



**MNN v Republic (Criminal Appeal E001 of 2025)  
[2025] KEHC 13138 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13138 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E001 OF 2025  
RM MWONGO, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**MNN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. S.K. Ngii, in  
Siakago MCSO No. E055 of 2022 delivered 29th May 2024)*

**JUDGMENT**

**The Charge**

1. The appellant and another were charged with two counts of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*. The Particulars are that on diverse dates in the year 2022 to 20<sup>th</sup> November 2022 at [Particulars withheld] sublocation in Mbeere North subcounty within Embu County, the appellant unlawfully and intentionally inserted his penis into the vagina of TWM a child aged 15 years.
2. The two faced the two alternative charges of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars are that on diverse dates in the year 2022 to 20<sup>th</sup> November 2022 at [Particulars withheld] sublocation in Mbeere North subcounty within Embu County, the appellant unlawfully and intentionally caused his penis to touch the vagina of TWM a child aged 15 years.
3. At the trial, the appellant pleaded ‘not guilty’ to the charges. A full hearing was conducted and the appellant was subsequently convicted and sentenced to 20 years imprisonment. The other accused was acquitted.



## The Appeal

4. Dissatisfied with the decision of the trial court, the appellant filed a petition of appeal dated 09<sup>th</sup> January 2025, seeking orders that the appeal be allowed, conviction quashed, the sentence of 20 years imprisonment be set aside and that he be set at liberty. The appeal is premised on the grounds that:
  1. The learned trial magistrate erred in both law and fact by convicting the appellant based on evidence that was contradictory and untruthful;
  2. The learned trial magistrate erred in both law and fact by failing to inform the appellant of his constitutional right to representation; and
  3. The learned trial magistrate erred in both law and fact by ordering that the sentences run consecutively and not concurrently.

## Summary of the Evidence

5. PW1 was the victim. She stated that the appellant, who is her cousin, used to defile her many times. During that period, she was not attending school and the appellant would warn her against telling anyone about the defilement incidences. In the process of the appellant defiling her, she fell pregnant and he gave her a pill to help in inducing an abortion and she lost the pregnancy. She informed her father about the abortion but he did not do anything about it. The area sub chief found out about the defilement and called her to his office where she was explained what happened and she was taken to the hospital.
6. PW2 (minor) was PW1's sister. She testified that the appellant used to take PW1 behind the house but she did not know what they were going to do there. After he did that and PW1 returned, he also took her behind the house, undressed her and defiled her. She stated that PW1, herself and their younger brother shared a sleeping space and the appellant had formed the habit of going into their sleeping area all the time.
7. She said that in November 2022, the subchief took her and PW1 to his office and they told him what the appellant had been doing to them. The matter was reported at Kanyuambora Police Post and the appellant was arrested. The appellant is her cousin. On cross-examination, she stated that she had asked the appellant to stop going to their house but he wouldn't listen and continued entering their house.
8. PW3 was Njuki Placidus Farida, a children department officer who stated that her office received an anonymous tip about a child who was being sexually abused by a relative. With the help of the Assistant Chief, the victim was traced and interrogated. It was established that the victim and her sister were defiled by a relative. The victim had gotten pregnant and there had been an unsuccessful attempt to terminate the pregnancy. The victims were escorted to Siakago level 4 Hospital for examination and treatment. A temporary safe home was secured for the victims at Embu Rescue Center.
9. PW4 was Pauline Mukami Gikunda a children department officer who stated that her office responded to an anonymous tip concerning the victim's ordeal. The children officers found her with the help of the are Assistant Chief. They established that the appellant was one of the assailants of the victim and at some point, she had fallen pregnant and attempted an abortion. It was discovered that PW2 was also a victim in the hands of the same assailant who was identified as the appellant. The victims were placed in a children's home for safety and the appellant was arrested. PW1 was found to be pregnant.
10. PW5 was Lucy Regina Wawira, the area subchief. She testified that 3 children officers accompanied by the victim's school teacher visited her office asking about the victim. PW1 was traced and brought to



the subchief's office where she was interrogated. She was taken to the hospital and the appellant was arrested in connection with the offence.

11. PW6 was Joyce Kaari, the investigating officer who stated that the matter was reported at Kanyuambora Police Station. The victim said that she had been defiled by her cousin, the appellant, and he had threatened to kill her if she told anyone about the incident. The appellant had also defiled the victim's sister. The appellant was arrested and charged.
12. PW7 was John Mwangi of Mbeere District Hospital. He testified, without objection, on behalf of his colleague Clinical Officers, Joshua Njagi and Irene Wachira who examined the victim and filled the P3 form and PRC form, respectively. He produced the P3 and PRC forms as evidence. It was observed that the hymen was broken and the victim was 5 weeks pregnant. There was vaginal discharge present. She also tested positive for a bacterial infection and was treated.
13. DW1, the appellant, when placed on his defense, denied committing the offence.

### **Parties' Submissions**

14. The appeal was canvassed by way of written submissions.
15. The appellant submitted that the prosecution failed to prove the case against him beyond reasonable doubt. He relied on the cases of Kura Charo Ndombo v Republic [2001] KEHC 229 (KLR), Henry Kimathi v Republic [2006] KECA 249 (KLR), George Opondo Olunga vs Republic [2016] eKLR, John Mutua Munyoki v Republic [2017] KECA 376 (KLR) and Paul Etole & another v Republic [2001] KECA 285 (KLR). He denied committing the offence and urged the court to allow the appeal.
16. The respondent relied on section 8(1) and (3) of the *Sexual Offences Act* and the cases of NFN v Republic [2022] KEHC 11774 (KLR) as quoted in the case of George Opondo Olunga vs Republic (supra), 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. Further, it was its argument that the sentence imposed is fair and imposed by statute and there is no basis for setting it aside. In its argument that the sentence should be upheld, further reliance was placed on the case of Wilson Waitegei v Republic [2021] KEHC 1458 (KLR).

### **Issues for Determination**

17. The issues for determination are as follows:
  1. Whether the offence was proved beyond reasonable doubt; and
  2. Whether the sentence meted out to the appellant should be set aside.

### **Analysis and Determination**

18. In the case of Okeno v Republic [1972] EA 32 the court held thus regarding the role of an appellate court:

“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."

19. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (3) of the [Sexual Offences Act](#) provide:

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

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

20. Therefore, the elements of the offence may be broken down as follows:

1. The age of the complainant- that the complainant was a child;
2. Penetration as defined under section 2(1) of the [Sexual Offences Act](#) happened to the child;
3. The perpetrator was positively identified.

21. PW1, the victim, testified that she was 15 years old. None of her parents testified because her father was the appellant's co-accused person. The only family member who testified was PW2 who is the victim's sister and who was also defiled by the appellant. There was no birth certificate produced as proof of her age. However, the P3 and PRC forms indicate that the victim was 15 years old at the time of the incident.

22. In cases of defilement, the age of the victim may be proved through different means. Such was the position held in the case of *Alex v Republic* [2023] KEHC 19483 (KLR) where the court relied on the following sentiments of the Court of Appeal in the case of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR ;-

"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 documentary 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."

23. The court in that case also held that common sense may guide the court where necessary, in proving the age of the victim. It stated:

"27. In *Francis Omuroni v Uganda Criminal Appeal No 2 of 2020*, the Court of Appeal of Uganda stated as follows on proof of age in defilement case"

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person 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..."



28. Guided by the above decisions age can be proved by the parents, guardian medical evidence, birth certificate of the victim or even common sense.”
24. The P3 and PRC forms indicate the age of the victim. This, coupled with the fact that PW1, at the time of the testimony was not a child of tender age, means that she was intelligent enough to know her age. At the time of testifying, she stated her age as 15 years. The victim’s age was not in dispute since the appellant, through his submissions, repeatedly stated that he had no issue with the victim’s age.
25. The victim testified that the appellant used to defile her and that he did this on several occasions. At some point, she fell pregnant and the appellant gave her some pills to take in order to abort the pregnancy. PW3, PW4 and PW5 also heard about the defilement from PW1. They reported the matter and PW1 was taken to the hospital. PW7 produced the findings of the examination of the victim and it was ascertained that she was indeed defiled and was 5 weeks pregnant at the time. With this, there is enough proof of penetration.
26. The prosecution is also tasked with proving that the appellant was positively identified as the perpetrator. PW1 testified that the appellant is her cousin, a fact that was corroborated by PW2 who is PW1’s sister. PW2 also testified that she was preyed upon by the appellant. She said that she had told the appellant not to come to their shared sleeping area but he insisted on going there and taking turns at defiling her and PW1. The appellant is well known to the victim and he defiled her on several occasions. His identity as the perpetrator was based on the victim’s knowledge and her recognition of him, and cannot be easily doubted as being mistaken.
27. In any event, when it comes to identification of an assailant in sexual offences, section 124 of the Evidence Act provides that the testimony of the victim is sufficient and it does not need to be corroborated. It states:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

28. Following conviction, the appellant was sentenced to 20 years imprisonment the mandatory minimum sentence prescribed under section 8(3) of the Sexual Offences Act. There is no basis for reviewing or setting aside this sentence since it is prescribed in law as a mandatory minimum.
29. The Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) rendered itself on the sentences prescribed under the Sexual Offences Act. It was held thus:

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision



of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious.”

30. The Supreme Court reiterated its findings in that case through its recent decisions in the cases of Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) and Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR). It held that until parliament reviews the sentences imposed in statute, the court has no mandate to review them.

### **Disposition**

31. In light of the foregoing discussion, it is my view that the appeal must fail and is hereby dismissed. The conviction and sentence are therefore hereby upheld.
32. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 24<sup>TH</sup> 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

