



**Nzioka v Republic (Criminal Appeal E062 of 2024)
[2025] KEHC 13301 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E062 OF 2024
RC RUTTO, J
SEPTEMBER 25, 2025**

BETWEEN

AISACK MWANGI NZIOKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of Hon. D. V. Sure (SRM) at Kangundo Chief Magistrate Court Sexual Offence Case No. E034 of 2021 delivered on 31st July 2024)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* Cap 63A lodged this appeal. He seeks that his conviction be quashed and the life imprisonment sentence set aside.
2. The appeal is premised on the following grounds, that the Learned Senior Principal Magistrate erred in matters of law and fact by failing to observe that the evidence procured by the prosecution did not have any probative value; by failing to find that the essential ingredients of the offence were not discharged against the Appellant; by failing to find that the whole case was marred by material contradictions and inconsistencies which went to the root of the charges facing me; by failing to properly consider the cogent defence case which reasonably exonerated the Appellant from the commission of the ill-fated offence and by imposing a sentence of life imprisonment which is manifestly harsh and unjust.

B. Background

3. Before the trial court, the appellant was charged with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 17th February 2021 in Kangundo Sub-county within Machakos County intentionally caused his penis to



penetrate the vagina of PM a child aged 10 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 17th February 2021 in Kangundo Sub-county within Machakos County, the accused intentionally touched the vagina of PM a child aged 10 years.

4. The appellant pleaded not guilty to the charges and to prove its case, the prosecution called 4 witnesses. The defence did not call any other witness.

C. Prosecution case

5. The victim, PW1, PM testified that she was 12 years old and in Class 5 living in Muthuani. She stated that on 17th February 2021, she was sent by her grandmother to Mwangi's place to get a container. She stated that she found Mwangi who told her to enter the house. That when she got in to pick the container, Mwangi held her, pushed her to bed, removed her clothes and removed his. She testified that her legs were wide apart and that Mwangi did bad manners to her. She stated that she went home and did not tell anyone but later told the teacher, Mrs M who took her to hospital. She testified that Mwangi is their neighbour and that he was the one on the dock.
6. On cross-examination, PW1 stated that the appellant has a wife and children and that she was told that his wife and children went to Thwake with his children. She stated that she found the accused in the house when she went for the container. She stated that she did not know why she was referred to Kangundo Level 4 hospital but she was taken to Kyevaluki Hospital. She stated that she was not lying before court.
7. PW2, JK, PW1 grandmother's stated that on 23rd February 2021 she received a telephone call summoning her to PW1's school. As she was approaching the market, she was informed that PW1 had been taken to Kyevaluki Hospital. She proceeded there and was advised to take PW1 to Kangundo Level 4 Hospital, which she did in the company of PW1's teachers. PW2 stated that PW1 was, however, not treated at Kangundo Level 4 Hospital because she did not have the money requested for payment. She then went home and reported the matter to Kyevaluki Police Post as advised by the hospital staff. The following day, she took PW1 to Kathiani Hospital, where the attending doctor confirmed that PW1 was defiled. She testified that she talked to PW1 and after sometime, PW1 told her that when she went to Mwangi's place, he defiled her.
8. Upon cross examination, she stated that she is not using PW1 to frame the accused. She further stated that she was also not lying as she was alerted by the teachers.
9. PW3, Timothy Kiao Nduva, a doctor at Mitamboni Health Centre, testified that he produced the P3 Form and PRC Form filled at Kathiani Hospital for PW1, who was 9 years old at the time of examination. He stated that PW1 had been taken to hospital by her grandmother and had complained of being defiled by a known person. Upon examination, PW3 observed no tears or blood stains, noted lacerations on the thigh, swelling of the labia minora and majora and a perforated hymen, with no signs of venereal infections. He further stated that a high vaginal swab revealed over 100 epithelial cells, indicating that PW1 had an infection. Additionally, the VDRL and Hepatitis B tests returned negative results. During cross-examination, PW3 stated that he had no knowledge of the circumstances of the case beyond the medical examination and the reports prepared. He confirmed that he examined PW1 on 2nd March 2021.
10. PW4, PC Margaret Irungu, the investigating officer, testified that on 23rd February 2021, PW1, accompanied by her grandmother and the late teacher AK, reported at the police post that PW1 had been taken to hospital because she was walking abnormally. PW4 stated that PW1 and her grandmother had gone to Kyevaluki Dispensary, where they were examined and referred to Kangundo Police Station,



but they were unable to proceed due to lack of funds. Upon interrogating PW1, PW4 was informed that PW1 had been on her way to the shop when she met the accused, who led her to a maize farm and defiled her, warning her not to disclose the incident. PW4 testified that she took PW1 to Kathiani Level 4 Hospital, where an examination confirmed defilement. She thereafter arrested the accused and charged him with the offence. During cross-examination, PW4 stated that she knew the accused. She confirmed that PW1 had taken time before disclosing the incident, often crying during interrogation. PW4 further testified that PW1 had implicated the accused in the act.

11. With the testimony of these four witnesses, the prosecution closed its case. Upon consideration, the court found that the prosecution had established a prima facie case. The appellant was placed on his defence. He elected to give a sworn statement and did not call any more witnesses.

D. Defence case

12. DW1, the appellant, stated that he is a casual labourer. That in February 2021, he was accused of defiling a girl and was arrested on 29th May 2021. He questioned why he was arrested after three months. He stated that his neighbours wanted to destroy him. Upon cross examination, he testified that he is being framed by his neighbours and that there is no truthfulness to what PW1 and her mother said.
13. After the close of the defence case the appellant did not file any submissions and the matter was scheduled for delivery of the judgment.
14. The trial court delineated the following issues for determination: the age of PW1, whether there was penetration, whether PW1's vagina was touched and with what and whether the prosecution has established the identity of the perpetrator.
15. On the age of PW1, the court held that after looking at the child health nutrition card, it shows that PW1 was born on 20th March 2021 and therefore concluded that the prosecution has established that PW1 was 10 years old on 17th February 2021.
16. On penetration, the trial court observed that PW3's evidence corroborated PW1's testimony that she was defiled based on PW3's findings. The court stated that having considered the timeline and having been convinced that PW1 did not report the defilement but for reasons known to the school she was taken to the hospital and reported the case on 23rd May 2021 and injuries confirmed, the prosecution established penetration.
17. On the third ingredient of identity of the perpetrator, the trial court observed that PW1 did not have any motive for framing the accused who was well known to her and PW2.
18. Ultimately, the appellant was convicted on the count of defilement. On sentencing the trial court noted that the accused despite given time for mitigation, did not offer any mitigation for the court to consider. The court noted that despite the foregoing, considering the age of PW1 and the circumstances of the offence, the accused was sentenced to life imprisonment as per the law.

E. The Appeal

19. The appeal was canvassed by way of submissions. The appellant submissions are dated 9th June 2025 while the respondent are dated 10th March 2025.

a) Appellant's Submissions

20. The Appellant began his submissions by outlining the background of the case as heard in the trial court. He then relied upon the Amended Grounds of Appeal arguing that each that the Learned Magistrate



erred in law and facts by not exercising a proper competence inquiry to test as per Section 19 (3) of the *Evidence Act*; by failing to find that the prosecution's evidence on penetration was insufficient to justify a life sentence by imposing of a life sentence on the appellant which violates emerging jurisprudence on sentencing discretion and contravenes Article 60 (1) of *the Constitution* and by improperly rejecting the defence's sworn evidence which could have established the appellant's innocence regarding the alleged penile penetration of the victim.

21. On the first ground of appeal, the appellant submitted that the trial magistrate failed to conduct a proper competence inquiry as required under Section 19(3) of the *Evidence Act*. He urged that the learned magistrate was obliged to ascertain whether PW1, a minor understood the duty to tell the truth and was capable of giving reliable testimony.
22. The appellant contended that the voir dire examination conducted by the court, consisting of questions about school, church, Bible, and the oath did not adequately establish PW1's comprehension of the duty to tell the truth. He maintained that that the voir dire examination should have asked more direct and specific questions to assess whether PW1 understood the difference between truth and falsehood.
23. Referring to Section 19(1) of the *Oaths and Statutory Declarations Act*, the appellant submitted that a minor may only testify if the court is satisfied that the minor understands the duty to speak the truth. In support of this position, the appellant relied on K v Republic [2015] eKLR, Republic v C [2014] eKLR, and Republic v W [2012] eKLR, arguing that the absence of such specific questions amounted to a procedural lapse that undermined the credibility of PW1's testimony.
24. On the second ground of appeal, the appellant challenged the sufficiency of the prosecution's evidence regarding penile penetration. He submitted that PW4 testified that the complainant informed her she was defiled in a maize farm after being approached and diverted from her journey to the shop. This, account, he argued, conflicted with PW1's earlier account that she had been sent by her grandmother to the appellant's house for a container, where she was confronted and allegedly defiled.
25. The appellant contended that the inconsistency in the location of the alleged defilement was a fundamental factor that the trial court failed to consider. The further submitted that PW3 who examined PW1 on 2nd March 2021, found no tears or blood stains, noted that PW1 was calm, and observed lacerations on the thigh, swelling of the labia minora and majora, a perforated hymen, and a closed cervix, with no sign of venereal infection. While referring to P.K.W v Republic [2010] eKLR (Criminal Appeal No. 186 of 2010), the appellant argued that a perforated hymen alone does not conclusively prove penetration, as hymenal rupture can result from non-sexual causes such as physical exercise, tampon use, or injury, and is therefore unreliable as sole proof of penetration. He further submitted that a closed cervix does not in itself constitute evidence of penetration; that swelling of the labia minora can result from injury or infection; and that lacerations on the thigh may indicate trauma but do not directly establish penile penetration. The appellant also questioned why he was never subjected to DNA testing to confirm whether penile penetration had occurred.
26. On grounds three and four, grounds of appeal, the appellant challenged the trial court's exercise of sentencing discretion. He submitted that recent developments in the law increasingly recognise that sentencing must consider not only the nature and gravity of the offence but also the offender's individual characteristics and rehabilitative potential. While citing Article 160(1) of *the Constitution*, and the decision in Peter Njenga Njoroge v Republic [2021] eKLR, and Julius Karanja Mwaura v Republic [2017] eKLR, he argued that the imposition of a life sentence without adequate consideration of his personal circumstances, and without regard to evolving sentencing standards,



amounted to a misapplication of judicial discretion and a breach of the constitutional principles of fairness, justice, and proportionality.

27. In conclusion, the appellant submitted that the fact he was arrested three months after the alleged offence, without any evidence suggesting he attempted to flee or evade justice, was a crucial factor that ought to have been taken into account in sentencing. He urged the court to reconsider the imposition of a life sentence.

b) Respondent's Submissions

28. The respondent opposed the appeal in its entirety and, addressed the three additional grounds of appeal raised in the appellant's submissions. It was submitted that given the appellant was unrepresented, the court should consider both his Petition of Appeal and his Amended Supplementary Grounds of Appeal, as it was unclear whether he had formally abandoned the former. While citing *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Okeno v Republic* [1972] EA 32, the respondent emphasized that the duty of a first appellate court is to re-evaluate the evidence afresh and arrive at its own independent conclusion, while bearing in mind that it neither saw nor heard the witnesses testify.
29. In response to the first ground of appeal, challenging the nature of the voir dire conducted by the trial magistrate before allowing the minor to give sworn evidence, the respondent submitted that it is incorrect to suggest that the trial court failed to conduct the examination. Counsel for the respondent pointed out that the court asked the minor, among other things, her age, the class she was in, and whether she attended church. These questions, it was argued, guided the court to determine that the witness was competent to give sworn evidence.
30. Referring to *Maripett Loonkomok v Republic* [2016] eKLR, counsel noted that the Court of Appeal held that voir dire examination of children of tender years is mandatory. However, failure to conduct it does not automatically invalidate the prosecution's case. Nonetheless, evidence from such a child, taken without assessing their intelligence or understanding of the oath, cannot be used to convict an accused unless supported by sufficient independent evidence.
31. In response to the second ground of appeal, challenging the finding that penetration had been established, counsel submitted that the complainant gave a clear and detailed account of how the appellant defiled her. On the material day, the complainant testified that her grandmother had sent her to the appellant's house to collect a container. While she was bending to pick up the container from the ground, the appellant pushed her onto the bed and, defiled her. Counsel argued that the minor's testimony was corroborated by the medical evidence of PW3, who examined her and documented injuries consistent with defilement. According to counsel, the appellant's alternative explanations for the injuries suggesting they could have resulted from other causes were purely speculative, unsupported by evidence, and insufficient to displace the prosecution's case.
32. On the final ground, concerning the legality of the life sentence imposed, counsel for the respondent acknowledged that there has been ongoing jurisprudential debate in Kenya regarding the constitutionality of mandatory minimum sentences, and that recent decisions have clarified that "life imprisonment" may be interpreted as a fixed number of years rather than incarceration of the offender's natural life. Nevertheless, counsel maintained that life imprisonment remains a lawful sentence and that the circumstances of the present case fully justify its imposition. While citing *Dismas Wafula Kiiwake & Another and Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, counsel submitted that the aggravating factors in this case warranted the life sentence imposed. Counsel concluded that the appeal lacked merit and urged the court to dismiss it.



F. Analysis and determination

33. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence presented before the trial court and arrive at its own independent conclusion. However, in doing the court must remain mindful that it did not see or hear the witnesses testify. See the cases of *Pandya v R* [1957] EA 336; *Ruwalla v R* [1957] EA 570 and *Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic* [2010] eKLR
34. After carefully reviewing the record of appeal and the submissions made by parties, I discern the following key issues for determination:
 - a. Whether the voir dire examination of the minor was properly conducted;
 - b. Whether the offence of defilement was proved beyond reasonable doubt; and
 - c. Whether the sentence was excessive or harsh in the circumstances.

a. Whether voir dire was properly conducted

35. The Appellant submitted that the voir dire examination conducted by the trial court failed to adequately assess whether PW1 a minor, understood the consequences of telling the truth.
36. However, the record clearly indicates that before taking the evidence of the complainant, the trial court conducted an examination of her and made the requisite finding that she was intelligent enough to give a sworn statement. The Court of Appeal in *Japheth Mwambire Mbitha v Republic* [2019] eKLR affirmed that the purpose of voir dire is to ensure that a minor understands the solemnity of the oath or at the very least the importance of telling the truth. In this case the objective was a.
37. It is also well established that there is no rigid or prescribed format for conducting a voir dire examination. In *Maripett Loonkomok v Republic* [2016] eKLR the Court of Appeal held thus:

“We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi v R*, Criminal Appeal No.10 of 2014.”
38. Section 19 of the *Oaths and Statutory Declarations Act* governs and the admissibility of evidence of a child of tender years. It provides that if, in the opinion of the court, a child does not understand the nature of oath, their evidence may still be received without being given under oath. However, such evidence is only admissible if the court is satisfied that the child possesses sufficient intelligence and understands the duty of speaking the truth. Provided the evidence is recorded in writing, it qualifies as a deposition under section 233 of the Criminal Procedure Code. Notably, the CPC does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. This is left to the discretion of the court.
39. Consequently, I find that the voir dire conducted herein was sufficient and this ground of appeal is dismissed.



b. Whether the offence of defilement was proved

40. Section 8(1) of the *Sexual Offences Act* provides that “a person who commits an act which causes penetration with a child is guilty of an offence termed defilement”. Section 8(3) further stipulates that 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.
41. In the case of *George Opondo Olunga v Republic* (2016) eKLR the ingredients for the offence of defilement were set out as:
- a. Proof of the age of the victim;
 - b. Proof of penetration or indecent act;
 - c. Identification of the perpetrator.
42. On age, the prosecution relied on the evidence of PW1 who stated that she was 12 years old as at the time of testifying. This was collaborated by a copy of the minor’s health nutrition card which was produced in evidence as Exhibit No 1. The document was admitted without objection and forms part of the record. Based on this evidence I find that the victim was 10 years old at the time the offence was committed. Notably, the appellant did not contest the victim Mwangi’s age.
43. On penetration, PW1 testified that she had been sent by her grandmother to the appellant’s house to get a container. Upon arrival, the appellant invited her inside. As she bent to pick up the container, he pushed her onto the bed, removed both their clothes, and proceeded to sexually assault her. He did bad manners to her. This evidence is collaborated by PW3 through the production of the medical reports produced as Exhibit 3 and 4. The report indicates that the injuries was classified as harm, with a perforated hymen, no sign of venereal infections, Hepatitis B and VDRL were negative; The presence of epithelial cells was also noted. Further, in this case, PW1’s testimony was credible and corroborated by medical evidence. Taken together, this medical evidence supports the finding of penetration. in accordance with section 124 of the *Evidence Act*.
44. Further, in the case of *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus;
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”
45. Consequently, guided by the above authority, I find that the evidence of the victim and the PW3, the Doctor, was sufficient to prove the ingredient of penetration, and there is no reason to disturb the finding on this issue.
46. Turning to identification of the perpetrator, PW1 testified and gave a clear and consistent an account of the events on the day the offence occurred. She identified the appellant, a neighbour known to her, as the perpetrator PW1 clearly knew their neighbour. The trial court found the appellant’s defence lacking in credibility and dismissed it I hasten to add that the appellant does not dispute the fact that the victim knew him.
47. Flowing from the foregoing I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court. This ground must fail as it surely does.



c. Whether the sentence was harsh

- 48. The appellant was sentenced to life imprisonment. In passing sentence, the trial court stated thus: “I have considered the questions asked by the accused in mitigation and they were not tested on the investigating officer. In any case, I have already found for the prosecution and believed the evidence of PW1 under Section 124 of the *Evidence Act*. The accused has the recourse of challenging this decision in the High Court. The accused has not offered any mitigation for the court to consider and I am left to consider the age of PW1, the circumstances of the offence and sentence the accused to life imprisonment per the law”.
- 49. The appellant argues that the court was wrong in ordering a mandatory sentence since recent jurisprudence gives the courts discretion which should not include offenders being subjected to life sentences to shut the door on any possibility of reintegration into society.
- 50. This court notes the recent decision of the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) where the apex Court affirmed the mandatory sentences in the *Sexual Offences Act*. It therefore follows that the mandatory life sentence in Section 8(1) of the *Sexual Offences Act* that the appellant was sentenced to is a legal sentence and it is for upholding.
- 51. Following the above therefore, this court makes the following orders;
 - a. The Appeal is dismissed in its entirety and the trial court decision is upheld.
- 52. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 25TH DAY OF SEPTEMBER 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellants

.....for Respondent

Selina Court Assistant

