



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Munyiri alias Messi v Republic (Criminal Appeal E081 of 2022)
[2025] KEHC 14235 (KLR) (8 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E081 OF 2022
HI ONG'UDI, J
OCTOBER 8, 2025**

BETWEEN

SAMUEL MUNYIRI ALIAS MESSI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment delivered by Hon. Y. I. Khatambi in
Nakuru Chief Magistrate's Court S. O No. E005 of 2021 on 13th October, 2021)*

JUDGMENT

1. Samuel Munyiri alias Messi hereinafter referred to as the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars were that the appellant on diverse dates between 1st July, and 3rd August, 2021 at unknown time at [Particulars withheld] area, Kabatini location intentionally committed an act by inserting his male genital organ namely penis into the female genital area of RN a child aged 13 years causing penetration. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
2. He denied both charges and the matter proceeded to full hearing with the prosecution calling six (6) witnesses. The appellant gave a sworn defence without calling any witnesses. Thereafter the trial Magistrate delivered a Judgment on 13th October, 2022 and found the appellant guilty and convicted him and later sentenced him to thirty-five (35) years imprisonment on 10th November, 2022.
3. Being dissatisfied with the conviction and sentence the appellant filed this appeal dated 23rd November, 2022 on the following grounds



- a. That the learned trial magistrate erred in law and in facts during the trial when she convicted the appellant and gave a harsh punishment of 35 years in jail because of the evidence adduced before the honorable court which was all total fabrication.
 - b. That the learned trial magistrate erred in law and in facts when she relied on evidence adduced by the prosecution witnesses without noting that he was not examined to prove he was the one who committed the offence.
 - c. That the learned trial magistrate erred in both law and in facts during the trial when she failed to note that investigation of this case was poorly done.
 - d. That the learned trial magistrate erred in law and in facts when she relied on the evidence adduced before the court by the six (6) witnesses which was not linking him directly to prove that he was the one who defiled the complainant.
 - e. That the learned trial magistrate erred in law and in facts when she convicted him without considering his sworn defence according to the trial procedure.
4. The evidence placed before the trial court was by the victim (PW1) and others. PW1 aged 13 years gave sworn evidence after a *voire dire* examination. She stated that she lived with her mother in a one roomed mud house. The door was wooden and unlockable. On the material day which was a Saturday, she was in the house alone and it was at night. She was asleep when she heard a knock on the door which was pushed and left open. There was full moon and she was able to identify the person who came as "Messi" the appellant who was her mother's friend who used to come there. She had covered herself with a shawl which Messi threw down. She was wearing a dress which he pulled up and removed.
 5. He touched her private parts and lay on her after removing his trouser. She felt pain in her vagina and cried as he slept on her. Her mother came but Messi hid behind the house. Her mother was drunk when she came while making noise and Messi managed to go away. She took her shawl, covered herself and slept.
 6. The next day her mother beat her with a panga when she told her what had happened the previous night. The child said she felt a lot of pain when she urinated. She was later admitted in hospital after she informed her teacher what had happened to her.
 7. In cross examination she said she knew the appellant who used to come to their house quite often. He mainly came at night around 9.00pm as he was her mother's friend.
 8. PW2 – EN a teacher at [Particulars withheld] Primary School where PW1 went testified how during July-August, 2021 PW1 used to collapse in school and they got concerned. On talking to her the child said she was having pain in the stomach and in the vagina while urinating. PW2 reported the matter to the Head teacher who reported to the area chief Kaptembwa. The Head teacher took the child to Kabati health centre from where it was confirmed the child has been defiled.
 9. PW3 B a sister to PW1 was called to [Particulars withheld] primary school where the teacher told her about PW1's condition after being defiled by about 3 people the appellant being one of them. She confirmed that the appellant was their mother's boyfriend. PW3 could not take PW1 to her house as she lived with her 3 children and a younger sister. She informed their mother of the defilement just to learn the next day that the mother had beaten PW1 who fell down unconscious more than thrice. The child was taken to their auntie together with her drugs.



10. The hospital confirmed that the child had been defiled, and she was even admitted for ten (10) days. The matter was reported to the police and the appellant was arrested. PW3 confirmed that PW1 was epileptic.
11. PW4 Eunice Amemba is a clinical officer in medicine and surgery at Kabatini health centre. She is a specialist in reproduction health Nakuru MTC. She attended to PW1 on claims of defilement. Her findings were that the child could not talk, had a torn hymen with bruises on the outer genitalia with foul swelling discharge. Drugs were administered. She filled the P3 form which she produced as PEXB 2 while the PRC Form with similar findings was produced as PEXB1.
12. PW5 Cecilia Martin Kahungu assistant chief Wendo Kabatini Ward confirmed the teacher's (PW2) evidence. She talked to PW1 who appeared disturbed. She told her about the defilement by the appellant and another. She was not able to get the children's officer.
13. C. Moffat Moyaka Joseph No. xxx of Kabatini police post (PW6) was the investigating officer in this matter. The defilement report had been made by PW3. He summarized the evidence by all the witnesses (PW1 – PW5). He visited the scene which was a one roomed house. It had a bed and a three-seater chair on which PW1 slept. Messi the appellant was traced at a bar on 27th August, 2021, from where he was arrested. He produced PW1's birth certificate (P. EXB 3) showing her date of birth as 27th November, 2007.
14. In cross examination he said PW1's mother knew of what was happening to the child but she did nothing as she was always drunk.
15. The appellant in his sworn defence denied committing the offence. He said PW's mother was his lover for four (4) years but they fell out in May, 2021 due to her unfaithfulness. She had threatened him for leaving her. He denied ever going to her house. He said it was PW1's mother who used to come to his home with PW1 and spend the night there.
16. The appeal was heard by way of written submissions.

Appellant's submissions

17. The appellant has submitted basically on two issues namely:
 - i. That he was not identified as the culprit since it was at night.
 - ii. That the sentence that was imposed is unlawful as its not in line with section 8(3) of the [Sexual Offences Act](#) under which he was charged.
18. It is his submission that the victim's mother's utterances and actions confirmed that the victim was lying and the trial court should not have believed her. He argues that by being given a sentence of 35 years the court was not fair and it violated Article 27 of [the Constitution](#) which advocates for equality. He claims to have been discriminated against. The rest of the submissions are a mere repetition of the above.

Respondent's submissions

19. These are dated 5th May, 2025 having been filed by M/s Emma Okok principal prosecution counsel. Counsel opposed the appeal. She submitted on the evidence adduced on the 3 ingredients of penetration, age and identity of the culprit and urged the court to find that the same had been proved. Counsel stressed that the appellant who is also known as Messi was identified by recognition which is the best form of identification.



20. Additionally, counsel submitted that the appellant confirmed having been in a romantic relationship with PW1's mother but fell out in May 2021. He also confirmed being known as Messi. She submitted that the evidence by the prosecution was solid and the conviction should be upheld. On sentence counsel submitted that the 20 years sentence under section 8(3) of the Sexual Offences is the minimum sentence and can even be enhanced.
21. She referred to the sentencing guidelines 2023 whose objections for sentencing are as follows:
- i. Retribution: To punish the offender for their criminal conduct in a just manner.
 - ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
 - iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
 - iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs.
 - v. Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
 - vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
 - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - viii. Reintegration: To facilitate the re-entry of the offender into the society.
22. Based on the above, counsel contended that the sentence meted out by the trial court was proper in the circumstances of this case. She further urged the court to invoke the provisions of section 333(2) of the Criminal Procedure Code which had not been complied with by the trial court.
23. The appellant filed a replying affidavit filed on 28th July, 2025. Upon reading the same I found it to be a response/reply to the respondent's submissions and not a replying affidavit. In the response he argued on the issue of the 35 years sentence castigating the respondent for being in support of the same. He argues that in its submissions on the same counsel mis- interrupted the law.

Analysis and determination

24. This being a first appeal, this court is duty bound to re-evaluate and re-consider the evidence adduced before the trial court and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses testify hence give an allowance for that. This is a principle that is set out in section 347 of the Criminal Procedure Code and court decisions in:
- i. Okeno V Republic 1972 EA 32
 - ii. Kiilu & another V Republic [2005] I KLR 174
 - iii. Simiyu & another V Republic [2005] I KLR 192 among others.



25. Upon careful consideration of the record of appeal, grounds of appeal, both submissions and the law I find the main issue for determination to be whether a case of defilement was proved against the appellant. For a case of defilement to be proved the following ingredients must be established:
- i. Age of the victim
 - ii. Penetration
 - iii. Identification of the culprit

Age of the victim

26. The charge sheet showed the age of the victim to be 13 years. The victim (PW1) stated the same while the investigating officer (PW1) produced the birth certificate No. xxxxxx (PEXB 3) which showed the date of birth as 27th November, 2007. The date of incident was shown as 1st July – 3rd August, 2021. It was thus confirmed that PW1 was 13 years plus a few months. I therefore find that age was proved and the victim was a minor. She was taken through a voire dire examination and was found fit to give sworn evidence.

Penetration

27. PW1 in her evidence explained that she was all alone in their one roomed house. It was at night and there was moonlight. That the person who entered the house threw her shawl down and removed her dress and started touching her private parts. He then removed his trouser and lay on her on the chair. He lay on her while facing her and she felt pain in her vagina. To her what he did to her was bad manners. Thereafter she felt pain whenever she urinated she said. The next day she informed her mother on what had happened and her mother beat her up. At school the teachers noted something strange in PW1 and on being questioned she revealed what had been done to her and that's how she landed at the hospital (PW2 also confided in her elder sister (PW3)
28. The medical evidence by PW4 confirmed that indeed PW1 had been defiled. The clinical officer produced the P3 form (P. Exb2) and the PRC form (P. Exb 1). Both documents confirm PW1's and PW4's evidence. The child had to be admitted in hospital as stated by PW1, PW3, and PW4. It was also the evidence of PW2, Pw3, PW4 and PW6 that the child was in a lot of pain and had difficulty in walking.
29. Section 8(1) of the *Sexual Offences Act* defines defilement as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

While section 2 of the said Act defines penetration as:

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

30. Upon due consideration of the evidence analyzed above I am satisfied that indeed the victim's (PW1) genital organ was penetrated by a male genital organ. Thus, penetration was proved.

Identification of the culprit

31. The incident occurred at night (9pm) when PW1 was alone in the house. She said the assailant pushed the door open and left it like that. There was full moon and she was able to identify the person. Secondly



the person was known to her since he was her mother's boyfriend and used to come to the house with her. She gave his name as Messi.

32. PW3 who is PW1's elder sister told the court that when she spoke to PW1 she gave her the names of Messi, Shiria and Resta as the people who had been defiling her. She did not know Messi but knew he was their mother's boyfriend. The investigating officer (PW6) said PW1 told him it was Messi who had defiled her and he was her mother's lover. The officer said the man Messi was well known in the area. It was members of the public who led them in tracing Messi at a bar.
33. In his sworn evidence the appellant said on the date of arrest he had left work and gone to the center where he met police officers who asked for Messi. He confirmed to them that he was the one. He was then arrested. In cross examination he admitted having been in a romantic relationship with the victim's (PW1) mother for four (4) years. He confirmed having known PW1 since her childhood.
34. It is therefore clear that the appellant also known as Messi was well known to the victim (PW1) and vice versa. PW1 explained that the door on being pushed open was never closed. It remained open and there was full moon. There was therefore sufficient light coming into the one roomed house. PW1 could therefore not fail to identify the intruder who defiled her since he was a frequent visitor of her mother.
35. The appellant in his submissions focused so much on PW1's mother who never testified. The said lady beat up the child whenever she told her what the appellant had done to her. PW1 testified that on the night when she was defiled by the appellant her mother came home drunk when the defiler was still there but in hiding. As the drunken mother made noise, the defiler took off. This is the person whose actions the appellant wants this court to rely on to discredit PW1's evidence yet she never recorded a statement nor testified. That is not the law.
36. I also note that after PW1 gave all the incriminating evidence against the appellant, he only had 2 questions for her in cross-examination. This was her response.

“You used to come to our place at night around 9.00pm. you were my mother's friend”.

It is therefore clear that PW1's evidence was not shaken.

37. Upon careful analysis of all the evidence and the law I am fully satisfied that the appellant was very well identified as the person who defiled PW1. I find no reason to make this court to interfere with the conviction.
38. On sentencing this is what section 8(3) of the *Sexual Offences Act* provides:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”.

The twenty (20) years provided is the minimum sentence provided by the law. That means no lesser sentence can be meted out by the court. Does that mean a higher sentence cannot be meted out? My answer is in the negative. The court's hands are not tied to the 20 years minimum sentence. Depending on the circumstances of the case the trial court can and is allowed to pass a higher sentence. That cannot be said to amount to discrimination or inequality as long as the sentence is justified.

39. I have considered the circumstances of the case, the appellant's mitigation and the pre-sentence report. At the time of filing the report on 22nd October, 2022 the appellant was 46 years old which means he is 48 years now. What he did was very inhumane and beastly. He turned against the daughter of his lover, even if they had parted ways. I have equally considered the objectives of sentencing as enumerated in



the sentencing guidelines 2023 and the appellant's social life. At age 46 years he was still unmarried for reasons best known to him.

40. PW1 being his lover's daughter she ought to have been protected by him, which did not do. He did not only defile her once, or twice but severally. The learned trial Magistrate considered all this before exercising her discretion in passing the sentence which I do not find unlawful.

41. I am well guided on this by the Court of Appeal decision in Bernard Kimani Gacheru V Republic [2002] eKLR where it was held that:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case.

On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took not account, some wrong material or acted on a wrong principle. Even if the Appellate Court feels that the sentence is heavy and that the Appellant Court might not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogolla s/o Owoura V Reginum (1954) 21 270”.

Also see

(i) James V Republic (1950) 18 E.A.C.A. 147

(ii) Wanjema V Republic 1971 E.A 493

42. I have considered the appellant's age and the circumstances he finds himself in. On humanitarian grounds, I reduce his sentence of 35 years by seven (7) years which still remains above the mandatory sentence and is lawful. On that ground alone does the appeal succeed. Further as correctly pointed out by the prosecution counsel, the provisions of section 333(2) Criminal Procedure Code were not complied with. That will be effected by this court.

43. The upshot is that the conviction is confirmed while the sentence of 35 years is set aside and substituted with a sentence of 28 years imprisonment. The sentence shall run from the date of the appellants first appearance in court which is 14th September, 2021.

44. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 8TH DAY OF OCTOBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

