



REPUBLIC OF KENYA



**Mumo v Republic (Criminal Appeal E029 of 2025)
[2025] KEHC 17763 (KLR) (27 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E029 OF 2025
EN MAINA, J
NOVEMBER 27, 2025**

BETWEEN

DANIEL MUIA MUMO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Conviction and sentence delivered on
the 4th day of March 2025 at the Kangundo Law Court Sexual
Offence No. E051 of 2022 by Hon. S.A Opande, Principal Magistrate)*

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The particulars of the charge were that on 29th of November 2022 and 6th November 2022 at [Particulars Withheld] area, Tala location in Matungulu Sub County within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of AMK, a child aged 12 years.
2. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*, No 3 of 2006. The particulars of which were that on the same date and place he intentionally and unlawfully touched the vagina of A.M.K., a child aged 12 years with his penis.
3. At the trial four (4) witnesses testified against the Appellant who was found to have a case to answer. The Appellant was placed on his defence and equally called four (4) witnesses. After evaluating the evidence, the trial Magistrate found the appellant guilty on the main charge, convicted him and after considering the probation report and mitigation, sentenced him to 20 years imprisonment.



4. Being aggrieved by the entire judgement, conviction and sentence, the Appellant has preferred this appeal on grounds that;
 - a. The learned Trial Magistrate erred in both fact and law by convicting the appellant when the vital element of penetration was not proved to the required threshold.
 - b. the learned trial magistrate erred in matters of law and fact by not considering the appellant's plausible defence.
 - c. the learned trial magistrate erred in law by sentencing the appellant by virtue of the minimum mandatory provisions in the [Sexual Offences Act](#).
 - d. Spent.
5. The parties to the appeal consented to canvass it by way of written submissions. On his part the Appellant relied on the submissions on 17/07/2025 and submitted on six issues. First issue was that when the Trial Magistrate was making his findings, he relied on section 8 (1) (3) of the [Sexual Offences Act](#) which was different from what he took plea for. That amending the charge sheet after prosecution closed its case without fresh plea or notice, was a procedural defect and potentially a miscarriage of justice.
6. It was further submitted that the evidence of PW1,PW2,PW3 and PW4 were that the offence was committed on 29/11/2022 and not on diverse dates as indicated in the charge sheet To support this contention, the Appellant relied on the case of Benson Muia Selya V Republic Criminal Appeal NO.19 of 2013 [2014] eKLR and MKK V Republic Criminal Appeal 59 of 2019, Isaac Omambia vs R [1995] e KLR, Yongo vs R [1983] e KLR, Peter Ngure Mwangi vs Republic [2014] e KLR, Willie (William) Slaney vs State of Madhya Pradesh (A.I.R 1956 Madras weekly notes 391, Fatehali Manji vs Republic [1966]) EA 343.
7. Secondly, it was submitted that there was a breach of the right to fair trial under Article 50 (2) of [the Constitution](#) as throughout the proceedings, the Appellant was never supplied with the witness statements. Also, his preferred language was Kiswahili but the charge sheet was read out to him in English without an interpreter. To buttress this point, reliance was placed on the cases of Juma Ngodia vs Republic [2003] e KLR, Thomas Patrick Gilbert Cholmondley vs Republic [2008] e KLR, Paul Ndungu Maina vs Republic [2006] e KLR, John Muiruri vs Republic [1983] e KLR, David Njuguna Wairimu vs Republic [2010] e KLR, Okeno vs Republic [1972] e KLR and Republic vs Kipngeno Arap Ngeny [2001] eKLR.
8. The third issue was that the minor was not properly subjected to *voire dire* as required by section 19 (1) of the [Oaths and Statutory Declarations Act](#), Cap 15. The Appellant said this while relying on the case of Joseph Opondo vs Republic [2002] e KLR where the Court of Appeal dealt with the nature of *voire dire* examination. Reference was also made to the case of Kinyua vs Republic [2002] 1 KLR 256 and Godfrey Odhiambo and another vs Republic [2010] eKLR.
9. Fourth, it was submitted that the ingredients of the offence of defilement were not proved beyond reasonable doubt. That the P3 form confirmed that the hymen was intact and no spermatozoa was detected and these lacerations are not conclusive proof of penetration without forensic evidence. That there was no evidence directly linked him to the alleged offence. The Appellant contended that there was doubt that was raised by the inconsistencies in the case on the time the incident took place, time of examination by the doctor and whether or not the victim had a panty when she was examined at home. On the other hand, the Appellant submitted that PW3 who produced the P3 form and



the treatment was not the maker of the documents and did not give reasons why Dr, Mercy and Dr. Obiero respectively, could not be available to testify. Further reliance was placed on the cases of Ndungu Limanyi vs Republic [1979] KLR 282, Philip Nzaka Watu vs Republic [2016] e KLR, James Bari Munyoris vs Republic [2010] e KLR, Karanja & another vs Republic [2002] 2 KLR 140, Woolmington vs DPP [1935] AC 462 (UK), Miller vs Minister of Pensions [1947] 2 All ER 372, Sawe Vs Republic [2003] Eklr, CKM Vs Republic [2013] e KLR, Abdi Misinja Vs Republic [2016] e KLR and BK vs Republic [2014] e KLR.

10. The Appellant also submitted that his evidence was not considered and lastly that the sentence was severe as penetration was not proven. He therefore asked the court to substitute the conviction to that of an indecent act based on the evidence. The court was also asked to consider the period already served.
11. The Respondent in submissions on 16/07/2025 submitted that the prosecution proved its case beyond reasonable doubt and the elements of the offence were proven; that the birth certificate indicated that the victim was 12 years old and that there was penetration from the medical evidence that was produced as well as the victim who identified the Appellant as the one who did “bad manners” to her.
12. It was submitted that the appellant's defence was considered at page 12 and 13 of the proceedings where the court held that what comes out of the appellant's defence is that the complainant has never lied on the accused before and thus the defence case was considered contrary to what was alleged by the Appellant. Lastly, it was submitted that the sentence was within the law and should not be disturbed. In support of its submissions, reliance was placed on the cases of Charles 'Wamukova Karani vs. Republic. Criminal Appeal No. 72 of 2013, Francis Omuroni vs Uganda Criminal Appeal no 2 of 2000, Edwin Nyambogo Onsongo vs. Republic (2016) eKLR, Richard Munene vs Republic [2018] e KLR, Bassita vs Uganda Criminal Appeal no 35 of 1995 and SC Petition No. E 018 of 2023 R vs Joshua Gichuki Mwangi and 4 others. Learned prosecution counsel urged this court to dismiss the appeal and instead uphold the conviction and sentence imposed by the trial court.

Analysis and Determination.

13. As the first appellate court, I have carefully considered and evaluated the evidence 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 – (see the case of Okeno v Republic [1972] EA 32). I have also taken into consideration the rival submissions, the cases cited and the law.
14. Section 8 (1) of the [Sexual Offences Act](#) provides as follows:
 - “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”
15. The elements of the offence of defilement are therefore:
 - a. That the complainant/victim is a child.
 - b. The fact of the act of penetration of the genital organ of the child with the genital organ of the perpetrator whether complete or partial.
 - c. Identification of the accused as the perpetrator.

(see the case of Manyeso v Republic (Criminal Appeal 12 of 2012) [2023] KECA 827 (KLR) (7 July 2023) (Judgment).



16. In regard to age, the victim herein testified that she was 12 years old at the time. This was corroborated by a birth certificate that indicated that she was born on 28th October 2010. The incident is said to have taken place on 29th November 2022 and 6th November 2022 by which time the victim was 12 years 1 month old. That the victim was a child was therefore proved beyond reasonable doubt. Her exact age only becomes relevant for purposes of punishment as the sentences for the offence, once it is proved, are graduated according to the age of the child.

17. The next issue for determination is whether or not penetration was proved. Section 2 of the [Sexual Offences Act](#) as follows:

“The partial or complete insertion of the genital organ of is satisfied that the alleged victim is telling the truth.”

18. From the record, the minor testified that the Appellant hurt her by doing bad manners to her. She described what was done to her as follows-

“..... Daniel Muya Mumo hurt me. He is a cousin to my father and a neighbour. He did bad manners to me. It was on Tuesday 29th November 2022. I was 12 years old. It was 6pm. I was feeding our cows. He came from behind me. I turned behind and saw him. He held my mouth and put me in the trench. He removed my pantie; I was in a dress. He placed me somewhere. He unzipped/ he removed his private parts and placed it in my private part. I use my private part to urinate. He did bad manners to me.”

19. Her mother who testified as PW2 testified that the victim informed her that her uncle, Daniel Muia had raped her and that she took her to the police station to file a report and then to Kangundo Level 4 hospital where she was examined. This was confirmed by Jeffline Mwendwa (PW3), the coordinator of GBV (gender based violence) cases and treatment at the said facility and who produced medical reports and treatment notes evidencing the victim’s attendance and treatment at the hospital. PW3 testified that the victim complained of sexual violation by her uncle at 6pm in a ditch by the roadside. She told the court that the victim’s hymen was intact and the labia minora had lacerations and pain on touch. The Appellant took issue with the production of the reports by PW3 without any explanation for why the authors, Dr Mercy and Dr Obiero, were not called. From the proceedings, it is evident that the Appellant did not object to the production of the said documents by this witness. That he even went ahead to cross examine her means that he had no objection. The trial would have been the best forum to raise the objection as the court would then have made a determination of whether to exercise its discretion to call the doctors as provided in Section 77(3) of the [Evidence Act](#). Raising it at this stage can only be interpreted as an afterthought. In any event the medical evidence was not mandatory given that corroboration is not a requirement in sexual offences- see Section 124 of the [Sexual Offences Act](#) which states:

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence



of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

20. From the description given by the victim this court is satisfied that there was penetration. As provided in Section 2 of the Act penetration need not be complete so in my view the presence or absence of spermatozoa is not material. As was held by the Court of Appeal in the case of Mark Oiruri Mose vs R (2013) eKLR -

“... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ....”

21. The Appellant’s argument that the case was not proved as there was no evidence of spermatozoa cannot therefore hold.

22. That bring me to the issue of *voire dire* examination which the Appellant alleges was not done in accordance with the law. Section 19(1) of the [Oaths and Statutory Declarations Act](#) has something to do with receiving evidence of a child in the following;-

“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.”

23. In the case of Japheth Mwambire Mbitha v Republic [2019] eKLR the Court of Appeal rendered itself on the issue of *voire dire* as follows;

“As regards the second issue, the appellant has contended that the evidence placed before the trial court was not only contradictory, but that no *voire 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, *voire dire* examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of *voire 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 *voire 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.



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.
 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.
 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.
 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."
24. Applying the above principles to this case I am satisfied that the *voire dire* conducted in this case meets the test. The questions put to the child by the learned magistrate tested whether she understood the nature of an oath and whether she understood the duty of speaking the truth. It is clear that the child passed both tests and her evidence was therefore properly received.
 25. Having found that the evidence of the victim was properly received, I further find that that penetration was proved beyond reasonable doubt. It is instructive that she testified twice for reason of transfer of the magistrate and on both occasions, she was calm and very consistent. In my view she was a truthful witness. The evidence of her mother and the investigating officer leaves no doubt that the offence was committed.
 26. On the identification of the Appellant, the complainant testified that she knew the Appellant as an uncle and neighbour, this was confirmed by PW2, the mother who said that the Appellant was a cousin to the father of her daughter. Further, DW2 and DW3 stated that the complainant was their neighbour. The offence occurred during day time a condition favourable to a positive identification. The Appellant's allegation that he was framed for not constructing the house of the victim's brother is not convincing. It is noteworthy that his wife who was his key witness did not make mention of such a grudge. The alibi defence mounted by the appellant was also weak. It is not clear whether he was at the farm or in a quarry. It is also instructive that he avoids giving the approximate time of each activity. Him and his wife preferring to make a general statement that they were in the farm the whole day. The alibi was raised late in the trial and it was not possible for the prosecution to investigate it, but even then, I have examined it carefully in the totality of the other evidence and found it could not be true.
 27. The Appellant alleged that his right to fair trial was violated by the court using a language the Appellant did not understand and not being provided with a witness statement throughout the trial. The record indicates that the appellant understood the language used by the court. The witnesses testified in Kiswahili which he understood as he was able to cross examine them at length. He too testified in Kiswahili as did all his witnesses. Further, his choice language in this appeal was Kiswahili. He cannot therefore be heard to say that he did not understand the language. That ground cannot stand either.
 28. The Appellant also raised an issue that the evidence of the victim and her mother was riddled with contradictions. I have subjected that evidence to fresh scrutiny and though it is true that there were



inconsistencies in the evidence of the said witnesses, I am unable to find that the same were affected the prosecution's case or even occasioned prejudice to the appellant.

29. In regard to the charge having been framed under the wrong section, my finding is that the same is not fatal as the part which was not correct is the one that provides for the punishment. Since the child was twelve years old the correct section was 8 (3) but not 8(4) as framed. I am satisfied that the error did not prejudice the appellant and that the learned magistrate acted lawfully in rectifying it at the stage of sentencing. Moreover, the error is one that is curable under Section 382 of the Criminal Procedure Act.
30. The sentence imposed by the learned magistrate is the minimum provided in the law. It is a lawful sentence.
31. In the upshot I find that the charge against the appellant was proved beyond reasonable doubt. The appeal is not merited and it is dismissed in its entirety. The conviction and sentence of the court below are upheld.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF NOVEMBER 2025.

E. N. MAINA

JUDGE

In presence of:

Ms Kaburu for the State

The Appellant in person

Geoffrey- C/A/Interpreter

