



REPUBLIC OF KENYA



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**Masha v Republic (Criminal Appeal E066 of 2023)
[2025] KECA 1826 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1826 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E066 OF 2023
AK MURGOR & P NYAMWEYA, JJA
NOVEMBER 7, 2025**

BETWEEN

KAHINDI CHARO MASHA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at
Malindi (S. Githinji, J.) dated 16th May 2022 in HCCRA NO. 8 of 2020)*

JUDGMENT

1. Before us is an appeal arising from the judgment of the High Court of Kenya at Malindi in HCCRA No. 08 of 2020, delivered on 16th May 2022 by Justice S.M. Githinji. The High Court had upheld the appellant's conviction for defilement, and notably, enhanced his sentence from 15 years to 20 years imprisonment.
2. The appellant, Kahindi Charo Masha, was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. An alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act had also been preferred.
3. The particulars of the charge stated that on diverse dates of September 2017, in Shauri Moyo village, Magarini sub-county, Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of RK, a girl aged 14 years old.
4. The trial court found the appellant guilty and sentenced him to 15 years imprisonment, a decision which was subsequently affirmed by the High Court, with the sentence being enhanced to 20 years imprisonment. The appellant is now challenging both the conviction and the enhanced sentence.
5. The prosecution's case was that the complainant, who testified as PW1, stated that she was 14 years old and lived with her grandmother in [Particulars withheld] at Magharini. She referred to the appellant



- as "babu" (grandfather). She described an incident in September 2017 when the appellant took her to his house and had sex with her.
6. Following the incident, she fell sick, was taken to the hospital, and was found to be pregnant. Medical evidence included a P3 form and treatment notes which showed that the hymen as missing, and an age assessment report confirming her age as 14 years.
 7. Other witnesses; PW2, PW3, PW4, and PW5 corroborated aspects of the complainant's testimony, including her family relationship with the appellant, her rescue, the report to the police, and medical findings.
 8. The trial court found the appellant guilty based on the prosecution's evidence proving the age of the victim, penetration, and the perpetrator's identification. The appellant was sentenced to 15 years' imprisonment.
 9. The appellant was dissatisfied with the conviction and sentence and based his appeal on three grounds:
 - a. The prosecution did not prove the offence of defilement contrary to Section 8 (1) (3) beyond reasonable doubt.
 - b. Sharp contradictions in the prosecution's case were not properly weighed.
 - c. His defense was not adequately considered
 10. The High Court re-evaluated the entire evidence and found that the age of the complainant was established as 14 years old at the time of the offence; penetration was proven; and the appellant was recognized as the perpetrator. The court also noted that the complainant eventually gave birth on 19th July 2018, to a girl child. The court found that the evidence established beyond reasonable doubt that the appellant defiled the complainant.
 11. The High Court upheld the conviction. However, the court found that the original sentence of 15 years was illegal. Citing Section 8(1) as read with (3) of the *Sexual Offences Act*, which mandates a minimum sentence of not less than 20 years, for the defilement of a child between the age of 12 and 15 years, the court enhanced the sentence to 20 years imprisonment.
 12. The appellant is now appealing the High Court's judgment to this Court on the following grounds:
 - a. The learned Judge erred by failing to appreciate that there was a contravention of Article 50(2) of *the Constitution*.
 - b. The learned Judge erred by failing to consider that sections 107, 108, 109, and 110 of the CPC were not fully adhered to.
 - c. The learned Judge erred in enhancing his sentence by not considering the defence, mitigation, and the case of the appellant, thus making useless, the sentencing guidelines and policies.
 - d. The learned Judge erred by enhancing the sentence and upholding the conviction without considering Sections 77 and 163 of the *Evidence Act*.
 13. The appellant prays that the appeal be allowed, thereby quashing his conviction and setting aside the sentence.
 14. The appellant has also applied for a waiver of fees, stating that he is a poor man with no money for lodging an appeal. He also pointed out that he had not received assistance since his conviction.



15. When the appeal came up for hearing on 11th March 2025, the appellant was present in person, while the respondent was represented by Miss Nyawinda, learned prosecution counsel. Parties relied on their respective written submissions.
16. In his written submissions, the appellant filed amended grounds of appeal as follows:
 - a. Failure to appreciate Sections 107, 108, 109, and 110 of the [Evidence Act](#).
 - b. Failure to appreciate Sections 70, 77, 163, and 164 of the [Evidence Act](#).
 - c. Failure to consider Article 50(2)(c)(j) of [the Constitution](#).
 - d. Violation of Sections 25, 26, and 124 of the [Evidence Act](#).
 - e. Failure to consider and appreciate the independence of judicial officers in giving and assigning sentences.
17. The appellant submitted that the respondent failed to prove the offence of defilement beyond reasonable doubt despite the burden of proof resting entirely on the prosecution. He contended that the respondent did not sufficiently establish the key elements of the offence; being identification, penetration, and age.
18. The appellant further submitted that there were sharp contradictions and shadows of doubt in the respondent's case, which were not properly weighed or explained. Specifically, he points to a second incident in January 2022, which he submitted, complicated calculations of the pregnancy's duration; as the period between mid-September to January could not be four weeks; and the period from December to January could also not be four weeks.
19. The appellant also emphasized that his defense was not adequately considered.
20. The appellant pointed out that there was no proof of the authenticity of the documentary exhibits, such as the P3 form, treatment notes, PRC report, scan report, and lab test results; noting that the signatures on the P3 form were different and that the author was not indicated.
21. The appellant asserted a violation of his right to a fair trial, specifically the right to adequate time and facilities to prepare a defence, and the right to be informed in advance, of the evidence the prosecution intends to rely on. He submitted that his alibi defence was never considered by both the trial court and the first appellate court, making useless, the principles in Sections 306(1) and 306(2) of the [Evidence Act](#).
22. While making reference to Section 25 of the [Evidence Act](#), the appellant submitted that the court failed to consider that the rules governing the making of confessions, in all instances where the confession is not made in court, should be adhered to.
23. The appellant further submitted that although he never gave an alibi defence, his words should have been considered, and the court should not have concluded that he failed to fully explain himself.
24. The appellant submitted that the enhancement of his sentence from 15 years to 20 years demonstrated a lack of uniformity and reliability on the independence of junior judicial officers and that the court should have considered the circumstances and his mitigation. He submitted that mandatory minimum sentences for sexual offences are unconstitutional, as they deny judicial officers their independence.
25. Opposing the appeal, Miss Nyawinda submitted that although voir dire examination was not conducted, it was not fatal to the prosecution's case because it is only mandatory for a child of tender years, and that a 14-year-old is not considered a child of tender years.



26. The respondent pointed out that this is a second appeal, meaning this Court’s jurisdiction is limited to matters of law only, as per Section 361(a) of the Criminal Procedure Code (CPC).
27. Citing the case of *Njoroge vs Republic* [1982] KLR 388, the appellant submitted that on a second appeal, the court is bound by concurrent findings of fact by the two lower courts unless those findings were not supported by evidence, or were based on a misapprehension of evidence, or if the courts demonstrably acted on wrong principles.
28. The respondent submitted that the issue of the alleged contravention of Article 50(2) of *the Constitution* was never raised by the appellant before the first appellate court. The respondent pointed out that a scrutiny of the trial court proceedings shows no violation of the appellant’s rights; or that he was not accorded a fair hearing, as he participated actively in the trial, and extensively cross-examined the prosecution witnesses.
29. The respondent pointed out that Sections 107, 108, 109, and 110 of the CPC relate to the execution of warrants of arrest. The respondent further asserted that the trial court proceedings show no irregularity in the arrest of the appellant. Furthermore, the respondent contended that the appellant never raised any issues of illegality or irregularity regarding his arrest, either when he was before the trial court or the first appellate court. The respondent submits that the appellant’s arrest was lawful.
30. On whether the enhanced sentence was within the confines of the law, the respondent supports the High Court’s decision to enhance the sentence from 15 years to 20 years. The respondent submitted that the earlier sentence meted out by the trial court was illegal, as the prescribed sentence under Section 8(3) of the relevant law is imprisonment for a term of not less than 20 years, which is a minimum mandatory sentence. To buttress this submission, the respondent relied on the Supreme Court finding in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR).
31. The respondent submitted that the appeal lacks merit, humbly prays that the appeal be dismissed in its entirety.
32. Sitting as a second appellate court, we acknowledge this Court’s limited jurisdiction to matters of law only. The concurrent findings of fact by the two lower courts are generally binding unless they are shown to be unsupported by evidence, or that they were based on misapprehension, or that they were derived from wrong legal principles. In *Chris Kasamba Karani vs Republic* [2010] KECA 478 (KLR), this Court stated thus:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”
33. We have carefully considered the record of appeal, the submissions by both parties, the authorities cited, and the applicable law. The issues for determination are whether the appellant’s conviction for defilement was lawful and supported by the evidence; whether the High Court erred in enhancing the sentence from 15 to 20 years without prior notice to the appellant; and whether the sentence imposed complied with constitutional and statutory provisions.



34. The appellant contended that the complainant's evidence was inadmissible for lack of voir dire. The complainant was 14 years old at the time of testimony. This aligns with Section 127(2) of the *Evidence Act* and the principles laid out in *Maripett Loonkomok vs Republic* [2016] KECA 520 (KLR), this Court held that:

“ . . . That the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that: - “In appropriate cases where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

35. In this instance, the evidence of the complainant was corroborated by the evidence of PW2, PW3, PW4, and PW5, as well as medical evidence. Therefore, the independent evidence was sufficient to support the charge.

36. The appellant contended that the prosecution did not prove its case beyond any reasonable doubt. Both the trial court and the High Court found that the prosecution proved the following essential elements of the offence of defilement: the complainant was below 15 years of age; there was penetration; and the identity of the perpetrator was established.

37. In the persuasive case of *Charles Karani vs Republic*, Criminal Appeal No. 72 of 2013, the court stated that:

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

38. The complainant testified that she was 14 years old at the time of the offence. This was confirmed by the age assessment report, which was not controverted. This was further corroborated by the testimony of PW5, Dr. Rimba, who testified that the complainant was 14 years old, and that her hymen was broken, and also that she was pregnant. PW2, who was her father, also testified that the appellant was 14 years old at the time of the offence. The record also shows that the complainant's testimony was detailed, consistent, and credible.

39. The P3 form and medical report also documented that the hymen was absent; the complainant was pregnant, and that she subsequently gave birth to a child on 19th July 2018. This evidence satisfied the requirements under Section 240(3) of the Criminal Procedure Code, which admits medical evidence in sexual offences cases, and Section 138 of the Penal Code, which criminalizes sexual intercourse with a person below 18 years.

40. In *Francis Omuron vs Uganda*, Cr. Appeal No. 2 of 2000, the Court of Appeal of Uganda held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in



the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian, and by observation and common sense."

41. In the circumstances, we find that the age of the complainant was satisfactorily proven beyond reasonable doubt.

42. The appellant was well known to the complainant. She narrated how the appellant, who was known to her as "babu", defiled her. This assertion was not controverted. In *Wamunga vs Republic* [1989] KECA 47 (KLR), this Court, while dealing with the complexities of an identification of an assailant, stated that:

"It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".

43. We find that there was no possibility of mistaken identity in this case. This was a case of recognition. The complainant knew the appellant prior to the offence.

44. The appellant's assertions of inconsistencies regarding the timeline of pregnancy and the P3 form were speculative and unsupported by the record. These matters go to the weight and credibility of evidence of fact. The trial and first appellate courts made concurrent findings, which this Court is bound to respect unless a miscarriage of justice is demonstrated. Both courts found that the alleged inconsistencies were neither material nor did they go to the root of the prosecution's case.

45. The appellant contended that the trial court failed to consider his alibi defence. His alibi was that he was at home at the time when the offence is alleged to have taken place. By setting up an alibi defence, the appellant did not assume the burden of proving its truth so as to set a doubt in the prosecution's case as in the case of *Ssentale vs Uganda* [1968] EA 365.

46. The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution. In *Joseph Waiguru Wang'ombe vs Republic* [1980] KECA 6 (KLR), this Court held that:

"The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in Court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it."

47. It is common ground that the appellant did not directly raise the defence of alibi, but was expecting the court to deduce the said evidence from his testimony. Be that as it may, given the implicit nature of an alibi defence, the appellant bore no burden to prove his alibi. He would still have been entitled to the benefit of the doubt, if his alibi cast doubt on the case presented by the prosecution.

48. In *Ganzi & 2 Others vs Republic* [2005] 1 KLR 52 this Court held that:

"Where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence."



49. The trial court addressed the appellant's defence and rejected it for lacking credibility. We find that the alibi defence, when weighed against the evidence on the record, is completely displaced and does not hold.
50. The appellant also alleged a violation of his rights under Article 50(2) of *the Constitution*. Pursuant to Article 50(2), every accused person has the right to a fair hearing, including adequate time and opportunity to prepare a defence. The record herein reflects that the appellant was duly informed of the particulars of the charges against him. Thereafter, he actively participated in proceedings by appropriately cross-examining the prosecution witnesses, as well as giving his own relevant testimony, which was intended to answer the charges against him.
51. The appellant also contended that his arrest was unlawful and that statements made to police were improperly admitted in violation of Section 25 of the *Evidence Act* and Sections 107 – 110 of the Criminal Procedure Code.
52. These issues were not raised by the appellant either before the trial court or the first appellate court. It is a well-settled principle that matters not raised at the first appellate stage generally cannot be introduced for the first time in a second appeal, which is limited to addressing questions of law.
53. In *John Kariuki Gikonyo vs Republic* [2019] KECA 1016 (KLR) this Court held that:
- “Similarly, from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her”. This Court when faced with a similar issue in *Alfayo Gombe Okello v. Republic* [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows: “....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.” Page 11 of 20 [18] In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal.”
54. In the circumstances, we find that this Court can only entertain matters that were raised for consideration by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and was therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.
55. Accordingly, we are satisfied that the conviction was safe, supported by law and evidence, and not tainted by any procedural or constitutional infirmity.



56. 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.”

57. The trial court sentenced the appellant to 15 years imprisonment. The High Court relied on the Supreme Court’s decision in *Republic v Mwangi* (supra), in affirming the constitutionality of mandatory minimum sentences; and proceeded to enhance the sentence to 20 years, however, the court did so without giving the appellant prior notice or an opportunity to be heard on the matter.

58. It is a well-established principle of criminal justice and fair trial rights that an accused person must be afforded an opportunity to be heard before a sentence is enhanced. This requirement is implicit in the right to a fair hearing under Article 50(2)(q) of *the Constitution*, which guarantees the right not to be convicted for an act or omission, that, at the time it was committed, was not an offence. Secondly, a person cannot be sentenced to a more severe punishment than was applicable at the time the offence was committed.

59. In *Kesusa & Another vs Republic* [2022] KECA 546 (KLR), this Court held that:

“Moreover, this Court in *JOA v Republic*, Cr App No 25 of 2011 and *Charles Muriuki Mwangi vs. Republic*, Cr App No 24 of 2014 held that in the absence of a cross-appeal, it was necessary for the court to warn the appellant that the sentence was likely to be enhanced, and having failed to do so, the appeal against sentence was allowed. In *Mutuku v Republic*, [1980] KLR 532, this Court set aside enhancement of sentence by the High Court due to inordinate delay on the part of the prosecution in making an application for enhancement.”

“...In the instant appeal, there was no cross- appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon them could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence”.

“...The sentence of death passed by the High Court cannot therefore stand and, were we to uphold the conviction, we would restore the 14- year sentence imposed by the trial court on the basis only of lack of notice or warning which render the enhancement a nullity for want of jurisdiction.””

60. In the present case, we find that although the Supreme Court upheld the constitutionality of mandatory minimum sentences under the *Sexual Offences Act*, it did not oust procedural fairness. Procedural safeguards remain a fundamental component of the right to a fair trial under Article 50(2) of *the Constitution*.

61. The record shows no indication that the appellant was put on notice that his sentence could be enhanced. Neither was he given a chance to address the High Court on the legality of the sentence or to make further submissions in mitigation. This was a clear violation of his constitutional rights and renders unlawful, the sentence enhancement.

62. Therefore, while the High Court was correct in its interpretation of Section 8(3) of the *Sexual Offences Act*, which prescribes a mandatory minimum sentence of not less than 20 years for defilement of a child aged between 12 and 15 years, we take judicial notice of the established principle that an appellate court



cannot enhance a sentence without giving the appellant prior notice and without according him an opportunity to be heard.

63. In the circumstances, we find that the sentence enhancement was procedurally improper and cannot stand.
64. Consequently, the appeal against conviction is dismissed.
However, the appeal against enhancement of sentence is allowed.
65. In light of the foregoing, we make the following final orders:
 - a. The appeal against conviction is dismissed.
 - b. The appeal against sentence enhancement is allowed.
 - c. The sentence of 20 years imprisonment imposed by the High Court is set aside.
 - d. The original sentence of 15 years imprisonment imposed by the trial court is reinstated.
 - e. The appellant's application for waiver of court fees is allowed, taking into account his indigent status and prolonged incarceration.
66. Lastly, this judgment is delivered and signed under Rule 34(3) of the Court of Appeal Rules (2022), following the untimely death of the Hon. Mr. Justice Fred Ochieng JA prior to its delivery.
67. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

