JWM v Republic (Criminal Appeal E042 of 2025)
[2026] KEHC 674 (KLR) (29 January 2026) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E042 OF 2025

DKN MAGARE, J

JANUARY 29, 2026

BETWEEN

JWM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. D.N Bosibori, Senior Resident Magistrate in Mukurweini PMCSO No. E016 of 2023. The Appellant was charged with defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.

2. The particulars of the offence were that between the year 2020 and 13th November 2022 at [Particulars Withheld] sublocation within Mukurweini sub-county of Nyeri County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of SNM, a child aged 8 years.

3. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The particulars are that on diverse dates between the year 2020 and 13th November 2022 at [Particulars Withheld] sublocation within Mukurweini sub-county of Nyeri County, the Appellant unlawfully and intentionally touched the vagina of SNM, a child aged 8 years, with his penis.

4. The Appellant was arraigned, and he denied the charges. A plea of not guilty was consequently recorded.

5. The Trial Court considered the case and rendered the Judgement on 31.7.2024. The Court found the Appellant guilty of the offence of defilement and convicted him. The Appellant was also sentenced to serve life imprisonment.

6. The Appellant, aggrieved, lodged this Appeal. The Petition of Appeal dated 11.7. 2025 raised the following Grounds:

   a. The learned trial magistrate erred in convicting the Appellant without considering that there was a land dispute between the family members hence the case was framed.

   b. The learned trial magistrate erred in law and fact in failing to find that the incident took place in 2020 and the case was reported to the police on 13.11.2022 which was an afterthought.

   c. The learned trial magistrate erred in law and fact in failing to appreciate that medical evidence and the elements of offence were proved.

   d. The learned trial magistrate erred in law and fact in failing to find the evidence of the prosecution was uncorroborated and contradictory.

Evidence

7. At trial, PW1, Julius Mwendia Mukuro, clinical officer at Mukurweini Hospital. He relied on the P3 form, the PRC Form, and the laboratory request form. On examination, the minor had yellowish discharge with an old, broken hymen. The notes were made on 17.11.2022 and generated on 28.8.2023. Outer genital was intact. He concluded that there was penetration. On cross-examination, he stated that there was no way of telling the cause of the hymen breaking.

8. PW2 was PMG from [Particulars Withheld]. She was the minor's father. He testified that the minor was 11 years old. The Appellant was his cousin and was not married. On 13.11.2022, around midday, he went to buy Sukuma wiki. He returned and found the minor standing near his home, and he asked her to go home. The Appellant followed him with a bucket. His house and the Appellant's home were 15 meters apart. He then left the minor to prepare the vegetables.

9. He stated that the minor told him she was full as she had eaten at A's home, who was her friend. She then went to play after he gave her permission. Again, he went to Thangatho market to withdraw Ksh. 200/= that was owed to the Appellant. At 5 pm, his son called him informing him that the minor had Ksh. 60. He came back, and the minor pleaded that she had not stolen the money. The Appellant had given her the money so that he could have intercourse with her. That she had been defiled. He informed the assistant chief, and he also took the minor to Mukurweini Hospital. The Appellant escaped to Kariokor in Nairobi. He later returned home and was arrested.

10. On cross-examination, it was his case that he found the minor at the Appellant's door and asked her to go home. At that juncture, he was unaware of the incident.

11. PW3 was Serah Wambui Wachira. She testified that she was neighbour to PW2. The minor's mother was deceased. The minor had a brother called B, 17 years and they stayed with PW2. The Appellant was also her neighbor. PW2 was a cousin of the Appellant. PW2 phoned her on 13.11.2022 at 7 p.m. to go to his home. She found PW2 with the minor. PW2 then asked the minor where she had gotten the money that she had. The minor said that the Appellant gave her Ksh. 60. The Appellant had also defiled her.

12. It was his evidence that the minor's grandfather, one FG, was a village elder and was also with them. He requested that the issue be left to him. Later, on 14.11.2022, Fredrick called the area chief, and the minor was escorted to the area chief. It was her testimony that she was at Thangathi Police Station, where the report was made. On cross-examination, she testified that the minor said that the Appellant had given the minor Ksh. 60. That she had not had sex with the minor that day. The sex was done on

occasions in 2020. After 14.11.2022, the Appellant fled and returned home in November 2023 when he was arrested.

13. PW4 was BG. He was born on 26.11.2005 and was 18 years. The minor was his sister. She was in Grade 6. He knew the Appellant's house and described it. It had 3 rooms and was made of bricks. His family had left him for about 12 years. On 13.11.2022, around 1 p.m., he was at St Luke Kihuti Orthodox Church when A Wanjiru, a neighbor, called him. A asked him where the minor could have gotten the money that she had. The minor then told PW2 that the Appellant had given her the money. The minor said the Appellant asked him if the minor could agree to be defiled, and he could give her more cash. PW2 then reported to the chief and later to the police station.

14. On cross-examination, it was his case that the minor had earlier told him that the Appellant had defiled her in 2020. It was the time their mother was still alive. He did not take the minor seriously he thought it was a lie.

15. PW5 was the minor. According to her, she was born on 18.11.2012 and was 11 years. She stayed with her father, PW2, and brother PW4. The Appellant was her uncle. Her mother died in December 2021. She recalled that in 2020, around June, the Appellant visited her home while drunk at 7 p.m. On this day, he knocked at the window to the minor's bedroom. She asked him and he left. On another occasion in 2020, she had visited her aunt, Virginia Wangeko, during the day. The Appellant was outside an adjacent house. He chased the minor towards the main road. She did not manage to defile her as she escaped.

16. she stated that on 13.11.2022, PW2 went to buy Sukuma wiki. He found her at the Appellant's doorstep, where she stood. The Appellant then asked her whether she wanted money, and she agreed. H gave her Ksh. 60. He covered her face with a lesso, but soon PW2 showed up, and the Appellant said he wanted to shower. both PW2 and the minor also went home. She informed PW2 that she was full and could not eat more. PW2 asked who had given her Ksh. 60. She initially did not say, but he threatened her with a cooking stick, and she said it was the Appellant. The Appellant wanted to do tabia mbaya, so he gave her the money. The matter was reported to the chief and then Thangathi police station.

17. She was stood down as she was tired and hungry. Proceedings continued on the next day when she testified that the Appellant defiled her over 10 times. He found her near Virginia's fence and carried her to his bedroom. He forced her to remove clothes. He removed her trouser to the knee and removed her white innerwear. He them removed his trousers. She did not remember its colour. He inserted his penis to her vagina. This took about a minute. She did not report to anyone. This was not the first time as he had done it earlier on her. On another occasion, he defiled her on his brother's bed while they were both standing. She did not report to anyone. On cross-examination, it was her case that the Appellant carried her to his home. He emerged from a live fence. She told her brother but he thought she was lying. She recognized the Appellant's voice when he called her. She did not feel pain or bleed after the incident. She had never bled from her vagina. She had never had menses.

18. PW6 was No. 255067 PC George Kimani of Mukurweini Police Station. He narrated what PW2 and PW5 had told him. It was his case that upon investigations, he established the Appellant to be the suspect. On cross-examination, it was his case that the medical report conformed to defilement. He did not visit the crime scene.

19. On being placed on his defence, the Appellant opted for sworn testimony. He testified that he stayed in Ruiru selling gas cylinders and gas. The minor was his niece. On 20.11.2023, he left Ruiru at 10 a.m. He arrived at Thangathi at 7-8 p.m. He bought two bottles of alcohol from Nyakio bar. Peter Mwai, PW2, and his father were around the bar, and suddenly he saw two police officers enter the bar and

arrest him. He thought he was arrested due to drunkenness. There was a grudge as PW2 and his father had a boundary dispute with the Appellant. He was being fixed.

20. On cross-examination, it was his case that he had hardly visited his home since 2020. He testified that he was not in talking terms with the complainant's family.

21. DW2 was EWM. She stayed in Ruiru. The Appellant was her mother's uncle and brother. On the diverse dates between 2020 and 13.11.2023, she stayed with the Appellant in Ruiru. He worked at Mazao Gas Traders. He only visited his ancestral home in November 2023 where she learned of his arrest. She testified that there was a land dispute as complainant family wanted to take over the Appellant's mother's family portion after the Appellant's fathers died.

Submissions

22. The Appellant filed submissions dated 24.10.2025. He submitted that the trial court failed to consider that it was a land dispute, but he was framed as a criminal case. He submitted that the court ignored the corroborative evidence of DW2. He cited David Waweru v Republic (2019)e KLR.

23. The Appellant also submitted that the crucial elements of the crime were not proved beyond reasonable doubt. He relied inter alia on Francis Mutuku Tweni v Republic (2017) e KLR.

24. It was further submitted that the trial court shifted the burden of proof to the Appellant. On this, he cited Woolmington vs. DPP [1935] A.C 462, pp. 481.

25. The Respondent did not file submissions despite postulating that they were to file within the timelines given. Nevertheless, the court considered the case on its merits, having regard to the law relating to submissions. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

Analysis

26. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. this was set out by the former Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question

turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

27. This court, dealing with the instant appeal, is entitled to consider the evidence in the trial court as a whole as being submitted fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows: -

1. 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.

2. 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.

1. Therefore, this Court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong. The law under which the appellant was charged is provided under Section 8 of the *Sexual Offences Act* as hereunder:

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) ...

(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.

29. On the other hand, the appellant was charged with an alternative count under Section 11 of the *Sexual Offences Act*, which provides as follows:

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

(2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged

commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.

(3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.

(4) 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 (Cap. 141)

(5) The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

30. In the case of Charles Wamukoya Karani v. Republic, Criminal Appeal No. 72 of 2013, it was held that the essential elements constituting the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant. These key ingredients of the offence of defilement, were similarly elucidated in the case of George Opondo Olunga v Republic [2016] eKLR are;

a. Proof of the age of the complainant,

b. Proof of penetration and

c. Proof that the appellant was the perpetrator of the offence.

d. and {I must add that the penetration is of a sexual organ, [of the vagina or anus] by a sexual organ}.

31. The first element, age, is a bit relaxed, especially for children of tender years. It can be proved, though, by a birth certificate, baptism card, or by oral evidence of the child if the child is sufficiently intelligent, or by the evidence of the parents or guardian, or medical evidence, among other credible forms of proof. The key element in proof of age is credibility. In more grown-up children, the difference between young adults and children is razor sharp. The court must be vigilant to prevent adults masquerading as children. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016)eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> ... 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, 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. 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.

32. While addressing the question of age of the victims in the Sexual Offenses Act, the court in Kaingu Elias Kasomo vs. Republic, Malindi, the Court of Appeal in Criminal Appeal No. 504 of 2010 stated as follows:

Age of the victim of the 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.

33. The issue for this court's determination is whether the prosecution proved the offence of defilement against the Appellant beyond a reasonable doubt. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence "of course it is possible, but not in the least probable", then it can be said in law that the case is proved beyond reasonable doubt. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

34. The parameters that were to be proved in cases such like the instant case were settled in the case of George Opondo Olunga vs Republic [2016] eKLR that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and proof of the identification of the perpetrator.

35. At trial, the court conducted voire dire and established that the minor had a proper understanding of the significance of oath.

36. The material testimony of the minor as to the charges before the trial court was that on the material day, 13.11.2022, the Appellant gave her Ksh. 60 and requested that they do tabia mbaya. The Appellant attempted to cover the minor's mouth so that she could not scream, but the minor managed to flee.

37. However, while at home, PW2 had information that the minor had Ksh. 60. PW2 did not know where the minor got the amount. PW2 then queried the minor and, in fact, took a cooking stick and threatened that if the minor did not say where she got the cash, he would kill her. The minor then revealed that the Appellant had given her Ksh. 60, and she had spent Ksh. 5 out of it. The Appellant, upon giving her the cash, also asked to sleep with her, and she refused and fled to her home. It was her stated case that previously, on unnamed dates within the year 2020, the Appellant had defiled her on several occasions, but she had not reported to anyone. She described how the Appellant could undress her, dress himself, and then defile her.

38. The penetration must be proved to have been caused by the act of the Appellant. The duty to do so is not placed on anybody other than the state. The most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the 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 insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. 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."

39. The legal burden is the burden of proof, which remains constant throughout a trial. According to established principles, it rests upon the prosecution to prove the guilt of an accused person beyond reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

40. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that: -

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

41. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 had this to say: -

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

42. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. Within these limits, the court is duty-bound to subject the evidence to a fresh and exhaustive examination, reassess the credibility of witnesses, and weigh conflicting testimony to draw its own independent conclusions.

43. Throughout this process, the legal burden of proof remains constant, resting squarely on the prosecution to establish the appellant's guilt beyond reasonable doubt. It is only by carefully scrutinizing the evidence in its entirety, while remaining faithful to the statutory framework, that the

court can ensure the appellant receives a full and fair re-evaluation of the case. The section reads as follows:

> " 382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

44. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. In this case, the Appellant was sent in for life imprisonment. This must be a serious offense that requires the clearest view of the evidence to justify keeping the Appellant behind bars for life. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state. Conviction and sentence as a sexual offender were a badge that a convict could only deserve based on undoubted evidence.

45. The appellant maintained that he was not guilty. There are witnesses who were mentioned and had no horse in the race. Kerubo was said to be with the PW1 during the alleged defilement in the Appellant's house. The area assistant chief and chief who PW2 and PW3 notified of the incident were never called to give their version of evidence. PC Chebet, PC Juma and PC Cherop who PW6 described as officers who arrested the Appellant, or either of them never testified in court. The evidence of PW5 on penetration was not corroborated. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows: -

> " No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

46. The Appellant was thus convicted on circumstantial evidence. The threshold as stated in R vs Kipkering Arap Koske [1949] 16 EACA 135 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Sawe vs Rep [2003] KLR 364, the Court of Appeal expressed that:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

47. On the issue of identification, in my close reevaluation, I note that identification was by recognition and was equally not a disputed fact that the Appellant was known to DW1 as her uncle. The Appellant's defence was only that the allegations were not true, that he had been in Ruiru since 2020, and that he had just returned when he was arrested on 14.11.2023. The arrest was carried out one year after the alleged defilement.

48. Returning to penetration, the medical report and evidence was that there was evidence of penetration. PW1, the medical doctor, testified that he did not establish the exact date when the old, broken hymen was broken. There were no other injuries. He could also not establish the cause of the yellow discharge, which he also associated with infection. There was clear, uncontroverted evidence that there was no penetration of the minor on 13.11.2022. There is no plausible explanation for how 2020 penetration could cause a discharge in 2022. Based on the medical doctor's evidence, there was doubt as to what caused the penetration and whether the Appellant was responsible. The Respondent had a duty to prove the charge, which they failed to do.

49. On the aspect of age, age is such a crucial component in sexual offences that it points to the extent of punishment for the offenders. This was also the position of the court in Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), where the Court of Appeal stated doth:

> " 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."

50. The age of the minor herein could be proved by documentary evidence, such as a birth certificate, baptism card, or by oral evidence that the child is sufficiently intelligent, or the evidence of the parents or guardian, or medical evidence, among other credible forms of proof. In Mwalengo Chichoro Mwajembe vs Republic, Msa. App. No. 24 of 2015 (UR) the court held:

> "..... the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof....

51. Medical evidence is paramount in determining the age of the victim, and the doctor is the only person who can professionally determine the age of the victim if there is doubt in respect to other types of proof. In Francis Omuroni vs Uganda, CR. A 2/2000 it was held:

> " In defilement cases, 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 a birth certificate, the victim's parents or guardian and by observation and common sense. ...."

52. Consequently, age herein was proved by the production of the Birth Certificate. The birth certificate stated that PW5 was born on 18.9.2012, and so was 8 years old at the time of alleged initial defilement in 2020. The birth certificate was registered on 30.9.2012 and issued on 20.6.2017, and so was properly and credibly analyzed with the surrounding evidence and circumstances. I have no basis to interfere with the discretion of the trial court, which, based on the birth certificate and the projection by the medical report, applied the age of 8 years.

53. The court exercised discretion in accordance with the law. In the case of Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> " Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

54. However, there is no raison d'être for finding that the appellant committed the alleged offence. The appellant testified that he had been settled in Ruiru since 2020. He had a witness in town.

55. The one issue the court failed to address critically was the defence evidence. The court summarily dismissed the defence of alibi. It is true that in certain cases, an alibi needs to be set out early. However, the duty to prove the falsity of an alibi still remained with the prosecution. The appellant, as an accused, has no duty to help the state prove its case, as he remains innocent until proven otherwise. The accused was arraigned and denied the charges. A plea of not guilty was consequently recorded. In the case of R vs. Lifchus {1997}3 SCR 320, the Supreme Court of Canada explained the standard of proof as doth:-

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

56. If evidence was tendered that was surprising to the state, they had a chance under section 212 of the Criminal Procedure Code to call for rebuttal evidence. The section provides as follows:

> If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

57. The question of the rights of the prosecution to receive in advance defence evidence as addressed in the case of Thomas Patrick Gilbert Cholmondeley v Republic [2008] KECA 319 (KLR), the court of appeal [R.S.C. Omolo, E. O. O'Kubasu and J. W. Onyango Otieno] posited as follows:

> So, if at the beginning of the trial, *the Constitution* obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores

one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by *the Constitution*. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced. ...

That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of *the Constitution*. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: "If you rattle a snake, you must be prepared to be bitten by it." ....

We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by *the Constitution*. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in *the Constitution* and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words, there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and *the Constitution*, wisely in our view, does not give the prosecutors such powers.

They cannot be given through the inherent power of the court. Even in civil matters, there is a specific provision in the *Civil Procedure Act*, Chapter 21 Laws of Kenya, recognizing the existence of the inherent power of the court:

> " to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." – see section 3A.

There is no similar provision in the Criminal Procedure Code, Cap 75 Laws of Kenya and we think the omission is deliberate. But even if there was such a power with regard to criminal matters, we do not accept that a judge would be entitled to create non-existent rights and confer them upon a party as the learned Judge purported to do here.

58. The appellant was not under a duty to disclose his defence before being put on the defence. In any case, the State may call rebuttal witnesses. The appellant's case, as presented in cross-examination, was that he was not there. It used to be the position that an alibi had to be disclosed in advance. However, non-disclosure is not fatal. The court failed to consider the appellant's defence and treated it casually, resulting in an irreversible error.

59. In the circumstances, I do find and hold that the offence of defilement was not proved. The conviction is thus unsafe and consequently set aside. Given that the offence was not proved, the sentence is set aside. I do not find that the basis for which the court found that the Respondent proved their case beyond a reasonable doubt.

60. Besides noting that the hymen was old and broken, the medical report and the testimony indicated that the external genitalia were normal; the PRC reached the same conclusion. In the circumstances, and considering the age of the complainant, the absence of bleeding, rupture, or extensive injury following alleged penetration, whether full or partial, renders the alleged evidence unbelievable.

61. Further, a broken hymen alone is not sufficient evidence to prove a case of defilement or sexual penetration. There must be evidence of penetration. By having a blanket accusation of penetration sometime in 2020, the appellant was placed in a pedestal where he cannot defend himself. this then takes away his right to fair trial. There can be a fair trial where one has to remember where they were, three years earlier, every day of the COVID-19 year, 2020. The Court of Appeal in the case of P. K.W vs Republic [2012] eKLR observed as follows:

> 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified?" Is the hymen only ruptured by sexual intercourse?
>
> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."

62. Before departing, I note that the court erroneously used sections 306 and 307 of the Criminal Procedure Code. It is doubtful that the court complied with the requirements of Section 211 of the Criminal Procedure Code.

63. The court also erroneously dealt with the credibility of the witnesses at paragraph 8 of the ruling on the case to answer. Such consideration of the credibility of witnesses, and its expression at that stage, places the court in a position where it must convict. This is compounded in the warning in the same ruling that if the appellant tendered no evidence, the court must convict. This is contrary to the appellant's right to remain silent.

64. The last issue is section 124 of the *Evidence Act*. The court generously relied on the section. The reason was that the witness recognized the appellant. It is true that parties know each other. However, the issue of defilement is inconsistent with the parties' conduct. An allegation of defilement was made in relation to 13.11.2022, but was discounted. Therefore, where the initial evidence relating to defilement turns out to be false, it is worthless to believe the remainder of the evidence in the absence of corroborating evidence. Without the court discounting only and then flouting the same with the rest of the evidence, it fell into error.

65. Therefore, in my overall reevaluation of the evidence, I am unable to agree with the trial court that the prosecution proved penetration of the minor's vagina by the Appellant's penis beyond a reasonable doubt. In totality, the Respondent herein did not prove the offence of defilement against the Appellant beyond reasonable doubt, and the trial court erred in convicting the Appellant.

66. Having found that the conviction was improper, I do not think it will serve any purpose to delve into the issues in the sentence. However, it must be noted that the nature of sentences under the *Sexual Offences Act* is circumscribed. This particular offence under section 8(1) and (2) of the *Sexual Offences Act* provides for a mandatory sentence of life imprisonment. The question of such sentences was addressed in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [supra] where the Supreme Court, [MK Koome, CJ, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] posited as follows:

> 11. Mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, the USA, Australia, and South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed
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> 12. Before Kenyan courts could determine whether or not the prevailing trends and decisions were persuasive, there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. That was the Supreme Court's approach and direction in Muruatetu , which had to remain binding to all courts below.
>
> 13. The Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. That approach was problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

67. Further, the same position was reiterated by the Supreme Court in its decision in Republic v Manyeso [2025] KESC 16 (KLR), where it stated as follows:

> Paragraphs 11 to 14 of the Muruatetu directions are very clear that the decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, *Sexual Offences Act* , or any other statute. Further, that the Muruatetu case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with *the Constitution*. Paragraphs 93 to 97 of the Muruatetu decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence:
>
> 94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with

the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

96. We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

65. From the above paragraphs of the Muruatetu case any reading of that decision ought to lead to the conclusion that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.

68. However, having allowed an appeal on conviction, the issue of sentence is moot.

69. I find and hold that the prosecution's case was not proved beyond a reasonable doubt and therefore allow the appeal, set aside the conviction and sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Determination

70. In the circumstances, I make the following orders: -

a. The Appeal on conviction and sentence is merited and allowed.

b. The Conviction and sentence in Mukurweini PMCSO No. E016 of 2023 is set aside.

c. The Appellant be removed from the sexual offenders register.

d. The Appellant shall be set free forthwith unless otherwise lawfully held.

e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI, VIRTUALLY ON THIS 29 TH DAY OF JANUARY, 2026 . JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kihara for the State/Respondent

Pro se Appellant

Court Assistant - Michael