



**Mukwana v Republic (Criminal Revision E019 of 2024)  
[2025] KEHC 16150 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16150 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL REVISION E019 OF 2024  
BM MUSYOKI, J  
NOVEMBER 7, 2025**

**BETWEEN**

**FREDRICK NYONGESA MUKWANA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from conviction and sentence in the Senior Principal  
Magistrate's Court at Ruiru (Honourable J.A. Agonda PM) in  
her sexual offence case number E002 of 2020 dated 4-11-2022)*

**JUDGMENT**

1. The appellant was in the lower court charged with defilement of a child aged 16 years, tried, convicted and sentenced to serve 13 years in jail. He was dissatisfied with both the conviction and sentence hence this appeal in which raised the following grounds;
  1. That the Hon. learned trial Magistrate erred in law by failing to find that the elements of the offence of defilement were not conclusively proved to warrant a conviction.
  2. That the Hon. learned trial Magistrate failed to interrogate the entire evidence as a whole and independently before arriving at her decision.
  3. That the Hon. learned trial Magistrate erred in law by failing to observe that the prosecution witness (complainant) was not a credible witness and was erroneous to rely on her evidence.
  4. That the Hon. learned trial Magistrate erred in law and fact by failing to appreciate that the prosecution evidence was contradicted.
  5. That the Hon. learned trial Magistrate erred by failing to find and appreciate that vital witnesses were not called to testify.



6. That the Hon. learned trial Magistrate erred in law by failing to find that the rights of the Appellant under Article 50 (2) (c) and (j) of *the Constitution* were breached.
  7. That the Hon. learned trial Magistrate erred in both law and facts by convicting the appellant on prosecution case which was not proved beyond reasonable doubt as required by law.
  8. That the Hon. learned trial Magistrate erred in law and facts by relying on evidence of a single witness without any other independent or supporting evidence.
  9. That without prejudice to the above-mentioned grounds of appeal and the circumstances of this matter this Hon. Court to find that the sentence is excessive in the instant case.
2. This being a first appeal, this court is obligated to re-analyse and re-evaluate the evidence produced before the trial court and come to its own independent conclusion but always bearing in mind that it did not hear the witnesses first hand or observe their demeanour and should therefore give due allowance for that. In other words, a first appeal should be conducted as a re-hearing safe that the appellate court does not take the evidence of the witness but relies on what was recorded by the trial court. In *Mursal & another v Manesa* (suing as the legal administrator of Dalphine Kanini Manesa) (2022) KEHC 282 (KLR), Honourable Justice John Mativo as he then was held that;

‘A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.’

3. Similarly, in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (2017) KECA 79 (KLR), the Court of Appeal held that;

‘As this is a first appeal, it is this court’s duty to analyze and re-assess the evidence on record and reach its own conclusions in the matter.’

4. At the hearing in the lower court, the prosecution called five witnesses while the appellant gave an unsworn statement and did not call any witness. The first prosecution witness was the complainant who was taken through *voire dire* examination and the court was satisfied that she was intelligent enough and understood the purpose of taking an oath. She told the court that she was 17 years and a form four student and added that in November 2020, she was living with her sister in Ruiru having traveled from Meru.
5. The child stated further that on 26<sup>th</sup> November 2020, the appellant came home with two bottles of alcohol which he forced her to drink upon which she became unconscious and woke up at 6 pm. She had not known the accused who was her sister’s supervisor before that day. When she woke up, she found herself without a blouse and her trouser was suspended and worn backside front. She added that she had a discharge in her genital organ but she showered. She narrated her ordeal to a lady who in turn told her sister. She was later taken to hospital where she was treated for three days. She identified treatment notes, lab request notes, PRC forms, P3 form and the short she was wearing on the date of the incident.
6. In cross-examination the complainant maintained that the appellant entered her sisters’ house with two bottles of alcohol and that the appellant defiled and dressed her up after the act.



7. PW2 was one Faith Nyambura Mwathi who told the court that the complainant, her sister was born on 16<sup>th</sup> March 2004 and identified her birth certificate. She added that on 27<sup>th</sup> November 2020, she approached the appellant who was her supervisor for leave to enable her pick the complainant but he declined. Instead, the applicant himself picked the complainant and went with her at their place of work.
8. The following day, she left for work at 6.30 am leaving the complainant with her neighbour. At 5.30 pm, the appellant left to her place and later called and told her that he had done something and when she left work for home, she did not find them at home. They came back while drunk and there were bottles of alcohol in the house. She added that the appellant called and told her that he had slept with her sister following which she reported to their boss who asked her to forgive him in exchange of payment. She declined the proposal and reported to Gitongora police station.
9. In cross-examination, PW2 told the court that she had known the appellant for three months and insisted that she found bottles of blue ice and chrome brands of alcohol in the house. She denied coaching the complainant and threatening the appellant. She also denied that she was in a relationship with the appellant.
10. The third witness Corporal Mathew Mugambi told the court that on 28<sup>th</sup> November 2020, he was informed that the complainant had been defiled by the appellant. According to the report filed at the police station, Faith Nyambura was the appellant's boyfriend. He added that the appellant wanted to settle the matter out of court because him and the complainant were at the time of the incident drunk. He added that him and PC Alex Mathu went to Faith's house to arrest the appellant. After thirty minutes, Faith came with the appellant on a motor bike. The appellant admitted having defiled the complainant due to influence of alcohol and was arrested. In cross-examination by the appellant, the witness stated that at the time he was arrested, the appellant had bottles of chrome and bumena alcohol brands.
11. PW4, Sergeant Loice Wamaitha was the investigating officer. She told the court that after the report of the incident was made, she took the complainant to Ruiru Sub County hospital on 30-11-2020 and recorded statements from the witnesses. According to her, Faith asked the appellant to pick her sister, the complainant at Kamakis stage and being her boyfriend, he had keys to her house and took the sister to the house using the company motor bike. She went on to narrate what she recorded from the witnesses which I don't think I need to reproduce here since I have reproduced the testimony of the witnesses above. She added that she got a birth certificate from the complainant's mother and ascertained that she was 16 years at the time of the incident and charged the appellant.
12. When she was cross-examined, she stated that the incident was witnessed by a neighbour and that the alcohol bottles were not produced but the appellant admitted that he bought the alcohol.
13. Dr. Dennis Odhiambo Omondi based in Ruiru level 4 hospital was the 5<sup>th</sup> witness who told the court that the complainant was examined by Dr. Kamau and Dr. Muiruri on 28<sup>th</sup> November 2020. On examination, her vagina was found to have white discharge which was not smelly and hymen was found torn. There were no sperms found in the vagina swab. The appellant was also examined. He produced treatment notes, lab request note, P3 form, PRC form and birth certificate as exhibits.
14. He told the court under cross-examination that, he did into examine the child and he did not have evidence that the appellant defiled the child save for the medical documents. He added that the hymen could be broken by other things beside defilement.



## **Appellant's testimony**

15. The appellant in his unsworn statement told the court that he and PW2 were intimate partners and that they had started living together in August 2020. However, they started having marital issues as PW2 would come home and at work late and drunk. He decided to end the relationship due to her conduct. On 21-11-2020, PW2 woke up in the morning and told him that she was sick and would not go to work after which he gave her money for medication and went to work. The appellant added that, he did not find PW2 at home when he came from work and the household goods were missing. Upon calling her, she told him that he would know who she was.
16. On 27-11-2020, he went to work in the morning and at 2 pm, he was called at the office and when he entered, he found two police officers in civilian clothes who escorted him to Gatongora police station where he was told that he had defiled a girl. He concluded by denying that he defiled the complainant.

## **DIVISION - Analysis and determination**

17. The appeal was heard by way of written submissions. I have read the submissions of the appellant which are not dated and those of the respondent dated 3<sup>rd</sup> September 2025.
17. Before I go into the merits of the appeal, I wish to point out some interesting thing I have noticed in the court's judgement and the respondent's submissions. The court in its judgement made reference to the appellant removing his trousers and inserting his penis into the complainant's vagina. This is not captured in the testimony of the child and I am unable to say where it was picked from. Similarly, the respondent's submissions are misleading in that aspect by stating that the 'appellant undressed the complainant and removed his thing for urinating and inserted in her thing for urinating.' I suspect that the parts were copied and pasted from submissions and judgment in a different case.
19. There is an issue of law raised in the parties' submissions but not in the petition of appeal in regard to Section 211 of the Criminal Procedure Code. The appellant has submitted that the trial court failed to comply with Section 211 of the Criminal Procedure Code as it did not record the ruling. I have pained to understand this argument in vain. The record shows that the ruling was delivered on 29<sup>th</sup> August 2022 and Section 211 complied with. The court file contains the ruling of the Honourable Magistrate. If indeed the court did not comply with Section 211, how then did the appellant make an option of giving unsworn statement? In any event this is not a ground of appeal in the petition and by virtue of Section 50(2) of the Criminal Procedure Code, the appellant has no audience to address me on such an issue.
20. The appellant has submitted that the trial court did not conduct a *voire dire* examination of the complainant. There is no specific way or form of conducting a *voire dire* examination. All that is required is for the trial court to establish to its satisfaction that the child is sufficiently knowledgeable and understands the importance of testifying on oath. I have looked at the examination done by the trial court and in my opinion, I do not see any reason for disturbing the decision of the Honourable Magistrate on the basis of the *voire dire* examination.
21. The appellant has also argued that he was not sufficiently prepared by the court during pre-trials. He claims that after he pleaded not guilty, the court should have interviewed him in respect to his personal circumstances before the trial took off. I may be wrong but I do not know of any constitutional or statutory requirement for interview of an accused person to establish whatever the appellant is referring to as individual circumstances. A court of law is an impartial arbiter and cannot and should not decent into the arena of the trial by preparing the accused person or any witness. The authorities of *Zahira Habibullah Sheikh & another v State of Gujarat* (AIR 2006 SC 1367) and *Kinyua v Republic* (2002)



eKLR cited by the appellant in support of this argument are definitely quoted out of context. The claim by the appellant that he should have been informed of his rights under Article 50 of *the Constitution* is misplaced. He has not shown to the satisfaction of this court that his rights were violated in any manner.

22. The ingredients for the offence of defilement are penetration, age and identification. In *Vincent Kera Ambuka v Republic* (2019) KEHC 6961 (KLR), it was held that;

‘The law is settled that the critical ingredients of the offence of defilement are the age of the complainant, penetration and the positive identification of the perpetrator of the offence.’

23. The age of the complainant is not in issue. Having been born on 16<sup>th</sup> March 2004, the complainant was at the time of incident 16 years. The appellant has not challenged this fact in this appeal save for a general statement that the elements of the offence of defilement were not proved. He also did not raise issue with the stated age before the trial court.

24. The other ingredient is identification of the perpetrator. The appellant had picked the complainant from the bus stage to her sister’s house. He had stayed with her for two days. He is said to have been the boyfriend to the sister a fact he confirmed in his defence when he stated that they had lived as husband and wife for four months. The testimony of the complainant was in my view consistent that the two took alcohol before she passed out only to find herself without a blouse and with trousers worn in the opposite sides. Before she passed out, they were alone in the house and when PW2 came home, she saw them coming while drunk. In these circumstances, I am convinced that the appellant was properly identified as the perpetrator of the Act.

25. The appellant has argued that the element of penetration was not proved. He argues that the doctor admitted that she had no evidence that he defiled the child. The evidence of identification of who defiled the child does not have to come from the examining doctor. The evidence of the doctor goes to prove whether there was penetration and the condition or state of the complainant, unless where there is need to have a DNA analysis in identifying the perpetrator which I don’t think was necessary in this case.

26. The doctor testified that the examination showed discharge from the genital area which was not smelly. It is true as submitted by the appellant that such discharge may be caused by other things beside sexual intercourse. However, that is not the only evidence of penetration that was adduced in this case. The evidence of the complainant that she found herself in a condition that she was not in before she passed out and the fact that she discovered sperms in private parts with the appellant in the house all point to the fact that the appellant penetrated her. The evidence of the complainant is consistent and pursuant to Section 124 of the *Evidence Act*, I believe that it did not need corroboration.

1. The appellant argues that the prosecution failed to call vital witnesses and this court should make an inference against the respondent’s case. He cites failure to call the neighbour who was told of the incident by the complaint. In my view, the evidence of this neighbour would have added no value as she did not witness the incident. She was informed by the complainant just like the other witnesses. It is not the amount or number of witnesses that determines whether a case has been made out. What matters is the quality of the evidence produced.

27. The appellant has pointed out some contradictions in the testimony of the witnesses and submits that the same meant that the witnesses were not credible thus weakening the case against him. I have gone through the testimonies and I do not see any material contradictions that would entitle the appellant to an acquittal. It is trite that not every contradiction should be taken into account in analysing the weight of the evidence. It is never expected that witnesses would say or use the same words in their testimony



and any inconsistency that does not create a reasonable doubt should not influence the mind of the court. In Philip Nzaka Watu v Republic (2016) KECA 696 (KLR) the Court of Appeal held that;

‘However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.’

28. I would reject the defence of the appellant that he was framed by the complainant and PW2. When he took the witness stand, he did not allude to being framed except stating that they had misunderstanding as a couple leading to the PW2 leaving home. The complainant hardly knew the appellant and had no reason to frame him.
29. Finally, the appellant has claimed that the sentence meted on him was excessive. Section 8(4) of the *Sexual Offences Act* provides as follows;

‘A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.’
30. The appellant was sentenced to 13 years imprisonment, the court having taken into account the time the appellant had spent in remand. The sentence in the aforesaid Section is a mandatory one and the court’s hands were tied and it could not mete a less severe sentence. It is therefore my holding that the sentence was not excessive as it is the minimum provided in the statute.
31. Having gone through the evidence produced in the trial court and having said the above, I find this appeal lacking in merits and it is hereby dismissed. The lower court’s conviction and sentence are upheld.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of the appellant in person and Miss Torosi for the respondent.

