



**Mathews v Republic (Criminal Appeal E057 of 2024)  
[2025] KEHC 14943 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E057 OF 2024  
DK KEMEL, J  
OCTOBER 24, 2025**

**BETWEEN**

**NYAGAYA OMONDI MATHEWS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Arising from the judgment of Hon. J.A. Ayieta (R.M) delivered on 17th October 2024  
at Madiany Principal Magistrates Court in Sexual Offence Case No. E024/2023)*

**JUDGMENT**

1. The Appellant herein, Nyagaya Omondi Mathews, was charged before the trial court with an offence of defilement contrary to section 8[1] as read with section 8[3] of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on 8<sup>th</sup> December 2023 at around 1600hrs at Kamito market East Asembo Location in Rarieda Sub-County within Siaya County, intentionally caused his penis to penetrate the vagina of I.N. a child aged 14 years.
2. The Appellant also 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. The particulars of the offence were that on 8<sup>th</sup> December 2023 at around 1600hrs at Kamito market East Asembo Location in Rarieda Sub-County within Siaya County, intentionally touched the vagina of I.N. a child aged 14 years, with his penis.
3. The matter proceeded to a full trial whereupon the Appellant was convicted and sentenced to 20 years' imprisonment.
4. Aggrieved by the said conviction and the sentence, the Appellant filed his Petition of Appeal dated 5/11/2024 wherein he raised the following grounds of appeal:
  - i. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant while relying on medical evidence which was not satisfactory in law.



- ii. That the learned trial magistrate erred in law and fact by failing to consider that the ingredients forming the offence were not proved to the required standard.
- iii. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant on a case marred with lots of inconsistencies, contradictions and with many unfilled gaps making the evidence unbelievable and which could not warrant a conviction.
- iv. That the learned trial magistrate erred in law and fact in disregarding the Appellant's defense despite the same being worthy of an acquittal.

The Appellant therefore prayed that the appeal be allowed and that the conviction be quashed and sentence set aside and he be set at liberty.

5. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court so as to arrive at its independent findings and conclusion as to whether or not to uphold the decision of the trial court. [See *Okeno v Republic* [1972] EA 32]. In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to make due allowance in that regard as was held in *Ajode v Republic* [2004] KLR 81.
6. In determining this appeal also, I have to bear in mind that under Section 107 of the *Evidence Act* [Cap 80], the burden of proof is always on the prosecution to prove the charges levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt as held in *Woolmington v DPP*[1947] AC 462 and *Sawe v Republic* [2003] eKLR.
7. The prosecution called a total of six witnesses in support of its case.
8. I.N was the complainant who testified as PW1. It was her testimony that she was a minor aged 14 years. That on 08/12/2023 at about 1300hrs, her aunt sent her to Bondo shopping centre to buy bread. While there, the Appellant who was riding a motorcycle asked her to accompany him to buy milk for officers. That she was meeting him for the first time. That she boarded the motorcycle and that the Appellant took her round in circles and that she found herself at Burudani Square bar. That at the said bar, Mr Duncan Harun Aketch [PW3] refused to serve them because from his observation the Appellant was in the company of a minor who was not supposed to be in a bar. That the Appellant insisted that he was in the company of an adult. That it was then that PW3 walked to Asembo Bay police post and reported the matter. No. 254446 PC Eric Odongo [PW4] in the company of two other officers PC Samson and PC Ronald, arrived at the said bar within 15 minutes. By then, the Appellant had gone into a room with the complainant.
9. When the officers arrived at the bar, the Appellant had locked himself and the complainant in a room. The officers knocked the room about three times and after about five minutes, the Appellant opened the door. He was shirtless. The officers introduced themselves and requested both the Appellant and the complainant to produce their national identity cards. The complainant admitted being a minor of 14 years of age. The Appellant was arrested and the minor rescued. On a chair inside the room, they recovered the minor's panties and her bra on top of a chair in the room. PW4 then raised a distress call to Aram Police Station to send a female officer to investigate the matter.
10. No. 125254 PC Joan Serem [PW6] came on board as the investigation officer. On arrival at Asembo police post, she met the Appellant already under arrest while the complainant was present. She interrogated her during which interrogation the minor disclosed that she had been sent to buy bread at Bondo town when the Appellant asked her to accompany her to buy milk for officers. That she was forced to board the motorcycle and that the Appellant eventually took her to Burudani Square bar,



where he booked a room and defiled her. PW6 took both the complainant and Appellant to Madiany Sub County Hospital for medical examination.

11. Joyce Obiero [PW5] a clinical officer from Madiany Sub-County hospital for seven years, attended to the complainant. On vaginal examination, she established that her hymen was broken and that there was a thick vaginal discharge which was foul smelling. That a HIV test was negative as well as VDRL test. That she gave her TLT tablets to be taken at one tablet daily for twenty eight days. That she also organized for a session on physic-social counseling for the complainant. That her birth certificate indicated her date of birth as 09/06/2010 which placed her at 14 years at the time of the incident. That she produced the P3 form as exhibit 3 while the PRC form was produced as exhibit 5 and the birth certificate as exhibit 1.
12. That marked the close of the prosecution's case. The court later ruled that the prosecution had made out a prima facie case against the Appellant and who was placed on his defense. He elected to remain silent in defence.
13. The appeal was canvassed by way of written submissions. It is only the Appellant's submissions which are on record.
14. The Appellant's submissions are a reiteration of the grounds of appeal. The appellant has in summary submitted that the prosecution failed to prove its case beyond reasonable doubt as by law required. He thus prayed that the appeal be allowed, the judgment and sentence of the trial court be set aside and he be set free.
15. Having considered the lower court record, the submissions filed and the authorities cited. I find the issue for determination is whether the Respondent proved their case against the Appellant beyond the threshold of proof.
16. Section 8[1] and 8[3] of the [Sexual Offences Act](#) provides as follows:
  - 8[1] A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - 8[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.
  - 8[3] A person who commits an offence of defilement with a child between the ages of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
17. The prosecution must prove its case against an accused person beyond any reasonable doubt and that if there is a doubt, it must be resolved in favor of the accused. This was the holding by the House of Lords in the leading Judgment in that area in the case of *Woolmington v Director of Public Prosecutions* [1935] AC 462 where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant's guilt beyond any reasonable doubt.
18. In this case, it was incumbent upon the prosecution to prove three elements of the offence of defilement which are inter alia; age of the complainant [must be a minor]; penetration of the victim's genitalia and the identity of the perpetrator.
19. As regards the aspect of age of the complainant/victim, the Court of Appeal in the case of *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 20210, held as follows:

“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.”

20. The Complainant testified that she was 14 years old at the time of the incident. PW6 produced the birth certificate which indicated that the complainant was born on 09/06/2010. This meant that the complainant was aged approximately 13 years six months at the time of the offence and therefore a minor. At the time of the incident, the bar attendant at Burudani Square Bar [PW3] could tell that the complainant was a minor by observation and that he even refused to serve the Appellant drinks as he felt that the Appellant’s female companion was a minor who ought not to be in company of adults at alcohol drinking joints.

21. In *Omuroni v Uganda Criminal Appeal No. 2 of 2000*, the court held that a birth certificate was a prima facie proof of age and that it was sufficient as proof of age. [See also *Mwalango Chichoro v Republic MSA C. Appeal No. 24 of 2015*].

It is clear that the complainant was a minor and that she lacked capacity to engage in any sexual activity with the Appellant or any other person for that matter. I find that the Respondent proved this ingredient beyond any reasonable doubt.

22. The second element that must be proved is penetration. Section 2 of the *Sexual Offences Act* states that penetration may be partial or complete. Section 2 of the *Sexual Offences Act*: “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

23. The medical evidence indicated that the hymen of the minor was broken which suggests that penetration indeed occurred. The complainant stated that the Appellant had forceful sexual intercourse with her. The clinical officer [PW5] stated that on examination of the complainant’s genitalia, she observed a foul smelling discharge and that the hymen was broken. Further, penetration can be proved circumstantially even through the victims own oral testimony. In *CMM v Republic [2022]* the court reiterated the decision of the Court of Appeal in *Kassim Ali v Republic [2021] eKLR* where it was held:

“In any event, penetration can be proved circumstantially, taking into account the circumstances under which the act was committed. So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of the victim of rape or by circumstantial evidence.”

24. In the instant case, when PW4 arrived at the scene, they found the complainant’s inner wear and brazier on top of the Appellant’s bag which was on a chair. Further, it was PW1’s testimony that the Appellant removed her clothes, pulled her to the bed and had sexual intercourse with her. I find that the element of penetration was sufficiently proved by the Respondent beyond any reasonable doubt.

25. The last element is the identity of the perpetrator. It was PW1’s testimony that it was her first time to meet the Appellant. PW3 testified that the Appellant was a regular customer at the bar. Further, the Appellant was found in the act still locked in the room with the complainant and that it took a while before the police officers stormed into the room and found him trying to button his shirt. He was actually found in flagrant delicto as he was shirtless while the complainant’s underpants and bra were atop his bag. The Appellant was in fact arrested inside the room that he had booked at Burudani Square Bar. PW1, PW3 and Pw4 identified the Appellant in court during the trial. I am satisfied that the Appellant was positively identified as the perpetrator. I find this ingredient was proved beyond any reasonable doubt.



26. The Appellant opted to remain silent in defence. Even though the Appellant opted not to tender any evidence, the burden still lay with the Respondent to prove his guilt beyond any reasonable doubt. Having analysed the entire evidence, I find that the prosecution managed to place the Appellant at the scene of crime. He was arrested while in the company of the complainant in a room that he had hired at Burudani Square Bar and that the complainant, who had been defiled pointed him out as the perpetrator. I am satisfied that the offence of defilement was thus sufficiently proved by the prosecution beyond any reasonable doubt. Consequently, the finding on conviction by the trial court was quite sound and must be upheld.
27. As regards the issue of sentence, it is noted that the learned trial magistrate meted out 20 years' imprisonment. As a general rule, the issue of sentencing is usually at the discretion of the trial court. The Court of Appeal in the case of Benard Kimani Gacheru v Republic Criminal Appeal No. 188 of 2000 stated:
- “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 into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself 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.”
28. The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owuor v Regina [1954] 21 270 as follows: -
- “The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., [1950] 18 E.A.C.A 147:
- “It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”
- “To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. v Sher Shewky, [1912] C.C.A. 28 T.L.R. 364.”
29. It is noted that the minimum sentence provided for under section 8[3] of the *Sexual Offences Act* is twenty years' imprisonment. The Supreme Court of Kenya in Petition No. 18 of 2023 Republic v Joshua Gichuki Mwangi and Others [2024] Eklr, held that all minimum sentences under the *Sexual Offences Act* are lawful and remain so until the statute is invalidated. Hence, the sentence of 20 years imprisonment imposed against the Appellant is the minimum possible in law. It is instructive that the actions of the Appellant has psychologically affected the complainant. The Appellant took advantage of the hapless complainant and waylaid her while she was heading to a nearby shop to buy milk and took her to a certain lodging in Bondo town where he sexually assaulted her. The Appellant became a predator instead of a protector of the complainant. I find the Appellant deserves a custodial sentence



where he will undergo comprehensive custodial rehabilitation before being released back to the society. I find the sentence imposed is not excessive and thus i see no reason to interfere with the same. It is further noted that the Appellant managed to post bail and thus did not remain in custody during his trial and thus the provisions of section 333[2] of the Criminal Procedure Code does not apply. Consequently, i find the sentence imposed by the trial court to be the minimum possible in law and which must be affirmed.

30. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. The trial court's conviction and sentence is upheld.

31. Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 24<sup>TH</sup> DAY OF OCTOBER 2025.**

**D. KEMEI**

**JUDGE.**

In the presence of:

Mathew Nyagaya Omondi - Appellant

Soita - for Respondent

Kimaiyo/Maureen - Court Assistant

