4 Hospital who examined PW1. He observed that the hymen was intact with bruises and lacerations on the labia minora and there were numerous spermatozoa on the outer genitalia. He noted that there was partial penetration hence the bruises and lacerations on the outer genitalia. He produced the P3 and PRC forms as evidence.
11. DW1 was the appellant who stated that he was at his barber shop at 7am on the day of the incident and he had a client for 1 hour. PW1 went to the shop and looked at him, and said that she did not have money to pay for a haircut. She then left. He said that he was taken to the police station that day at 6pm but he was arrested by the Chief one month later. That he was held at the police station for 5 days within which time PW1 had been informed of the arrest. That PW1 said that the person who defiled her looked somewhat like the appellant. The appellant was not taken to the hospital for examination. On cross-examination, he stated that she did not know PW1 before this incident; That PW1 went to his barber shop once but she said she did not have money and that she would return when she had money. He denied defiling her.
12. DW2 was Patrick Kariuki Njue who stated that he went to DW1's barbershop at 6am and charged his phone while getting a haircut. He left the barbershop at 7am. He couldn't tell what happened after he left at 7am. He did not know PW1.

Parties' Submissions

13. The appeal was canvassed by way of written submissions.
14. The appellant, through his submissions, contested the prosecution's evidence and stated that he did not commit the offence. He stated that the hymen could not remain intact following penetration and that, in any event, he was not examined to ascertain that the spermatozoa found were from him.
15. The respondent relied on section 8(1) and (4) of the *Sexual Offences Act* and the cases of NFN v Republic [2022] KEHC 11774 (KLR), Philemon Koech v Republic [2021] KEHC 2354 (KLR) and Edwin Nyambaso Onsongo v Republic [2016] KEHC 4738 (KLR). It argued that all the elements of the offence were proved beyond reasonable doubt. It also relied on the case of Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR) and stated that the appellant was properly identified as the assailant. It was also its argument that the sentence imposed is fair and imposed by statute and there is no basis for setting it aside.

Issues for Determination

16. The issues for determination are as follows:
 1. Whether the prosecution proved the case beyond reasonable doubt; and
 2. Whether the sentence should be set aside.

Analysis and Determination

17. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of Okeno v Republic [1972] EA 32 when it held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting



evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

18. Under section 8(1) of the [Sexual Offences Act](#), the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:
 - a. The age of the complainant- that the complainant was a child;
 - b. Penetration occurred; and
 - c. The perpetrator was positively identified.
19. According to the minor's birth certificate produced by PW2, PW1 was born in December 2006. At the time of the incident, she was 15 years, 2 months, 5 days old. Therefore, she was proved to be a minor within the meaning of the [Children Act](#).
20. The second element to be proved is penetration. In the case of *E E v Republic* [2015] eKLR the court expressed itself on the question of penetration as follows:

"Penetration is defined in section 2 of the [Sexual Offences Act](#) as:

'Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person.'

The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In *Bassita Hussein v Uganda*, Supreme Court criminal appeal No. 35 of 1995, the court stated,

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence."
21. PW1 testified that she met the appellant on the road and he asked if she knew a certain person. When she said she did not know the person, he removed a knife from his pocket, grabbed her and led her to the nearby bushes while threatening her if she screamed. She testified that he forced her to the ground before defiling her.
22. PW4 testified that there was partial penetration with bruises and lacerations on the outer genitals while the hymen remained intact. There were numerous spermatozoa cells on the outer part of the genitals. These pieces of evidence constitute sufficient proof of penetration. The appellant challenged the fact that the hymen was intact yet the victim was allegedly penetrated. The presence of bruises and lacerations on the outer part of the genitals is also proof of partial penetration as stated by PW4.
23. The third element is whether the appellant was properly identified. PW1 stated that the appellant is someone she had seen around the village and is the same person who defiled her. She stated that a week after the incident, she saw the appellant at a barber shop and went back to the police station and reported. She said she later identified him through an identification parade comprising several people.
24. There is no evidence by the investigating officer to inform the court on how the appellant was traced and arrested even though PW1 and PW2 stated that the appellant was traced and arrested in connection with the offence. No identification parade form was produced as required by law neither was there



any testimony by the police officer who conducted the identification parade. The Police Form 156 (Identification parade form) informs the court when the parade was conducted, how and whether all the detailed and strict requirements for identification in law were followed.

25. An identification parade constitutes the actual evidence that an accused person was properly identified for purposes of arrest and charging. In the case of *Njihia v Republic* [1986] KECA 38 (KLR), the court stated:

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.” [Emphasis added].

26. In this case, it appears that an identification parade was necessary because the appellant was identified to the police one week after the incident. However, from the available evidence, it is not clear when the identification parade was conducted, how and by whom, or even whether it was conducted at all. In his defense, the appellant testified that when he was arrested, the victim had already been told to say that he was her assailant. By the time an identification parade was allegedly conducted, the victim said that the person who defiled her looked ‘somehow’ like the appellant. When she was cross-examined, she stated that she “never knew the accused prior to this incident.” Thus, there was no identification by recognition. She said that she was able to single out the appellant at ‘some sort of identification parade’ conducted at the Police Station.
27. Even though the proviso at section 124 of the *Evidence Act* allows for the uncorroborated testimony of the victim of sexual offence as sufficient proof of the identify of her assailant, in this case, the fact that the assailant had to be identified through an identification parade one week after the defilement, raises critical and concerning questions. These questions raise reasonable doubt especially given the fact that there is no proof of a proper identification parade being conducted in the first place.
28. Circumstances surrounding identification of an accused person are also better narrated through the testimony of the investigating officer and officer conducting the identification parade. In this case, even though the prosecution had the liberty of choosing the most appropriate witnesses, the testimony of the investigating and identification officers is critical in this case but it is conspicuously missing. Therefore, it is unclear how the police got to arrest the appellant as the victim’s assailant, when such arrest was done and how and following which investigation. Even PW1’s second report to the Police Station is not provided.



Conclusions and Disposition

29. Given the standard of proof in criminal cases, the prosecution's evidence cannot be said to have been sufficient to prove the offence against the appellant beyond reasonable doubt on the aspect of identification. In the case of Pius Arap Maina v Republic [2013] KEHC 1762 (KLR), the court held:

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the accused.”

30. Without the 3 elements of the offence all being proved beyond reasonable doubt, the conviction appears to be unsafe and it must be set aside.

31. It follows that the sentence must also be set aside.

32. In the result, the appeal is successful and the conviction and sentence are hereby set aside. The appellant shall be set at liberty unless otherwise lawfully held.

33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 24TH DAY OF SEPTEMBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Appellant Present in Court
2. Ms. Nyika for the Respondent
3. Francis Munyao - Court Assistant

