Kiio v Republic (Criminal Appeal E016 of 2025)
[2025] KEHC 17062 (KLR) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17062 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E016 OF 2025

EN MAINA, J

NOVEMBER 14, 2025

BETWEEN

JOHN MUSYOKA KIIO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Conviction and sentence delivered in the Kithimani Chief Magistrate's Court Sexual Offence No. E057 of 2021 by Hon. P. Wechuli, Principal Magistrate on the 4th November 2022)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read together with 8 (4) of the *Sexual offences Act*. The particulars of the charge were that on 18th of January 2021, at Matungulu sub-County within Machakos County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of GMM, a child aged 17 years.

2. The appellant faced an alternative charge of committing an indecent act with child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of which were that on 18th January 2021, he intentionally and unlawfully by use of his genital organs namely penis caused contact to the genital organ namely vagina, of GMM a child aged 17 years.

3. At the trial five (5) witnesses testified against the Appellant after which the court found he had a case to answer and put him on his defence. He then testified on oath and chose not to call any other witness. After evaluating the evidence, the learned magistrate found the appellant guilty on the main charge and sentenced him to a term of imprisonment for fifteen (15) years.

4. Being aggrieved by the entire judgement, conviction and sentence, the Appellant has preferred this appeal. The same is premised on the amended grounds of appeal wherein he avers as follows:

> "a. That the learned Trial Magistrate erred in both matters of law and facts by convicting the appellant despite the failure to conduct a voire dire examination on the complainant thereby illegitimately pegging conviction on Section 124 of the *Evidence Act*, hence the conviction is unsafe considering the burden of proof rests on the prosecution.
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> b. That the instant case has not been proved to the required standard espoused by Section 107 of the *Evidence Act* as the ingredients of penetration and identification remained unproved, hence unsafe to sustain a conviction or sentence for the alleged offence.
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> c. That the trial court magistrate erred in matters of law and facts by shifting the burden of proof to the appellant thereby failing to give his defence the attention it required by the law of evidence and fair hearing."

5. The appeal proceeded by way of written submissions. Relying on his submissions filed herein on 26th May 2025 the appellant submitted that, in view of the complainant's conduct in court her evidence was not credible. He also submitted that due to the failure to conduct a voire dire and to ask for a psychiatric report in respect to the victim, it was not possible to gauge and ascertain whether the testimony of the victim was truthful or credible. He contended that as such his conviction was not safe. In support of his submissions, he cited the cases of John Njuguna vs Republic [2019] e KLR and Boniface Okeyo vs Republic [2001] e KLR.

6. The appellant further submitted that the elements of penetration and identification were not proved. That it was not clear whether PW4 is a qualified medical practitioner as per the Sexual Offences (Medical Treatment) Regulations, 2012; that was it the case that he was then he would have established why he and the victim did not suffer the same UTI. Further, that it was not proved whether the tear in the victim's genitalia was linked to the alleged act of penetration and that a torn hymen was not proof of penetration. He submitted that whether the victim knew him or not was not in doubt; that the crux of the matter was whether he was the perpetrator of this offence or not. He submitted that considering that the victim's evidence was not corroborated by any other evidence. It does not of itself independently implicate him as provided in Section 124 of the *Evidence Act*; that the evidence of the victim and of her mother was not corroborated by the other witnesses. He contended that he was framed by PW3.

7. The appellant further took issue with what he described as the court shifting the burden of proof on him. He explained that this was because the court failed to elaborate why it believed the victim's evidence but not his. He urged this court to set him at liberty.

8. The appellant also placed reliance on the following cases; Ouma vs Republic [1986[KLR 619, Samson John Nderitu vs Attorney General [2010] e KLR, Mutonyi vs Republic [1982] KLR 203, PKW vs Republic [2012] e KLR, Punjab Jagar Singh (1974) 3 SCC 277.

9. For the State, it was submitted that the learned magistrate considered the victim's evidence and the medical evidence and came to the conclusion that the victim had told the truth which was sufficient to convict the appellant under section 124 of the *Evidence Act*. Secondly, that all the ingredients for the offence of defilement were proved beyond reasonable doubt; that a birth certificate was adduce to prove that the victim was born on 18th January 2021 and was hence a child. Further, that the incident

took place in broad daylight therefore the identification of the appellant was favourable. Thirdly, the prosecution submitted that the appellant's defence was fully considered. It was also submitted that the sentence was lawful and even lenient. Reliance was placed on the case of Anjononi and others vs Republic (1980) eKLR.

ANALYSIS AND DETERMINATION.

10. As the first appellate court, I have carefully considered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion, albeit keeping in mind that unlike that court I did not see or hear the witnesses. I have also considered the submissions by both sides, the cases cited and the law.

11. The Appellant was charged under Section 8(1) as read together with 8 (4) of the *Sexual offences Act* which state;

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (4) 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."

12. The offence of defilement occurs where a person commits an act of penetration with a child. The offence is deemed to have been committed notwithstanding that the child may have consented. Under the law a child is any person who has not attained the age of eighteen years. The first element that the prosecution must prove is that the that the victim is a child. Then it must prove the element of penetration and that the accused is the perpetrator of the offence. The prosecution must also prove the age of the child for purposes of the sentence as the sentence differs depending on the age of the victim. The standard of proof of all the elements is beyond reasonable doubt and at no time does the burden of proof shift to the accused person.

13. The first element is usually proved by adducing evidence of the age of the victim. It is now trite that whereas, a birth certificate is the best evidence age may be proved through other means- see the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR, where the Court of Appeal stated:

> "... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

14. In the instant case the victim stated that she was 17 years old and indeed a certificate of birth tendered by the prosecution proved that she was born on 19th May 2003. The offence was allegedly committed on 18th January 2021 which was a few months short of her eighteenth birthday hence she was still a child. Her exact age then becomes relevant for purposes of the sentence. It is my finding that the fact that the victim was a child was however proved beyond reasonable doubt.

15. We then move to the element of penetration and here, 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. Genital organs are defined by the same section to include the whole or part of male or female genital organs and for purposes of this Act includes the anus.

16. The victim in this case narrated how she was accosted, by a man who she identified as the appellant herein, as she was herding her parent's goats; how she was taken into a bush where he removed his trousers and her inner pant and how he used his private part to rape her in her private part. She narrated how he then gave her 20 shillings and warned her not to tell anyone. She stated that she went home but was afraid to tell her mother because she could have beaten her. Her mother PW2 confirmed that the victim did not report the matter on that day but that she found out when she sent the victim to herd the goats on another date and she refused to go. That it was then that the victim narrated what had happened to her. It is my finding that the testimony of PW2 brought clarity to that of the victim and shows that the victim was a truthful witness. If the trial magistrate did not state why she believed the witness, on my part I believed her because she was consistent in her evidence and the same was corroborated by that of her mother so that even though the medical evidence does not offer any corroboration her evidence suffices to sustain a conviction as provided in Section 124 of the *Evidence Act*.

17. The third element is identification. The victim testified that the appellant who she identified by name found her herding the goats, held her hand and took her to the bush. She knew him before as they were related. He then removed his trousers and her under pant and then used his private part to rape her in her private part. All this happened in broad daylight and can be defined as evidence of recognition. The appellant has conceded that he was known to the victim and this confirms that there was no possibility that mistook someone else for him.

18. The Appellant contends that the evidence of PW1 was not credible as she was not subjected to voire dire examination. Section 19(1) of the *Oaths and Statutory Declarations Act* states as follows in that regard;

> " Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

19. In the case of Patrick Kathurima –vs- Republic [2015] eKLR the Court stated as follows;

> " We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15."

20. Similarly, in the case of Japheth Mwambire Mbitha v Republic [2019] eKLR the Court of Appeal stated;

> " As regards the second issue, the appellant has contended that the evidence placed before the trial court was not only contradictory, but that no voir dire examination was ever conducted on the minors (PW 2 and PW 3). Voir dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See Duhaime, Lloyd. "VoirDire definition" Duhaime's Legal Dictionary).

With specific regard to the testimony of children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of voir dire was explained by this court in Johnson Muiruri vs Republic [1983] KLR 445 as follows:

> "1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
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> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
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> 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
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> 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
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> 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

21. The victim in the case against the appellant was not a child of tender years and therefore voire dire examination on was not necessary. I am also not persuaded that the burden of proof was shifted to the accused person. It is just that the evidence against him was watertight and was not displaced by his evidence.

22. As regards the sentence, Section 8 (4) prescribes a sentence of "imprisonment for a term of not less than fifteen years."

23. The Supreme Court of Kenya recently rendered itself on the issue of whether courts can impose sentences below the minimum prescribed by the *Sexual Offences Act* and categorically held it would be unlawful to do so- see the case of Joshua Gichuki vs Republic (Petition E018 of 2023) [2024] KESC 34 (KLR) where the court stated;

> " 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not

applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.57.In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

24. In this case, the Appellant was sentenced to 15 years. The sentence is therefore lawful and cannot be described as either excessive or harsh as alleged.

25. The upshot is that this appeal has no merit and it is dismissed in its entirety. The conviction and sentence are hereby upheld.

JUDGMENT SIGNED, DATED AND DELIVERED ON THIS 14TH DAY OF NOVEMBER 2025.

E N MAINA

JUDGE

In Presence of:

Miss Kaburu for the State/ Respondent.

The Appellant in person.

Geoffrey Court Assistant/Interpreter