Maweu v Republic (Criminal Appeal E015 of 2023)
[2025] KEHC 13423 (KLR) (26 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13423 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E015 OF 2023

TM MATHEKA, J

SEPTEMBER 26, 2025

BETWEEN

THOMAS KIOKO MAWEU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from both the conviction and sentence of 20 years by honourable J.D.KARANI (RM) On the 20th June 2022)

JUDGMENT

1. The appellant Thomas Kioko Maweu was charged with defilement contrary to section 8(1) as read with section 8(3)of the sexual offenses act.

2. The particulars of the charge were that on the 5th day of November 2020 at where Kwa Vutu village in Nzaui subcounty within Makueni county, he intentionally and unlawfully caused his male genital organ namely Penis to penetrate into the female genital organ Namely vagina of GKM a child aged 12 years.

3. In the alternative he was charged with committing an indecent act with child contrary to section 11(1) of the *akn ke act 2006 3 sexual offences act*. It was alleged that that on the 15th day of November 2020 at the same time and place he unlawfully and intentionally touched the vagina of GKM a child aged 12 years using his penis.

4. He denied the offence and the prosecution called five witnesses to prove their case.

5. The case for the prosecution was that the material time the complainant was 13 years old and in primary school in standard 7 .

6. That on the 5th day of November 2020 at 5:00 PM she had been sent by her grandmother to bring some bananas but while on their way back home her uncle one Andrew mutuku sent her to the appellant's home Thomas KIOKO to collect his phone. Upon arrival at the gate, she told him she had been sent by her uncle to collect the phone. The appellant went into the house to get the phone but instead came out carrying a panga . He told he that he was going to fetch firewood but once he got to the gate where she was, he grabbed her hand and dragged her to his house while telling her that if she screamed, he would kill her.

7. When they got inside the house, he removed all her clothes including her inner wear . He then lay on the bed and lay on top of her and in her own words said 'he raped me '. she said she asked him to stop doing what he was doing but he refused; that there were no people around the place and the closest home belonged to his mother but she was not around; that he released her around 5:30 PM she got dressed went home and immediately reported to her grandmother; that she told her grandmother that Thomas Kioko had raped her. Her grandmother reported the matter to her uncle, who together with Andrew mutuku went and arrested the appellant . That they all went to MBENI police station .She was taken to hospital at around 6:00 PM where she was examined and given some medication. she identified the treatment notes in court.

8. She identified the appellant in court as the culprit whom she told the court that he was their neighbor and she knew him before the incident.

9. On cross examination she told the court that nobody had told her what to say in court , she denied that she was beaten to come and lie to court that she had been defiled . She told the court that she did not own a phone and that and that she was the one who recorded her statement and that it was her first time to testify. She denied ever harvesting grass or fetching firewood from his land stating that it was her grandmother who would take grass from him and that on the material date she had only gone to collect the mobile phone and she found him in his house. She denied going to any hotel and that the appellant was inside the compound and he is the one who pulled her into the compound.

10. PW2 Angela Kalekye mbaluka That she was the grandmother to the complainant. SHE said that the appellant was their close neighbor and friend and that they were so close that if she did not have a matchstick she would go and borrow from them. that on the 5th of November 2020 she sent the complainant to buy bananas at the shop not far from home. that the complainant had also been sent to get her uncle's phone from the appellant where it had been taken for charging. That she stayed for too long without returning and PW2 sent other children to go and look for her. When they did not find her, she started to get worried she even went to the shop and she was told that the complainant had left the shop long before having bought the bananas , she went back home to untie her sheep where they were grazing then she began walking towards the main road with the sheep towards the appellant's house and she saw that the light was on then shortly she saw the appellant leave his house and then she saw the complainant leave. She immediately called her son mutuku to witness what was happening and her son immediately approached KIOKO and questioned him why the complainant was leaving his house that the appellant was rude and that annoyed her and she began shouting calling her other son Mutesia and other neighbors.

11. The appellant was arrested . They took the appellant and the girl to hospital. While at the hospital the Doctor who examined her called her in and asked her to see what was in the girl's vagina .She said she saw a whitish substance oozing out of the vagina. The doctor told her that the girl had been defiled. The appellant was not taken into examination room. The police were called and he was arrested. She identified the appellant in court.

12. On cross examination she said that she confirmed the girl was defiled through the doctor who called her inside the examination room . That she saw the private parts of the girl. She said that the appellant had a phone charging business and would usually give people their phones at the gate and they were surprised to see the complainant coming from the appellant's house.

13. PW3 Andrew mutuku Itumo testified that the complainant was his niece and was born on 3rd of October 2008.He produced the birth certificate. He told the court that he recalled the material day at 7:00 AM he had taken his phone to the appellant for charging and went to graze his livestock .About 4:00 PM he went to untie his livestock and headed home and about 5:00pm he asked his niece to go and pick the phone from the Appellant's house and that since the appellant had dogs people would usually stand at the gate and call him so that he would come to the gate. He said that when he was sending the complainant for the phone his mother had also sent her to buy bananas that after he sent her, he went to milk the cow . He came back to find his mother looking for the complainant .She also sent two younger siblings to go to the shop and confirm whether she had gone to buy the bananas her mother continued to look for the complainant and after a short while he heard his mother calling. He rushed where his mother was and that when she saw he saw the complainant leaving the Appellant's house at the gate holding the bananas and his phone .He also saw the appellant leaving the house from another side. His mother told him to get hold of the appellant so that he did not escape and called his other brother and neighbors . They came and they headed to the village dispensary for examination. They took both the complainant and the appellant for examination Then the police officer was called and the appellant was arrested and they all went to the police station. The complainant was re- examined at Sultan Hamud Hospital and he saw the treatment notes for the health center and also the documents from Sultan Hamud he said that the appellant was his neighbor and had known him since he , PW3 was born.

14. On cross examination he confirmed that he had taken his phone for charging and that because of the appellant's dogs people usually stood at the gate and called out the appellant to bring their phones. He said that it was not the first time he had taken the phone for charging. That the appellant had always been assisting them as neighbors to charge their phones because they did not have electricity at their home. That the same day the appellant was drunk because he had sold some trees. He said that their homes are very close like the distance from the courtroom to the court gate and it would take someone about three minutes to walk there. That there is a road and the hospital close to the appellant's home . That they went to that hospital after the incident and the doctor was called from his house. He denied ever stealing grass or firewood from the appellant's farm. He denied the existence of any grudge over their alleged grass and firewood. He said that the appellant committed the offence because he was drunk and was unable to escape. That it was the doctors who confirmed that the child was defiled.

15. PW4 number 237740 PC Helen Ndanu From Emali police station testified that she was the investigating officer and was on patrol on the 5th of November 2020 at around 8:00 PM when she was rung by OCS Emali who informed her that there was a matter reported at MBENU police post and the accused and the complainant had been arrested and were at the police post. She went there and escorted the two to EMALI police station she commenced her investigations interrogated the complainant who reported to her with had transpired on the 5th of November 2020 .

16. She charged the appellant with the offence after she had taken the complainant to Sultan Hamud sub-county hospital where she was treated and the P-3 form and PRC filled .

17. On cross-examination she said she did not visit the scene but believed the complainant. She was satisfied that the complainant was defiled because the complainant was duly examined at the hospital and a report filed . She said the panga was not found during his arrest.

18. DW5 Jackson Ndivo told the court that he was registered clinical officer and that he filled the P3 form for GKM who was twelve years old at that time. He found that her pant had stains but no tears, the genital external genitalia was normal, the hymen was broken at 2 and 8 o'clock and it had pus cells and numerous epithelial cells indicating that there was evidence of vaginal penetration . He produced the forms and the treatment notes.

19. On cross examination he told the court that the complainant was defiled and it was a penis due to the puss cells he said they never got any sperms because penetration does not have to have sperms.

The prosecution closed its case.

20. In his defense they accused a sworn statement and told the court that on the 4th of November 2020 at 8:00 AM he left home and went to Nairobi to take his mother to hospital .He left her with a sister to take care of her in Nairobi and because his wife had left him and he was living alone and had to take care of the homestead he returned home on the 5th of November 2020 and got there at around 4:00 PM. And when at the gate he saw a lady standing by this fence he said she is a witness in the case. He did not open the gate but approached her to ask what she was doing there. Instead of responding she started hurling abuse at him. He then saw some children coming from his land through a cutting in the fence they were all ferrying sacks of napier grass that he had planted. It was then that he realized that the lady was keeping watch over the children who were stealing his grass He questioned the lady but she was extremely rude to him. she threatened to cause him to be in prison so that they would have freedom to steal his grass . He said that that family had stolen from him for a very long time .They would ask for forgiveness each time he caught them and he would forgive them so as to maintain good relations . Her son Andrew mutuku approached him while armed with a stick and questioned him alone about the theft of the grass and cutting of his fence mutuku threatened him that he would cause him harm but he also told him that it would be the last day he would see them stealing his grass .Then Mutesia came and started was questioning him asking why he was quarreling with mutuku .He then decided to report to the assistant chief . when he told them he was making a formal report they started beating him and he got injured but since he was slightly drunk, he could not defend himself .He became unconscious he was taken to the nearby hospital about 150 meters from his residence .The two boys carried into hospital he was injured to the chest and had a cut to the mouth. Then the lady who is a witness in the case came with her granddaughter and lied that he had been beaten because he had defiled the girl. They took the girl to be examined .he immediately denied the allegations .Police were called they came and once he was treated, he was arrested and later charged with this offence . He told the court he had never thought of committing such an offence before and asked the court to acquit him.

21. On cross examination he told the court that on the 5th of November 2020 e left Nairobi in the morning to go home. He arrived at around 4:30 PM from Nairobi and he was at the gate at about 4:30 PM .The complainant and her younger siblings were among the children who came to steal from him. He said no one came to pick any phone from his place .He said he never allowed anyone to bring their phone to his place for charging due to his dogs. He said the complainant's home was very close to his home 250 to 300 meters away and the only existing grudge was the stealing of his grass and cutting of wire that was the 3rd time he had found them stealing his grass. He never reported so that he could maintain a good neighboring relationship, that the two boys are the ones who took him to hospital, and he did not see any of the neighbors or closest neighbor to the hospital and the complainants home come to the scene; he said the charges were false because of the theft of the grass and firewood that was happening on his land . That from the PRC and P-3 form there was no evidence that the child was defiled

22. From the foregoing evidence the trial court found the accused person guilty convicted him and sentenced him to 20 years imprisonment.

23. issatisfied , the appellant filed an appeal on the following grounds: that the trial magistrate erred by failing to observe that the trial was conducted in contravention of section 19 of the *akn ke act 1926 29 Oaths and Statutory Declarations Act* concerning the reception and admissibility of evidence of a child , Article 4, of *akn ke act 2010 constitution the Constitution* and section 2 of the *akn ke act 2006 3 sexual offences act* as well as proceeding over an unfair trial against his constitutional rights: that the learned trial magistrate erred in both points of law and facts by convicting the appellant without considering that there was no evidence to prove either penetration or indecent act without which the prosecution could not prove their case against the appellant to the required standard in law of beyond reasonable doubt; that the learned trial magistrate erred in both points of law and fact when he dismissed his defence without giving cogent reasons and sentenced him to a mandatory minimum sentence against *akn ke act 2010 constitution the constitution* and the courts discretion in sentencing; that the learned trial magistrate erred in both points of law and fact when he dismissed his sworn defence which alleged the possibility of being framed up due to an existing grudge without giving cogent reasons and sentenced him without applying section 333(2) of the Criminal Procedure Code.

24. On the first ground the appellant cites section 19 of the Oaths and statutory Declarations acts and section 125 of the *akn ke act 1963 46 Evidence Act*. he argues that The *akn ke act 1963 46 Evidence Act* provides that all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by a reason of tender years ,extreme old age, diseased body or mind or any similar cause. He argued that in light of section 19 of the Oaths and statutory Declarations acts the court was required to go through a question-and-answer process for the purposes of establishing the following ;Whether the child possesses intelligence to understand the nature of an oath to know the difference between telling the truth and lying; to prepare the child to testify truthfully and to observe remember and verbally describe events. He relies on John Otieno oloo versus Republic [2009] eKLR where it was held that the failure to form an opinion on a voire dire examination occasioned the miscarriage of justice. He also relies on Kiune V R criminal appeal 77 of 1982.

25. He reproduced the verbatim voire dire examination of the child by the court. He submitted that the answers given by the child with regard to the oath are recorded that I know not to know what it means to take an oath; I know what it means to speak while holding the Bible it means one should speak the truth; I know I should speak the truth today.

26. On this the court stated that I am convinced the minor hearing has an understanding of the nature of taking an oath she shall give sworn evidence

27. The appellant argues that the record by itself shows that the trial court did not make a finding as to whether the child understood the nature of an oath .he submits that an oath is a ritualistic declaration based on an appeal to God or a god or some revered person or object that one will speak the truth keep a promise remain faithful etc. That the trial court did not interrogate this particular issues and therefore this was a fatal omission when her evidence was not corroborated or even when the trial court did not indicate any kind of corroboration. It is further submitted that the trial court did not establish whether the child knew the consequences of not telling the truth. It is submitted that this is very important in understanding whether the child knew the nature of an oath. It is also important because the accused person questioned the integrity of the child and whether she was coached in any way.

28 Further that the trial court did not record the questions it asked the child which he contends is a crucial requirement for any VOIRE DIRE examination; That the court direct misdirected itself that PW1 understood the nature of an oath and went ahead to allow her to testify on oath. The appellant urges

the court to find that there was a flagrant breach of the requirement of section 19 of the oaths and statutory declaration act and that this was fatal to the case for the prosecution

29. On the second ground the appellant relies on the definition of penetration as provided by section two of the sexual offenses act . the partial or complete insertion of the genital organ of a person into the genital organ of another person. he submits that PW1 did not state how the insertion took place, she did not mention a male organ or a female organ in her testimony, that penile insertion has to be defined clearly in the witness's testimony for the court to record as evidence that indeed penile penetration took place ;that PW1 stated that she was raped; He argues that it is unbelievable that a twelve-year-old can understand what the term rape means so as to use the word rape.

30. In analyzing her testimony, he states that she told the court that when she stood at the gate the appellant came out with a phone while armed with a panga implying that he first came out with a phone and then dragged her into the house . The question was where were his fierce dogs at that time.

31. There is also the question about the time; the complainant told the court that she left the house at 5:30 PM. Her grandmother said she had disappeared for one and a half hours. Her uncle said that when they went to check there were lights in the appellant's house so the question was whether at 5:30 you would have had to put his lights on.

32. He contends that the complainant told the court that that she reported to the grandmother however the grandmother and the uncle said they saw her by themselves the complainant leaving the appellant's house and immediately effected his arrest together with members of the public who had been attracted by the screams from the grandmother. What was strange about her to be coming from the appellant's house yet they are the ones who had sent her there in the first place? How could they have concluded that by the mere fact that she was coming from the appellant's house that she had been defile even before getting the information from the complainant? He argues that this evidence of the complainant's grandmother and uncle clearly points to the plan to frame him. The complainant has self-stated that it was her grandmother who would take grass from the appellant and not herself.

33. It is argued that the medical evidence was not sufficient to confirm that an offense had been committed The P3 was filled by Jackson NdIvo and the PRC by Patrick Mule. It was noted that the first treatment notes allegedly completed at MBENUU health facility at 7:00 PM on the 5th of November 2022 only bears an outpatient number 315 3 20 but does not bear the name of the Doctor clinician who attended the complainant. The appellant contends that the person who completed the P-3 testified that he relied on the presence of puss cells and numerous epithelia cells as evidence of penetration and told the court that there were no spermatozoa, he clearly stated that he did not see only sperms.

34. It is argued that this is contradictory to the evidence of the grandmother who told the court that when the girl was being examined, she was called into the room " and when she (the girl) opened her legs the doctor examined her and asked me to see what was in her vagina i saw mucus like substance oozing out of her vagina and doctor then told me that she had been defiled"

35. The appellant contends that if this was true then why did the doctor not take a vaginal swab as this was critical evidence. He submits that he was present according to the evidence when the complainant was examined and therefore a specimen could have been taken which would have been able to identify whether that was spermatozoa.

36. The treatment notes of 5 11 2020 indicate that on examination there are sperms on the innerwear, sperms at the right thigh, that she also complains of pain at the vagina and pain at the lower limbs

37. The treatment notes from Sultan Hamud are not dated, and do not bear the name of the person who treated the complainant . the form PRC indicates that upon examination the doctor found that the

hymen was broken with a bruise but it was not freshly broken , there were no tears, there was no spermatozoa . it was filled on 6th of November 2020

38. The P-3 indicated that there was a broken hymen at two o'clock and 8:00 o'clock there were no tears to the vagina or the cervix The genitalia was normal. There was no per vagina discharge.

39. The Appellant contends that if indeed there had been forceful penetration there would have been evidence of injuries not just a single bruise. He contends that the medical evidence presented is insufficient to support the allegation of forceful penetration.

40. Citing PKW VS Republic [2012] eKLR he submits that it has been held that a broken hymen by itself is not proof of defilement.

41. He submits that the trial court failed to apply the rule of corroboration in this case yet the complainant was a minor ;that the magistrate ignored section 124 of the *akn ke act 1963 46 evidence Act*.

42. With regard to the alternative charge of indecent act contrary to section 11(1) of the *akn ke act 2006 3 sexual offences act* the appellant cites the definition of indecent act and submits that in her evidence the PW1 did not state that her vagina was touched either by hand or finger or penis as the charge sheet implies. The variance alone is fatal to proving the offense of indecent assault he relied on David OCHIENG AKETCH vs R [2015] eKLR which he submits is pari materia with this case.

43. In conclusion he submits that it shows that the prosecution has failed to comply with section 107(1) of the *akn ke act 1963 46 evidence Act* and the principles established in Woolmington versus DPP AC 462 and other cases on the standard of proof in criminal cases.

44. On ground number three he submits that the evidence among the witnesses was inconsistent pointing out that how the incident happened he cites the testimony of the complainant and that of her grandmother and her uncle.

45. The one that stands out is that PW2 claimed to have seen the complainant leaving the appellant's house and then she called out her son PW3 who came from wherever he was to see the exact thing PW2 had seen when she was calling him. The appellant's contention is that that was not possible.

46. The evidence of PW2 that she went to the shop to check whether the complainant had left yet P W 3 says that she sent some younger children to go and look for the complainant she also says that she just walked towards the main road towards the appellant's house PW3 says that she took a feeder road to go towards the appellant's house.

47. The versions of the circumstances of the offence are different as between the complainant and PW2 and PW3.

    He submits that the trial court failed to reconcile these discrepancies.

48. In the 4th the ground he submits that the trial court misdirected itself on his defence for instance in the judgment the trial court said that the accused never raised the issue of a grudge during cross examination of PW2 yet he says the record shows that he raised the issue of the grudge when he cross examined PW2.

49. That the trial court attempted to shift the burden of proof to him from the prosecution yet he did not raise an alibi defense.

50. Citing Muruatetu , he argued that the court ought not to have sentenced him to a minimum mandatory sentence . He also cited Dismas WAFULA KILWAKE versus Republic [2019] eKLR . He submits court did not consider the mitigating circumstances of his case and the court did not exercise its discretion even if this was a sexual offense . he cited YAWA NYALE versus Republic [2018] eKLR for

the argument that mandatory minimum sentences take away the discretion of the court . In addition, that he had been in the corridors of justice for at least three years from the date of his arrest on the 5th of November 2020 and was convicted on the 30th of May 2022 That the trial court did not take into account this time when it gave him a term of imprisonment of 20 years as required by section 333(2) of the Criminal procedure Code. He cited AHAMAD ABOLFATHI MOHAMMED And another vs Republic [2018]eKLR

51. For the respondent it is submitted that the appeal raises several issues for determination; whether the complainant was fit to give sworn statement; whether there was penetration; whether the appellant is the perpetrator; age, whether there was corroboration of the minor's testimony whether there were notable inconsistencies in the testimonies of the witnesses; whether the ingredients of defilement have been established ;and whether the sentence meted out to the appellant is safe;

52. He submitted the complainant victim was properly tested on whether she knew the meaning of an oath, and the court clearly be inquired in simple languages to whether she knew what it meant to speak when holding the Bible.

53. On penetration the respondent reiterates the evidence of the complainant and of Pw 5 on record and submits that the complainant testified that she was defiled by the appellant.

54. Identification of the perpetrator it is submitted that the complainant and the perpetrator new one another and her evidence is corroborated by pw 2 and PW3.

55. On age the complainant testified she was 13 and a class seven pupil and her birth certificate was tendered in evidence indicating she was born on 3rd October 2008

56. On corroboration it is submitted that the victim's evidence was corroborated by PW2 and PW3 who saw her at the appellant's homestead ,and the medical evidence.

57. The Respondent relies on GOA versus Republic [2018] eKLR where the court stated that a court could convict solely on the evidence of the victim stating that ...section 124 of the *akn ke act 1963 46 Evidence Act* comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. In fact, a court can even convict on the sole evidence of the victim if the court records the reason for believing the victim and also records that it was satisfied the victim was telling the truth...

58. On the alleged inconsistencies of the testimonies of witnesses, it is submitted that in Ali Mohamed Ibrahim v Republic the court was of the view that picking a few sentences from the testimonies of witnesses could not be evidence of inconsistencies. That the appellant needed to establish significant inconsistencies as was held in Eric Onyango v R [2014]eKLR , and Twehangane Alfred vs Uganda Crim App no 139 of 2001[2003]UGA

59. Citing Lucas MULI NZIOKA vs Republic [2019] eKLR the respondent submits that the ingredients of defilement; penetration; minor victim; and positive identification of the perpetrator were established

60. On whether the sentence meted is legal and safe the respondent relies on SKM versus Republic 2021 eKLR where the court held that sentencing is a discretion of the trial court and the sentence meted out by the trial court should not be interfered with unless it is found to be illegal or unsafe ,That the discretion is for the trial court.

61. Having considered the evidence on the record the grounds of Appeal the submissions by both the appellant and the respondent the issue to be determined is whether the appeal has merit.

62. the duty of the Court of first instance on appeal was determined in the case of Okeno versus Republic . That duty is to review and relook at the evidence given in the trial court, in a way conduct retrial and draw its own conclusions always keeping in mind that it never saw nor heard the witnesses. The re-trial is based purely on the record.

63. The ingredients of defilement have been set out by precedent to be penetration, the age of the victim and the identity of the perpetrator. my view is that the court must also look at the circumstances of the offence. that is the import of section 33 of the sexual offenses act which states us follows;

> Evidence of surrounding circumstances and impact of sexual offence
>
> Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove
>
> (a) whether a sexual offence is likely to have been committed
>
> (i) towards or in connection with the person concerned;
>
> (ii) under coercive circumstances referred to in section 43; and
>
> (b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.

64. Regarding penetration the persecution relied on the evidence of the complainant and pw 5. the complainant used the technical term rape there was no description of what actually happened or how It happened.

65. In using a technical term rape for a 12year old it was not helpful to determine what the child really meant. That is not the ordinary language used by minors.

66. The prosecution was required to take this further for the child to explain in her own words what this really meant. Her testimony ought to have described to the court what happened to her after the appellant allegedly removed all her clothes. There was no mention of any genital organs in any form in the testimony of the complainant whatsoever. The prosecution ought to have done better by getting evidence of what happened and how it happened in the words of the child. Legally rape has its own definition at s. 3 of the SOA:

> Rape
>
> (1) A person commits the offence termed rape if
>
> (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
>
> (b) the other person does not consent to the penetration; or
>
> (c) the consent is obtained by force or by means of threats or intimidation of any kind.

67. The court is to draw its conclusion that rape has occurred where evidence of penetration of genital organ(s) without consent of forced consent happened is tendered .

68. It is my view that by accepting the use of the technical term (rape) without the supporting testimony from the complainant, the court and the prosecution used their own imagination to fill in the details. That is where the error lies as evidence of what happened was not tendered.

The medical evidence was also not conclusive.

69. The broken hymen:- a broken hymen is not conclusive proof of penetration. In this case the P3 said it was not fresh hours after the first examination. There was no evidence of spermatozoa, despite there being copious amounts just hours before this 2nd examination. The sperm-stained clothing was not seen by the police and was not produced in court. Neither were these stains seen by the 2nd doctor hours despite the complainant not having taken a bath before the examination. 'break' was not fresh meaning it had not happened recently.

70. The grandmother and the 1st person who is unknown who examined the complainant said there were sperms. She said she saw the same oozing out of the complainant's vagina. The police were called to that clinic. The police do not speak of this evidence and No specimen of this obvious evidence was taken. Even the stained clothing was not handed over to the police and none was produced in court. The one who completed the P3 testified that though the hymen was broken it was not fresh, there was no discharge from the vagina.

71. The prosecution did not provide any other explanation for the testimony that the hymen tear was not fresh and no other injuries or signs of penetration. The prosecution cannot switch from the obvious presence of spermatozoa to the presence of epithelial cells in urine as the proof of penetration. This appears to be a move from certain to speculative evidence. Spermatozoa would have nailed the appellant.

72. The greatest disparity is the one between the testimony of the complainant and that of the grandmother and uncle on how it all started. She told the court that after she was 'raped' she went home and immediately reported to the grandmother who told her uncle, called the neighbours. However, the grandmother and the uncle testified when they saw the complainant leaving the house of the appellant, they knew that something had happened to her and immediately raised the alarm, appellant was rude, was arrested both were taken to the clinic and defilement was confirmed. The only reason for raising the alarm and for arresting the appellant was because they saw the complainant leaving his house, not because the complainant had reported any wrong doing by the appellant. This is not just a mere disparity it is inconsistency in material particulars. It creates doubt in the whole story. Considering the appellant's defence, the fact of defilement falls in the shadow of doubt . There was no report made of the alleged defilement by the complainant to the grandmother and the grandmother had no reason to raise alarm. That would explain the use of the technical term rape. The sight of spermatozoa that no one else saw and whose evidence was not presented to court.

73. Who went in search of the complainant , her grandmother or her siblings.? For how long was she missing 30 minutes, 1 hour 30 minutes?

74. What about the age ?The complainant said she was 12. Date of Birth was said to be 3 10 2008. The certificate of birth was produced obtained after the offence as the date of registration is 4th February 2021. When she testified on 5th March 2021, she said she was 13 years old. The grandmother said she was 14 years old. The first medical examination that she was 13 yrs., the 2nd and the P3 that she was 12 , the PRC indicated the date of 3 10 2008. The trial court relied on the certificate of birth stating that she was 12 years however she was 12 years and 5 months old. Age as required by s. 8(3) was established . It states

    (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.

    The appellant was known to the complainant.

75. However, it is curious that the PW3 made excuses for the appellant that he committed the offence because he was drunk. The appellant stated he was a bit drunk and could not defend himself but did not commit the offence.

76. The panga he is alleged to have used was not recovered yet he was arrested within the precincts of his home by mutuku and the neighbours. Even when the police came for from the dispensary near his home, they did not visit his home to conduct the search and to visit the scene which was fresh.

78. It is noteworthy that none of the neighbours who came to respond to PW2's screams none was called to testify . The fact that they are said to have responded immediately their testimony would have corroborated that of PW2 and PW3. Not calling them calls the inference that their evidence would not have supported that of the two witnesses and was adverse to the case for the prosecution. Considering the appellant's defence that there was a grudge and hence a reason why the two adults would frame him it was necessary to call these witnesses.

    The sentence meted was in accordance with the law .

79. The upshot is that I find that prosecution established the age of the complainant to be between 12 and 15 years . However, the evidence around penetration is doubtful and the conviction unsafe.

80. The appeal is allowed. The conviction quashed, the sentence set aside and the appellant be set at liberty unless otherwise legally held.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH SEPTEMBER 2025.

MUMBUA T MATHEKA

JUDGE

CA Chrispol

Appellant

Mr. Kazungu for state