Mwai v Republic (Criminal Appeal E040 of 2023)
[2025] KEHC 14427 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14427 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E040 OF 2023

AK NDUNG'U, J

OCTOBER 9, 2025

BETWEEN

SIMON KINYUA MWAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki
CM Sexual Offences Case 73 of 2019– V. Masivo, SRM)

JUDGMENT

1. The Appellant, Simon Kinyua Mwai was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between the month of March and April, 2019 in Kieni East Subcounty within Nyeri County, unlawfully and intentionally caused his penis (genital organ) to penetrate the genital organ (vagina) of RNW. On 02/05/2023, he was sentenced to fifteen (15) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he filed the petition of appeal on 15/05/2023. He also filed supplementary grounds of appeal accompanying his submissions. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate failed to note that he had no previous record.

    ii. The learned magistrate failed to note that the case was not proved beyond reasonable doubt.

    iii. The learned magistrate failed to note that he was not placed squarely at the crime scene.

    iv. The learned magistrate failed to note that he was not subjected to medical examination.

    v. The learned magistrate failed to note that DNA test was not conducted to prove the case.
    Amended supplementary grounds of appeal

i. The learned magistrate erred by failing to note that identity of the perpetrator was not proved beyond reasonable doubt.

ii. The learned magistrate failed to note that the prosecution's case was riddled with inconsistencies, contradictions and non-corroborating evidence.

iii. The learned magistrate failed to appreciate that there were circumstantial aspects of the case to remotely link him with the offence of defilement that was fabricated against him.

iv. The learned magistrate misapplied section 124 of the *Evidence Act* in the backdrop of the lack of integrity, honesty, truthfulness and reliability of PW1's evidence.

v. The learned magistrate failed to weigh his defence vis-à-vis the weak prosecution's case.

vi. The learned magistrate erred by meting out a mandatory minimum sentence without considering any mitigating factors.

3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the medical evidence failed to create a nexus to link him to the defilement of the complainant. That the prosecution was able to prove the age and penetration as the complainant was pregnant but failed to prove that he was the perpetrator. That the complainant informed her mother that Josiah was responsible for her pregnancy a name that he vehemently denied to be his alias during his defence. No evidence was produced from any independent source including his employer to confirm that he was known as Josiah. That the court held that the complainant's mother used to send her to her grandfather where he used to work which was not the case as PW2 stated that the Appellant's employer, whom PW1 lied was her grandfather was not remotely related to her. PW2 confirmed that the complainant's grandfather was living in Mathira which was far from their home. It therefore follows that PW1 was lying to court as his employer was not her grandfather.

4. He submitted that her narration as to when and where the sexual assault took place was disjointed and vague as she was unable to describe the alleged place or house. The matter was farfetched as PW1 testified that she was being threatened with poisoning if she revealed the affair yet she claimed to go back on her own accord. That a 16 year- old is intelligent enough not to fear someone threatening her with poisoning. That she claimed that the encounter took place on Saturdays at her grandfather's place and on Sundays at her home in absence of her mother yet no one saw them even the neighbours bearing in mind it used to be in broad day light. That PW1 and PW2 evidence did not corroborate as PW2 did not testify that she would send PW1 to grandfather's place on Saturdays as PW1 claimed. He submitted that PW4, the investigating officer failed to conduct proper investigations. She also conflicted PW1 and PW2's evidence as she testified that the Appellant would visit the minor at their home when her mother was away and the scene was at their home. She did not mention the scene at his workplace. That this contradiction proved that PW1 was unreliable witness who lacked credibility. Additionally, PW4 testified that the sexual encounter occurred in March and June 2019 which was not recorded in the charge sheet which shows that there was misinformation ab initio which further dents PW1's credibility.

5. On medical evidence, he submitted that PW1 was examined in August and was found to be six months pregnant which meant that she might have conceived in the month of February and there was no evidence from PW1 that she was in a sexual relationship with him on the said month as she testified that the sexual encounter was in the month of March to April. That this left doubt as to who could have impregnated her in the said month. Though there was penetration due to pregnancy, identity of the perpetrator was not proved. Further, epithelial cells were seen which revealed a recent sexual encounter raising a question as to who could have engaged in sex with her in the month of August. That PW3,

the clinical officer contradicted himself when he testified that defilement was not fresh yet there was presence of epithelial cells. That the presence of epithelial cells did not connect him to the defilement. That in light of the foregoing, DNA test was important in this case to prove paternity. Further, DNA was important in light of PW1 lack of integrity, honesty, truthfulness and trustworthiness as she claimed no one else had penetrated her except him. Although DNA test is not mandatory, it would have removed all the doubts.

6. He submitted that his defence of alibi was quashed without cogent reasons as he denied the name Josiah and he testified that he was a herdsman and would graze the cattle during weekends and holidays which is a common knowledge that cattle must graze daily. The investigating officer failed to interrogate his employer to verify whether the cattle were being grazed even during the weekends. Therefore, his defence was uncontroverted and he deserved a benefit of doubt. As to sentence, he submitted that he was a first time offender and there were no aggravating factors that were adduced to warrant a 15 years sentence. The court also failed to consider an option of a non-custodial sentence and that there were other factors that suggested a defence under section 8(5) and 8(6) of the *Sexual Offences Act*. Further, the minimum sentences have been termed to be unconstitutional.

7. In rejoinder, the Respondent's counsel submitted that the complainant's age was proved through her birth certificate. With respect to penetration, she submitted that the complainant was examined days after the incident therefore unlikely that there would be any visible injuries on her genetalia at the time of examination. That the issue of penetration was supported by her testimony when she stated that she engaged in sexual intercourse with the Appellant. As to identification, she submitted that identification was through recognition as not only was he well known to her, she also referred him as Kinyua Simon who was employed as a herder and that they were friends in March 2019 and from that time till April 2019, they engaged in sex. That his identification was not challenged during cross examination. That his defence was properly rejected as it was a mere denial because he admitted that he was a herder and denied knowing the complainant and denied engaging in sex with her.

8. With respect to sentence, she submitted that it was proper, justified and lenient taking into consideration the nature of the offence and provision of mandatory minimum sentence. That the issue of minimum sentences was distinguished by the Supreme Court in R v Joshua Gichuki Mwangi & others Petition No. E018 of 2023 from mandatory sentences discussed in the Muruatetu case where the court clarified that Muruatetu case does not apply to minimum sentences under the *Sexual Offences Act*. Therefore, the sentence of 15 years was within the law and there was no discretion to reduce the sentence any lower.

9. 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.

10. 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."

11. 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.

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

13. Complainant in her sworn testimony testified that she knew the Appellant, Kinyua Simon as he was employed as a herder in their village. He was employed by her grandfather. They were friends in March 2019 and he seduced her to be his lover but she declined. In March to April 2019, they engaged in sex or made love. The Appellant would visit her home when her mother was not there. She testified that he used to threaten her with poisoning if she revealed their sexual encounter to her mother. That her mother questioned why her stomach was big and she took her to hospital for a pregnancy test which came out positive. They went to police station and informed them what happened between her and the Appellant.

14. On cross examination by Appellant's counsel, she testified that they used to have sex on Saturdays. That her mother used to send her at her grandfather's where the Appellant worked to check whether if he was around and the Appellant would tell her that he was not around. He was her boyfriend and she accepted to have sex with him because he convinced her. That he would insist that it was a must for her to sleep with him. He used to give her Kshs.50/- and he would visit their home on Sundays when her mother was not around. That she was not going to his place but to her grandfather's place despite his threats to poison her and she stopped visiting him at the end of April after the poisoning threat.

15. She testified on re-examination that she gave birth on 14th August. That when she engaged in sex with the Appellant, she was in class 8 and he knew that she was a student.

16. PW2, the Complainant's mother testified that she noticed the bulging stomach and she questioned the complainant who said it was due to overeating. She was not convinced and she took her to hospital and the pregnancy test turned to be positive. She asked her in the presence of the doctor as to who was responsible and she mentioned Simon Kinyua whose other name was Josiah. She further mentioned that she did not disclose this due to threats of being poisoned and beaten. The Appellant was a neighbour who was employed to graze cows. She reported to police station and she accompanied police officer to Nanyuki hospital where the complainant was examined.

17. On cross examination, she testified that on Saturdays of March-April, 2019, PW1 would normally be at home and she would occasionally go for tuition. She testified that she was normally away during the same period and she would attend church on Sundays. That the Appellant's employer was not related to her. PW1 informed her Josiah used to call her and when she stopped visiting him, he started visiting her home. That she did not reveal due to threats as Josiah had promised to poison and beat her. That the Appellant was the only person known as Josiah in the area.

18. On re-examination, she testified that PW1 would get back from tuition at lunch time. That her grandfather was alive and was living in Mathira which was far from her home and she never sent her there.

19. PW3, the clinical officer produced the P3 and PRC forms after laying a proper basis on behalf of a colleague who was on leave. He testified that on examination, the outer genetalia was normal, there were no tears and bruises on labia majora and labia minora, hymen was broken but not freshly broken, there was no discharge, HIV test was negative, HDRL was negative and the pregnancy test was positive. On high vagina swab, there were many epithelial cells and there was no presence of spermatozoa. That the pregnancy was 19 weeks and five days. That his colleague concluded that pregnancy confirmed sexual encounter. He produced the P3 form as Pexhibit2 and PRC form as Pexhibit3.

20. On cross examination, he testified that Nancy Muthoni, the maker of the document was a registered officer from KMTC Meru though he did not know her admissions and license year. That he had worked at Nanyuki referral hospital with Nancy for a period of three years and he found her working there when he joined. That he was in charge of GBV department while Nancy was attached at ear, nose and throat department. That he was familiar with her signature though he did not have any document to confirm her signature. That in the event of fresh defilement, there would be injuries on labia majora and minora, tenderness on the vulva and presence of spermatozoa and in the event of an old defilement, the injuries might have healed.

21. On re-examination, he testified that he was well versed with Nancy's handwriting as they had worked together despite departmental demarcation. That the hospital confirmed that the signature belonged to her. That the defilement in this case was not fresh.

22. PW4 was the investigating officer. She testified that PW1 and PW2 reported that between the month of March and June 2019, PW1 was defiled by the Appellant who resided within their village. The minor informed her that they used to have sexual intercourse on Saturdays when her mother was absent. The Appellant would go to her home when her mother was not there and they would engage in sex. They escorted her to hospital and the lab test confirmed that she was 6 months pregnant. That they visited the scene and arrested the Appellant. The complainant also identified where they used to commit the offence. That the Appellant promised to marry the complainant after class 8 exams. He also recorded his witness statement where he admitted committing the offence. The minor delivered on 30/12/2019. She produced complainant's birth certificate as Pexhibit1 and investigation diary as Pexhibit4.

23. On cross examination, she testified that at the reporting time, the complainant referred to the Appellant as Jesse and the name of the Appellant was Josiah Jesse Kinyua. That according to the complainant's statement, she named the suspect as Josiah Kinyua. That the scene was at their home and the complainant told them that she was coerced by the Appellant.

24. On re-examination, she testified that the Appellant gave his name to the villager as Jesse Josiah Kinyua but his name was Simon Kinyua according to his identity card as confirmed while at police station. The complainant identified him.

25. The appellant in his sworn defence testified that in March-June, 2019, he was employed as a herder where he used to graze cows at Mt. Kenya Forest. He would start work at 8:00am until 5:00pm and upon return, he would graze the cows. That Jesse Kinyua was not his name and he has never used that name. The complainant was not familiar to him and he had never had sex with her. That the child born was not his and that he used to work the entire week.

26. On cross examination, he testified that in 2019, he was a resident at Kirima and he did not know the complainant though she used to see him grazing. He did not have any difference with the complainant or her family.

27. On re-examination, he testified that he was grazing in open and people knew the nature of his work.

28. 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 due regard of 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.

29. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

30. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of 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."

31. In the present appeal, the complainant's age was not disputed. PW4, the investigating officer produced the complainant's birth certificate as Pexhibit1 which shows that she was born on 14/08/2003. The offence was committed in the month of March to April 2019 and therefore the complainant was a minor at the material time.

32. On the question whether there was penetration of the Complainant's genetalia, there is medical evidence of pregnancy. The Appellant does not dispute that fact and indeed admits it even in his own submissions. He, however, maintains that the medical evidence did not link him to the offence.

33. Prove of penetration is not solely dependent on medical evidence. The court of Appeal in Evans Wanjala Wanyonyi v Republic [2019] KECA 679 (KLR) stated;

> " The complainant PW 1 testified she had sexual intercourse with the appellant as a result of which she became pregnant. On his part, the appellant did not challenge the evidence on having sexual intercourse with the complainant; the age of the complainant as 14 years is not disputed; his defence is that he is not the one who impregnated the complainant.
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> 20. An essential ingredient in the offence of defilement is penetration not impregnation. In F O D - v -Republic [2014] eKLR, it was stated in order to secure a conviction for the offence of defilement under the *Sexual Offences Act*, the prosecution must establish that the person has committed an act which causes penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
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> 21. 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."

22. This was 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."

34. The more contested duel between the parties is on the question whether the Appellant was identified as the perpetrator of the act against the complainant. His main contention is that the Complainant referred to him as Josiah yet that was not his name and that his defence was not considered.

35. I have reviewed the evidence on record. The question of the identity of the Appellant was ably answered in evidence in that the Appellant who was employed as a herder in the village commonly used the name Josiah and it is on production of his identity card to the police that his full names were established.

36. More importantly, the question of the identity does not only lie in the name. The identification of the Appellant by the Complainant was based on her personal knowledge of him, a person who was employed in the village and the person who she interacted with and had several sexual encounters with. The record reveals that the appellant was a person known to the complainant; his identification as perpetrator of the offence was by way of recognition.

37. As rightly observed by the trial court, there was no reason, and indeed the Appellant offered none in his defence, why the Complainant would frame him with the offence when there is no evidence of a past grudge. His defence bolsters this conclusion since he says the Complainant was not familiar with him and he was not familiar with her. Why then would a stranger frame him? The only logical inference is that the Appellant's defence could not, in light of the evidence on record, possibly be true. There was prove that the Appellant was the perpetrator of the Act.

38. Regarding sentence, the Appellant contends that he was a first time offender and there were no aggravating factors that were shown to warrant a 15 years sentence. The court also failed to consider an option of a non-custodial sentence and that there were other factors that suggested a defence under section 8(5) and 8(6) of the *Sexual Offences Act*. Further, the minimum sentences have been termed to be unconstitutional.

39. The sentence imposed on the Appellant was within the law. That the issue of minimum sentences has now been distinguished by the Supreme Court in R v Joshua Gichuki Mwangi & others Petition No. E018 of 2023 from mandatory sentences discussed in the Muruatetu case where the court clarified that Muruatetu case does not apply to minimum sentences under the *Sexual Offences Act*. Therefore, the sentence of 15 years was within the law and there was no discretion to reduce the sentence any lower. I have no basis upon which to interfere with the sentence.

40. With the result that the Appeal herein lacks in merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2025.

A.K. NDUNG'U

JUDGE