



**Mbandi v Republic (Criminal Appeal E098 of 2023)
[2025] KECA 1867 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1867 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E098 OF 2023
AK MURGOR & P NYAMWEYA, JJA
NOVEMBER 7, 2025**

BETWEEN

JOSEPH MBANDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Malindi
(R. Korir, J.) delivered on 14th February, 2019 in HC.CR.A. No. 8 of 2018)*

JUDGMENT

1. The appeal before us involves an initial conviction and sentence by the Senior Principal Magistrate's Court at Mariakani, followed by an appeal to the High Court of Kenya at Malindi.
2. The appellant was charged in Mariakani SPM Criminal Case No. 404 of 2016 with defilement contrary to Section 8(1) as read with (3) of the *Sexual Offences Act* No. 3 of 2006, and an alternative charge of committing an indecent act contrary to Section 11(1) of the same Act. The incident allegedly occurred on 9th June 2016, at Kivango District of Kwale County, involving the complainant aged 13 years.
3. The complainant testified as PW2. She stated that she was feeling unwell on 9th June 2016 and asked her friend, "E," to escort her to the hospital. On their way back from the hospital, "E" requested that they go to her house. While at "E"'s house, the appellant allegedly covered her mouth, tied her legs, and defiled her. She later went home and reported the incident to her father.
4. PW1 was the Clinical Officer. She testified that she examined the complainant and concluded she had been defiled. She also produced a P3 form.
5. PW3 was the complainant's father. He testified that after he received the report from his daughter that she had been defiled by the appellant, he reported the matter to the police.



6. PW4 was the Investigating Officer. He testified that he conducted the investigations and ultimately charged the appellant.
7. At the close of the prosecution's case, the court determined that the accused had a case to answer and was placed on his defence.
8. When put to his defence, the appellant claimed that the complainant's father had a disagreement with him and that he was trying to frame him. He called one witness in support of his case.
9. The Senior Principal Magistrate's Court (Hon. N.S Lutta SPM) found that the prosecution had proven its case beyond reasonable doubt, and that the evidence from the prosecution witnesses was consistent and corroborated. The court further held that the defence presented by the appellant did not shake the prosecution's case.
10. Consequently, the appellant was convicted of the principal charge under Section 215 of the Criminal Procedure Code. He was sentenced to serve 20 years' imprisonment.
11. Aggrieved by the conviction and sentence, the appellant appealed to the High Court at Malindi in Criminal Appeal No. 8 of 2018. The appellant raised several issues in his appeal, arguing that the trial court failed to appreciate that the perpetrator was unknown to the victim, making the conviction and sentence unsafe; the medical evidence, (P3 form) had no link to the present matter and indicated that injuries were 24 hours old, which was deemed false, and that the hymen was missing due to a past history of rape, which suggested no fresh injury consistent with the alleged defilement; his arrest had no link to the present matter, and investigations were poorly done; the trial court failed to consider the alibi defense adequately; the complainant was not a trustworthy witness, as she claimed to know the appellant as a Maasai, despite him being a Duruma; the clinical officer had informed the court that the victim was defiled at a friend's house by an unknown person; the prosecution failed to summon crucial witnesses, particularly the schoolmate "E" who allegedly escorted the complainant; and that there was an implication that the complainant's father had a previous dispute with the appellant, leading to the arrest being a fix.
12. In response, the respondent maintained that the ingredients of defilement were proven, including the victim's age of 13 years, which was confirmed by PW1, PW2, PW3, and the birth certificate produced as Exhibit 4, as well as penetration.
13. The respondent submitted that the perpetrator was known, as the complainant identified the appellant, and this was corroborated by PW3 and PW1, who stated the perpetrator was a barber known to PW2. DW1 and DW2 also confirmed that the appellant was a barber who worked at a nearby business premises.
14. The respondent further submitted that the trial court properly considered the appellant's defense and found it insufficient to shake the prosecution's case.
15. Upon re-evaluating the evidence, the High Court (W. Korir, J.) (as he then was) reiterated that the prosecution bears the duty to prove the accused's guilt beyond a reasonable doubt. The court found that the victim's age of 13 years was sufficiently proven by her own testimony, her father's testimony, and the birth certificate, which showed she was born on 20th June 2003, making her 13 at the time of the incident on 9th June 2016.
16. The court also found that the complainant's statement that the appellant defiled her was sufficient to establish penetration as defined by Section 2 of the [*Sexual Offences Act*](#).



17. The court found PW1 to be a reliable witness, despite the appellant's claims regarding medical evidence. The Court further acknowledged the weakness in the prosecution's case regarding the uncalled witness "E", the schoolmate who allegedly lured the complainant. The Court noted that "E" could have been an adverse witness for the prosecution. However, the court found PW3's testimony to be corroborative of the complainant's account.
18. As regards the appellant's alibi, DW2 claimed that the appellant was at his barber shop. However, the court found DW2's testimony to be unbelievable due to contradictions, specifically regarding a dispute between PW3 and the appellant's wife. This rendered the alibi defense unsubstantiated.
19. The court further noted that the PW4 failed to cross-examine PW3 about the alleged bad blood between him and the appellant, which could have shed light on the defense's claim of a fix.
20. Consequently, the court found the conviction to be safe. The court determined that the appeal was without merit and dismissed it. The sentence of twenty years imprisonment was affirmed as the minimum provided for the offence.
21. Being dissatisfied with the judgment, the appellant lodged the present appeal based on the following amended grounds of appeal:
 - a. The High Court erred by upholding the conviction despite penetration not being proven as one of the essential ingredients of defilement.
 - b. The High Court erred by upholding the victim's age as proven, even though the complainant was not recalled to identify the birth certificate presented by PW4.
 - c. The High Court erred by considering that the appellant was identified by the complainant, while the identification itself was doubtful.
 - d. The High Court erred by affirming the sentence imposed as a mandatory minimum sentence, which is argued to be unconstitutional.
22. When the appeal came up for hearing on 10th March 2025, the appellant was present in person, whereas the respondent was represented by Ms. Keya Ombele, Principal Prosecution Counsel. Parties relied on their respective written submissions, which they orally highlighted.
23. The appellant expressed a desire to add to his submissions, primarily focusing on a plea for a reduced sentence or an opportunity to reunite with his family. He explained that his mother passed away in 2011, and his father suffered a stroke in 2016, rendering him unable to care for the family. As the firstborn, he felt that his siblings were scattered and suffering, akin to goats without a guardian. He mentioned having spent nine years in prison and learned various things, including industrialization and the Bible.
24. In his written submissions, the appellant asserted that the complainant did not explicitly state the alleged act of penetration, only saying, "He held me and covered my mouth with his hands. He removed my clothes and defiled me". The appellant contends that evidence must clearly demonstrate penetration.
25. The appellant also disputed the medical evidence, stating that the P3 form indicated that the hymen was absent and that there was no laceration, with PW1 stating she relied on the victim's history of a past rape. The appellant argued that the P3 form had no link to the current matter and that the finding of a missing hymen due to previous rape history does not necessarily imply fresh injury consistent with the alleged defilement. He also submitted that the finding of a broken hymen should not automatically



- lead to a presumption of guilt, especially when it could be due to other factors like physical activity or tampon use.
26. On identification, the appellant submitted that the complainant claimed to know him as a Maasai, despite him being a Duruma, casting doubt on her trustworthiness. He further stated that the Clinical Officer was informed that the victim was defiled by an unknown person.
 27. The appellant also raised concerns about the birth certificate, arguing that it was improperly introduced by the Investigating Officer without the complainant being recalled to identify it. He maintained that the investigating officer was neither a doctor nor a relative of the complainant, making the introduction of the birth certificate questionable.
 28. The appellant emphasized that the prosecution must prove its case beyond a reasonable doubt and that the evidence given for the age and circumstances of the alleged defilement was insufficient.
 29. Regarding the mandatory minimum nature of the sentence, the appellant submitted that Section 50(2) of *the Constitution* provides that every accused person has the right to a fair trial, which includes the right to mitigation. He contends that the trial court denied him the right to mitigate and imposed a set sentence. He cited several judicial decisions, including those from the Supreme Court of Kenya and the South African Constitutional Court, to support the argument that mandatory minimum sentences can infringe upon judicial discretion and be unconstitutional by undermining the sentencing function and the right to a fair trial.
 30. The appellant therefore prays for the appeal to be allowed, the conviction quashed, and the sentence set aside, or at least for the sentence to be reduced to a lesser one, allowing for mitigation.
 31. Ms. Ombele reaffirmed that the prosecution had established all ingredients of defilement under Section 8(3) of the *Sexual Offences Act*. She reiterated that the victim was 13 years old, as proven by a birth certificate; identification was clear as the victim knew the appellant as a barber near her father's workplace, and the incident occurred during the day, ruling out mistaken identity.
 32. The respondent further submitted that penetration was proven by the minor's very elaborate evidence and corroborating medical evidence (P3 form). The respondent also emphasized the victim's sworn statement after *voire dire* and the applicability of Section 124 of the *Evidence Act* regarding corroboration.
 33. The respondent submitted that the 20-year sentence was lawful under Section 8(3) of the *Sexual Offences Act*, which mandates a minimum of not less than twenty years for defilement of a child aged 12-15 years. The respondent further submitted that no mitigating factors were raised by the appellant at the trial court, and that a 20-year sentence was proportional, given that the victim was 13 years old.
 34. The respondent urged the court to uphold both the conviction and sentence.
 35. This is a second appeal. Section 361(1) of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of *Karani vs Republic* [2010] 1 KLR 73 the 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.”



36. 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 penetration was proved; whether the victim's age was properly established; whether the identification of the appellant was reliable; and whether the imposition of a mandatory minimum sentence of 20 years violated the appellant's constitutional right to a fair trial, particularly the right to mitigation and judicial discretion.
37. Section 2 of the *Sexual Offences Act* treats "any penetration whatsoever" as sufficient. This includes even slight penetration.
- Courts have consistently held that the mere act of someone "defiling" a minor, coupled with corroborative medical evidence (P3), suffices. There is no requirement that penetration be precise or forcefully described, as was held in *Fappyton Mutuku Ngui vs Republic* [2012] eKLR.
38. The complainant testified that the appellant covered her mouth, removed her clothes, and defiled her. The Clinical Officer provided medical confirmation via the P3 form. This dual evidence comfortably meets the statutory threshold. In the circumstances, we find that penetration was properly established beyond reasonable doubt.
39. Section 8(3) mandates a sentence based on age, 12 to 15 years. Thus, accurate proof of age is critical. The complainant's age was established through multiple, consistent sources. The complainant explicitly stated she was 13 years old during her sworn *voire dire* testimony. Her father also independently confirmed this. Furthermore, the birth certificate produced by PW4 clearly indicates a birth date of 20th June 2003, which would make the complainant 13 years old at the time of the incident on 9th June 2016.
40. The fact that the complainant was not specifically recalled to identify her own birth certificate is not fatal, given her direct testimony on age and her father's corroboration, because, while ideally the complainant might be called to identify the exhibit, courts have held that corroboration by a parent and documentary proof suffices if no prejudice arises. The High Court's acceptance was reasonable, and the chain of evidence supports a finding beyond a reasonable doubt. We find that the age of the complainant was legally and factually established.
41. Identification is presumptively clear in daylight, by a known person, and reinforced by corroborating evidence. Furthermore, recognition is more reliable than identification by strangers.
42. The evidence on record strongly supports identification by recognition. PW2 knew the appellant as a barber near her father's workplace, even if she did not know his name. This was corroborated by PW3, who stated the complainant pointed out the appellant; and by PW4, who testified that the complainant pointed out the suspect. Crucially, the appellant himself confirmed he was a barber at Meli Kubwa, and his witness further confirmed this and his proximity to the complainant's father's place of work. The incident occurred in broad daylight, thus eradicating any chance of error. The argument that identification was doubtful or that the appellant was only identified in court is therefore unfounded.
43. Section 8(3) of the *Sexual Offences Act* clearly stipulates a sentence of "not less than twenty years" for the offence committed, and the appellant was indeed sentenced to 20 years' imprisonment.
44. The appellant explicitly invoked the Supreme Court's decision in *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR. His fourth amended ground of appeal is that the High Court erred in affirming a sentence that is a mandatory minimum, which he argues is unconstitutional. The appellant's submissions quote the Muruatetu ruling, stating that "the mandatory nature of a sentence deprives the courts of their legitimate power to exercise jurisdiction". He also cited other cases



to support the view that mandatory minimum sentences curtail judicial discretion and can lead to injustice.

45. The respondent countered the argument, stating that the sentence imposed on the appellant is lawful under Section 8(3) of the *Sexual Offences Act*, as the section stipulates that a person convicted of defilement with a child aged between twelve and fifteen years is liable to imprisonment for a term of not less than twenty years. The respondent supports this submission by citing *Said vs Republic KECA 1274 (KLR)*, which held that this court can only address the legality of the sentence and not its severity.
46. The High Court upheld the 20-year sentence, concluding that it was the minimum sentence provided for the offence.
47. While the appellant relies on the principles established in *Muruatetu* to challenge mandatory minimum sentences as unconstitutional, the High Court and the respondent's arguments in the present appeal indicate that mandatory minimum sentences, specifically for sexual offenses under Section 8(3) of the *Sexual Offences Act*, are currently being upheld as legally sound. The respondent's reliance on *Said vs Republic* further suggests that, in the context of sexual offenses, the courts' role regarding sentencing is seen as addressing its legality, adherence to the statutory minimum, rather than its severity, which implicitly limits the broad application of *Muruatetu*'s impact on sentencing discretion in these specific cases.
48. The Supreme Court has unequivocally directed that the *Muruatetu* case applies only to mandatory death sentences in murder cases under Sections 203 and 204 of the Penal Code, not to other offences or mandatory minimum sentences under other statutes.

This position was also recently reiterated by the Supreme Court in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR)* which found the minimum sentences in the *Sexual Offences Act* to be legal.
49. Accordingly, the appeal against both conviction and sentence is dismissed.
50. 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.
51. 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

