



**Masinde alias Mose v Republic (Criminal Appeal E002 of 2025)
[2025] KEHC 13421 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E002 OF 2025
HI ONG'UDI, J
SEPTEMBER 19, 2025**

BETWEEN

MOSES WAFULA MASINDE ALIAS MOSE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment delivered on 27th November 2024 by Hon. A. Lorot (Chief Magistrate) in Naivasha Chief Magistrate's Criminal Case No. MCSO/E017/2024)

JUDGMENT

1. Moses Wafula Masinde alias Mose hereinafter referred to as the appellant was charged with defilement contrary to section 8(1) as read with sections 8 (2) of the *Sexual Offences Act*. The particulars being that the appellant on 1st May 2024 in Naivasha sub-county within Nakuru County intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of FWK a child aged 3 years.
2. He equally faced an alternative count 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 the appellant on 1st May 2024 in Naivasha sub-county within Nakuru County intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of FWK a child aged 3 years.
3. He denied both counts and the matter proceeded to full hearing with the prosecution presenting five (5) witnesses. In his defence the appellant gave a sworn statement and called no witness.
4. After hearing the case, the trial Magistrate found the appellant guilty and convicted him on 27th November 2024 and sentenced him to serve life imprisonment.
5. Being aggrieved with both conviction and sentence the appellant filed this appeal on the grounds which were later amended to the following:



- i. That the learned trial magistrate erred in law and facts by convicting and sentencing the appellant to serve a mandatory life sentence but failed to note the provisions of Article 50 (2)(p) and (q) of the constitution the policy guidelines on sentencing 2016 and recent law developments followed by superior courts on sentencing.
 - ii. That the learned trial magistrate erred in law and facts by convicting and sentencing the appellant in a prosecution case where the elements of the offence of defilement were not conclusively proved.
 - iii. That the trial magistrate erred in law and facts by failing to note that, very crucial witnesses were not called to testify hence prosecution's concealment of fact.
6. A summary of the case before the trial court is that on the material day PW1, (FWK) then aged 3 years was playing with her friend Chantelle and they went to the appellant's house but Chantelle was sent away. The appellant carried PW1 to his bed, defiled her and she told the appellant to stop since she felt a lot of pain but he refused to listen. He promised to give her money and she went back home and told her mother that the appellant had done bad manners to her. She was later taken to the hospital where she was treated and got well.
7. PW2 – EWK, PW1's grandmother testified that on the material day at around 3.30pm she sent her son to call PW1 so that she could shower. Her son who is 18 years found PW1 at the gate next to theirs where Chantelle lived. PW2 noticed that PW1 looked tired, she slept on the chair and when she tried to feed her she refused. PW1 had no socks on when she asked her, she said that they were at the appellant's house and Chantelle also confirmed the same.
8. She asked Chantelle where the appellant's house was and she said he was their neighbour. PW2 later found PW1's socks in between the house of the appellant and Chantelle's house. Later when she tried to bath PW1 she noticed that she was in a lot of pain as she tried to sit on the potty to urinate, PW1 told her that she felt pain in her vagina and that the appellant had removed her trouser and panty then inserted his 'thing' into her "susu". Later, PW1 was taken to the hospital where she was put on medication and the incident was reported at Naivasha police station.
9. On cross examination, she stated that she used to see the appellant and that PW1's socks were found between the appellant's and Chantelle's home. She confirmed that she did not know the appellant at the time of the incident and that both PW1 and Chantelle confirmed that they had been at the appellant's house. She denied framing the appellant and that it was the PW1 who had named him as the person who defiled her.
10. PW3- Dr. Preston Ochieng Otega produced the P3 form filled by him and the post rape care form filled by his colleague one Veronica Wambui Gathiru. He stated that PW1's genital organ revealed bruises on the labia majora and there was hyperahemic vulva. The hymen was present and intact, libia was hyperahemic, there was also laceration on the right labia majora and she had no discharge. His conclusion was that the same was caused by a blunt weapon and consistent with history of sexual abuse. The Post Pape Care and P3 form both dated 3rd May 2024 were produced as P. Exhibit 1 and 2 respectively.
11. Upon cross examination, he confirmed that there were lacerations on PW1's private parts which was evidence of force to try and penetrate her. He futher confirmed that her vulva was hyperhemic and there was red blood cells in the urine. He added that she had been examined three (3) days after the incident.



12. PW4- No. 25xxx PC Nicholas Musyoka 25xxx PC Nicholas Musyoka attached to Karagita police post on general duties, testified that on 4th May 2024 he received a call from his boss IP Ngetich who informed him of a defilement case reported at Naivasha police station. They proceeded to arrest the suspect who was identified by the victim (PW1). On cross-examination, he confirmed that he was the arresting officer.
13. PW5 - No. 24xxx PC Lydia Mwangi stationed at Naivasha police station- gender desk testified that she took the statement of the victim and the witness. She stated that she visited the scene and that the child was able to identify the appellant to officers of Karagita police post and the accused was arrested. She produced PW1's birth notification as Exhibit 3.
14. When placed on his defence the appellant in his sworn statement stated that he produced flowers. On 4th May 2024 he woke up and was planning to go to work at 6:30 am when he heard a knock on the door. He opened it and two men greeted him they told him that there were shop items missing and so they should go to the gate. At the gate he met PW1's mother and the lady village elder who told him that he had been accused of sleeping with PW1 but when she was called she confirmed that he had not done anything to her. He stated that he had loaned PW1's mother some money and they had quarreled over the loan so she decided to frame him.
15. On cross-examination, he confirmed that on 21st April 2024 he loaned PW1's mother kshs. 10,000/ = though he had no proof of the same and that she was to pay him on or about 6th May 2024. He stated that the incident occurred on 1st May 2024 and he went to demand for the money on or about 3rd May 2024.
16. The appeal was canvassed through written submissions.

Appellant's submissions

17. These are dated 10th March 2025 and the appellant submitted on the amended of grounds of appeal. On the first ground, counsel submitted that the recent law developments clearly showed that courts could divert from the mandatory minimum sentences enshrined in the *Sexual Offences Act*. He placed reliance on several decisions including R vs. Scott [2005] NSWCCA 152 where Howie J Grove and Barr JJ which stated that sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed.
18. On ground two, he submitted that the age of the complainant was proved but the penetration was not and the P3 form and the PRC form were unreliable.
19. On ground three, he submitted that Veronica Wambui a colleague to PW3 and who filled the PRC form was not called to testify yet she was a crucial witness. Reference on this was made to the decision in *Bukenya v Uganda* 1972) EA 549, where the court stated that where the evidence called is barely adequate the court may infer that the evidence of the uncalled witness would have tended to be adverse to the prosecution.
20. In conclusion, he urged the court to allow the appeal, quash the conviction, set aside the sentence and he be set at liberty.

Respondent's submissions

21. The respondent filed grounds of opposition together with submissions by Joseck Abwajo prosecution counsel. Both are dated 10th April 2025. It is counsel's submission that the prosecution proved all the



three ingredients of defilement. On penetration he relied on the PRC form (exhibit 1) and PW2's evidence, and that the complainant had said the appellant had defiled her. On age he submitted that the birth notification produced (Exhibit 3) showed that PW1 was aged 3 years old.

22. On sentence, he submitted that the Supreme Court held that the sentences provided for in the Sexual Act, were mandatory and legal. Further, that the said court further stated that sentences under *Sexual Offences Act* were not subject to its pronouncement in the Muruatetu case. Thus, the sentence of life imprisonment against the appellant was sound and proper, and there was no reason for this honourable court to interfere with the same.
23. He concluded by urging the court to dismiss the appeal in its entirety and the conviction and sentence by the trial court to be upheld.

Analysis and Determination

24. As a first appellate court, this court has a duty to re-consider and re-evaluate all the material before it and arrive at its own independent conclusion. It must bear in mind that unlike the trial court it did not have the opportunity to see and hear the witnesses and must give an allowance for that. This has been stated in a number of cases. See *Okeno vs Republic* (1972) E.A. 32; *Pandya vs Republic* (1975) E.A. 336;
25. In *Simiyu & Another vs Republic* [2005] I KLR 192 the Court of Appeal on the same issue stated thus:-
- “It is the duty of the first Appellant court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions.”
26. I have carefully considered the evidence on record, grounds of appeal, submissions by both parties, cited authorities and the Law. I find the main issue for determination to be whether the charge of defilement was proved against the appellant beyond reasonable doubt.
27. Section 8 (1) of the *Sexual Offences Act* provides as follows:
- “A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement”
28. Section 8(2) of the same Act provides as follows:
- “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.”
29. For this offence to be proved the following ingredients must be established by the prosecution. Age of the victim Penetration of the victim's genital organ Identification of the culprit.

Age of the victim

30. The charge sheet shows that PW1 was aged 3 years as at 1st May 2024. She told the court that she had just turned 4 years old and the court took her through a voire dire examination. The PRC Form (Exhibit 1) and P3 Form (Exhibit 2) show that PW1 was 3½ years and finally the birth notification (Exhibit 3) confirms the date of birth to be 2nd September 2020. It was therefore confirmed that PW1 was at the time of the alleged offence aged 3 years plus 8 months. Age was therefore proved.



Penetration of the victims genital organs

31. Section 2 of the [Sexual Offences Act](#) defines “penetration” as follows:

“Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”

32. The evidence by PW1 is that the appellant took her to his house where he removed her trouser, her panty and inserted his penis in her vagina causing her to feel a lot of pain. PW3 who examined the minor confirmed that her genital revealed bruises on the labia majora, there was hyperaemic vulva, the hymen was present and intact, labia was hyperaemic, there was also laceration on the right labia majora but she had no discharge. His conclusion was that the injuries were caused by a blunt object which was consistent with the history of sexual abuse. I am thus satisfied that the medical evidence confirmed PW1’s evidence that indeed there had been penetration of her genital organ, by a male organ even though the hymen was not broken. Section 2 of the Sexual Offences clearly states what penetration is. The penetration does not need to be complete.

Identification of the culprit

33. PW1 testified and identified the appellant as ‘Mose’ who is the person who defiled her. PW2, the minor’s grandmother told the court that the appellant lived in their plot and was neighbours with PW1’s friend Chantelle and that she had never quarreled with the appellant or borrowed money from him. The appellant in his defence denied the offence claiming that he was framed by PW3 since he had loaned her some money and they had quarreled about it. He never explained his movements on the date of incident but confirmed that it was his off day.

34. There was no eye witness to this incident since it was PW1’s testimony that she went inside the appellant’s house accompanied by her friend Chantelle who was sent out by the appellant. The court had to weigh PW1’s evidence to see if it was reliable. Section 124 of the [Evidence Act](#) provides:

Corroboration required in criminal cases

“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”.

35. The learned trial Magistrate in his Judgment noted that he was satisfied with the evidence led by the prosecution and that indeed PW1 was defiled. He found the appellant guilty as charged on the main count.

36. From the above evidence I find that PW1 and the appellant are well known to each other. The child was not coached to fix him and there was no evidence adduced revealing any grudges or enmity between PW1, PW2 and the appellant to make the minor lie against him. Putting all these pieces of evidence together leads me to the conclusion that the appellant was properly identified as the culprit and there is no doubt about that. Therefore, I am satisfied that the trial Magistrate assessed the evidence well



and arrived at the correct finding in convicting the appellant. I will therefore not interfere with the conviction.

37. On sentence Section 8(2) of the *Sexual Offences Act* is very clear as cited at paragraph 28 of this Judgment.
38. The imprisonment for life sentence is the minimum sentence for defilement of a 3½ year old and is not negotiable. The Supreme Court in Republic V Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition Bo. E018) of 2023 [2024] KESC 34 (KLR) recently spoke to this, and made the position very clear on minimum sentences. This is what the said court stated at paragraph 57 of the Judgment.

“Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor or rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the court to impose a harsher sentence. Infact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term “mandatory minimum” can be found used in different jurisdictions including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances”

39. In view of the decision by the Supreme Court the sentence set out under section 8(2) of the Sexual Offences Act is the one provided for by the law. The same can only be interfered with upon amendment of the law.
40. The upshot is that the appeal lacks merit and is hereby dismissed. The conviction and sentence by the lower court are hereby upheld.
41. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 19TH DAY OF SEPTEMBER 2025 IN OPEN COURT AT NAKURU

H. I. ONG’UDI

JUDGE

