



**Mwenda v Republic (Criminal Appeal E059 of 2022)  
[2025] KEHC 14975 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14975 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E059 OF 2022  
HM NYAGA, J  
OCTOBER 23, 2025**

**BETWEEN**

**BONIFACE MWENDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with the offence of defilement, contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.
2. The particulars of this count were that on the 24<sup>th</sup> day of December, 2020 at (particulars withheld) Location, (particulars withheld) Sub-County, Meru County, he intentionally caused his penis to penetrate the vagina of F.K.K a child aged 6 years.
3. In the alternative, the Appellant was charged with the offence of Indecent Act with a child contrary to Section 11(1) of the said Act.
4. The particulars were that on the same date and place he touched the vagina of F.K.K a child aged 6 years with his penis.
5. After a full trial, the accused was convicted on the principal count and was sentenced to life imprisonment.
6. Aggrieved by the conviction and sentence, the Appellant filed an undated petition of appeal which set out the following grounds: -
  - i. That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.



- ii. That the learned trial magistrate erred in law and facts by failing to note that the charges were frame-up because of grudge.
  - iii. That the learned trial magistrate erred in law and facts by failing to note that the evidence of broken hymen is not proof of defilement.
  - iv. That the learned trial magistrate erred in law and facts by failing to note that the sentence was harsh and excessive.
  - v. That the learned trial magistrate erred in law and facts by not observing that the evidence adduced by the prosecution witness were uncollaborating and inconsistency.
  - vi. That the learned trial magistrate erred in law and facts by failing to note that the testimony of the complainant contradicts the evidence of the expert (doctor).
  - vii. That the learned trial magistrate erred in both law and facts by failing to note that no independent witness in this matter to clear doubts.
  - viii. That the learned trial magistrate erred in law and fact by rejecting the Appellant defence without giving any cogent reason.
  - ix. That since the Appellant cannot recall all what transpired during the trial, he wishes to be availed with the trial proceedings and judgment to draft more cogent grounds.
7. In addition, the Appellant filed amended supplementary grounds of appeal which are as follows: -
- i. That the learned trial magistrate erred in law and fact by failing to note that the medical report does not support the evidence of penetration in this case.
  - ii. That the learned trial magistrate erred in law and fact by failing to note that the key witnesses were not called.
  - iii. That the learned trial magistrate erred in law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubts according to the law.
  - iv. That the learned trial magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under Section 8 (4) of the Sexual Offences Act denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27(1) (2) (4) of the Constitution of Kenya. Hence, the sentence imposed on the Appellant is harsh and excessive.
  - v. That the trial magistrate erred in both matters of law and facts by failing to consider the appellant defense.
8. The appeal was argued by way of Written Submissions.

### **Appellant's submissions**

9. The Appellant submitted that the medical evidence tendered during the trial did not support the allegations of penetration. He stated that the tests on the complainant did not reveal any spermatozoa. That the complainant was found to have broken hymen with an infection but when he was subjected to examination, he did not have any infection.



10. The Appellant further submitted that the complainant was not specific as to the act of penetration and that the use of the phrase ‘tabia mbaya’ does not arise that penetration took place. That in the absence of details as to what actually happened, it cannot be proven that penetration took place.
11. Citing the case of Julius Kioko Kivuva Vs Republic Machakos HCCRA No. 60 of 2014, the Appellant submitted that sensory details such as what the victim heard, saw, felt or even smelled were relevant to prove penetration, but in this case that evidence was missing.
12. The Appellant further submitted that even though Section 124 of the *Evidence Act* provides for conviction on the basis of the uncorroborated evidence of a child, the victim’s evidence falls short of establishing that penetration occurred. Citing the decision in PEW Vs Republic (2012) eKLR, the Appellant submitted that the broken hymen of the complainant was not sufficient to prove penetration.
13. The Appellant further submitted that key witnesses were not called. He sighted out the other children mentioned by the complainant. Citing *Bukenya Vs Uganda* (1972) EA 549, the Appellant urged the court to draw an inference that their evidence would have been arose to the prosecution.
14. In conclusion, the Appellant submitted that the prosecution had failed to prove its case to the requisite standard, as set out in *Millet Vs Minister of Pensions* (1947) ALL ER 373.
15. On sentence, the Appellant submitted that the same was harsh and excessive. That the court had the liberty to mete out a sentence other than the mandatory life sentence, which is unconstitutional. To support this argument, he cited *Maingi and 5 Others Vs DPP and another* (2022) KEHC 13118 KLR.
16. The Appellant thus urged the court to quash the conviction and set him at liberty.

### **Respondent’s submissions**

17. The Respondent submitted that it has proven the ingredients of the offence of defilement namely the age of the victim, the act of penetration and the identification of the penetration.
18. On the age of the victim, it was submitted that the victim’s mother and the birth certificate proved the same.
19. On penetration, it was submitted that the victim was able to describe what the Appellant did to her. That the clinician who examined the complainant confirmed that fact. That one observed an old torn hymen and a blood stained underwear.
20. On identification, it was submitted that the victim knew the Appellant well and so he was properly identified.
21. On sentence, the Respondent submitted that the same was deserved as the Appellant had defiled the victim several times.
22. The Respondent urged the court to dismiss the appeal.

### **Analysis and determination**

23. Being a first appeal, this court’s duty or as was set out in *Okeno vs Republic* [1972] EA 32 where the Court of Appeal stated 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."

24. Similarly, in *Kamau Njoroge vs Republic* [1987] eKLR, the Court of Appeal stated:

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

25. The offence of defilement incorporates 3 key ingredients namely; Age of the victim. The act of penetration. The identification of the penetrator.

26. This position has been restated by the superior courts over time and such decision is *Dominic Kibet Mwareng vs Republic* Criminal Appeal No 155 OF 2011, where the learned judge noted that:

"The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant"

27. It is with the above in mind that I shall examine the evidence adduced during the trial.

28. PW1, FKK, stated that on the material day she was at the accused person's house playing when the accused person gave the other children rice to eat and as she was leaving he held her hand put her on a bed and removed her clothes. She started screaming and he put his hand on her mouth. He then inserted his penis in her vagina. She then left and told her brother Evans who told her to go and notify her grandmother. She was then taken to hospital by her where she was treated. The witness further stated that the accused had previously defiled her and told her not to tell anyone.

29. PW2, EM, a minor stated that the complainant was his sister. He was at home with the complainant who was playing with other children when the complainant came to him and told him that the accused had defiled her. Their parents were not at home. They reported to their grandmother who called their parents. The accused was later arrested taken to the police station.

30. PW3, Lydia Wanjiru, stated that she is the complainant's mother. On the material date she had left the complainant with her brother PW2 at around 10.00 a.m. and left for her chores. Later she was called and told that the appellant had defiled her.

31. PW4, Inspector Binti Hamisi Swaleh, stated that she is the investigating officer in this case. She charged the accused with the offence herein upon concluding her investigations. She produced a birth certificate that showed the complainant was six years old as at the time of the defilement. She further stated that the accused person had ran away but was later arrested.



32. PW5, Huey Atemi, stated that he is a clinical officer at Nairobi Women's Hospital. He produced the medical reports for the complainant. The PRC form showed that the complainant's hymen was perforated. The P3 form produced showed that the complainant had been defiled.
33. The Appellant's case was that he knew the complainant and her family as they were neighbours. He claimed that a dispute between them arose after he discovered a plan that they had hatched to poison one of his family members.
34. The Appellant denied meeting the complainant on the material day. He narrated how he was arrested.
35. DW2 was the Appellant's father. He confirmed that the complainant and her family were their neighbours and that they had a dispute over land. He narrated how his son was arrested on 24/12/2020. He was unaware of any complaint over the alleged incident.
36. There was and there is no dispute that the victim was a child aged 6 years. She was duly examined by the court on that. Her mother also confirmed her age and her birth certificate was tendered as an exhibit.
37. The Appellant's submission largely dwelt on the question of penetration. He submitted that there was no evidence to support penetration.
38. "Penetration" is defined under Section 2 of the Act as follows;  
Section 2  
"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
39. The legal definition of penetration is not synonymous with the English term which may infer to forceful entry. Even the gentlest touch, or partial insertion amounts to penetration.
40. The complainant's testimony was taken after the requisite voire dire examination was conducted. The complainant narrated how the Appellant had taken her and other children to his house. He gave them food, which they ate outside his house. The Appellant then held her and took her to the bed. When she tried to scream, he put his hand on her mouth. He then proceeded to remove her clothes and did 'tabia mbaya' to her.
41. The Appellant's position is that the term tabia mbaya is not necessarily a reference to penetration.
42. Now, a child of the age of the complainant cannot be expected to give graphic details of what transpired. When one notes that she was undressed first, and that he put his thing into her thing, then the term 'tabia mbaya' can only mean one thing, the act causing penetration.
43. In my view, to ask a child of such a tender age to go into explicit details of how an act of penetration occurred is undesirable. Children must be allowed to maintain their innocence and once they have provided sufficient evidence to describe an act causing penetration, in whatever terms, then the explicit details are unnecessary. I find that trial court clearly understood the act she was referring to.
44. Also, if I get the Appellant correctly he states that the fact that he was not found to have an infection then it is evidence that the act of penetration took place.
45. That argument cannot hold water. It is not really necessary to find infections on both the victim and perpetrator. It may be that the latter used protection on that particular day.



46. The Appellant is clearly of the view that penetration must equate to some kind of force. As I stated earlier even a gentle insertion of a genital organ into the other person's organ suffices to be termed penetration.
47. Having considered the evidence, I am inclined to agree with the trial court that there was sufficient evidence to support the claim that there was penetration.
48. On identification, the complainant was clear that it was the Appellant who committed the act on her. There is evidence that she knew the Appellant well and vice versa. I am satisfied that the Appellant was duly identified.
49. The Appellant's defence was a mere denial which was rightly disregarded by the trial court.
50. In conclusion, I uphold the conviction of the Appellant on the principal count.
51. On sentence the appellant stated that the same was harsh and excessive.
52. The question of the sentences provided for in the *Sexual Offences Act* was considered by the Supreme Court of Kenya in Petition No. E018 of 2023 Republic Vs Joshua Gichuki Mwangi (Respondent) & Initiative for strategic litigation in Africa & 3 others (Amicus curia) delivered on 12<sup>th</sup> July, 2024. The apex court held as follows: -

“(51) In light of the structural and supervisory interdicts issued, the Court issued the Muruatetu Directions, wherein it, inter alia, pronounced itself on the application of its decision in the Muruatetu Case to other statutes prescribing mandatory or minimum sentences as follows: “

10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that:

[48] Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be SC Petition No. E018 of 2023 26 regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right”.

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases



11. The ratio decidendi in the decision was summarized as follows:

"69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

.....

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases." [Emphasis ours] ....."

53. It goes without saying that the said decision in now binds all other courts. Therefore, the trial court was correct to mete out the prescribed sentence that of life imprisonment.

54. Even if the court had a discretion over the matter, I don't see how the Appellant could expect any mercy from the court, having taken advantage of an innocent 6-year-old child.

55. In conclusion the appeal is dismissed.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT MERU THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025.**

**H. M. NYAGA**

**JUDGE**

