



**Mwandeni v Republic (Criminal Appeal E005 of 2024)  
[2026] KECA 89 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KECA 89 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL E005 OF 2024  
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA  
JANUARY 30, 2026**

**BETWEEN**

**ARAFALI MWANDENI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) delivered on 6th March 2020 in HC Criminal Appeal No. 165 of 2017)*

**JUDGMENT**

1. Arafa Ali Mwandeni, the appellant, was charged before Mombasa Chief Magistrate's Court in Criminal Case No. 859 of 2015 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that, on 10<sup>th</sup> May 2015, at [Particulars Withheld] in Changamwe sub-County within Mombasa County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of S.M., a girl aged 10 years.
2. From the trial court's Judgment (Hon. Kagoni. E. M., SRM) delivered on 13<sup>th</sup> September 2017, the appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The charge sheet on the record as put to us does not contain this alternative charge. The particulars of the charge as derived from the said Judgment were that, on the same date and place, the appellant intentionally and unlawfully caused his penis to rub the anus of S.M., a girl aged 10 years.
3. The prosecution's case was supported by the testimony of four (4) witnesses. PW1, S. M. (the complainant), after a voire dire examination, gave a sworn statement of evidence. She testified that she was a student at [Particulars Withheld] Primary School, and that she stayed in [Particulars Withheld] with her parents and a younger brother; that, on 10<sup>th</sup> May 2015, she had gone to visit her aunt oneV, whose home was not far from their home; that she left her aunt's place at around 7 p.m., and that



- among the people she met on the road on her way back home was her mother's friend who was also their neighbour, the appellant herein; that the appellant strolled her from behind; that when he caught up with her, he grabbed her by her mouth and led her to the bush while threatening to kill her if she screamed; that, in the bush, the appellant removed her clothes, being a skirt and a pant; and that he then removed his shorts and defiled her.
4. The complainant further testified that the appellant warned her not to tell anyone; that, nonetheless, when she went home she told her mother what had transpired; that she was then taken to Changamwe Police Station and thereafter to Coast General Hospital where she was examined; that she knew very well her assailant who was called Ali, and whom she identified in court as the appellant.
  5. PW2, BA, the complainant's mother, testified that, on 10<sup>th</sup> May 2015, she left church at around 3:00 p.m. with her sister; that they parted ways after church and her sister took the complainant with her; that the complainant left her sister's home at around 7.00p.m. and that, when she got home, she noticed that the complainant (hereafter PW1) was uneasy, and that she requested to go to the toilet; that she followed her to the toilet whereupon she noticed that she had difficulty in passing stool; and that she enquired from her what the problem was, but that she(PW1) refused to open up.
  6. PW2 further testified that she later reported the incidence to her husband who examined PW1's pants and observed fresh sperms on them; that when they threatened to take her to the police, she opened up and told them that she was defiled by one Arafa who fetches water for people; that they then took PW1 to Changamwe Police Station where they reported the matter; that they were referred to Coast General Hospital where PW1 was examined and found to have been defiled; and that she also knew the appellant as a person who fetched water for the area residents.
  7. PW3, Sgt. Josephine Mwangemi attached to the Changamwe Police Station at the Gender Office was the investigating officer. She summed up the prosecution witnesses' testimonies and, additionally, testified that she accompanied PW1 to hospital; that the appellant was arrested by members of the public on 12<sup>th</sup> May 2015 whereupon she placed him in custody; and that the offence took place on 10<sup>th</sup> May 2015 in the appellant's house in [Particulars Withheld].
  8. PW4, Doctor Jillian Njambi Muthoni, a Medical Officer at Coast General Hospital, produced the Medical Examination Report (P3 form) that had been filled by Doctor Mutha Mohammed with whom she had worked and was conversant with his handwriting. She testified that the examination revealed swelling in her private parts; that the hymen was broken with an old scar; and that there was a 6 o'clock scar in the anal region; that PW1 was examined for the purpose of filling the medical report (P3 form) after about 6 months; and that her age was estimated to be 10 years. PW4 produced the P3 form (P.Exhibit 2) and the Post Care Rape form (PRC) P.Exhibit 3) which was filled on 11<sup>th</sup> May 2015.
  9. After the conclusion of the prosecution case, the trial court ruled that the appellant had a case to answer and was accordingly put on his defence. He opted to give a sworn statement of defence but called no other witness.
  10. In a brief defence, the appellant testified that it was on a Monday when he received a call from a customer to deliver water; that he went to the tap to fetch water and that, while fetching water a second time, PW1's father approached her and told her that their house had been broken into the previous night, and that he was the suspect; that, as they argued, PW1 and PW2 joined them and started alleging that he had defiled PW1; that they started beating him until he lost consciousness; that his brother came and he was taken to a near-by clinic for treatment; and that, while at the clinic, police came and rearrested him.



11. After considering the evidence on record, the learned Magistrate (E. Kagoni, SRM) found that the prosecution had proved all the ingredients of the offence of defilement, namely the age of the complainant; penetration; and identification of the perpetrator beyond reasonable doubt. The court observed that, although there was no eye witness who saw the appellant committing the offence, applying the proviso to Section 124 of the *Evidence Act*, it (the trial court) had no doubt in its mind that PW1 was telling the truth as to what happened, and that the appellant was the culprit. He accordingly convicted the appellant and sentenced him to life imprisonment.
12. Dissatisfied, the appellant filed a first appeal to the High Court at Mombasa (Njoki Mwangi, J.), which appeal was hinged on three grounds, namely that the prosecution did not prove its case beyond reasonable doubt; that the prosecution's case was contradictory and laced with inconsistencies; and that the life sentence was excessive in the circumstances.
13. In her Judgment delivered on 6<sup>th</sup> March 2020, the learned Judge (Njoki Mwangi, J.) upheld the appellant's conviction on the same basis as the learned Magistrate, finding that all the ingredients of the offence of defilement were proved; and that the minor contradiction in the prosecution case as to where the offence took place did not rebut the fact that the defilement took place, and that it is the appellant who committed the offence. She however reduced the sentence to 30 years imprisonment, while noting that courts in our jurisdiction had then interpreted the Supreme Court decision in Francis Karioko Muruatetu & another vs. Republic (2017) eKLR to mean that all minimum mandatory sentences in our penal laws were unconstitutional; and that, in view thereof, courts had the discretion to vary such minimum mandatory sentences based on both the mitigating and aggravating factors of the case, but maintain the minimum mandatory sentence as the maximum penalty.
14. Further aggrieved, the appellant is now before this Court on a second and perhaps the last appeal. We have not had sight of the appellant's grounds of appeal on the record as put to us, but we have been able to deduce from his submissions dated 16<sup>th</sup> May 2025 that he complains that: the learned Judge erred in law and in fact by making a finding that the prosecution had proved its case beyond reasonable doubt despite the glaring discrepancies in the evidence tendered.
15. At the hearing of this appeal on 20<sup>th</sup> May 2025, learned counsel Mr. Okanga appeared for the appellant while learned Prosecution Counsel Ms. Mburu appeared for the respondent. Both counsel briefly highlighted their respective written submissions.
16. Highlighting the appellant's brief submissions dated 16<sup>th</sup> May 2025, albeit that no case law was cited, Mr. Okanga underscored the fact that the prosecution's case was laced with a material contradiction as regards the place where the offence took place; that PW1 testified that it took place in a bush while PW3, the investigating officer, testified that it took place in the appellant's house; that the contradiction vitiated the strength of the prosecution's case; that this created doubt as to the appellant's culpability; and that the doubt should have been resolved in favour of the appellant.
17. Counsel submitted that the PRC form was not produced in evidence by its maker, PW4 having testified that it was filled by a Dr. Mutha Mohammed; that this prejudiced the appellant who was unrepresented as he did not understand or know that the maker ought to have produced it; and that, therefore, the appellant's conviction was not in accordance with the law.
18. For the respondent, Ms. Mburu submitted that the evidence of the complainant was that the offence took place in the bush; that the trial court was satisfied that the complainant was telling the truth; and that, on the basis of Section 124 of the *Evidence Act*, no corroboration of her evidence was required.
19. On the production of the PRC form by a person other than its maker, it was submitted that the issue was being raised for the first time in this second appeal; and that, furthermore, PW4, the doctor who



produced the document, laid out her credentials confirming that she was a medical doctor and was well-known to the doctor who filled it and, therefore, competent to produce the document.

20. As to proof of the offence, it was submitted that all the ingredients of the offence charged were established, namely the age of the victim, penetration and proper identification of the perpetrator; that the complainant's age was proved by way of a birth certificate; that penetration was proved by evidence of the victim and the medical documents produced by PW4, namely the P3 and PRC forms; that, through the medical evidence, it was confirmed that there was swelling on the complainant's private parts, her hymen was broken with an old scar and a 6 o'clock scar in the anal region; that both the trial and the first appellate courts rightly found that there was sufficient evidence to prove penetration; and that, as to identification, PW3 positively identified the appellant in her testimony in chief, on cross examination and re-examination by the name Ali; and that the appellant was well known to her.
21. Reliance was placed on the High Court (Nyaga, J.) decision in *EK alias E vs. Republic* (2024) KEHC 1065 (KLR) in support of the elements constituting the offence of defilement; and this Court's decision of *Arthur Mshila Manga vs. Republic* (2016) KECA 691 (KLR) for the proposition that a court can convict an accused based only on the weight of the evidence of the victim.
22. On the issue of sentence, it was submitted that the first appellate court erred in setting aside the sentence of life imprisonment for the reason that the Supreme Court has rendered itself in a ruling in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (2024) KESC 34 (KLR), (although the respondent cited the wrong appellant in its citation of this decision) that the Court's decision in *Muruatetu* (supra), did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute, and we were thus urged to reinstate the life imprisonment.
23. We have considered the record of appeal, the respective parties' submissions and the law. In our view, the issues that fall for determination are: whether the appellant was convicted on the basis of contradictory and inconsistent evidence; whether the offence of defilement was proved to the required standard; and whether the sentence of life imprisonment that was initially meted out by the trial court should be reinstated.
24. This being a second appeal, our mandate is limited to considering only matters of law under Section 361 of the Criminal Procedure Code. This Court will only interfere with the concurrent findings of facts made by the two courts below if it is established that the findings were not based on evidence or were based on a misapprehension of the evidence, or that, it is apparent that no reasonable tribunal could have reached that conclusion. In *David Njoroge Macharia vs Republic* (2011) KECA 406 (KLR), it was stated that:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong vs. Republic*, (1984) KLR 213). See also: *M'Riungu vs Republic* (1983) KLR 455).
25. The exception to considering matters of fact was also expounded by this Court in the case of *Dzombo Mataza vs. Republic* [2014] KECA 831 (KLR) to be where it is demonstrated that matters which ought to have been taken into account were not considered or those which should not have been considered



were taken into account in the determination of the matter, or that, from the facts on record, the decision arrived at was plainly wrong. The Court had this to say:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno vs. Republic* (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. We do not discern such misgivings in this appeal.”

26. Therefore, this Court will resist to interfere with the concurrent findings of fact of the two courts below unless it is established that the decisions were based on no evidence or on misapprehension of the evidence. See: *Samuel Warui Karimi vs Republic* (2016) KECA 812 (KLR).

27. Section 8(1) of the Sexual Offences Acts provides that a person is considered to have committed an act of defilement if they engage in a sexual act which causes penetration with a child as follows:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

while a child is defined under Section 2(1) of the *Sexual Offences Act* as a person under the age of 18 years as follows:

"child" has the meaning assigned thereto in the *Children Act* (Cap. 141);

"child" means an individual who has not attained the age of eighteen years;

28. The ingredients constituting the offence of defilement are: proof of the age of the complainant; proof of penetration; and proof of identification of the perpetrator. This Court in *SNK vs. Republic* (2024) KECA 1526 (KLR), with respect to what constitutes the elements of defilement, held that:

“Under the *Sexual Offences Act*, the elements of the offence of defilement are as follows: the victim must be a minor, there must be penetration of the genital organ, but such penetration need not be complete, partial penetration will suffice; and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above elements. In the case of *Charles Karani v Republic*, Criminal Appeal No. 72 of 2013, the Court stated that: -

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant.”

29. The appellant faults his conviction on the argument that the prosecution evidence was marred by contradictions and inconsistencies. He particularly pointed out that the complainant testified that she was on her way from her aunt’s place when the appellant accosted her from behind and dragged her to a nearby bush where he defiled her. Admittedly, the investigating officer, PW4, testified that the offence took place in the appellant’s home. This fact, the appellant asserts, casts doubt on the prosecution’s case as to his culpability. In *Richard Munene vs. Republic* (2018) KECA 186 (KLR), this Court stated:

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main



issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

30. This Court in *Ahamad Abolfathi Mohammed & another vs. Republic* [2018] KECA 743 (KLR) had the following to say in regards to effect of contradictions arising in the prosecution case:

As regards contradictions in the prosecution’s case, other than the fact that the appellants did not point out any specific contradictions, this Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. (See for example *Joseph Maina Mwangi v. Republic*, CR, APP No. 73 of 1993, *Kimeu v. Republic* (2002) 1 KAR 757 and *Willis Ochieng Odero v. Republic* [2006] eKLR). In *John Nyaga Njuki & 4 Others v. Republic*, Cr. App. No. 160 of 2000, this Court expressed itself as follows on the issue:

‘In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.’”

31. We have already spelt out what ingredients the prosecution is obligated to prove in an offence of defilement, being the age of the minor, penetration and identification of the perpetrator.

The fact of where the defilement took place is not one of the elements that the prosecution should establish. Whether the defilement took place in a bush, or in the home of the appellant, or even on the road is a non-issue. All that the court would be interested in, is whether the elements of defilement were established.

32. The prosecution proved beyond reasonable doubt the complainant’s age through a Birth Certificate produced as PEXH1. It indicated that PW1 was born on 20<sup>th</sup> November 2005, thereby placing her age at 10 years as at the time of the incident.

33. As to penetration, PW3 was very candid in her account of how the appellant accosted her on the road from behind, dragged her into a bush and defiled her; that it was not until she was consistently interrogated by her parents and after they noticed that her pants were wet that she recounted her ordeal to them. Her testimony was corroborated by the evidence of PW4, the doctor who produced the medical record (P3 form and PRC form), which confirmed that indeed PW1 had been defiled.

34. It is common ground that sexual assault cases will hardly take place in the view of eye witnesses, of course by their nature; that if the law were that an eye witness must corroborate the fact of a sexual assault, there can hardly be any person to be held culpable. However, the proviso to Section 124 of the *Evidence Act* comes to arrest this mischief. It provides that a court can convict an accused

person in a case of sexual assault against a minor notwithstanding the absence of corroboration as long as the court believes that the minor is telling the truth. It reads as follows:

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the



accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. (Emphasis ours)

35. In this case, the learned trial Magistrate, as did the learned Judge, were of the view that PW1 told the court the truth as regards to the fact that she was defiled, and that the culprit was the appellant. We are of a similar view that PW1 was consistent in her evidence and that she gave a vivid account of how the appellant accosted and defiled her. PW4 sealed it all as the medical evidence confirmed injury to both the vagina and anus, and a broken hymen, all of which were proof of defilement. To us, even though PW3, the investigating officer testified that the offence took place in the appellant's house, that assertion was ousted by the consistent and truthful evidence of PW1 as regards the place where the offence was committed. After all, the person best placed to state where she was defiled is the victim herself. We therefore conclude that the minor discrepancy regarding the place of defilement did not go to the root of the prosecution case as to cast doubt in the mind of the court that indeed PW1 was defiled.
36. That aside, PW1 identified the appellant not only by name but also by his occupation, being that he fetched water for the area residents. This description was repeated by PW2, PW1's mother, and indeed the appellant himself also confirmed that he occupied himself by fetching water for the area residents. The learned Magistrate, having the privilege of interacting with the witnesses, considered the complainant's intelligence, age and calm demeanour when she was testifying, and was satisfied that she was speaking the truth, and that her testimony required no corroboration in identifying who defiled her.
37. The appellant also took issue with the fact that the PRC and P3 forms were not produced by their maker, being the doctor who filled them. Counsel for the appellant conceded at the hearing of this appeal that this was not an issue raised before the trial court. He also took issue with the fact that the P3 form was filled six months after the incident. The learned Judge adequately addressed herself on this issue, noting that there was an explanation as to why there was delay in filling the P3 Form.
38. A perusal of the trial court proceedings indicates that it was PW1's father who unfortunately hampered the efforts of availing the complainant to the police station for purposes of issuance of the P3 form. That notwithstanding, the fact remains that PW1 was examined in hospital the next day after the assault took place. As to the person responsible for production of the medical reports, there is no remote suggestion that the appellant who fully participated in the hearing before the trial court objected to their production. In any event, it is common knowledge that a P3 form is filled based on the treatment record (notes). There is no new record of treatment that the person filling a P3 form reinvents other than copy and paste what the medical officer recorded in the treatment notes. In our view, the fact that the P3 form was filled long after the incident did not negate the fact that the medical record indicated the position and condition in which PW1 presented herself as at the time of treatment.
39. As to the issue of the maker of the medical records not testifying, it is settled law that this Court will not consider or determine the arguments made regarding any issue not raised in the first appeal. It cannot



be raised for the first time in a second appeal. See: Alfayo Gombe Okello vs. Republic (2010) KECA 319 (KLR) where this Court held:

“Firstly, the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

40. This Court’s in Michael Saa Wambua & another vs. Republic [2017] KECA 236 (KLR) held as follows:

“In view of the clear provisions of section 382 CPC no prejudice or injustice was occasioned to the appellants by the failure of the prosecution to indicate in the charge sheet the time the offence was committed, especially when there is undisputed evidence from both sides, that appellants had been drinking in the deceased’s bar on the very night when the deceased was robbed and murdered. The evidence tendered by either side demonstrated clearly that the incident occurred at night. We also note that the issue was never raised before the two courts below. It is being raised for the first time before us. We are not therefore persuaded that the appellants are genuinely aggrieved by this omission. It has definitely come as an afterthought. We find no merit in it and it is accordingly rejected.”

41. Furthermore, it has been held by this Court that medical evidence is just but an extension of proof that a victim was defiled, but it is not a mandatory document of proof. In George Kioji vs. Republic, CR. App No. 270 of 2012 (Nyeri) (UR), this Court held that:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

42. That said, the PRC form confirmed the injuries sustained by the complainant that she had swelling on her private parts, her hymen was broken with an old scar and a scar at the anal region. We thus fully concur with the findings of facts with the two courts below, and are satisfied that the prosecution proved beyond reasonable doubt that the appellant defiled the complainant. His conviction was proper and safe, and we have no reason of interfering with it. We uphold it.

43. As to the sentence, the prosecution has urged us to reinstate the sentence of life imprisonment. However, this plea was made in the submissions but not through notice to enhance the sentence or a cross-appeal, thus denying the appellant a chance to respond to it. We agree that the mandatory sentences imposed under the *Sexual Offences Act* are to be meted as they are. See the decision of the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (supra) which clarified that mandatory sentences under the *Sexual Offences Act*, are constitutional. The Supreme Court also reiterated that its decision in Francis Muruatetu (supra) only applied to murder trials. Therefore, for want of a cross- appeal, we are bereft of jurisdiction to interfere with the

sentence of 30 years’ imprisonment as meted out by the first appellate court.



44. In the end, we find that the appeal lacks merit and it is hereby dismissed. We uphold the Judgment of the High Court at Mombasa (Njoki Mwangi, J.) dated and delivered on 6<sup>th</sup> March 2020.

**DATED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JANUARY, 2026.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

