



**Mbathi v Republic (Criminal Appeal E072 of 2025)
[2025] KEHC 17315 (KLR) (26 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E072 OF 2025
J WAKIAGA, J
NOVEMBER 26, 2025**

BETWEEN

JOSEPH KITIJA MBATHI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against original conviction and sentence in criminal case no CM Sexual offence Case Number 105 of 2016 at Makadara Chief Magistrates Court)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the *sexual Offences Act*, the particulars of which were that on the diverse dates between 22nd day of February 2015 and 11th day of May 2016 at commercial slums in industrial area within Nairobi county intentionally caused his penis to penetrate the genital organ of EMK a child aged 14 years old. He faced an alternative charge of committing an indecent act with a child.
2. He was tried ,convicted and sentenced to twenty-five (25) years imprisonment the court having taken into account the three years and eleven months in remand custody.
3. By an application filed on 5th May 2021 in Misc. Criminal Application No E 156 of 2021 the applicant sought for and was granted leave to file an appeal out of time on the 16th November 2021 leading to the filing of Criminal Appeal no E 156 of 2021 in which the appellant raised the following grounds of appeal :
 - a. The prosecution case was marred on inconsistencies and contradictions that cupid not prove the case beyond reasonable doubt.
 - b. That the court erred by not finding that the medical evidence was benign and unable to prove penetration as a key element of defilement.



- c. Section 163(1) and 169(1) of the *Evidence Act* was not complied with.
4. On the 15th November 2023 the appellant filed amended grounds of appeal together with written submissions and on 12th February 2024 the respondent filed written submissions thereon with the appellant filing a rejoinder thereon 12th March 2024 and the matter fixed for hearing as a criminal appeal no E135 of 2024 by the order issued by Kimondo J on 3rd October 2024.
 5. In a strange turn of even the matter was on 13th February 2025 transferred to this court a matter which was technically pending the highlighting of submissions and which has been pending before the said court from the 5th May 2021.

Submissions

6. From the record herein, the following written submissions were filed: appellant filed on 15th November 2023, respondent filed on 12th February 2024, appellants rebuttal forwarded on 21st February 2024, appellants dated 6th March 2024 and appellants submissions dated 17th January 2025, all filed at the criminal registry at Milimani and a further rebuttal dated 5th June 2025 filed at the criminal registry at Makadara.
7. It seems that every time the appeal was fixed for hearing the appellant would be on the safe side file written submission as if crying for help to be heard, all to no avail.
8. It was submitted by the appellant that he was not accorded legal representation thereby breaching his right under Article 50(2)(h) of *the constitution* in support of which the following cases were tendered: Z.W.O v R [2019] eKLR, Republic versus Kartisa Chengo & 2 others [2017] eKLR, Evans Wanjala Siibi versus Republic and Kenga Hisa v R [2020] eKLR to the effect that the appellant was gravely disadvantaged by the failure by the trial court to inform him of the charge with sufficient detail to answer it, have adequate time and facilities to pursue an exonerative defence and given his level of illiteracy he should have been assigned an advocate.
9. It was further submitted that the charge sheet was defective and that it caused vivid jeopardy to the appellant as it was contrary to section 134 of the Criminal Procedure Code as the appellant was charged twice in two counts which were framed in two separate paragraphs and further that the charge sheet had two different offences under the same section of the SOA in support of which reference was made to the case of Maurice Oduor & another v R [2017] eKLR and Joseph Njuguna Mwaura versus Republic [2013] eKLR.
10. It was contended further that the prosecution witnesses were not reliable and credible as there was contradiction between the evidence of PW1 and her mother on the dates of the incident and that the same therefore required corroboration. It was further contended that there was contradiction between PW5 whose evidence was that PW1 took two weeks in Kitale and one month at her grandmother's home unlike TW2 whose evidence was that she took one year before tracing her.
11. It was contended that penetration was not positively proved as P3 form does not indicate the organ used and that there was no evidence that the old tear to PW1 genitalia could not be caused by other factors.
12. It was contended further that the court should review the appellants sentence downwards since the same was excessive, harsh since it fettered the with the discretion of the judicial officer based on the overall circumstances of the case and Article 50(2) (p) of *the Constitution* which provides that the accused is entitled to the least severe of the prescribed punishment for an offence, in support thereof reference was made to the case of Philip Mueni Mueke Maingi.



13. On behalf of the respondent, it was submitted that PW1 testified that she went with the appellant to his house where they stayed for two days until her mother found them and called the police who arrested both of them. It was her evidence that they slept in the appellants bed and had sex on the second day, she later missed her period and the appellant took her to Kitale.
14. It was submitted that penetration was proved by the evidence of PW1 as corroborated by PW3 and PW4. Age was also proved by PW4 and the PRC and P3 forms. The appellant was positively identified by the victim

Proceedings

15. This being a first appeal, the appellant is entitled to as re-evaluation of the evidence tendered before the trial court afresh.
16. PW1 testified that she met the appellant on her way to throw rubbish and they talked, the next day she went to his house and stayed there for two days during which period they “made Sex”. They were then arrested by the police and she was taken to the hospital. She went to stay with her aunt and called the appellant from there who took her to Kitale the same having missed her period. In cross examination she confirmed having known the appellant as a business man selling meat.
17. PW2 stated that in the month of June 2015, she noticed a change in PW1 when she made an inquiry she was told that there was a boy who used to come to the house to talk to her, he later came to the house and told her that he was from the nearby butchery and said he wanted to marry PW1 on the 25th he came for PW1 who was later on found in the appellants house under the bed and when she was interviewed at the Chiefs office, she said that the Appellant whom they knew as ‘jose’ used to give her money and would thereafter have sex with her in his house. They were both punished by the chief and she went away with PW1 only for her to escape from the house.
18. After six months she called her and said she was in Mombasa and wanted fare to come back. When she sent money to the number PW1 had called her from, the registered owner thereof was Joseph Mbatha, the appellant. She later surfaced and told them that the appellant had taken her to Kitale.
19. PW3 Dorren Muiya examined the complainant on 8.8.2016 who gave a history of having become pregnant in may 2016 and miscarried in June and that on physical examination, the hymen had an old tear, which means that there had been sexual violation. PW4 Dr Joseph Maundu examined PW1 on 9.08.16 aged 14 years who had been defiled between 22.2.16 and 10.06.16. He also examined the appellant on the same date. PW 5 SGT Penina Mewabua interviewed PW 1 who stated that the appellant had defiled her seven times and that the appellant admitted having had sex with her.
20. When put on his defence, the appellant confirmed that he used to sell meat and that on 24.6.2016 he moved to a new house when people came to his house and he slapped the compliant in this cause, who came the next day with her mother who asked him why he had assaulted her daughter, he was then taken to the Chiefs office where the complainant confirmed that he had assaulted her. On 8.8.2016 he was arrested for drinking before the hours and on the way to the police station he met PW2 who said she had a case with him and that he should not be released. He was later brought to court and charged with the case herein.
21. In cross examination he stated that he knew PW1 after he slapped her in his house and that he never slept with her neither did he take her to his Aunt in Kitale.



Determination

22. From the proceeding herein and the submissions. the following issues have been identified for determination :
- a. Whether the appellant right to legal representation was violated
 - b. Whether the charge sheet was defective
 - c. Whether the prosecution against the appellant was proved
 - d. Whether the sentence was harsh and excessive
23. The issue of legal representation has now become a standard ground for every appellant in their submissions. In this matter I have noted that the appellant did not raise the same before the trial court, however since it is an allegation of a violation of a constitutional right , the same can be raised at any time in the proceeding.
24. The right to legal representation has been settle in the Court of Appeal case of Manyeso versus Republic [2023] KECA thus:
- “Secondly, the appellant claims that his right to legal representation was also violated. Article 50(2)(g) and (h) of *the Constitution* in this respect provides that the right to a fair trial includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly;h.to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- This court (Kairu, Mbogholi-Msagha and Nyamweya JJA) held in William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) versus Republic (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, the appellant did not raise the issue of legal representation either in the trial court and the High Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2) (h) of *the Constitution* were violated.”
25. In this cause, I note that whereas the appellant was charged with defilement, the same was able to conduct the trial herein, including offering a defence herein and therefore find and hold that lack of legal representation did not prejudice the appellant and did not vitiate the trial herein. I find no merit on this ground of appeal.
26. On the defect on the charge sheet, it is clear that the appellant was charged with offence of defilement contrary to section 8(1) as read with (3) thereof, the fact that the charge sheet read 8(2) (3) did not prejudice the appellant and further the fact that the same was charged with an alternative count did



not lead to duplicity thereof. The charge sheet as drafted complied fully with their provision of section 134 of the CPC and therefore the appellant submissions thereon has no merit and is dismissed.

27. On the proof of the prosecution case, as submitted by the respondent, the age of the victim was not in dispute, the same was proved by her testimony, her mothers and the medical reports produced before the trial court. On the identification of the appellant, the same was arrested in his house where the victim who had escaped from home was found under the bed, the appellant in his defence put himself with the victim when he stated that he had slapped her but failed to state what led to him slapping her. The appellant was known to the sisters of the victim as Jose and the same came to the house where he confessed his love for the same to PW2 her mother and indicated that he wanted to marry her.
28. His identification was further confirmed by PW2 whose evidence was that the victim called her from a phone which was registered in the name of the appellant and therefore the identification was by recognition and safe from error.
29. On penetration, the complainant PW1 testified that she went to the appellant house and they made sex, she described in details how the appellant came from work at 10 pm they went to bed, she removed her pullover, the appellant removed her blouse, skirt, biker and underwear, he then removed his trouser, shirt and shorts inside, they then slept and “made Sex” and in cross examination stated that they made it seven times. This graphic explanation can not be from “view sasa “.
30. The victim might not have been that innocent, the appellant having confused her with money from the butchery, but the fact that the appellant penetrated her against the law is proved beyond reasonable doubt. Her account was corroborated by the fact that she thereafter missed her period which led to the appellant sending her to Kitale from where she either procured an abortion or a miscarriage. The medical evidenced and reports corroborated the same .
31. Were there contradiction in the prosecution case? Yes, there were contradictions on the dates and the period the victim was away from home, but those were not material to the case before the trial court. Was the appellants defence considered ? the appellant case was that he assaulted the victim when she came to his house with five people. What is missing in this defence is why would the compliant a 14-year-old school girl go to the appellant house? when weighed against the evidence of PW2 I would agree with the prosecution that the same was properly rejected.
32. I therefore find and hold the prosecution proved the case against the appellant as required and dismiss the appeal against conviction by affirming the trial court determination thereon.
33. The final issue is whether the sentence of 25 years was harsh and cruel? the law provides for a sentenced of not less than twenty years upon conviction. The twenty years is the minimum sentence provided and therefore whereas the court has the discretion to met out a sentence above the minimum, the same is under a judicial duty to give reasons therefor. In sentencing the appellant, the court had this to say “I have considered the time spent by the accused in custody which is from 11/8/2016 which is 3 years 11 months to date. I have considered manner in which this offence occurred and I wish to state that the accused despite being warned off the complainant , he persisted in pursuing her and accepted taking her to his rural home away from her family. His brazen attitude with the minor is regrettable “
34. Did this justify giving the appellant a sentence over and above that provided for? I don’t think so. whereas ignorance of the law is no defence, the appellant herein was aged 22 years, in his mind he had found a wife, this explains his going to the victim’s mother and expressing his desire to marry her. By the time he was taking her away , the victim was already pregnant and in his simple mind was trying to do the best in the circumstances.



35. This is a matter where the law ought to have looked at the appellant favourably because perhaps in his village they marry them that young. He did not like his age mates abandon the victim . he was failed by the traditional system around him , including his aunt who was very happy in keeping the victim without finding out the whereabouts of her parents. The mother of the victim instead of counselling both the victim and the appellant, who had by then tested the forbidden fruit only told him that the victim was going to school.
36. I will therefore agree with the appellant that his sentence herein being above the minimum allowed in statute was harsh and quarrel, I therefore allow the appeal on the sentence. Which I hereby quash and substitute the same with a sentence of twenty (20) years from 11th august 2016 when the appellant first appeared in court , the appellant is entitled to remission thereon.
37. In the final analysis I dismiss the appeal on conviction but allow the appeal on sentence with I hereby quash and substitute the same with a sentence of twenty years in conformity with the judgement of the Supreme Court on sentences on sexual offences, which the jury is still out as to whether it took into account “Kwa ground’ things are different as the appellant’s case herein shows.
38. And it is ordered .

DATED, SIGNED AND DELIVERED THIS 26th DAY OF NOVEMBER 2025

J. WAKIAGA

JUDGE

In the Presence of

Court Assistant - Irene

Ms Kariuki for the state

The appellant in person

