Muriuki v Republic (Criminal Appeal 53 of 2020)
[2025] KECA 2199 (KLR) (11 December 2025) (Judgment)

Neutral citation: [2025] KECA 2199 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 53 OF 2020

K M'INOTI, A ALI-ARONI & PM GACHOKA, JJA

DECEMBER 11, 2025

BETWEEN

CYPRIAN MURIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Musyoka, J.) dated 6th February 2014 in HCCR.A NO. 198 OF 2010)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Meru (Musyoka, J.) dated 6th February 2014. By that judgment the High Court dismissed an appeal by the appellant, Cyprian Muriuki, in which he was challenging his conviction and sentence by the Senior Resident Magistrates' Court at Tigania (the trial court).

2. The appellant was charged before the trial court with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on 15th January 2009, at [Particulars Withheld]in Miathene Location of the former Eastern Province, he defiled FM, a girl aged 6 years. The appellant also faced an alternative count of indecent act with a child contrary to section 11(1) of the Act, the particulars being that on the same date and at the same place as in count one, he touched FM's private parts.

3. The appellant took his plea on 22nd January 2009. The record indicates that the interpretation was from Kiswahili to Kimeru. The appellant pleaded guilty and the facts of the offence were read out to him, indicating that he had defiled FM on the date and at the place stated in the charge sheet. The prosecution produced in evidence a P3 Form (Exhibit 1) and FM's treatment notes (Exhibit 2), which showed that she had indeed been defiled.

4. After presentation of the facts of the offences, the appellant responded in Kimeru language, which was interpreted in English as follows:

> " The facts are true and correct. I defiled M."

5. The appellant was treated as a first offender and when offered an opportunity to mitigate, he stated that he had nothing to say. Accordingly, he was convicted on his own plea of guilty and sentenced to life imprisonment as required by section 8(2) of the Act, where the victim of defilement is aged eleven years or less.

6. The appellant was aggrieved by the judgment and lodged a first appeal in the High Court. He challenged his conviction and sentence on the grounds that the charge sheet was fatally defective because it omitted the "mandatory" words "intentionally and unlawfully" as allegedly provided in section 3 (10) of the Act; that the trial court erred by failing to order age assessment for FM; that it further erred by failing to take medical evidence; and that his trial amounted to a mistrial.

7. After considering the appeal, the High Court held that the Act did not require the charge sheet to contain the words "intentionally and unlawfully" as alleged by the appellant; that the failure to order age assessment FM was not fatal because her case was not an age boarder-line issue; and that the appellant, having pleaded guilty to the offence, it was not necessary to call medical evidence. Accordingly, the first appellate court dismissed the appeal against conviction and sentence.

8. The appellant was still aggrieved by the judgment of the High Court and preferred this second appeal in which he faults the High Court for failing to find that his plea of guilty was not unequivocal; for failing to hold that the trial court should have warned him of the consequences of pleading guilty; for failing to hold that the age of FM was not proved; and for failing to find that penetration was not proved.

9. On whether the plea of guilty was unequivocal, the appellant submitted before us that the facts he admitted were at variance with the charge. He cited Adan v. Republic [1973] EA 445 and Kariuki v. Republic [1984] KLR 809 and contended that the facts he admitted did not disclose the offence with which he was charged, which rendered the plea of guilty equivocal and occasioned a miscarriage of justice.

10. As regards proof of age of the complainant, the appellant submitted that the prosecution did not prove her age and that the age ought to have been proved by production in evidence of her birth certificate because under section 8 of the Act, the prescribed sentence is dependent on the age of the victim. In support, he relied on the decision of the High Court in GOA v. Republic [2018] eKLR, for the proposition that the elements of the offence of defilement are proof of the age of the complainant, penetration and the perpetrator of the offence. It was his position that the age of the complainant was not proved.

11. Lastly, as regards penetration, the appellant submitted that it was not proved because, although the P3 form indicated that the victim's hymen was broken, that in itself was not proof of penetration, taking into account the evidence that the victim's libia majora and minora had no bruises or lacerations. In support of his submissions the appellant cited the decision of this Court in John Mutua Munyoki v. Republic [2017] eKLR.

12. The respondent opposed the appeal vide written submissions dated 9th August 2025. The respondent based its submissions on the appellant's original grounds of appeal rather than the supplementary grounds of appeal and therefore addressed some issues which the appellant did not pursue in the supplementary grounds and his written submissions. As far as is relevant to the supplementary grounds, Ms, Mengo, learned counsel submitted, as regards whether the appellant's plea was equivocal

that the trial court properly followed the procedure prescribed in Adan v. Republic (supra) and that the appellant pleaded guilty to the charge in Kimeru language, which he understood. Counsel contended that by his response to the facts presented by the prosecution, the appellant knew and appreciated that he was pleading guilty to a charge of defilement.

13. We have carefully considered this appeal. Before we consider its merits, it is apt to advert to section 348 of the Criminal Procedure Code, which provides as follows:

> " 348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

14. Where an accused person has pleaded guilty to an offence in the subordinate court, he cannot appeal to the High Court against conviction; his right of appeal is limited to the legality or severity of sentence. The limited circumstances under which an accused person who has pleaded guilty can appeal against conviction include where he alleges and satisfies the court that he did not understand the charge, or that the plea of guilty was not genuine or was unequivocal, or where the facts he admitted do not disclose the offence with which he was charged and convicted. (See Adan v. Republic (supra) and Olel v. Republic [1989] KLR 444).

15. The High Court did not directly address the question whether having pleaded guilty to the offence, the appellant could still appeal against conviction. Be that as it may, we shall treat the fact that the first appellant court entertained the appellant's appeal against conviction as affirmation that it understood him to contend that his plea of guilty was not genuine or was not disclosed by the facts he admitted.

16. We start with the appellant's complaint that the High Court erred by upholding his conviction, yet the trial court had not warned him of the consequences of pleading guilty to the offence he was charged with. This issue was not raised before the first appellate court and not surprising, that court did not pronounce itself on the issue. The issue is being raised for the first time in this Court and it would be remiss to fault the first appellate court for an issue that was neither raised before it nor decided by it. This being an appeal that challenges the decision of the High Court, this Court cannot agree or disagree with the High Court on an issue that it neither considered nor decided. (See the decisions of the Supreme Court in Republic v. Mwangi [2024] KESC 34 (KLR and Republic v. Ayako [2025] KESC 20 (KLR)). That ground has no merit.

17. The next issue is whether the appellant's plea of guilty was unequivocal. The procedure for taking down a plea of guilty is elaborately explained in Adan v. Republic (supra), the central concern being that the trial court must satisfy itself that the accused person fully understands the offence with which he is charged and that he consciously and willingly admits having committed the offence. In this case, the charge was read to the appellant and interpreted in the Kimeru language, which the appellant does not contend that he did not understand. He responded to the charge with the words, "It is true." After the facts were presented, the record indicates that the appellant responded in the Kimeru language that "The facts are true and correct. I defiled (F)M."

18. Having carefully examined the record of the proceedings before the trial court, we do not find any basis for concluding that the appellant's plea was taken in violation of the principles set out in Adan v Republic (supra). The appellant understood the charge and knew what he was pleading guilty to. The plea of guilty was genuine and unequivocal.

19. Turning to whether the prosecution proved the age of the complainant and penetration, the appellant insists that the age of the complainant should have been proved by a birth certificate and that penetration was not proved due to lack of bruises and lacerations in the complainant's private parts.

20. We agree with the appellant that in a charge of defilement, the age of the victim is a critical element that must be proved because the prescribed sentence is dependent on the age of the victim. However, we do not agree that the age of the victim can only be proved by a birth certificate. In Mwanguo Gwende Mwarua v. Republic [2015] KECA 155 (KLR) this Court held as follows:

> As has been stated severally, the age may be proved by various means, among them, birth certificate, age assessment or evidence of parents of the complainant."

21. Similarly, in Edwin Nyambogo Onsongo v. Republic [2016] eKLR the Court reiterated as follows:

> " ... (age) can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

22. The statement of facts presented by the prosecution indicated that the victim was a girl of 6 years. The appellant admitted the facts, including the fact that the victim was 6 years old. Having admitted the facts, including the age, it would have been preposterous for the prosecution to prove facts already admitted by the appellant. Once more, we find no merit in this ground of appeal.

23. Lastly, as regards whether penetration was proved in the absence of bruises and lacerations in the victim's private parts, we think that there is no merit in the appellant's argument. The offence of defilement is proved, in addition to proof of age, if penetration, however slight, is proved. There does not have to be bruises or lacerations. Indeed, even the hymen need not be broken. In Hadson Ali Mwachongo v. Republic, [2016] KCA 521 (KLR) this Court held that:

> "...in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and ... it is not necessary that the hymen be ruptured..."

24. In this case, we note that the P3 Form and the treatment notes presented by the prosecution indicated that the victim's hymen was broken, which was sufficient evidence of penetration.

25. The only error committed by the first appellate court is its misstatement of the charge sheet and what constitutes the offence of defilement. In its judgment, the High Court stated as follows:

> " The particulars of the charge against the appellant were that on 15th January 2009 at Kirukire village, Miathene Location in Tigania District within Eastern Province defiled FM, a child of six years by touching her private parts. The appellant pleaded guilty to the charge."

26. If those were really the facts, the appellant could not have been convicted of defilement, but only indecent act with a child contrary to section 11(1) of the Act. We have, however, confirmed that the error did not stem from the charge sheet or the record of proceedings before the trial court but was possibly a slip by the first appellate court. In view of what we have already stated, nothing turns on that error.

27. For all the foregoing reasons, we find no merit in the appellant's appeal and hereby dismiss the same in its entirety. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER, 2025.

K. M'INOTI

JUDGE OF APPEAL

A. ALI-ARONI

JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR