



**Njeru v Republic (Criminal Appeal E086 of 2024)
[2025] KEHC 13645 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13645 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E086 OF 2024
RM MWONGO, J
OCTOBER 1, 2025**

BETWEEN

AUGUSTINE MUCHANGI NJERU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. J. Otieno, in Embu
MCSO No. E003 of 2021 delivered 23rd November 2023)*

JUDGMENT

The Charge

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars are that on 13th January 2021 at [Particulars Withheld] in Embu North Subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AN, a child aged 5 years.
2. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars are that on 13th January, 2021, at [Particulars Withheld] in Embu North Subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of AN, a child aged 5 years.
3. The appellant pleaded ‘not guilty’ to the charge. A full hearing was conducted and the appellant was subsequently convicted and sentenced to life imprisonment.

The Petition of Appeal

4. Dissatisfied with the decision of the trial court, the appellant filed a petition of appeal seeking that the conviction and sentence be set aside. The appeal is premised on the following grounds:



1. That the learned trial magistrate erred in law and fact in failing to inform herself on the mental condition of the Appellant;
2. That the learned trial magistrate erred in law and facts in failing to appreciate that the Appellant was suffering from psychosis, a mental condition which significantly altered the Appellant's capacity to tender a defence;
3. That the learned trial magistrate erred in law and facts in convicting the Appellant and imposing a maximum sentence on the accused;
4. That the learned trial magistrate erred in law and facts in failing to inquire into the unsoundness of the accused; and
5. That the learned trial magistrate erred in law and facts in failing to invoke the requisite procedure under the Criminal Procedure Code in relation to the accused herein.

Summary of the Evidence in the trial court

5. PW1 was the victim. She stated that the appellant is known to her as Baba Brian. On the day of the incident, the appellant asked her to follow him so that he could buy her bread. She followed him but he took her to some bushes and defiled her. He threatened to kill her if she told anyone about it. She stated that Mama Hope took her to the hospital. In cross-examination, she stated that the appellant took her from her home when her father and brothers were present. He knew that the appellant was a neighbor.
6. PW2 was Hezron Macharia Maina, a clinical officer who examined the victim. He stated that upon genital examination, the victim had suffered a tear at the entry point of the vaginal orifice and the tear had been stitched at Tenri Hospital. The hymen was broken and he estimated that it had happened 24 hours prior. There were abrasions around her genital areas and there were no spermatozoa in the vagina. He produced the P3 and PRC forms as evidence.
7. PW3 was Purity Wanjiku a neighbour who stated that she was at home when the victim's father asked for her help looking for the victim. They asked one Julius who told them that he had seen someone going away with some children but he couldn't identify the person. Julius took his dogs and joined them to look for the victim. Shortly after the search began, they heard some screams and they saw the appellant trying to escape while putting on his trousers. The victim was beside him almost naked. The appellant was arrested by the people there and the child was taken to hospital. The matter was reported at Mutunduri Police Station. On cross-examination, she stated that the appellant lived at her aunt's compound and the victim used to be left at the same place sometimes. The appellant was found with the victim after he took her from her parents' home.
8. PW4 was the complainant's father who stated that his daughter arrived home from school at around 5pm. He went to take a bath and when he returned, he did not see PW1 and when he asked where she was, he was told that she had been called by the appellant. He asked his son to go and look for PW1 and return with her as he changed his clothes.
9. PW4 also decided to go out to look for PW1. He met PW3 and asked if she had seen PW1. They tried to call the appellant on his phone but he did not pick the call. PW3 joined in searching for PW1 and within a short time, they found the child with the appellant in the bushes. PW4 produced PW1's birth certificate showing that she was born in 2015. He said that the appellant was arrested by a large group of people numbering about 15.
10. PW5 was Julius Mugendi who stated that he heard that PW1 was missing and so he took his dogs to go and help with the search. He found the appellant on top of PW1 in a bush and both of them were



undressed. He saw the appellant defiling the minor and he raised an alarm, causing the other people looking for PW1 to find them. The appellant was arrested by the members of the public, and PW1 was taken to the hospital. On cross-examination, he stated that he was the first person to find the appellant defiling PW1. The appellant offered to give him his phone so that he does not report the matter but PW5 refused.

11. PW6 Roseline Wawira Njiru testified that she heard PW4 talking on the phone saying that PW1 was missing. She went to inform 2 other people that PW1 was missing, as PW4 went to the appellant's home to get his phone number from his host. They all tried to reach the appellant and his wife but their phones were unanswered. She asked PW5 to come with the dogs to help with searching for PW1. Shortly afterwards, PW5 raised the alarm and when the people gathered, he told them that he had found the appellant defiling PW1. He said that he had found PW1 bleeding from her vagina and she was in pain. She PW6, took PW1 to the hospital and then the matter was reported at Mutunduri Police Station. Members of the public arrested the appellant and took him to the police station.
12. PW7 was PW1's brother who stated that when his father sent him to search for PW1 at the appellant's home, he said he did not know who the appellant was. PW5 came and told them that he had seen PW1 with the appellant near the river. He went towards Mutunduri market and that is when he saw a woman carrying PW1 on a motor cycle. He also saw a group of people who had seemingly arrested the appellant who did not have his trouser on.
13. PW8 was PC Margaret Wamuyu, the Investigating officer. She stated that the appellant had been arrested by members of the public and he was brought to the police station where he was detained in a cell. It was reported that the appellant had defiled a 5-year-old girl. The minor's parents produced the child's birth certificate to prove her age and she obtained P3 and PRC forms. The appellant was charged with the offence
14. After close of the defense case, the appellant who had absconded failed to give any defense. The defense case was closed and the court delivered its judgment.

Written Submissions

15. The appeal was canvassed by way of written submissions.
16. Through his submissions, the appellant admits that he did not offer any defense. However, it was his argument that he was of unsound mind, a fact that the trial court ought to have considered. He relied on section 162 of the Criminal Procedure Code and the case of *Wambua Musili v Republic* [2020] KECA 702 (KLR).
17. The respondent submitted that throughout his trial, the applicant did not inform the court that he was of unsound mind. When given a chance to defend himself, he absconded court for one year and the trial proceeded in his absence under Article 50(2)(f) of *the Constitution*. It argued that during the prosecution's case, the appellant did not give the court any reason to doubt the soundness of his mind, therefore, there was no need for provisions of the Criminal Procedure Code in that regard to be applied. As to whether the sentence should be reviewed, the respondent urged that the life imprisonment sentence was found to be unconstitutional in the case of *Manyeso v Republic* [2023] KECA 827 (KLR), given its indeterminate nature.

Issues for Determination

18. The issues for determination are as follows:
 1. Whether the appellant's failure to tender a defense should be attributed to a mental illness; and



2. Whether the sentence meted out to the appellant should be set aside.

Analysis and Determination

19. In the case of *Kiilu & another v Republic* [2005] KECA 335 (KLR), the Court of Appeal stated thus regarding the role of an appellate court:

“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.”

20. The appellant stated in the grounds of appeal that the trial court failed to acknowledge that he was a person of unsound mind. That his mental state affected his ability to give his defense yet he was convicted and sentenced. Section 162(1) of the Criminal Procedure Code provides:

“(1) 1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.”

21. When the appellant was arraigned, the charges were read to him and he pleaded not guilty. He was released on bail and the case began. During that period, he attended hearings throughout the prosecution’s case and when it was time for his defense, he absconded. The court mentioned the matter several times. Inevitably, the court resorted to proceeding in the absence of the appellant.
22. At the mention on 11.02.2021 the appellant notified the Court that he had received the prosecution documents; on 08/04/2021 the accused applied for his cash bail to be reduced to Kshs.30,000/- from Kshs.100,000/-. The Court reduced it. There was no indication of insanity. On 17/06/2021, the accused declined to start the hearing saying he was not feeling well. The Court allowed his adjournment request. On 30/08/2021 he stated that he was ready for hearing and the hearing proceeded and he cross examined witnesses. All these are instances whereby the court could not suspect him of insanity.
23. At no point before absconding, did the appellant plead insanity such that the court would have had a chance to exercise its mandate under section 162(1) of the Criminal Procedure Code. In other words, the trial court had no reason to believe that the appellant was of unsound mind such that he couldn’t tender his defense. The trial court was also aware that the appellant had skipped bail and absconded for 1 year, which is the reason why he did not defend himself. It is under these circumstances that the issue of insanity is being raised for the first time during this appeal.
24. It is important to note that both the prosecution and the trial magistrate referred to a conviction for murder in Embu HCCRC 8 of 2014 where the accused person was allegedly the appellant herein. From a perusal of that file, this court has noted that the offender therein was ‘Edwin Muchangi Njeru’ while the appellant is ‘Augustine Muchangi Njeru’. His name according to the charge sheet is ‘Augustine Muchangi Njeru’.
25. In Embu HCCRC 8 of 2014, the accused was convicted for the offence of murder and was sentenced to 3 years community service. The offender in that case did not have an alias to indicate that his other



name was 'Augustine/Agustine' while the appellant herein did not inform the trial court whether he is also known as 'Edwin'. The 2 offenders are, seemingly, 2 different people. It is trite in law that each case be determined based on its own unique set of facts.

26. The judgment in the murder case was read on 16th October 2018 and the CSO order was made on 14th November 2018. These findings of F. Muchemi, J. in the murder file were based on the fact that the accused person pleaded insanity and the court found a reason to acknowledge that fact. Therefore, the findings of the murder case cannot be imported into the defilement case for 3 reasons:
1. that the accused persons were 2 different people in the 2 cases;
 2. even if the accused person in the 2 cases refer to the same person, the accused had the obligation of pleading insanity before both courts separately; and
 3. the issue of insanity was never raised before the trial court and therefore, it cannot be raised for the first time on appeal.
27. For these reasons, the ground of insanity that allegedly hindered the appellant from defending himself fails. The trial court proceeded cautiously when it noted that the appellant had absconded, and it closed the defense case rightly so under Article 50(2)(f) of *the Constitution*.
28. As to whether the life imprisonment sentence should be set aside, the sentence is applied as prescribed under section 8(2) of the *Sexual Offences Act* in mandatory terms as follows:
- “(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
29. The Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) rendered itself on the sentences prescribed under the *Sexual Offences Act*. It was held thus:
- “We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious.”
30. The Supreme Court reiterated its position in the Mwangi case through its recent decisions in the cases of Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) and Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR). It held that until parliament reviews the sentences imposed in statute, the court has no mandate to review them.

Disposition

31. For all the foregoing reasons, the appeal lacks merit and it fails in its entirety. The trial court's findings on conviction and sentence are hereby upheld.
32. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 1ST DAY OF OCTOBER, 2025.



R. MWONGO

JUDGE

Delivered in the presence of:

Appellant Present in Court.

Kariuki for Appellant

Miss Nyika for the Respondent

Francis Munyao - Court Assistant

