



REPUBLIC OF KENYA



**Ndurya v Republic (Criminal Appeal E021 of 2025)
[2025] KEHC 16285 (KLR) (3 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E021 OF 2025
AN ONGERI, J
NOVEMBER 3, 2025**

BETWEEN

BAKARI ATHMAN NDURYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of Hon. D. Wangeci (SPM) in
Wundanyi SPMC No. E012 of 2023 delivered on 12th March 2025)*

JUDGMENT

1. The Appellant Bakari Athuman Ndurya was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars were that on 23rd March 2023 at about 7:30a.m at xxxxx Village in xxxxx Location of xxxxxx Sub-County within Taita Taveta County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of A.M, a child aged 9 years.
3. The Appellant was faced with an alternative charge of committing an Indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006 in that on the same material particulars as in Count I above, the Appellant intentionally touched the anus of A.M, a child aged 9 years old against his will.
4. The prosecution called 6 witnesses whose evidence was that on the material day, the complainant A.M, a child aged 9 years old was walking to school with his sister.
5. The complainant who testified as PW2 said he went to the Appellant's house to ask for water.
6. The complainant said the Appellant did not give him water but he told the other children to go ahead and the complainant would join them later.



7. The Appellant undressed the complainant and inserted his penis into his anus. He said he screamed and the Appellant removed him from his house and threatened to beat him if he told anyone.
8. PW3 Wilson Nasambi Obienga said he was digging near the Appellant's house when he heard the Appellant telling the children to go ahead leaving the complainant behind.
9. Later PW3 said he saw a man arrive at the Appellant's house asking the Appellant why the child was still in the house.
10. PW3 said he went to the Appellant's house with the intention of taking the child to school.
11. The Appellant told the child to run to school. When PW3 confronted the Appellant, he blamed the devil for his action and threatened to poison him if he let word out about what the Appellant had done.
12. PW4 said she learnt the incident from neighbours who heard the altercation between the Appellant and PW3.
13. PW4 went to the complainant's home and told the complainant's mother. The complainant was escorted to Mwatate Sub County Hospital where he was examined and the report was made at Mwatate Police Station.
14. PW6 William Segey, a Clinical Officer based at Mwatate Sub County Hospital examined the complainant on 23rd March 2023 and said that no anal laceration, swelling or bruises were noted.
15. The Appellant in his defence said he went about his duties on the material day and at 8:30p.m there was a loud bang at his door. He said he was arrested by 3 police officers and taken to Mwatate Police Station and later charged with an offence he had no knowledge of.
16. The trial court found that the incident happened in broad daylight and that the Appellant was properly identified.
17. The Appellant was convicted on the main count of defilement and acquitted on the alternative charge of Indecent Act.
18. The Appellant was sentenced to life imprisonment. He has appealed against the conviction and sentence on the following grounds:-
 - i. That the life imprisonment imposed by the trial court is harsh, excessive hence seeking this court's intervention for further consideration and refers to the recent jurisprudence in the High Court and this court (see Maingi & 5 Others Versus Director of Public Prosecution and another) Petition Number E017 of 2021 (2022) KEHC 13118; Joshua Gichuki Mwangi Versus Republic (Court of Appeal) Criminal Appeal Number 84 of 2015 (UR) and Julius Kitsao.
 - ii. That the trial court erred in law and facts in failing to appreciate the fact that there was a gross violation of the Appellant's rights as constitutionally provide contrary to Article 25(c) and 50(2)(g), (h) and (j) of *the Constitution* of Kenya 2010 occasioning a miscarriage of justice.
 - iii. That the Appellant prays this court to take affirmative action under Article 27(1)(2) to grant appropriate relief as it was in the case of William Okungu Kitinya =versus= Republic (eKLR).
 - iv. That and without prejudice to the instant appeal, the sentence as meted remains harsh and manifestly excessive especially in light of the developing jurisprudence as pertains to the presidential pleasure.



19. The parties filed written submissions as follows;- The appellant, Bakari Athman Nduraya, submitted that he was convicted of defilement and sentenced to life imprisonment.
20. That he now seeks to have his conviction quashed and sentence set aside. His appeal is premised on several key arguments challenging the trial court's findings.
21. He contends that the prosecution's case was marred by significant contradictions and inconsistencies in the evidence of its witnesses, which should have been resolved in his favor, rendering the evidence unreliable for a safe conviction.
22. A central pillar of his defense is that the case was a fabrication orchestrated by PW3, a co-worker, due to a pre-existing grudge stemming from workplace rivalry and privileges.
23. The appellant argues that PW3's delayed revelation of a poisoning threat and his suspicious conduct on the day of the alleged incident reveal an ulterior motive to frame him.
24. Furthermore, the appellant challenges the proof of penetration, a critical element of the offence. He highlights that the clinical officer's testimony (PW6) found no physical injuries or discharge, which he argues fails to establish penetration beyond reasonable doubt.
25. He also points to discrepancies in the testimonies regarding how the complainant was seen entering his house and the events that followed, suggesting the evidence is based on hearsay and unreliable narration.
26. The appellant maintains that the trial magistrate erred by rejecting his defense and mitigation without adequate explanation and by convicting him on evidence that did not meet the standard of proof beyond a reasonable doubt.
27. Finally, he submits that the mandatory life sentence imposed is harsh and excessive, citing emerging jurisprudence that favors definite prison terms over indefinite sentences.
28. He pleads for the appeal to be allowed, his conviction overturned, and he be set at liberty.
29. The Respondent submitted that the conviction and life sentence imposed on the Appellant for defilement were just and based on evidence proving guilt beyond a reasonable doubt.
30. That the prosecution's case, comprising six witnesses, established that the Appellant lured the 9-year-old complainant into his home, sodomized him, and threatened him into silence.
31. A birth certificate confirmed the minor's age. Although medical evidence showed no anal injuries, the trial court rightfully relied on the minor's credible testimony under Section 124 of the *Evidence Act*, which was unshaken during cross-examination.
32. Furthermore, a witness testified that the Appellant confessed to the act, blaming it on the devil.
33. The Respondent contends that the defense was considered but was insufficient to counter the prosecution's compelling evidence.
34. Consequently, the Respondent prays that this Court upholds the trial court's judgment.
35. This being the first appellate court, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
36. The issues for determination in this appeal are as follows:-



- i. Whether the Appellant was properly identified.
 - ii. Whether the prosecution proved penetration.
 - iii. Whether the age of the complainant was proved.
 - iv. Whether the sentence meted is excessive.
37. This Court, sitting as the first appellate court, has a duty to re-evaluate the evidence adduced before the trial court and subject it to a fresh analysis so as to arrive at its own independent conclusion, while bearing in mind that it neither saw nor heard the witnesses testify. (See *Okeno vs. Republic* [1972] EA 32).
 38. The Appellant was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to life imprisonment.
 39. The first issue for determination is whether the Appellant was properly identified as the perpetrator.
 40. The evidence on record places the Appellant at the scene of the crime. The complainant, PW2, a child aged 9 years, testified that he went to the Appellant's house to ask for water.
 41. The Appellant then told the other children to proceed to school, leaving the complainant behind.
 42. PW3, Wilson Nasambi Obienga, corroborated this sequence of events, testifying that he was digging near the Appellant's house and heard the Appellant instruct the other children to go ahead.
 43. This evidence places the Appellant alone with the complainant immediately before the alleged incident.
 44. The incident occurred in broad daylight, and the complainant knew the Appellant, making the identification direct and free from error.
 45. The trial magistrate correctly found that the Appellant was properly identified.
 46. The defence of a grudge raised by the Appellant against PW3 was not substantiated with any evidence and was therefore rightly rejected by the trial court.
 47. A mere allegation of a grudge, without proof, is insufficient to vitiate otherwise cogent and credible evidence of identification.
 48. The second issue is whether the prosecution proved the crucial element of penetration. Section 2 of the *Sexual Offences Act* defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
 49. The complainant, PW2, gave a clear and unshaken account of how the Appellant undressed him and inserted his penis into his anus, causing him to scream.
 50. While the Clinical Officer, PW6, testified that there were no visible physical injuries such as anal lacerations, swelling, or bruises, the absence of injuries does not per se disprove penetration.
 51. The law is well settled that the evidence of a victim of a sexual offence, if believed, can found a conviction even without corroboration.
 52. Section 124 of the *Evidence Act* permits a court to convict on the sole evidence of a victim of a sexual offence if, for reasons to be recorded, it is satisfied that the victim is telling the truth.



53. The trial court, which had the advantage of observing the demeanour of the young complainant, believed his testimony and found it to be truthful.
54. This Court finds no reason to depart from that finding. The testimony of a single witness, if credible, is sufficient to prove penetration.
55. Furthermore, PW3 testified that when he confronted the Appellant, the Appellant blamed the devil for his actions, which amounts to an admission of guilt. The totality of this evidence proves penetration beyond reasonable doubt.
56. The third issue is whether the age of the complainant was proved. Proof of age is a critical component in a defilement case as it determines the applicable sentence under Section 8 of the *Sexual Offences Act*.
57. The prosecution produced a birth certificate which was admitted in evidence, showing that the complainant was born on 25th August 2013.
58. This conclusively proved that the complainant was 9 years old at the time of the offence on 23rd March 2023.
59. The age of the victim was therefore proved beyond any doubt.
60. The final issue is whether the sentence of life imprisonment meted out is excessive.
61. The Appellant was convicted under Section 8(2) of the *Sexual Offences Act*, which prescribes a mandatory life imprisonment for defiling a child aged eleven years or less.
62. On the Sentence, the Appellant was convicted for defiling a child aged 9 years, an offence under Section 8(2) of the *Sexual Offences Act*.
63. The sentence prescribed by law is imprisonment for life. Contrary to the Appellant's submissions, the Supreme Court's decision in Francis Karioko Muruatetu & Another v. Republic [2017] eKLR (Muruatetu 1) which declared the mandatory death sentence unconstitutional, was expressly confined to the offence of murder under the Penal Code.
64. The sentence of life imprisonment imposed by the trial court was lawful, mandatory, and proper.
65. The appeal against conviction is devoid of merit and is hereby dismissed.
66. The conviction is upheld.
67. The appeal against the sentence is likewise dismissed.
68. The sentence of life imprisonment imposed by the trial court is confirmed.
69. orders to issue accordingly

DATED, SIGNED AND DELIVERED THIS 3RD OF NOVEMBER 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

.....for the State



.....for the Appellant

