



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYANDARUA

CRIMINAL APPEAL NO. E029 OF 2024

JOHN IRUNGU MURAYA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in the S.O. Case No. E010 of 2024 of the Senior Principal Magistrate's Court at Engineer by Hon. H.O. Barasa-Chief Magistrate)

JUDGMENT

1. John Irungu Muraya, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence are that on the 3rd day of May 2024 at Ndunyu Njeru of North Kinangop Sub-County, within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of E.W.T., a child aged eight years.
3. The appellant was sentenced to serve thirty years' imprisonment. He was aggrieved and filed this appeal against the conviction and sentence. He raised the following grounds of appeal:
 - a) The trial was unfair, contrary to Articles 25(c), 27 (1) (2) (4), 28, 29 (f) of the Constitution.
 - b) The learned trial magistrate erred in law and fact by failing to find that the ingredients of the offence were not proved.
 - c) The learned trial magistrate erred in law and fact by failing to find that crucial witnesses were not availed to testify.
 - d) The learned trial magistrate erred in law by awarding a mandatory minimum life sentence that offended articles 25(c), 27 (1) (2)(4),28, 29, (f), 50 (2) (p) of the constitution.
4. The state did not file any grounds of opposition and submissions.

5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of **Okeno vs Republic [1972] EA 32**.
6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
 - a) That there was penetration of the complainant's genitalia;
 - b) That the accused was the perpetrator and
 - c) The victim must be below eighteen years old.

This position was echoed in the case of **Fappyton Mutuku Ngui vs Republic [2012] eKLR**.

Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant.

7. I will determine if the prosecution proved these ingredients to the required standards.
8. E.W.T. (PW1), the complainant, stated she was eight years old when she gave her testimony. A copy of her birth certificate shows that she was born on December 7, 2015. As of May 3, 2024, she was approximately eight years and five months old. Her age was therefore established.
9. The medical evidence was adduced by Doctor Patrick Wakahiu (PW3) on behalf of Doctor Victor Waithaka, who examined the complainant on the 13th day of May 2024. Injuries and blood were noted on the external genitalia. The hymen was broken. He, therefore, concluded that there was penetration.
10. The prosecution proved to the required standards the element of penetration.
11. E.W.T. (PW1), the complainant, stated in her evidence that the appellant defiled her. She testified that she met with the appellant after fetching water at about 9 p.m. He told her to accompany him to a field where he defiled her. She further testified as follows:

I know how old I am. I am eight years old. Something happened to me on 5th May, 2024. I was at my mum's place. I was fetching water. This was at Ndunyu Njeru. The time was 9.00 p.m. After fetching water, I met that man (points at the accused). He then told me to go with him to Kiharo. Kiharo is at Ndunyu Njeru. Kiharo is a field. He took me to Kiharo, where he told me to do tabia oza. He wanted me to lie down so that he lies on top of me. That is what tabia oza means. He did not remove his clothes, but he removed the thing he uses to urinate through his zip. He then put that thing into the thing I use to urinate. I felt some pain. He is the one who told me that it was 9.00p.m. He told me that he loves me. He then kissed me on the neck. When he was done. I left the field and went to my shosho's place. I told Shosho what happened the following morning. There were many people at home that night, so I did not tell her. I waited until the following morning. When I told Shosho, she instructed me that if I saw the man again, I should tell her. I saw the man on 8/5/2024 when I was fetching water. I saw him in the Catholic Church area. I told Shosho my cousin, Njeri, also told Shosho that he knew about the incident. We then went to where he was hiding. My shosho called for a motorcycle. My father also came. The man was arrested.

12. E.W. (PW2) is the complainant's grandmother. On the 8th of May, 2024, a neighbour called her at about 8 p.m. and asked where the complainant was going with a scrap metal man. She sent her grandson, who followed the complainant and her cousin. When she asked them where they were going, they said the scrap metal man had asked them to escort him. Her grandson, however, informed her that a rumour was circulating that the complainant was known to have slept with the scrap man in a nearby field.
13. There are contradictions between the complainant's evidence and that of her grandmother. Whereas the complainant testified that the appellant had sex with her only once, her grandmother (PW2) indicated that she had information that it had occurred on several occasions. PW2's evidence was that on 8th May 2024, the complainant and her cousin were going with the scrap metal man, and her grandson had to fetch them. This was about 8 p.m. The complainant informed her that the scrap-metal man had asked them to escort him. The complainant, on her part, stated that on 8 May 2024, while fetching water, she saw the appellant and informed her grandmother (PW2).

14. These contradictions were not reconciled, and they painted the complainant as a person who cannot be relied upon to tell the truth. The Court of Appeal in the **Ndungu Kimanyi vs Republic [1979] KLR 283** (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

15. For the court to act on the complainant's evidence regarding the identification of the perpetrator, corroboration was necessary due to numerous contradictions. This could have been inferred from the evidence of PW2's grandson, who is alleged to have pursued the complainant on 8 May 2024. The grandson of PW2, although described as an adult, was not called as a witness, nor was any explanation provided to the court as to why he was not called. The Court of Appeal for East Africa in the case of **Bukenya vs Uganda [1972] EA 549** (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

16. My conclusion is that had PW2's grandson been called to testify, his evidence would not have been in favour of the prosecution's case.

17. Besides the doubts raised by the complainant's evidence, her behaviour raised further questions about whether an adult had harmed her. She was 8 years old at the time. After the incident, she described as her first, she went back home but did not report it to her grandmother because there were many people in the home. She did not have to report. If indeed an adult had defiled her, it would have been noticed due to the excruciating pain she could have experienced. In the case of **Ben Maina Mwangi v Republic [2006] eKLR Lesiit, J.** (as she then was) observed:

Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At

least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt were made to penetrate the Complainant's private parts, it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.

18. I entirely associate myself with the observation by the learned judge in this case.

19. The complainant's evidence regarding the identity of the perpetrator was not corroborated due to numerous discrepancies, as I have noted. It was therefore unsafe to rely on it for a conviction. The conviction is quashed, and the sentence is set aside. The appellant is released unless otherwise lawfully detained.

Delivered and signed at Nyandarua on this 3rd day of December 2025

KIARIE WAWERU KIARIE

JUDGE