



**Nyambura v Republic (Criminal Appeal E026 of 2024)
[2025] KEHC 18317 (KLR) (5 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E026 OF 2024
AK NDUNG'U, J
DECEMBER 5, 2025**

BETWEEN

DENNIS MURIUKI NYAMBURA APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki CM
Sexual Offences Case E011 of 2022– V Masivo-SRM)*

JUDGMENT

1. The Appellant, Dennis Muriuki Nyamburawas convicted after trial of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on unknown date in the month of December 2021 at Timau township Buuri West Subcounty Meru County, intentionally caused his penis to penetrate the vagina of A.K a child aged 7 years. On 22/04/2024, he was sentenced to thirty (30) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he lodged this appeal, initially on grounds in a petition of appeal filed on 25/04/2024. His counsel however filed amended grounds of appeal dated 04/11/2024 with leave of this court. The conviction and the sentence are being challenged on the following grounds;
 - i. The learned magistrate erred by convicting him on a case that was not proved beyond reasonable doubt.
 - ii. The learned magistrate erred convicting him based on the evidence which was marred with inconsistencies, contradictions and lacked corroboration.
 - iii. The learned magistrate erred convicting him and placing reliance on medical prognosis of an old broken hymen whose cause was unknown by the medical officer.



- iv. The learned magistrate erred convicting him despite the fact that the clinical officer confirmed that there was no evidence of penetration.
 - v. The learned magistrate erred by failing to observe that the case lacked crucial witnesses such as the complainant's friend Kanana, whom she reported the incident to.
 - vi. The learned magistrate erred by convicting him by invoking section 124 of the Evidence Act without giving cogent reasons why he believed that PW1 was telling the truth against the backdrop of unverified evidence.
 - vii. The learned magistrate erred by convicting him without appreciating that there was a brewing grudge and extortion claims perpetrated by PW1's mother hence the coached evidence.
 - viii. That his defence was quashed without giving good reasons.
 - ix. The learned magistrate erred convicting him based on the evidence which failed to meet the required standard and was insufficient to secure and sustain a conviction.
 - x. The learned magistrate erred applying the wrong principle in sentencing by meeting out a mandatory minimum sentence of 30 years on a case that was not proved against him.
3. The appeal was canvassed by way of written submissions.
 4. Counsel on record for the Appellant submitted that a birth certificate was not produced and prosecution's witnesses gave contradicting testimonies on PW1's age in that, PW1 and PW2 testified that she was seven years. PW2 testified that PW1 was about to turn 8 years when she testified on 01/04/2022 which meant that by the time the offence was committed, she was 7 years. PW4, the clinical officer on the other hand testified that she was 6 years old and this was also captured in the PRC form. The prosecution failed to produce the birth certificate or age assessment report hence the prosecution failed to prove the complainant's actual age with certainty. Therefore, the trial court erred convicting him despite the fact that age was not proved beyond reasonable doubt.
 5. She submitted that the PRC form was produced by Agnes Kinya despite the objection from the defence counsel who argued that there were no viable reasons given in accordance with Evidence Act as to why the maker could not be availed. That there was no evidence provided in the analysis of the PRC to confirm that there was penetration as the complainant's genitalia was normal, pus cells were seen and which PW4 indicated was a result of urinary tract infection, that there were no injuries, no spermatozoa but PW4 made a conclusion that there was evidence of penetration due to the broken hymen. She submitted that the fact that PW1 had an old broken hymen was not conclusive proof of penetration as has been held by superior courts.
 6. Further, that the trial court failed to accurately point out the elements in the PRC form that led to its conclusion that the ingredients of penetration had been established and there was no evidence that the broken hymen was broken at the material time of the offence. Therefore, the trial court erred convicting the Appellant based on an old broken hymen whose cause was unknown by the medical officer. Further, PW4 confirmed that the complainant was examined prior to the matter being reported to the police which was contrary to the evidence of PW1 and PW2 who testified that they first visited the police station before going to the hospital casting doubt on whose evidence was true. That the prosecution retained the mandate to summons the makers of the PRC form even if under summons or warrant of arrest given the conflicting medical reports.
 7. It is submitted that PW3 produced the P3 form and she formed the opinion that there was no evidence of penetration and the trial magistrate overlooked PW3's testimony. The trial magistrate referred to the



PRC and P3 forms but omitted the conclusion indicated on the P3 form and ignored PW3 testimony hence the trial court failed to discharge its duty for it went ahead and convicted the Appellant despite the conflicting testimonies of different medical professionals without requesting for preparation of an independent medical examination. The trial court erred in arriving at a conviction despite the evidence of PW3 who examined the child and she testified that there was no evidence of penetration.

8. It is submitted that the trial court erred finding that the complainant was truthful in line with section 124 of the *Evidence Act* whereas her version of the story contradicted other prosecution's witnesses. That she testified that the Appellant undressed her whereas according to P3 form, PW1 stated that the Appellant removed her clothes but did not remove her pants. That she stated that she was given Kshs.10/- after the ordeal whereas the PRC form indicated that she was given Kshs.20/- and the P3 form indicated that she was given Kshs.100/-. That these conflicting narratives shows that PW1 could not recall which version of her fabricated story to adhere to. That she gave different accounts of the incident to different individuals which suggested lack of certainty and raised concerns about the reliability of her statement hence the trial court erred invoking section 124 without giving cogent reasons why he believed her against the backdrop of unverified evidence.
9. She argued that there was no circumstantial evidence adduced to implicate the Appellant as there was no evidence that the complainant ever visited him on the material day or any other day. The alleged complainant's friend was not called to testify as to whether she had ever witnessed the complainant going to the Appellant's house. That the investigating officer failed to lead PW1 in describing the Appellant's house in order to compare her description with the actual house. She also did not testify to having visited the scene. PW2 testified that she was not aware of the alleged defilement as she was summoned at police station where she found the complainant and others. The complainant on the other had testified that on their way to police station, her mother angrily asked her if the Appellant had done anything to her. The complainant never complained on her own volition to have been defiled but came forward after Kanana claimed to have been defiled. That she reported to her brother about Kanana's alleged defilement by the Appellant raising the question why she revealed what happened to Kanana and not to herself and if indeed she was fearful, she would have kept quiet about both allegations. That the allegation of defilement was only by the complainant which was not corroborated and it was also unsupported by circumstantial evidence.
10. In regards to identification, counsel submitted that the complainant was found to have an infection. The Appellant was taken for examination but no medical record was produced which would have been important in creating a nexus between him and the complainant. There was therefore no evidence tying him to the offence and which could have positively identified him as the perpetrator.
11. It is submitted that the prosecution's case was marred with contradictions and inconsistencies in that PW1 and PW2 testified that they went to hospital after reporting whereas PW4 testified that the PRC form was done prior the reporting of the matter to police station. Further, that the charge sheet did not indicate the exact date of the offence. The exact age of injuries was indicated in the P3 form to be 3 days old whereas it was 3 months old since according to PW3, she filled the P3 form on 02/02/2022. Therefore, the medical evidence revealed that the injuries were not from the duration that the Appellant was accused of having committed the offence, that is, December 2021, but approximately two months prior.
12. Further, that PW2 made a report that PW1 was defiled on 30/01/2022 yet she testified that the incident occurred before Christmas. PW1 could not even remember the month of the incidence noting that she testified that the incident was before Christmas but she had reported the date as 30/1/22. This also raised a question on how the investigating officer arrived at December 2021 as the date of the commission of the offence. PW1 testified that she was in PPI at the material time and at the time of



- testifying, she was in grade I whereas PW2 testified that she was in PPII at the material time and this would place the time of the alleged offence in 2020 which is the estimated period when PW1 was in PPI. Hence, she would have been defiled over a year prior to the period captured in the charge sheet. She submitted that a child whom the court found to be coherent and truthful could not have made such an error as not to remember what class she was in at the time of the incident.
13. That PW2 confirmed that she bathed PW1 and did not see any signs that PW1 could have been defiled raising question how a grown man could have defiled a child and there be no physical evidence on her body. That had PW1 been defiled, it is unlikely that her mother would have failed to note injuries on the child's genitalia noting that the child testified that she felt pain. She would have had some reaction which her mother would have noted.
 14. It is submitted that PW2 alleged to have been told by PW1 that the Appellant had threatened to slay her while PW1 in her testimony stated that he threatened to beat her if she revealed to anyone and not kill her as alleged by PW2. In addition, that medical report indicated that she was calm and jovial during examination hence her demeanour was not of a typical victim of a sexual offence raising the question as to whether she was ever defiled.
 15. Counsel added that crucial witnesses were not called to testify being Kanana, Mama Kanana, and the area manager whom PW2 had found at the police station and who informed her what had happened. Further, that the Complainant's brother whom PW1 indicated as having joined after she bought sweets following the incident was not called as a witness. Despite PW1'S testimony that Kanana informed her that she had been defiled and PW1 passed the information to her brother who in turn informed Moses and who in turn informed Masha who eventually told Mugweru about the incident and Mugweru subsequently told Allan and who in turn passed the information to Mama Kanana, none of these witnesses were called to testify.
 16. It is submitted that the trial court failed to adequately consider the Appellant's defence and that he was placed at the scene whereas there was no witness who testified to have ever seen the complainant at his house or interacting with him. The investigating officer did not visit the scene and he could not be placed at the scene at the material time and date since there was no material date or time stated in the charge sheet. That he was convicted without being informed when he committed the alleged offence rendering the options of his defence limited. Hence omission of the date bared him from adequately defending himself. He was prejudiced as the prosecution failed to inform him of the date of the alleged offence thereby limiting his defence which was a violation of his right under Article 50(2)(b). This eliminated his opportunity to raise a defence of alibi at the time of the alleged offence. The court also ignored the issue of the defective charge which was raised and failed to address that issue in the judgment.
 17. That DW2 corroborated his defence of a grudge with PW2 which the trial court stated that the same was sufficiently rebutted by PW2 whereas, what the court referred as sufficient rebuttal was a mere denial as PW2 only stated that she did not have a grudge with him. The trial court ought not to have overlooked the issue of grudge. That PW2 influenced Kanana's mother who also claimed that her daughter was defiled and a suit in S.O E010 of 2022 was filed against the Appellant where he was acquitted and while acquitting him, the learned magistrate noted that the case was instituted due to a grudge between PW4, who was the caretaker of the plot and one Evelyne, who is PW2 in this case. That the court went further to find that PW2 stated that PW4 told them to tell the police that the Appellant had done tabia mbaya to them which shows that the minor witnesses were coached. That that case was reported on the same day with this case when PW1 and the said Kanana were taken to police station by their parents and the sub-area. That the complainant testified in the other case that



- they were told to tell the police that the Appellant had defiled them. Hence, PW1's evidence ought not to have been relied on to convict.
18. On sentence, counsel submitted that it was harsh and excessive since the trial court failed to consider the findings and recommendations of the pre-sentencing report. The sentences also failed to meet the sentencing objective of rehabilitation as outlined under paragraph 4.1(3) of the Sentencing Policy Guidelines. He was a first time offender and the sole breadwinner of his family hence the sentence was manifestly unjust. That in the presentencing report, parties were not opposed to a non custodial sentence and the report recommended for a non custodial sentence. She urged the court to consider a non custodial sentence as was recorded in the report. She further implored the court to substitute the sentence with a lesser sentence in case the court opts for a custodial sentence.
 19. In rejoinder, the Respondent's counsel submitted that the court observed before conducting voir dire that PW1 appeared tiny and of a tender age. That common sense and observation are apt way of proving or assessing age. Further, PW1 testified that she was 7 years which was confirmed by her mother, PW2. The P3 form indicated that she was 7 years. That this was not contested during cross examination by the Appellant's counsel. Further, even though PW4 stated that she was 6 years, this does not assist his case as her age is fitting within the bracket of section 8(2) of *Sexual Offences Act* hence she was a minor. Age was therefore proved through her own evidence, her mother, medical evidence and court's observation.
 20. On penetration, he submitted that PW1's evidence was detailed and described what unfolded before the Appellant inserted his thing of urinating into her thing of urinating. Her evidence was also partially corroborated by PW3 who observed that her hymen was broken and even though she had formed the opinion in the P3 that there was no evidence of penetration, she conceded during cross examination that common cause of a broken hymen is penetration. PW4 also confirmed that there was evidence of penetration supported by a broken hymen and results from analysis. Further, the court relied on the complainant's evidence to convict contrary to the Appellant's counsel submissions that the court relied on the medical evidence. The court gave reasons for believing PW1 was truthful. The Appellant did not give prior instances by PW1 where she may have been untruthful in order to contest the court's impression that she was truthful. That a question of truthfulness of a witness is a question of demeanour as well the impression left upon the court by a witness and there would be no basis for an appellate court to overturn a trial court's finding that a witness was truthful. On the production of PRC form by PW4, he submitted that the trial court examined the reasons for non-availability of the maker before allowing PW4 to testify. She understood her handwriting having worked with her before. More so, PRC is a public document that enjoys presumption of correctness as per section 77 of *Evidence Act*. This cannot therefore absolve the Appellant and the case of *Kenneth Mwenda Mutugi v Republic* (2019)eKLR was cited for the proposition that an omission of the production of medical evidence alone cannot absolve the perpetrator. Hence, penetration was proved through complainant's evidence and medical evidence.
 21. In regards to identification, it is submitted that PW1 and the Appellant had been neighbours for 2 years hence her evidence was of recognition and there was no possibility of error. Further, the fact that his medical notes were not produced is a non issue as his recognition did not depend on forensic evidence. Circumstantial evidence was a non issue in this case since there was direct evidence of PW1 and PW3 and PW4 who examined her. On failure to call crucial witnesses, he submitted that Mama Kanana was not an eye witness hence there was no value of calling her to tell court what the complainant told her. There was no need to call her brother to simply tell the court that she shared sweets with him and calling Moses, Masha, Mugweru and Allan would only have corroborated a chain of hearsay. None would have provided relevant material in resolving the controversy.



22. He submitted that the inconsistencies noted by the Appellant's counsel were superficial as they did not touch on the elements of the offence. Issues as to whether the complainant was taken to hospital or police station first, whether she was in PPI or grade I when she was defiled, whether he gave her Kshs.10, or 20 or 100 are superficial as they do not go to the root of the charge. There were no decisive contradictions regarding the fact that she was a minor, she was penetrated and she identified the Appellant as the perpetrator. He submitted that the court rightly found that his defence of extortion was an afterthought as it was not put to PW2 when she testified and that the allegations were never reported. The allegations that PW2 wanted him to marry her sister was also refuted by PW2 and no evidence was led to prove that there existed the said grudge. Further, it was not probable that a mother would resort to using an innocent child to settle such scores.
23. He submitted that the Appellant is barred from bringing new issues in the submissions and more so an Appellant who is represented by a counsel. That the issue of violation of his right under Article 50 was not contained in his petition of appeal and the same was not placed before the trial court for it to make an opinion. Hence, his submissions on this issue ought to be disregarded. Further, the fact that the charge sheet failed to make a reference to a specific date was not fatal as section 137 of the Criminal Procedure Code requires that the particulars be sufficient in a way that the Appellant can understand the nature of the charges. He was not impeded from cross examining the witnesses and it would be erroneous to insist that the complainant must have remembered the specific date nearly 2 months after the ordeal. That the record of S.O E010 of 2022 was not part of the evidence in the lower court and was not part of the record of appeal. The decision in the said case was inconsequential in so far as the present charges are concerned. The trial court could not have been bound by findings of another magistrate who was hearing a totally different matter and the trial court could not have automatically agreed that PW2 had a grudge with him because he had benefited from a finding of a grudge in a separate suit. Further, new evidence cannot be raised on appeal where it cannot be tested through cross examination without leave of the court. This also amount to asking this court to be bound or persuaded by lower court's finding.
24. With respect to sentence, he submitted that the Appellant did not demonstrate that the sentence was excessive, harsh, illegal, that the court considered extrinsic factors to sentence or omitted to consider material factors. That the sentence under section 8(2) is life imprisonment but he was sentenced to 30 years which was based on the overturned jurisprudence. That the supreme court has since clarified in R v Joshua Gichuki Mwangi & others-Petition No. E018 of 2023 that Muruatetu case does not apply to minimum sentences under the [Sexual Offences Act](#). Therefore, 30 years imprisonment was illegal and he urged this court to enhance the same and sentence him to life imprisonment.
25. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.
26. This duty was set out in Okeno v Republic [1972] EA by the Court of Appeal as follows;

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the



trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] E.A 424.”

27. Similarly, in *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

28. To this end a summary of the evidence at trial would be a suitable point of departure.

29. Complainant in her sworn evidence testified that she was 7 years old. She knew the Appellant as they were staying in the same plot. He took her to his house and onto his bed. He undressed and undressed her, laid on her and removed his body part for urinating and inserted in her urinating part. She told him to stop but he continued a little and stopped. He gave her Kshs.10/- to buy sweets and she bought sweets. She did not report. Her friend Kanana told her that the Appellant did the same thing to her and that he had promised to buy her chip. When this happened to Kanana, she had gone for maize flour. She informed her brother Moses what Kanana told her who then informed Masha who then told Mugweru who told Allan and Allan informed Kanana’s mother. With Kanana and their parents, they went to Timau where there is a court to report. They were taken to hospital and the doctor examined their private parts. The Appellant had threatened to beat her if she reported to her parents.

30. She testified on cross examination that she could not recall when it happened as it was long time ago. She was in PPI then but now in grade I. There was no blood from her private part and he only used his thing for urinating. After he finished, she went to the shop and bought sweets and shared the sweets with her brother. Her mother was not home. She was feeling pain and her mother bathed her on that day but she did not notice anything strange. Her mother angrily asked her if the Appellant had done anything to her while she was going to the police station. She was bitter in order for her to tell what he did to her and nobody told her what to say in court but only recalled what he did to her.

31. On re-examination, she testified that the Appellant used to send her to shop for things like credit. She did not reveal to her mother as he had threatened to beat her. Her mother did not beat her to reveal the truth.

32. PW2, complainant’s mother testified that the complainant was 7 years old and was about to turn 8 years. She had travelled to Nairobi and had left her children with a neighbour and on her return on 30/01/2022, she was summoned at police station where she went and found the sub area, her daughter, her neighbour and the neighbour’s daughter. She was informed that the Appellant had defiled the complainant and neighbour’s daughter. The complainant reported that she was defiled before Christmas. The children were taken to hospital where they were examined. The complainant had not told her what had happened until that time.

33. On cross examination, she testified that she asked her daughter calmly what had happened. The Appellant was a neighbour for two years and had no grudge with him. Her sister would visit her and she was not aware that her sister wanted a relationship with the Appellant. She did not know the



- relationship between her sister and him. That she went to visit her elder sister on 28/01/2022 and she left home at 7:00am so she was not at home on that date. That the complainant was in Grade 1 and in January-July 2022, she was in PPII. The complainant would bathe herself but she would also occasionally bathe her. That she agreed that for such a child to be raped, there must be visible signs.
34. On re-examination, she testified that the complainant informed her that it happened on December 2021 and could not tell the date. That it only came out after Kanana said she was defiled by the Appellant. She could not recall if she washed the complainant on the material day. She sent her for maize flour on 22/01/2022.
 35. PW3, the clinician testified that she filled the P3 form for the complainant who was 7 years old. Her genitalia was normal and the hymen was old broken, no per vaginal bleedings, there was foul smelly discharge, pus cell seen, no yeast cell and spermatozoa, she had an infection, HIV and VDRL was negative and she formed the opinion of no evidence of penetration. She produced the P3 form as Pexhibit2(b).
 36. She testified on cross examination that the age of the injuries was 3 days old. That she could not tell how old or when the hymen was broken. The most common cause of broken hymen is penetration though there are other causes. The genitalia would be normal if there was no struggle. There are other causes of foul smelly discharge other than penetration.
 37. On re-examination, she testified that the injuries were three months old and indication of 3 day old injuries on the P3 form was an error.
 38. PW4, a clinician produced the PRC form as Pexhibit 2(a) on behalf of Teresa, a clinician, who she had worked with for a year and she was on other duties. She testified that at the time of the incident, the complainant was 6 years old. She was calm on examination and the external genitalia was normal. The hymen was old broken and she had a minimal foul smelly discharge from the vagina. There were pus cells which could have indicated UTI and she was given antibiotics. The conclusion was that there was evidence of defilement supported by broken hymen and result from urinalysis.
 39. She testified on cross examination that the hymen was old broken and there were no sperms due to lapse of time. There were no physical injuries. That the victim of sexual assault could approach the hospital first before making a report and the examination was done prior to the report to the police. The PRC and P3 forms were filled on the same date. The other reasons for broken hymen are exercises and insertion of objects.
 40. She testified on re-examination that it was not indicated how old was the broken hymen. The reason for the broken hymen from the history was defilement.
 41. PW5, the investigating officer only testified that she took the witness statement and escorted the complainant to hospital and with the help of the public, arrested the Appellant. A birth certificate was availed which disclosed her age to be 7 years.
 42. On cross examination, she testified that the report was made on 30/01/2022 and the child was young and could not tell the precise date of the offence. The victim contradicted the date of the offence. They were informed by the members of the public on his location and he was arrested.
 43. The Appellant in his sworn defence testified that the complainant was a neighbour. He got home from work on 01/02/2022 and he was summoned to an incomplete building by a woman who forced him to give Kshs.50,000/- for sheep. He questioned and they declined to explain and swore to teach him a lesson. The police appeared and arrested him. The police asked for money but he maintained his innocence and the charges are false. That the said woman was Evelyne, complainant's mother and she



wanted him to marry her sister whom she had invited in the plot. That he declined to marry her sister hence this charge. That he was acquitted in Sexual Offences No. 010 of 2022. He was staying with the complainant in the same plot.

44. On cross examination, he maintained that he was the complainant's neighbour for two years. That he could not recall the dressing of the woman. That she was with a blue skirt and yellow top. He summoned his wife who witnessed. That there was presence of two police officer Karita and Evelyne. He did not report the extortion.
45. DW2 testified that she was the Appellant's wife and got married to him on 10/10/2021. She was familiar with the complainant who was a neighbour for about two years. She testified that the Appellant contacted her to avail herself at an incomplete building where she found a crowd. She identified four women including the complainant's mother. They were demanding Kshs.50,000/- and a sheep and he declined to give them. A police appeared from an empty house and handcuffed him. That she used to hang her clothes and find them on the ground and Evelyne was the one who was doing it. Her husband told her that Evelyne was displeased with their marriage as she intended for him to marry her sister.
46. On cross examination, she testified that the complainant's mother was in company of Purity, Naomi and others and two police officers appeared from a house. She could not recall how Evelyne and Purity were dressed. They did not report the extortion.
47. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.
48. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator.
49. Having established the ingredients of the charge, the question that this court should therefore determine is whether each of those ingredients were proved to the required standard.
50. Proof of age is important in a sexual offense. In *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

51. In the present appeal, the Appellant's counsel contention is that age was not conclusively proved since there was conflicting evidence on complainant's age. That the complainant testified that she was 7 years. Her mother also testified that she was 7 years but in the PRC form, it was indicated that she was 6 years which was affirmed by PW4. The Respondent's counsel on the other hand submitted that age was proved through the complainant, her mother, P3 form which indicated that she was 7 years and common sense and observation since the trial court noted that the complainant was small/tiny and of tender age before conducting voir dire. Furthermore, whether she was 6 or 7 was a non-issue since she would still fall under section 8(2) of the *Sexual Offences Act*.



52. It is trite law that, where the actual age of the victim is not proved, it has been held that the apparent age of the victim shall suffice. The Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR held that:-

“Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual Offences Act.”

53. The Court of Appeal in Ali v Republic [2025] KECA 1004 (KLR) stated that;

“The appellant's main ground is that the ingredients of the offence of defilement were not proved, i.e., the complainant's age, penetration and identification of the perpetrator. He based his grievances on the fact that the evidence placed before the court was contradictory and inconsistent. The two courts below were satisfied that the complainant's age had been proven. Although the trial court noted that no documentary proof of age was presented to the court, it was of the view that, having interacted with the victim, it was obvious that she was four (4) years old. We do not fault the trial court for its observation. The prosecution cited cases that were on point regarding this issue. The cases of Mwolongochichoro Mwanjembe v Republic, Mombasa Criminal Appeal No.24 of 2015 (UR) (cited in Edwin Nyambaso Onsongo v Republic [2016] eKLR) where concerning age, this Court stated:“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptismcard or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, amongst other credible forms of proof, ” “.we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”Also, Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, the court held:“In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

54. And in Moses Nato Raphael v R {2015} eKLR the Court stated as follows:

“On the challenge posed by the uncertainty in the complainants age, this Court had occasion to deal with similar issue in Tumaini Maasai Mwanya v R Mombasa CRA No. 364 of 2010 where the Court held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually, the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.”

55. I harbor no doubts that age was proved.

56. With respect to proof of penetration, the Appellant's counsel faulted the trial court reliance of the complainant's evidence in line with section 124 of the Evidence Act despite the contradictions in her testimony and what she reported to other witnesses. She faulted PW4's evidence that there was proof of penetration despite the fact that hymen was old broken and there were no injuries noted. That PW3 testified that there was no proof of penetration and the trial court disregarded this piece of evidence.



Further, the trial court failed to give cogent reasons for believing the complainant and that there was no circumstantial evidence that was adduced to implicate him.

57. Addressing the legal principle on burden of proof, Mativo J, (as he then was) in the case of David Wahome Wanjohi v Republic 2015] eKLR, expressed himself as follows;

“The legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C in the Celebrated case of Woolmington v DPP in a subtle and mastery fashion stated the law on legal burden of proof in criminal matters, that: -

'throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of the insanity and subject also to any statutory exception... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.“

58. The above quotation expresses the correct legal position, which is the legal burden of proof in criminal cases rests on the prosecution and this burden must be discharged at all material times. Thus, the legal burden is the burden of proof that remains constant throughout the trial; it is the burden of establishing the facts and contentions which will support a conviction.

59. It may however be true that the accused person committed the heinous act but that cannot be left to speculation and to strong suspicion or upon the Court to fill in the gaps for the prosecution. The legal burden squarely rests upon the prosecution throughout.

60. Commenting further, Justice Mativo in the case of David Wahome Wanjohi (supra) at page 3, stated thus: -

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. “

61. At page 5, the Learned Justice continues: -

“... If at the conclusion of the trial, the prosecution has failed to establish these to the appropriate standard the prosecution will lose. It is clear that the legal burden of proof in criminal cases is only one and rests on the shoulders of the prosecution. The burden of the prosecution in criminal cases is to establish its case beyond reasonable doubt. The question that follows is whether the prosecution in this case established its case beyond reasonable doubt. This calls for close scrutiny of the evidence on record and also an examination of the defence advanced by the accused... ”

62. In the case of REPUBLIC v WILSON LEARPORA [2007] eKLR, L. Kimaru, J (as he then was) stated in Obiter at page 3 thus: -

“In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. An accused person is under no obligation to prove his innocence. His duty is only restricted to raising reasonable doubt on the prosecution's case. The onus of proving a criminal case is always on the prosecution and does not shift to an accused person. This court is required to evaluate the evidence that was adduced by the prosecution witnesses and the defence offered by the accused so as to



reach its own determination whether or not the prosecution has established the guilt of the accused in this case. “

63. The trial court while convicting the Appellant relied on section 124 of the Evidence Act and held that PW1 maintained her evidence when cross examined by the Appellant’s counsel and explained that the accused only used his thing for urinating. That he observed her when she was testifying and considered her movement, shame, posture and formed a view. He appreciated her evidence and veracity and credibility. That he took caution of her age and considered that she revealed to others upon Kanana confirming similar thing happening to her. She was able to recall how the Appellant took her to his house and what unfolded and she had a vivid recollection that she asked him to stop but he continued briefly and stopped. That she struck him as a truthful witness and had no reason to disbelieve her testimony.
64. Upon re-evaluation of the evidence, i have serious concerns with 2 aspects of the PW 1’s evidence. Firstly, her evidence that the Appellant inserted his” body part for urinating in her urinating part” does not find support in the evidence of PW3, the clinical officer, whose observation was that the minor’s genitalia was normal and hymen was old broken and there were no vaginal bleeding. She noted that the minor was 7 years old.
65. It is my considered view that in a situation where a 7 year old is penetrated by an adult there would be expected to be physical injury on the genitalia. Further uncertainty is fueled by the fact that the minor continued with her normal activities after the ordeal with no signs of discomfort noted by her parent.
66. Further, the minor in her evidence states that she was told by Kanana that the Accused had done the same thing to her. In turn the minor told her brother Moses, who told Masha, who then told Mugweru and Mugweru told Allan. The mind boggling question is; if she told the named persons what had been done to Kanana, why not what was done to her if at all?
67. While the court was right in its appreciation of the law that under section 124 of the evidence Act, a conviction can lie on the evidence of a sexual offence victim so long as the court believes the victim is telling the truth, the court needed to go a step further in the circumstances of this case.
68. Since the minor’s evidence is that she was penetrated and given her tender age, it would be expected that the clinician would have observed injury on her genitalia or at the very least, there would be signs that the minor was hurt. As it were the minor’s evidence is contradicted by the medical evidence and the post act disposition of the minor who showed no signs of hurt and continued with her activities.
69. Thus section 124 of the evidence Act was not applicable as the truth the trial court believed is clearly contradicted by other evidence.
70. The evidence by the Appellant is that PW2 harboured a grudge against him since she wanted him to marry her sister but he declined. DW2 testified that a demand of Sh 50,000 was made to the Appellant by Pw2 and 3 other women. That she used to air her clothes and she would find them on the ground and she learnt that it was PW2 who was responsible due to the grudge of the Appellant refusing to marry her sister.
71. While this evidence and especially the aspect of a sister wanting a man to marry her sister and holding a serious grudge if turned down is bizzare, I am quick to note that the Appellant had no duty to prove his innocence. Once the prosecution evidence falls short, the Appellant must benefit from the doubts arising therefrom.
72. I hasten to add that the sexual offences under the Sexual offences Act provide for very stringent and lengthy minimum sentences on conviction and there is need for a meticulous evaluation of evidence



to ensure that conviction is achieved fairly. One may not lose sight that in defilement the witnesses are invariably minors who owing to their level of mental development would be prone to and expected to have minor contradictions and inconsistencies in their testimonies. These can safely be ignored. However, where there is a material contradiction in the evidence on record like in the case the variance between the medical evidence and PW1's testimony, the evidence becomes unreliable.

73. Having so found, the issue of identification becomes moot and I need not delve into it.
74. With the result that upon re-evaluation of the evidence, I find merit in the Appeal and I allow it in its entirety. I quash the conviction and set aside the sentence and substitute thereof an order acquitting the Appellant who shall be set at liberty forthwith unless otherwise lawfully held.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER 2025.

A.K. NDUNG'U

JUDGE

