Mwaura v Republic (Criminal Appeal E002 of 2025)
[2025] KEHC 18007 (KLR) (Crim) (3 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18007 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL E002 OF 2025

KW KIARIE, J

DECEMBER 3, 2025

BETWEEN

MOSES MWANGI MWAURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E097 of 2022 of the Senior Principal Magistrate's Court at Engineer by Hon. H.O. Barasa–Senior Principal Magistrate)

JUDGMENT

1. Moses Mwangi Mwaura, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on diverse dates between the 27th and the 30th day of November 2022, at [Particulars Withheld], in Kipipiri sub-county within Nyandarua County, he intentionally caused his penis to penetrate the anus and the vagina of A.W.W., a child aged fifteen years.

3. The appellant was sentenced to serve twenty years' imprisonment. He has appealed against both conviction and sentence. He was in person. He raised the following grounds of appeal:

    a. The learned trial magistrate erred in both law and fact by convicting the appellant in the present case, yet failed to find that penetration of the complainant's genitalia was not proved.

    b. The learned trial magistrate erred in both law and fact by convicting the appellant in the present case, yet failed to find that the complainant absolved the appellant from the commission of the offence.

c. The learned trial magistrate erred in both law and fact by convicting the appellant, yet failed to find that the medical evidence adduced did not corroborate the charge as stated.

d. The sentence imposed is both harsh and excessive and did not take into consideration the appellant's mitigation and the unique circumstances of the case.

4. The state opposed the appeal through M/s. Vena Odero. She urged a dismissal for lack of merit.

5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses testify. Therefore, I will follow the well-known case of Okeno vs Republic [1972] E. A 32 to guide my decision-making process.

6. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> An offence of defilement, therefore, 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 when Joel Ngugi J. said:
>
> > Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The 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.
> >
> > These are the ingredients that the prosecution must prove against an accused person.

7. The copy of the birth certificate produced as an exhibit indicates that A.W.W. was born on September 28, 2007. As of the 27th day of November 2022, she was fifteen years and two months old. The victim's age was proven to meet the required standards.

8. A.W.W(PW1) is the complainant. Her evidence was that when her mother sent her to fetch some food at home, she decided to go to Naivasha town to stroll. She used a boda-boda. She returned at about 8 p.m. and started walking around the Turasha market. She then called the appellant and informed him that she did not want to go home. This is when the appellant asked her to go to his house. She spent four days in his house, and they had sexual intercourse. On the 30th day of November,2022, police officers arrested both of them while in the appellant's house.

9. The evidence of arrest was confirmed by Samuel Karanja Kamenya (PW4), the area chief, and Inspector Justus Chumwa (PW5).

10. Dr Joseph Mburu (PW3) examined the complainant on the 1st day of December 2022. He found that she was on her menses, meaning she was not pregnant. High vaginal swab revealed spermatozoa.

11. Inspector Justus Chumwa (PW5) stated that they arrested the appellant in his house and found the complainant beneath his bed. The complainant was stark naked. This occurred on the 30th of November 2022 at night. The following day, the girl was taken to the doctor for examination.

12. Moses Mwangi Mwaura, the appellant, denied engaging in any sexual conduct with the complainant.

13. The evidence confirmed the complainant's court testimony. While the sexual activity was consensual, the complainant lacked the capacity to legally give consent.

14. The appellant termed the sentence as harsh. Section 8 (2) of the *Sexual Offences Act* provides:

> 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.

15. The appellant ought to have been charged under section 8 (3) of the *Sexual Offences Act* provides:

> 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.

16. Since the appellant participated fully in the trial, I find that he was not prejudiced in any way, and the error is curable under section 382 of the Criminal Procedure Code.

17. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of Nillson vs Republic [1970] E.A. 599, as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James Vs. Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. Shershewsity (1912) C.CA 28 T.LR 364.

18. The appellant has not provided sufficient reasons to demonstrate that the learned trial magistrate acted upon some incorrect principle or overlooked some material factor. He was sentenced to the minimum prescribed sentence for the offence. The punishment cannot be described as harsh. I have no basis for interfering with the sentence.

19. The appeal is therefore dismissed.

DELIVERED AND SIGNED AT NYANDARUA, THIS 3RD DAY OF DECEMBER 2025

KIARIE WAWERU KIARIE

JUDGE