Matunge v Republic (Criminal Appeal E064 of 2021)
[2025] KEHC 14607 (KLR) (16 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14607 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E064 OF 2021

AK NDUNG'U, J

OCTOBER 16, 2025

BETWEEN

JOHNSON MATUNGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki
CM Sexual Offences Case 15 of 2018– V. Masivo, SRM)

JUDGMENT

1. The Appellant, Johnson Matunge, was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between 01/05/2018 and 31/05/2018 at Kurikuri area within Kurikuri location in Laikipia North subcounty of Laikipia County, unlawfully and intentionally caused his penis to penetrate the vagina of F.L a child aged 15 years.
2. After a full trial, he was found guilty and convicted and sentenced to twenty (20) years imprisonment.
3. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 14/10/2021. He also filed amended grounds of appeal filed alongside his submissions. The conviction and the sentence are being challenged on the following grounds;
    i. That the learned magistrate erred by failing to note that the case was not proved beyond any reasonable doubt.
    ii. The learned magistrate erred by failing to note that section 200 of the Criminal Procedure Code was not complied with.
    iii. The learned magistrate erred by depending on the evidence of a child without warning self on the credibility of the same when her evidence was that of a single witness.

iv. The learned magistrate erred quashing his defence without weighing it against the weak prosecution's case.

v. The learned magistrate erred for failing to invoke Section 33 of the *Sexual Offences Act* to adduce circumstantial evidence when determining this case.

vi. The learned magistrate erred by failing to note that he was not accorded a fair trial.

vii. The learned magistrate erred by meting out a sentence which was harsh, excessive and unconstitutional.

4. The appeal was canvassed by way of written submissions. In his written submissions, the appellant argued that the complainant's age was not proved since it was the clinical officer who produced the age assessment report instead of a dentist. Therefore, Section 33 of the *Evidence Act* was not complied with. As to penetration, he submitted that the trial court failed to record the demeanour and the reasons why it believed the complainant in the proceedings and therefore Section 124 of the *Evidence Act* and Section 199 of the Criminal Procedure Code were not complied with. The complainant was a hostile witness as she was not truthful, honest and lacked integrity as she testified that she was born on 15/12/2004 whereas her mother could not remember her year of birth which portrayed her lying and dishonest character. She also testified that she was 16 years old and if she was born on 15/12/2004, it meant that she was 14 years old and this cemented her lying character. That she testified that the first time when they had sex was when she was at home alone and further testified that the first time was when she was going to fetch water which further portrayed her lying character. That she also lied to her mother when her mother noted that she was pregnant which she denied. That she testified that he warned her against informing her mother whereas during cross examination, she testified that he threatened to inform his father. That she remained mum only to be exposed by sign of pregnancy and framed him which was an afterthought.

5. He submitted that PW3 failed to form an opinion on whether there was proof of penetration or not as pregnancy is not conclusive prove of penetration as the same can occur as a result of intra uterine insemination. Therefore, the clinical officer failed to place him as the penetrator. With respect to identification, he submitted that the prosecution relied on oral evidence of PW1 and PW2 who testified that he was their neighbour hence an easy target for frame up. PW2 did not witness the ordeal and therefore her evidence was hearsay. She also testified that she blamed him because he was her neighbour.

6. He submitted that Section 200 of the Criminal Procedure Code was not complied with as the section was loosely read to him and was not fully elaborated. The trial court had a duty to clearly explain to him and guide him on the importance of the same. This was not done and he was blackmailed to continue with the trial. Further, the third magistrate took over when the key witnesses had testified and therefore he determined a case in which he was not quite familiar with. That the trial court failed to warn self and record on the proceedings that the complainant was a child before admitting her evidence as superior courts have warned because such victims are susceptible to coaching or coercion from adults. That the complainant was coached hence her evidence was not credible. Further, the trial court termed his defence a mere denial and the prosecution failed to rebut his defence and the evidence introduced during his defence. The trial court thus erred dismissing his defence and absolving the prosecution from the legal burden to rebut the defence.

7. The trial court also erred by failing to invoke Section 33 of the *Sexual Offences Act* and only depended on the complainant's oral evidence whereas Section 33 cite circumstantial evidence as key. That the learned magistrate ought to have adduced circumstantial evidence surrounding the alleged defilement as the complainant testified that she was defiled while at her home whilst nobody saw him enter into

or leave her home. The other incidents happened when she was going to school raising the question as why she did not shout for help and why no one witnessed the ordeal. She was also found to be pregnant and though DNA test is not mandatory, the same was important circumstantial evidence which could have added weight to the prosecution's case. That he was not accorded a fair trial as he was not accorded a right to have an advocate as he had requested for time to secure service of an advocate which request was turned down by the court hence his right under Article 50(2) (g) of *the Constitution* was contravened. Article 50(2)(e) was also contravened as the case took so long to be completed. He was also discriminated due to his age and sex. That it was discrimination because he was a man on trial against a female child.

8. With respect to sentence, he submitted that the trial court meted out a sentence which was harsh, mandatory and unconstitutional and failed to consider the mitigating factors, non-aggravating factor and the fact that he was a first time offender. He submitted that mandatory sentences have be frowned upon by superior courts including Muruatetu case among other cases. That he was eligible for non-custodial sentence but the trial court failed to consider all the mitigating factors.

9. In rejoinder, the Respondent's counsel submitted that the Appellant failed to formally seek leave to amend the petition of appeal which is contrary to Section 350(2) of the Criminal Procedure Code. That if he had sought leave, he would have accorded the Respondent an opportunity to respond to the new grounds of appeal. She urged the court to disregard the amended grounds of appeal.

10. She submitted that age was proved as PW1 and PW2 testified that she was 16 years old. The age assessment report produced indicated that she was approximately 15 years thus the age given by PW1 and PW2 was not far off from the one in the age assessment report. Further their testimony and the age assessment report confirmed that she was a minor at the time of the offence. Penetration was also sufficiently proved as PW1 testified that it was the Appellant who defiled her. That she consistently gave a detailed testimony on the chain of events preceding the ordeal on how he defiled her and even warned her against telling her mother about it and how he visited her home to warn her against telling her mother that he was the one who was responsible for her pregnancy. PW2 corroborated her evidence and medical evidence corroborated the fact of penetration. As to identification, she submitted that PW1 identified him as the defiler and also visited her home to warn her against revealing that he was responsible for her pregnancy. That this coupled by the fact that PW2 testified that he was their neighbour, there could be no error as to identification.

11. She submitted that it is not mandatory for the victim's evidence to be corroborated pursuant to Section 124 of the *Evidence Act*. That the court did not conduct voir dire examination since she was 16 years old and therefore the trial court had no reason to doubt her evidence as to need corroboration before it could rely on the evidence tendered. As to non -compliance with Section 200(3) of the Criminal Procedure Code, she submitted that he was given a chance twice to choose whether the matter should proceed or start afresh but he elected to proceed and never made an application to have any witness recalled. He also had ample time cross examining the prosecution's witness and therefore cannot say that he had been unfairly heard. As to whether his defence was considered, she submitted that his defence was a mere denial without any substantive explanation of the events of the material days. That he failed to give conflicting version of events that would cast doubt on the prosecution's case.

12. Regarding sentence, counsel submitted that the sentence imposed is the one prescribed under the law and commensurate to the offence and was merited going by the circumstances of the case. She further submitted that the Supreme Court in Petition E018/2023 R vs Joshua Gichuki Mwangi also clarified that the minimum mandatory sentences under the *Sexual Offences Act* are lawful and constitutional and Muruatetu case only applied to murder cases.

13. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.

14. This duty was set out in Okeno vs. Republic [1972] EA by the Court of Appeal as follows;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a 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 findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see Peters vs. Sunday Post [1958] E.A 424."

15. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings 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."

16. To this end a summary of the evidence at trial would be a suitable point of departure.

17. Complainant in her sworn testimony testified that she was 16 years old and was born on 15/12/2004. On 01/05/2018, she was at home alone as her mother had gone to town and her brother was not around and the Appellant had sexual intercourse with her at her brother's house. He removed her underpants and his clothes and she was lying on the bed. She did not want to have sex with him. He inserted his penis into her vagina and he then left. She did not inform her mother as he had warned her against informing her. She met him again in the forest as she was going to school and he lured her and had sexual intercourse with her. Another day she was going to school when she met him. She ran away but he caught up with her and led her into the forest, removed her underpants and removed his clothes and inserted his penis into her vagina. He also touched her breast with his fingers. He had sex with her three times. That she met him on the first date when she was going to fetch water and she saw him and ran away but he caught up with her and led her into the bush. He removed her underpants and his underwear and removed his penis which he inserted into her vagina. He threatened to beat her if she told her mother that he had defiled her. In June 2016, he visited their home and warned her against telling anyone that he was the one who had made her pregnant and she told him that if she found out that she was pregnant, she will inform her mother that he was the one who was responsible. That her mother later found out that she was pregnant when her body changed. That she had not known him before the offence.

18. She testified on cross examination that she could not recall the day he went to her home but it was in May. That he threatened to tell his father if she reported that he had made her pregnant. That she knew his father. He removed his under wear and that he had worn a short and underwear.

19. PW2, complainant's mother testified that the complainant was 16 years old as she was born on 15th December but she could not recall the year. She testified that she noted that the complainant was pregnant around October/November, 2018 but she denied. After sometime, she noted that the stomach had grown and she asked her as to who was responsible and she said it was the Appellant who had warned her against informing her. She reported and he was arrested. That she blamed the Appellant because he was their neighbour. She testified that she had no differences with him.

20. On cross examination, she maintained that the complainant informed her that he was the one who was responsible and that she knew about the pregnancy when she was about 6 months pregnant. That she said she got pregnant in April, 2018.

21. PW3, the clinical officer testified on behalf of a colleague who was off duty. She testified that she had worked with him for a period of two years thus she was familiar with his handwriting and signature. She testified that on examination, her vagina, labia majora and minora were normal, there were no injuries, there was a whitish discharge around the vagina as a result of pregnancy and urinalysis revealed a bacterial infection. The P3 form did not indicate the age of her pregnancy. She produced the P3 form as Pexhibit 1. She testified that age assessment was conducted which approximated her age as 15 years old. She produced the age assessment report as Pexhibit 2.

22. She testified on cross examination that the complainant had been defiled weeks before visiting the hospital according to the age of the pregnancy. That she could not tell the age of her pregnancy as she did not examine her and the P3 form did not indicate the age of the pregnancy. That she could not tell how many times she was defiled.

23. PW4, the investigating officer testified that he was assigned the case after the previous investigating officer was transferred. He produced the investigation diary as Pexhibit3.

24. He testified on cross examination that he was the one who arrested the appellant and that the incident was reported after five months.

25. The appellant in his unsworn defence testified that he was arrested on 07/11/2018 and he was taken to court and charges were read to him. That the charges were false and the complainant could not tell the date when he questioned her. He denied committing the offence.

26. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had regard to the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.

27. But before delving into the merit of the appeal, it is noteworthy that the Appellant raised preliminary points of law. He argued that Section 200(3) of the Criminal Procedure Code was not complied with as the said section was loosely read to him and was not fully elaborated. That the trial court had a duty to clearly explain to him and guide him on the importance of the same but this was not done.

28. I have read through the trial court record and contrary to the Appellant's contention, Hon Njeri Thuku who took over the matter from the magistrate who was on transfer noted on 07/03/2019 as follows;

> Court: I note Hon. Gichimu who started this case is on transfer to Runyenjes. Under section 200(3) Criminal Procedure Code, I am required to find out from you, would you like the case to continue from where it reached or start a fresh? You have the right to recall the witnesses who testified.
>
> Accused: I want the case to continue from where it reached.

29. At this stage, only two witnesses had testified, the complainant and her mother. The matter was later re allocated to another court and no witness had testified before Hon. Njeri Thuku. Hon. Masivo took over the matter and on 17/01/2020, he recorded as follows;

> Court: Provisions of section 200(3) of the Criminal Procedure Code are hereby explained to the Accused.
>
> Accused: I would like my case to proceed from where it had reached.

30. Clearly, the provision of the said section was explained to him twice and he maintained that he wanted to proceed from where the matter had reached. Hon. Njeri Thuku also informed him that he had a right to recall the witnesses but he chose to proceed. It therefore follows that he cannot now claim that the provision of the said section was not explained to him.

31. As to the delay of the trial, the record speaks for itself in that the trial delayed one, because of his unavailability which had necessitated the issuance of warrant of arrest against him and due to the fact that the court could not travel to Dol Dol for mobile court for various reasons.

32. The Appellant raises another preliminary point that he was not accorded a fair trial as he was not accorded a right to have an advocate as he had requested for time to secure service of an advocate which request was turned down by the court hence his right under Article 50(2) (g) of *the Constitution* was contravened.

33. The record shows that on 05/12/2018, the prosecution counsel had two witnesses but the matter did not proceed as the Appellant told the court that he was not ready as he had not received the witness statements and the matter was adjourned. The matter was set down for hearing on 09/01/2019 and on the said day, he informed the court that he was not ready because he was looking for an advocate. The trial court rejected his request by stating that the reasons for adjournment by the appellant were not sufficient and ordered the case to proceed. On the said day, the prosecution had two witnesses, the complainant and her mother who testified.

34. Article 50(2)(g) of *the Constitution* provides that;

> Every accused person has the right to a fair trial, which includes the right-
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly.

35. In B M K v Republic 2015KEHC998(KLR), Nyamweya J held as follows;

> " On the argument that the Appellant's right to be represented by an Advocate was violated, I note that the right to legal representation must also include the right to be afforded

a reasonable opportunity of securing it. Therefore, a court is obliged to consider an application by an accused for a postponement in order to enable him to obtain legal representation, and a refusal to grant such a postponement may amount to an irregularity. Where an accused's legal representative withdraws from the case or is not present as was the case in this appeal, the appropriate procedure to be employed by a Court should be to ask the accused whether he wished to have the opportunity to instruct another legal representative and/or whether he wishes to undertake his own defence. The failure to do so by the trial Court was irregular and invalidated the proceedings. However, it must also be stated that in circumstances where an accused has sufficient opportunity to obtain legal representation and fails to arrange this, he cannot subsequently attack the proceedings unless he can furnish an acceptable explanation for his failure. I therefore find for these reasons that the refusal by the trial Court to grant the Appellant a postponement of the trial for the purpose of enabling him to obtain a new advocate violated his right to have adequate time to prepare his defence, and to procure legal representation. I also note that this irregularity prejudiced the Appellant as the trial magistrate on that date ruled that the trial was to start de novo, without the Appellant having the benefit on legal advice on the issue, and three prosecution witnesses then proceeded to give evidence on that date including the key witness who was the complainant. I am therefore constrained to quash the conviction and sentence on the ground that he was not accorded a fair trial by the trial Court."

36. In the circumstances of this case the period between plea taking and the first hearing date when the Appellant sought adjournment and the period between that adjournment and the return date in my view afforded the Appellant adequate time to secure counsel. The matter then came up for hearing on several occasions but the Appellant never instructed an advocate. The right to be represented by an advocate of choice cannot be translated to be a carte blanche for an accused person to delay a trial. The constitutional guarantee is firmly etched in *the constitution* but an indolent party ought not to raise the issue subsequently after trial having failed to actualize the right. As held in B M K v Republic (supra), in circumstances where an accused has sufficient opportunity to obtain legal representation and fails to arrange this, he cannot subsequently attack the proceedings unless he can furnish an acceptable explanation for his failure.

37. Now onto the substantive issues. It is trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013, where it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

38. In the case of Kaingu Elias Kasomo vs. Republic Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

> " Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

39. This position was reaffirmed in Alfayo Gombe Okello vs. Republic (2010) eKLR where the Court stated that:

> " In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

40. In Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011 it was held that:

> "...while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."

41. In the case of Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000, it was observed as follows:

> " 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..."

42. In Chipala vs. Rep. [1993] 16 (2) MLR 498 the Malawian High Court held at 499 that:

> " It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person."

43. I have deliberately gone into great detail on the principles already established in so far as proof of age of a victim of a sexual offence is concerned. This is in a bid to put the evidence of age in this appeal in proper perspective. The appellant argued that the complainant's age was not proved since it was the clinical officer who produced the age assessment report instead of a dentist. I have reviewed the evidence on the production of the age assessment report. That aspect of the evidence was very casually treated by the prosecution in that the clinical officer produced the report without laying a proper basis as expected vide provisions of Section 78 and 33 of the *Evidence Act*.

44. That said, however, and as seen in the exposition of the law above, we have the evidence of PW2 the mother to the complainant, who despite not being armed with a birth certificate, gave evidence that the complainant was 16 years old. PW2 was the parent to the complainant and in line with the decision in Francis Omuroni vs. Uganda, (supra), am satisfied the age of the complainant was proved.

45. Notably, the age assessment was done 7 months after the time of the Act thus confirming the fact that the minor was 15 years at the time of the incident.

46. On the question of penetration, section 2 of the *Sexual Offences Act* defines "penetration" as:

> the partial or complete insertion of the genital organs of a person into the genital organs of another person.

47. The appellant asserts he is not the person who impregnated the complainant. Whether the victim of a sexual offence is impregnated or not is irrelevant to the ingredient of the offence of defilement. The appellant contends that no DNA was conducted to prove that he was responsible for impregnating the complainant. In Aml v Republic [2012] eKLR (Mombasa), this Court upheld the view that:

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

48. This is further affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

49. Guided by the foregoing judicial decisions, am satisfied that the ground that no DNA was conducted on the complainant has no merit in this appeal.

50. I have reviewed the evidence and judgement of the trial court. The court in a very precise and meticulous manner analysed the evidence and came to the conclusion, which conclusion I concur with, that the complainant gave graphic details of the sexual encounters between herself and the Appellant describing with clarity how the Appellant would insert his penis into her vagina. I have no hestitation in making a finding that the complainant was penetrated.

51. The next pertinent issue is whether the Appellant was the perpetrator of the Act. There is evidence that the Appellant was a neighbour to the complainant. The sexual encounters were several and evidence on record shows that they all took place in broad daylight. In rebuttal to this evidence the Appellant in his unsworn defence testified that he was arrested on 07/11/2018 and he was taken to court and charges were read to him. That the charges were false and the complainant could not tell the date when he questioned her. He denied committing the offence.

52. The Appellant had no duty to prove his innocence. However, his bare statement of defence in an unsworn statement bereft of any explanation why the complainant would pick on him and frame him falls far short of displacing the prosecution evidence. From the evidence on record, am satisfied that the appellant was identified by way of recognition as the person who committed the offence as alleged.

53. As regards the sentence, sentence is at the discretion of the court and the Appellant has not raised any grounds upon which this court can interfere with the exercise of discretion. In any event, the finding 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) is relevant. Considering the application of mandatory minimum sentences in sexual offences, the court stated;

> " Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act*

remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence".

54. I find no error of law or fact on the part of the learned magistrate in the conviction of the appellant. Accordingly, i affirm and uphold the conviction and sentence of the appellant for the offence of defilement.

55. The appeal has no merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF OCTOBER 2025.

A.K. NDUNG'U

JUDGE