



REPUBLIC OF KENYA



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**Mutuura v Republic (Criminal Appeal E012 of 2024)
[2025] KEHC 17762 (KLR) (27 November 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E012 OF 2024
RL KORIR, J
NOVEMBER 27, 2025**

BETWEEN

PIUS MUGENDI MUTUURA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in Sexual
Offence Case No. E026 of 2021 at Principal Magistrate's Court Marimanti
delivered by Hon. J.M. Gacheru (R.M) on 14th September, 2023)*

JUDGMENT

1. Pius Mugendi Mutuura (Appellant) was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#).
2. The particulars of the offence are that on diverse dates between 14th and 17th December 2020 at [Particulars Withheld] village, Matakiri Location, Tharaka South Sub-County, within Tharaka Nithi County intentionally caused his penis to penetrate the vagina of G.A.N a child aged 17 years.
3. He faced an alternative is charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006, whose particulars were that he intentionally touched the vagina of G.A.N, a child aged 17 years.
4. He was tried, convicted and sentenced to serve 15 years imprisonment.
5. Aggrieved with the judgement, the Accused (now Appellant) appealed to this court vide Petition of Appeal dated 5th March, 2024. He raised 8 grounds which I paraphrase and understand to be:-
 - i. That the Prosecution case was not proved to the required legal stand.
 - ii. That the trial court rejected Appellant's defence without reason and,



- iii. That the Appellant's mitigation was not taken into consideration leading to a harsh and excessive sentence.
6. Parties were directed to canvass the Appeal through written submissions. The Appellant's submissions were dated 5th May, 2025 and filed on 16th July, 2025; while the Respondent's submissions were dated 12th March 2025.
7. My duty as an appellate court is to subject the case to a fresh evaluation. The Court of Appeal in the case of *Mark Ouiruri Mose vs Republic (2013) eKLR*, held that:-

“That this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.”

Summary of the Prosecution Case

8. The Prosecution case was that the Accused went to the church where the Complainant Code named G.A.N(PW1) and her mother (PW2) were attending. He sent for the complainant who walked out of the church and they left for the Accused's place where they spent some time
9. G.A.N told the court that when she got home in the evening, her mother was furious with her and sent her back where she had been. That she went to the Accused's place where she spent two days with him and the 3rd day she travelled with him (Accused) to his aunt's place in Meru where they spent on day. She said that they had sex three times during the time they were together, once in his home and twice at his aunt's home.
10. The Prosecution produced medical evidence to corroborate penetration and the complainant's birth certificate to prove that (PW1) was below 18 years.

Summary of the Defence Case

11. The Accused stated in his defence that he was at his home on 14th -17th December 2020 and went to visit his aunt on 18th December 2020. That on his way he was accosted and arrested then escorted to the complainant's home where he was tied with ropes before being taken to the police station and later charged. He denied having committed the offence.

Issues for determination

12. I have considered the trial record, the grounds of appeal and the respective submissions of the parties. The issues for my determination are:-
 - i. Whether the Prosecution case was proved to the required legal standard;
 - ii. Whether the defence case cast doubt on the Prosecution case; and
 - iii. Whether the sentence was just, fair and appropriate.
13. These issues are intrinsically linked to the ingredients of the offence and my analysis of the evidence necessarily follows proof of age, penetration and the positive identification of the Accused. It is trite that for the sexual charge to be proved the prosecution must prove age, penetration and the positive identification of the Accused.



Positive Identification of the Accused

14. I will begin with the identification of the Accused. G.A.N (PW1) testified that she was in church with her mother when she was informed that someone wanted to see her outside and responding, she found the Accused and they left together. That she went to her home in Nkerambwe while the Accused went to his home in Matukini. She said that when her mother got home in the evening, she (her mother) beat her up and told her to go where she had come from that day. That she went to the Accused's home around 6.00- 7.00 pm and she stayed with the Accused for 2 days, then they went to visit his aunt in Meru on the 3rd day and that they had sex 3 times during that period.
15. PW1 further stated when they returned from Meru, the Accused escorted her to her home and left her there. She said that the Accused went to her home the next day and was arrested. She told the court that they attended the same high school and church with the Accused and that he was her boyfriend.
16. In this appeal, the Appellant did not submit on the issue of identification. He denied the charge stating that he was accosted and arrested when he returned home from a visit to Meru. The Respondent on the other hand submitted that the Accused was properly identified by the complainant as they were not strangers. That it was a case of recognition.
17. I have evaluated the evidence of identification. The complainant testified that she left the church in the company of the Appellant and that later when her mother got home and beat her for having disappeared with the Appellant, she went to his home where she spent two nights with him before going to Meru together. She stated that they were school mates and he was her boyfriend.
18. PW1's testimony was clear and credible. This was a person very well known to her. In her words, he was her boyfriend and school mate. They had known one another for some time. They spent three days together in the time leading to the charges.
19. This was therefore, as submitted by the Prosecution, a clear case of recognition which was more assuring and more reliable than identification of a stranger. She knew him prior as her boyfriend and school mate. As held in the case of Reuben Taabu Anjononi & 2 others vs Republic the Court of Appeal at Nairobi (C.B Madan, E.J.E Law & K.D Potter JJA)

“.....This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form of other.”

20. In the case of Peter Musau Mwanzia vs Republic (2008) eKLR, the Court of Appeal expressed itself as follows:-

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.....”



21. I am satisfied therefore that there was no mistake on the identity of the Appellant as the person who had spent 3 days and nights with the Complainant and had penetrative sex with her.

(ii) Proof of penetration

22. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of *Bassita vs Uganda S.C. Criminal Appeal Number 35 of 1995*, the Supreme Court of Uganda held that:-

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence.....”

23. In this case PW1 testified that they had sex with the Appellant on 3 occasions during the 4 days they were together. Upon return to her home she was escorted to hospital for medical examination.
24. Kenneth Mutwiri (PW4) was the clinical officer from Marimanti Level 4 hospital who testified on behalf of his professional colleague Lilian Wahu who had examined the Complainant. He stated that the complainant was examined on 18th December 2020 with a history of having been defiled by a person well known to her. She reported that they had unprotected sex on 15th and 16th of December in his house. PW4 testified that the hymen was not intact but not freshly broken. That laboratory tests showed presence of spermatozoa and epithelial cells. He concluded that there was penetration. PW4 produced the P3 Form [Prosecution Exhibit 1]. The P3 Form was dated 9th August 2021 while the report was made on 18th December 2020.
25. Lilian Wahu (PW5) yet another clinical officer testified on behalf of her professional colleague one Mr. Gitonga clinical officer who filed the Post Rape Care (PRC) Form but had since been transferred. She stated that the complainant had been away from home for 4 days and during that period had had sex multiple times. That the examination showed that the hymen was broken, not freshly and the vaginal swab showed presence of sperm cells. She produced the PRC Form as Prosecution Exhibit 2.
26. From the above, it was clear that the evidence of the Complainant that she had penetrative sex was corroborated by the medical evidence. I find it proven that there was penetration.

Age of the complainant

27. The importance of proving the age of the victim was stated by the Court of Appeal in *Hadson Ali Mwachongo vs. Republic [2016] eKLR* thus:-

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello vs. Republic Criminal Appeal No.203 of 2009 (Kisumu)*. This Court stated as follows:-

‘.....In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim and consequently the age of the victim is necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8(1).’



28. In this case the age of the victim was established through the production of her Birth Certificate [Exhibit 3]. It showed that she was born on 23rd July, 2003. This means that she was 17 years at the time of the commission of the offence on 14th December 2020. She was seventeen and a half years, which in law is 17 years as she had not attained her 18th birthday.
29. The Appellant has stated in this Appeal that he would not have known the complainant was under 18 years. In essence, he admits that they had a sexual relationship with the Complainant and that she visited him several times and they had consensual sex. He submitted that the defence under Section 8 (5) of the *Sexual Offences Act* was available to him.
30. The Respondent did not submit on the Appellant's submission in respect of the defence under section 8(5) of the Act.
31. I have looked at the Appellant's homemade grounds of appeal. He did not raise the defence as a specific ground. His grounds were general to the effect that the case was not proved beyond reasonable doubt and that the trial court did not consider the circumstances of the case.
32. I have also looked at the Appellant's defence in the trial court. He did not admit that they had sexual intercourse with the complainant on the mistaken belief that she was of age of consent. In other words, he did not raise the defence available under Section 8(5) *Sexual Offences Act*.
33. Section 8 of the Act provides:-
- 8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) 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.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
- (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.
- (5) It is a defence to a charge under this section if -
- (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- (b) the accused reasonably believed that the child was over the age of eighteen years.
- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the Children's Act (No. 8 of 2001).
- (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.



34. The principles underpinning the application of the defence were set out by the Court of Appeal in the case of *Meshack Nyongesa v Republic* [2016] KECA 84 (KLR) where the court stated thus:-

“We take judicial notice of the fact that these days, children, especially females, appear older than they actually are. In the circumstances, given the fact that this is a defence which few non-lawyers know about, it is our considered view that where a young man is charged with defiling a girl child above the age of 16 years, the trial court should ascertain whether he had reason to believe that the girl was 18 years or above. The appellant has raised this defence for the first time in this appeal. Whereas the defence set out under section 8(5) of the Act may not have been strictly applicable in the appellant’s case, but the fact that the complainant was a college girl may have caused the appellant to believe that she was an adult.”

35. Further in the case of *Wambui v Republic* (Criminal Appeal No. 102 of 2016 [2019] KECA 906 (KLR), the Court made important observations on section 8(5) of the Act and held as follows:-

“34. Subsection (5) states that it is a defense to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it a rather curious provision in so far as it is set in conjunctive as opposed to disjunctive terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from deception in subsection (5)(a). We would therefore opine that the elements constituting the defence should be read disjunctively if the two sub-sections are to make sense.

“35. We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.

36. We find merit in the appellant’s contention that in all the circumstances of the case he reasonably believed that the complainant was over the age of 18 years. The burden of proving that deception or belief fell upon the appellant, but the burden is on a balance of probabilities and is to be assessed on the basis of the appellant’s subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It is also germane to point out that a child need not deceive by way of actively telling a lie that she is over the age of 18 years. We would give the term deceive the ordinary



dictionary meaning which is to; “Deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to.” (underline mine)

(Per the Concise Oxford English Dictionary, 12th Edn 2011).

36. I have considered the circumstances of this case to see if the defense was available to the Appellant. The evidence before the trial court as presented by PW1 the Complainant, was that she attended the same school with the Appellant. She was in Form three while the Appellant was in Form two having repeated a class. She told the court that the Appellant was her boyfriend and that they had a sexual relationship and, in the period leading to the charge, they had had sex four times.
37. At the close of his defense on 19th June 2023, the Appellant submitted that he was 21 years old. This means that he was 20 years’ old at the time of the offence. A pre-sentence Probation report filed on 19th September, 2023 stated that the Appellant was 21 years and before his arrest was a Form two student at Turima Tweru Secondary School. The Probation officer confirmed that the complainant and the Appellant were school mates and were also boyfriend and girlfriend.
38. The evidence (according to PW2, the Complainant’s mother) further showed that upon returning from their trip to Meru, the Appellant escorted the complainant to her home and even requested to speak to her parents. That she told him to return the following morning when her husband would be present. He did return and was arrested. It was not stated why he wished to speak to his girlfriend’s parents.
39. The above circumstances, show that the Complainant who was a few months shy of 18 years and the Appellant who was 20 years old were in the same age bracket. Their joint romantic misadventure led to the commission of the sexual offence for which the Appellant was charged. The evidence has however shown clearly that the defense under section 8(5) of the Sexual Offences Act was available to the Appellant. He had no legal literacy or representation to raise the defense at the trial, choosing instead to deny the offence. Justice demands that I recognize and give effect to the said defense.
40. The Appellant is thus acquitted and set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 27TH DAY OF NOVEMBER, 2025.

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Appellant acting in person at Embu Prison. Ms Rukunga for the Respondent; Muriuki (Court Assistant).

