



**Mwasi v Republic (Criminal Appeal E091 of 2024)
[2025] KEHC 15126 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E091 OF 2024
JK NG'ARNG'AR, J
OCTOBER 28, 2025**

BETWEEN

DOUGLAS N MWASI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Ogembo (P.C. Biwott, CM) delivered on 28th May 2024 in Criminal Case (SO) No. E084 of 2023)

JUDGMENT

1. The appellant, Douglas N. Mwasi, 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 of the offence were that on diverse dates between 18th June 2023 and 8th July 2023 at (particulars withheld) market (particulars withheld) sub-county within Kisii County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of M.K., a child aged 15 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same days and place, the appellant intentionally and unlawfully touched the vagina of M.K, a child aged 15 years with his penis.
3. When the appellant was brought before the trial court to answer to the charges, he pleaded not guilty to the main charge and the alternative charge. After a full trial, the appellant was convicted on the main charge and sentenced to 10 years imprisonment.
4. Aggrieved with those findings, the appellant filed his undated petition of appeal. He challenged the trial magistrate's findings by raising six grounds. The appellant advanced that the prosecution failed to discharge its burden of proof to the required standard on the basis of shoddy investigations, glaring contradictions and insufficient medical evidence. He also complained that the sentence meted out was



harsh and excessive. For those reasons, the appellant prayed that this appeal be allowed by reducing the sentence of 10 years imprisonment.

5. The appeal was heard on the basis of the parties' rival written submissions on 10th September 2025. The appellant's undated written submissions argued that PW1's evidence was not credible and could not therefore sustain his conviction. He pointed out that the circumstances leading to his arrest were not clearly spelled out as PW2 and PW1 contradicted each other.
6. The appellant questioned why the complainant failed to receive treatment soon after the incident alluding that in the circumstances, he had been framed. He added that since there were conflicting testimonies regarding the complainant's age, then it had not been proved beyond reasonable doubt. He opined that the complainant's father, Nyaora and Peris Juma ought to have testified since the evidence of the prosecution was scanty. He prayed that his appeal be dismissed.
7. The respondent opposed the appeal. Through Prosecution Counsel Nora Rono, it filed written submissions dated 29th August 2025. She submitted that all the ingredients to the offence of defilement namely, the age of the complainant, the aspect of penetration and the identity of the perpetrator were proved beyond reasonable doubt. Counsel added that there were no contradictions as alleged. Finally, on his sentence, the respondent submitted that the sentence was lenient taking into account the fact that the minimum sentence imposed by law is 20 years imprisonment. The respondent thus prayed that the conviction be upheld and the sentence be affirmed.
8. I have considered the submissions, examined the record of appeal and analyzed the law. The Court of Appeal in *Sango Mohamed Sango & another vs. Republic* [2015] KECA 178 (KLR) set out the duty of this court as a first appellate court in the following words:

“A first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. The Court is not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, the Court must weigh conflicting evidence, make its own findings and draw its own independent conclusion. (See *OKENO V. REPUBLIC* [1972] EA 32 and *KIILU & ANOTHER V. REPUBLIC* [2005] KLR 174).”
9. The record before me shows that the prosecution called five witnesses in a quest to prove beyond reasonable doubt that the appellant committed the offence that he was charged with. PW1 M.K. the complainant herein testified that she was born on 10th February 2008 as revealed from her birth certificate. As at the time of her testimony, she was a 16-year-old form II student at (particulars withheld) Secondary School. She testified that she knew the appellant who was her boyfriend. Her evidence was that she was taken to Ronald's place by the appellant on 18th June 2023 at noon. The appellant had picked her from her home.
10. PW1 recalled that she stayed in that house for three days. In those days, the appellant would meet her at night and have unprotected sex. He would leave at 8:00 p.m. On the third day, PW1 was found at 7:00 a.m. in the house by her uncle. PW1 was taken to Magena police station and the hospital. She denied that she had sex with Ronald who was arrested together with herself.
11. PW2 Agnes Sabiri Oirere, a clinical officer at Gucha sub-county Hospital produced the complainant's medical records. She was seen on 8th July 2023 after being rescued by the community policing team. She was brought to the facility three weeks later. On observing the complainant's private parts, PW2 noticed that her hymen was torn, broken and old. She filled the P3 form on 10th July 2023 and her lab request form dated 8th July 2023



12. PW3 NM the complainant's mother testified that on 18th June 2023, the minor went missing. After reporting the matter, the complainant was found in (particulars withheld) living with the appellant. She found the minor at Nyacheki police station whereafter she was taken to Ogembo Hospital. At the time of the offence, the minor was 15 years old.
13. In her cross examination, PW3 stated that she found the appellant at the police station. That the appellant had hidden the complainant at Nyaora's house where he was hiding. She was called by her husband and found the appellant at Magena police station. The complainant was present. That the appellant was initially arrested by motorcycle riders with a warning.
14. PW4 Nicodemus Oenge Onyambo testified that on 8th July 2023, he was called by Peris Juma who informed her that the complainant had been locked in a house. She was found at the house of Nyaora who was there. The complainant was found hidden in the bedroom while Nyaora ran away. They were then informed that it was the appellant who brought the complainant there. The appellant was arrested by bodaboda operators. Nyaora was arrested at Magena police station and stated that the complainant was brought there by the appellant.
15. PW5 PC Sheil Mabira conducted the investigations in this matter. She received a report on 5th July 2023 that the complainant went missing on 18th June 2023. She was later found on 8th July 2023 in Mr. Nyaora's house. He was arrested together with the complainant. She confirmed that the complainant admitted that she had slept with the appellant. Mr. Nyaora on his part was charged with the offence of wrongful confinement. The appellant was identified by the complainant at Nyacheki police station in the presence of her mother.
16. At the close of the prosecution's case, the trial court formed the opinion that the appellant had a case to answer. His sworn testimony was that the complainant was his neighbour. He denied committing the offence maintaining that he had been framed. His testimony was that he could not recall where he was on the dates stated in the charge sheet. He was however arrested in Nyacheki by Fidelis Ongari Juma and two police officers and taken to Nyacheki police station. He was then transferred to Magena police station. He urged that the person alleged to have hosted them ought to have been brought as a witness. He maintained his innocence.
17. As stated earlier, in order to sustain a conviction, the prosecution must establish the following conjunctive ingredients to a charge of defilement: the age of the complainant, the aspect of penetration and the identity of the offender. On the complainant's age, PW1's birth certificate was produced in evidence. It revealed that the complainant was born on 10th February 2008. The offence was alleged to have occurred between 18th June 2023 and 8th July 2023. I therefore find that the complainant was 15 years old and was a minor within the meaning ascribed to the term under the Children's Act.
18. Next on penetration, PW2 confirmed from the treatment notes and the P3 form that the complainant's hymen was torn and old. PW1 also stated that she had sexual intercourse with the appellant. This proves that penetration was proved beyond reasonable doubt in line with the provisions of section 2 of the *Sexual Offences Act*.
19. The last ingredient is the identity of the perpetrator. Was the appellant the culprit? PW1 was the sole witness to the crime. Her evidence was that the appellant was her boyfriend. That she was taken to Ronald's place by the appellant on 18th June 2023. PW1 recalled that she stayed in that house for three days. In those days, the appellant would meet her at night and have unprotected sex. He would leave at 8:00 p.m. On the third day, PW1 was found at 7:00 a.m. in the house by her uncle. PW1 was taken to Magena police station and the hospital. She denied that she had sex with Ronald who was arrested together with herself.



20. Section 124 of the *Evidence Act* provides that the evidence of a single identifying witness shall not sustain a conviction except in sexual offences where the minor who is a victim is deliberate with the truth. Was the complainant a truthful witness? Firstly, it must be borne in mind that the charge sheet indicated that the complainant was defiled on diverse dates between 18th June 2023 and 8th July 2023. However, from the testimony of PW1, she was only in the appellant's friend's house for three days and was arrested on the third day. There was also a sharp contrast on the date the appellant was arrested when looking at the evidence of PW3, PW4 and PW5.
21. PW1 in her evidence testified that she was found in the home of Ronald by her uncle. She was arrested together with Ronald. However, PW3 testified that she was found with the complainant while PW4 testified that Nyaore fled the scene and was later arrested. Lastly, though PW1 pointed out that the appellant was her lover, it is mysterious why the said Ronald was not charged alongside the appellant to unearth the truth. In my view, Ronald was either a prime suspect or a key witness that would have shed light on the veracity of PW1's narration of facts.
22. In view of the foregoing, it is my finding that based on those glaring contradictions, PW1 was not a truthful witness. Her evidence thus failed to qualify under the proviso to section 124 of the *Evidence Act*. Though the ingredients of age of the complainant and penetration were proved beyond reasonable doubt, I cast doubt on the identity of the culprit. Accordingly, this appeal succeeds. I hereby quash the conviction and set aside the sentence meted out to the appellant. The appellant shall forthwith be set at liberty by the prison officers unless otherwise lawfully withheld.

It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

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HON JULIUS K. NG'ARNG'AR
JUDGE

Judgement delivered in the presence of:

Siele/Kipchirchir (Court Assistants)

Appellant Present

Koime for the Respondent

