**Mutua v Republic (Criminal Appeal 19 of 2018)**
**[2025] KEHC 16244 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16244 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAJIADO**

**CRIMINAL APPEAL 19 OF 2018**

**CW MEOLI, J**

**NOVEMBER 6, 2025**

**BETWEEN**

**BENSON MUTUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against Conviction and Sentence in Kajiado CM's S.O. No. 28 of 2016)***

## JUDGMENT

1. Benson Mutua, the Appellant herein was charged in the main count with Defilement contrary to Section 8 (1) as read with Section 8(2) of the *akn ke act 2006 3 Sexual Offences Act*. The particulars of the offence were that on 24th July, 2016 at Mashuru sub-county, Kajiado County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of NMW a girl aged 10 years. The Appellant faced an alternative charge of Indecent Act with a child contrary to Section 11(1) of the *akn ke act 2006 3 Sexual Offences Act*.

2. Following a full trial the Appellant was convicted and sentenced to life imprisonment. By his initial undated petition of appeal, he challenged the outcome, and later via his submissions dated 16th November, 2024, he raised the following amended grounds of appeal:

    a. That the age of the complainant was not proved as required in law.

    b. That identification of the appellant was not properly done as the law stipulates.

    c. That the evidence of the prosecution was riddled with a lot of inconsistencies that made the whole trial questionable.

    d. That the sentence the appellant is serving is too harsh and it's the request of court discretion to review the sentence.

3. The appeal was canvassed by way of written submissions. By his submissions, the Appellant contended that the age of the minor was not established because no age assessment was carried out. Citing the case of Hillary Nyongesa -vs- Republic (Eldoret) Criminal Appeal No 123 of 2009 in that regard. Pointing to the absence of a birth certificate or medical age assessment report, or immunization card, he asserted that the trial court could not determine the appropriate sentence.

4. Regarding identification, the Appellant stated that he was not identified by the complainant before his arrest, which occurred in the complainant's absence. And that neighbors such as Maggie, Ndung'u, and Susan, who allegedly made a report to the police, did not testify, creating uncertainty as to the identity of the offender. He cited the famous case of Terakali & Anor. Vs. Republic (1952) EACA , regarding the importance of the first report by a witness and asserted that the complainant's first report lacked clarity on when or by whom she was defiled, having only mentioned "Baba Mutindi" as the perpetrator, without a description.

5. He further relied on Republic vs Turnbull (1977) EA 24 and Paul Etole & Anor.-vs- Republic [2001] KECA 285 (KLR) regarding the importance of accurate identification, and careful examination by a trial court of identification evidence in criminal proceedings. Contending that the complainant claimed to have been defiled on her way to purchase rice, in a public place, he pointed out no one noticed the incident as he reiterated his alibi defense tendered at the trial.

6. Invoking Section 124 of the *akn ke act 1963 46 Evidence Act*, he asserted that his conviction was based solely on the complainant's uncorroborated evidence. Further, attacking the medical evidence presented at the trial, the Appellant asserted that it contradicted the complainant's testimony, especially regarding the age of the injuries described as fresh as of 27th July 2016, despite the defilement having occurred on 24th July 2016. This discrepancy, he contended, raised doubts about the accuracy and reliability of the medical testimony and the overall narrative of the complainant.

7. In highlighting asserted inconsistencies in the prosecution evidence, the Appellant argued that the complainant was uncertain of the exact date of the offence and identity of the person who defiled her. Whereas the Appellant gave evidence denying involvement in the offence. Moreover, the absence of a reliable escort to brief the medical personnel at the hospital created further doubt about the reliability of the medical findings and the identification of the alleged perpetrator.

8. He also highlighted the fact that while PW2 (the complainant's mother) stated she took the minor to the hospital on the night of 27th July 2016, PW1 contradicted this, saying the mother only called the father, who could not return home due to lack of fare. Further that while the investigating officer, PW3 Cpl. Bartula Abdilahi, testified that the complainant was taken to Sultan Hamud Hospital, she did not specify who escorted her there. As for PW4, Dr. Muia, her testimony was that the complainant was brought to the facility by police from Mashuru Patrol on 27th July 2016. The Appellant contended that the failure to identify the complainant's escort to the hospital raised questions about the chain of evidence and the reliability of the medical examination.

9. Attacking the complainant's description of how she was defiled while pinned to a wall, he dismissed it as impossible citing the height difference between her and the Appellant. And stated that medical examinations conducted of the two yielded no incriminating results, further weakening the prosecution's case.

10. Finally, the Appellant submitted that the sentence was manifestly excessive, citing inter alia the case of Shadrack Kipkoech Kagoi -vs- R Criminal Appeal No. 253 of 2002 as concerns the discretionary nature of sentencing. Stating his age to be 38 years old and poor health, he contended that he could not survive the strenuous prison conditions, while urging the court invoke Section 26(3) of the Penal

Code, and to consider the time already served in custody pursuant to the case of Ahamed Abolfathi Mohammed & another -vs- Republic (2018) eKLR.

11. The Respondents opposed the appeal through submissions dated on 16th June, 2025. Regarding the three ingredients of defilement, namely, age, penetration and identity of the accused the Respondent stated as follows. First, that the evidence of penetration adduced by the victim was corroborated by the medical officer, who testified that complainant's labia majora was bruised and inflamed while her hymen was torn, the conclusion being that she was defiled. Citing here the holding by the Court of Appeal in Mohammed Bachero -vs- Republic [2015[eKLR that the slightest penetration is sufficient to establish the offence of defilement.

12. On the identification of the Appellant as the perpetrator, reference was made to the evidence that the complainant knew the Appellant well as Baba Mutindi, and moreover, the incident happened at around 6pm when there was daylight. Reiterating that the Appellant confirms that the minor's family were his neighbors, the Respondent stated that this was a case of recognition rather than of identification of a stranger. Here relying on dicta in the famous case of Anjononi & others-vs- Republic (1980)eKLR .

13. Submitting that there were no discrepancies in the prosecution case, the Respondent argued that in the event any existed, the same were minor and curable under Section 382 of the Criminal Procedure Code. Hence in their view, the appeal is without merit as all ingredients of defilement were proved and there was no basis for interfering with the conviction.

14. In support of the sentence, the Respondent asserted that it was lawful pursuant to Section 8(1) as read with Section 8(2) of the *akn ke act 2006 3 Sexual Offences Act* which provides for minimum sentence of life imprisonment for the defilement of a child aged eleven years and below. And citing the Court of Appeal decisions in SOO -vs- Republic (Criminal Appeal 120 of 2020)[2025]KECA 796(KLR) and Republic -vs- Julius Manyeso (petition E013 of 2024)[2025]KESC 16 KLR.

**Analysis and Determination**

15. The court has considered the record of the lower court and rival submissions on this appeal. The duty of this Court in a first appeal is to re-evaluate the evidence adduced before the trial court with a view to arriving at its own conclusions. In Okeno -vs- Republic (1972) E.A 32 the Court of Appeal for Eastern Africa stated that:

> "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) EA. 424."

16. Three ingredients must be proved beyond reasonable doubt to secure a conviction for defilement, namely, penetration, age of the victim and identity of the perpetrator. The prosecution case through five witnesses was as follows . NMW (PW1) was aged 10 years in 2016 and resided at Emali with her parents including her mother JNW (PW2). The Appellant was a neighbour and friend of her family, and also lived with his family close by. On 24.7.2016 at 6:00pm PW1 left her house to go out shopping for rice. According to her, on the way back, the Appellant whom she referred to as Baba Mutindi and whom she identified in court accosted her, pinned her to a wall, removed her inner wear, and covered her mouth, before inserting his penis in her private parts, which she indicated by touch at the trial.

She experienced pain but was unable to scream. Before releasing her, he gave back her underwear and threatened that if she told anyone about the incident he would kill her.

17. Thus, she did not inform her mother about the incident but due to pain in her private parts had to walk and sit with her legs apart, and PW2 upon noticing this fact on 27.07.2016 questioned PW1 and struck her when she appeared reticent. PW1 then revealed that Baba Mutindi had defiled her, and upon examining her PW2 noted pus and a foul smell emanating from genitals. When immediately confronted by PW2 and neighbours in the presence of his wife, the Appellant denied the accusation.

18. The neighbors described as Mama Maggie and Susan called police who arrested the Appellant on the same date, while another neighbour, one Ndunge escorted PW1 and PW2 to Mashuru Police station to file a complaint, with Ndunge and Cpl. Bartula Abdulahi (PW3) the investigating officer based at Mashuru Police Station later escorting PW1 to Sultan Hamud hospital where she was examined and the PRC form completed on 27.07.2016 by Esther Daudi, a clinical officer (Exh.3) .

19. On 28.07.2016 PW3 escorted PW1 to Sultan Hamud Hospital where she was examined by Dr. Muia (PW4) who noted the same injuries documented in the PRC (Exh. 3) including bruises on the labia majora, tenderness and inflammation of the vaginal wall, torn hymen and numerous pus cells, all indicative of defilement trauma. The injuries were days old, older than 72 hours according to the witness. PW3 produced the immunization or clinic card of PW1 as Exh 1, showing her date of birth as 18.07.2006 . The Appellant was eventually charged.

20. Upon being placed on his defence, the Appellant gave an unsworn statement. To the effect that he was a farmer, and on 24.7.2016 was away in Masimba planting tomatoes, hence not present at the time of the offence and was arrested by police from his home on 27.7.2016.

21. Based on the oral evidence of PW1 and PW2, the immunization card she identified as MFI1 and later produced as Exh.1, the complainant was born on 18.07.2006, thus aged 10 years in 2016. The Appellant's complaint that the evidence of age was inadequate because no age assessment was conducted is misplaced as there is no such mandatory requirement. In Elias Kaingu Kasomo vs Republic (2014) eKLR, the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *akn ke act 2006 3 Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

22. In the case of Mwalongo Chichoro Mwanjembe v Republic, Msa Cr. App. No. 24 of 2015 (UR) the Court of Appeal addressed the question of age of complainants in defilement cases as follows ;-

> " ...the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R, Cr. Appeal No.19 of 2014 and Omar Uche v R,Cr.App.No.11 of 2015.
>
> We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000. We think that what ought to

be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

23. The evidence tendered by witnesses PW1, 2 and 3 proved beyond reasonable doubt that the complainant was ten years old at the material time. Besides in cross-examination of PW2 the Appellant did not raise that matter with her, contenting himself with allegations of a land dispute, inter alia.

24. As regards penetration, there is the testimony of PW1, PW2, PW3 and the medical evidence by PW4. PW1 gave a lucid account of her encounter on 24.07.2016 with the Appellant as she went out to buy some rice having been sent by her mother. The mother PW2 also confirmed having sent out the daughter to shop, and that she delayed in returning. It was not until she noticed her daughter's odd gait on 27.07.2016 that she confronted her and seeing her reluctance, struck her. Then PW2 narrated the occurrence of the incident and naming Baba Mutindi as the culprit. Examining her immediately, she observed pus and a foul odor emanating from her private parts.

25. PW2 immediately understood the reference to Baba Mutindi as a reference to the Appellant who was known to her as a friend and neighbour of her family. She therefore proceeded directly to the Appellant's house and confronted the Appellant. Evidence of penetration by PW1 and PW2 is strongly supported by the testimony of PW4 and documentary medical evidence (Exh. 2-4 b). Thus, contrary to the assertions of the Appellant, this was not a case where he was convicted upon the uncorroborated evidence of PW1. There is ample corroboration of penetration inter alia.

26. As for the Appellant's allegation that there were inconsistencies that raise doubts in the medical evidence, nothing could be further from the truth. A wholesome reading of the evidence by prosecution witnesses reveals that the neighbours Susan and Mama Maggie called police on 27.07.2016 who came and arrested the Appellant, while PW1, PW2 accompanied by another neighbour, Ndunge went to make a formal report at Mashuru Police station where PW3 was based. The PRC form documenting the initial examination of PW1 (Exh.3) reflects the name of PW3 and the date when the complainant was first seen at Sultan Hamud hospital by one Esther Daudi, a clinical officer as 27.07.2016, and according to PW2, Ndunge escorted PW1 to hospital, PW1 explaining that her mother had a young child at the time.

27. On the other hand, the P3 form (Exh. 2) was completed on 28.07.2016 upon PW1 being examined by PW4 when, PW3 who had already taken over the matter escorted the complainant to Sultan Hamud hospital. The fact that the neighbours who helped in their various ways were not called as witnesses does not detract from the evidence of PW1-4, and more particularly the medical evidence. It is after all, the independent hospital personnel who attended to PW1 and PW4 said as much during cross-examination. The role of an escort was just that. There was no requirement to call a multiplicity of witnesses on that aspect when the core witnesses had testified. In Keter versus Republic [2007] 1EA135 the court observed that:-

> " The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

28. As to whether it was possible to penetrate the minor while standing, PW1 described in lucid detail that the Appellant pinned her against the wall and having removed her underwear, penetrated her. He did not raise the question of his height and impracticability of this with PW1 when he cross-examined her at the trial. Besides, the fact that the assault happened next to a wall rather than in a house does not make it unbelievable. After all, the Appellant at the time lived in his house with his wife and children and could not possibly take the minor to that house to execute his intentions.

29. According to PW1, the offence occurred beside a house and not at a public footpath as suggested here by the Appellant. From the description of the complainant the offence occurred within the residential area where both the Appellant and PW1 lived. The description suggest that there were several rental houses clustered together and as often happens in such set ups, it is not uncommon to have lonely spaces or corners hidden from open view. It is inconceivable that a sane person such as the Appellant would attempt to defile a child on a public path in daylight, and it appears from the narration of PW1 that the Appellant had been monitoring her movements with intentions of defiling her and positioned himself ready to accost her on her way home at a lonely or hidden space that was conducive for the execution of his intentions.

30. In the court's view therefore, there were no contradictions of any significance, and reviewing the entire evidence on penetration, this court, like the trial court found PW1' s account of the incident believable and the findings of the trial court which observed her as she testified are unassailable. As stated by the Court of Appeal in Joseph Maina Mwangi versus Republic Criminal Appeal No.73 of 1993 :

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

31. As regards the identity of the perpetrator, this was a case of recognition: PW1's family and that of Appellant were not only neighbours at Emali but also friends who shared meals according to PW1 and PW2. PW1 described the perpetrator as Baba Mutindi, and her mother understanding this reference to be to the Appellant, proceeded to his house to confront him. Not only was he identified in court by PW1 at the trial, PW2 confirmed that he was the person known as Baba Mutindi, which fact the Appellant did not dispute. The incident occurred at dusk and when questioned, PW1 named the perpetrator as the Appellant whom she knew well as Baba Mutindi. In these circumstances, there was no need for an identification parade to be conducted, as the Appellant was known to the victim.

32. Further, the fact that it took the complainant some three days before revealing the incident of defilement to her mother is not strange and cannot, without more, be used to disparage her credibility. On this score, the complainant testified that the Appellant threatened to kill her if she disclosed his actions to anyone. This was a ten year old girl, and it is not unusual for such young children to fear exposing sexual assaults to parents and significant others for fear of reprisals or punishment by the adults in their lives. PW1 apparently took the warning by the Appellant seriously, which is not surprising, so that despite the pain she endured in the days following the assault, she could not readily disclose the assault to her mother who had to smack her to make her reveal the source of her odd gait. From her description of the assault, the Appellant had pinned her to a wall which close proximity enabled her to see the assailant clearly. He also spoke to her during the incident.

33. The Appellant himself did not deny that he was well known to PW1 and her family and as confirmed by the questions he put to PW2 especially. His defence was that on the material date he was away at Masimba, a defence not canvassed with any witness during cross-examination. He did not state when he returned, but in any event the offence occurred after working hours and it is not inconceivable that he travelled back to Emali on the same date, if indeed he had travelled to Masimba. The clear evidence of PW1 places him at the scene of the offence on the evening of 24.07.2016.

34. His denials raise the question why would a child who knew him as a neighbour would falsely accuse him out of the many neighbors living near PW1's home. Allegations put to PW2 concerning a land dispute were not repeated in his defence, but in any event, it is not feasible that the young and reticent PW2

could have been conscripted into such a conspiracy by her parents. Whereas the fact of penetration is not in doubt. In the court's considered view there is firm proof that the Appellant was recognized by PW1 on the date of the offence, confronted by PW2 and others on the 27.07.2016 in the presence of his wife after PW1 revealed the assault incident. His defence was completely displaced by the prosecution evidence and was properly dismissed by the trial court.

35. In the result, the court is satisfied that the three ingredients of defilement were proved to the required standard, and the Appellant's conviction was sound. The appeal against conviction must fail.

36. Concerning the sentence, Section 8 (2) of *akn ke act 2006 3 Sexual Offences Act* provides that a 'person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.' The trial court sentenced the Appellant to life imprisonment in accordance with that provision. The Court of Appeal in Dismas Wafula Kilwake v Republic [2019] eKLR discussed Section 8 of the *akn ke act 2006 3 Sexual Offences Act* as follows:

> " In Hadson Ali Mwachongo v. Republic (2016) eKLR, this Court stated as follows regarding the sentences prescribed by the *akn ke act 2006 3 Sexual Offences Act*:
>
> > "The *akn ke act 2006 3 Sexual Offences Act* provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment."

37. The sentence prescribed by Section 8 of the *akn ke act 2006 3 Sexual Offences Act* is mandatory, and neither the trial court nor this court have discretion in the matter. In its recent decision in Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024) KESC 34 (KLR) the Supreme Court stated as follows, regarding minimum and mandatory sentences prescribed under Section 8 of the *akn ke act 2006 3 Sexual Offences Act*:

> '' In any case, the sentence imposed by the trial court was lawful and remains lawful as long as Section 8 of the *akn ke act 2006 3 Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with the sentence."

38. Further, in Republic v Evans Nyamari Ayako Petition No: E002 of 2024 the Supreme Court in its judgment delivered on 11th April 2024 stated that:

> " (51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.
>
> In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence."

39. Thus, the sentence imposed by the trial court is the lawful sentence for the offence for which the Appellant was convicted. By this token, the Appellant's invocation of Section 333(2) of the CPC is to

no avail here where the mandatory sentence is life imprisonment. Nothing turns on that score. In the result the appeal is without merit and is hereby dismissed in its entirety.

**DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 6 TH DAY OF NOVEMBER 2025 .**

**C.MEOLI**

**JUDGE**

In the presence of:

For the State: Ms. Halima h b for Mr. Kilunda

Appellant: Present

C A: Lepatei