Mwangashi v Republic (Criminal Appeal E009 of 2024)
[2026] KECA 58 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 58 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E009 OF 2024

AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

JANUARY 30, 2026

BETWEEN

DISHON MWAFWANI MWANGASHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement of the High Court of Kenya at Voi (Dulu, J.) dated and delivered on 26th September 2023 in HCCRA No. E023 of 2022)

JUDGMENT

1. This is a second appeal from the Judgement delivered by the High Court of Kenya at Voi (Dulu, J.) on 26th September 2023. The original conviction was by Voi Chief Magistrate's Court in Sexual Offence Case No. E005 of 2020.

2. The appellant, Dishon Mwafwani Mwangashi, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the charge were that, on 21st day of September 2020 at around 1800 Hours at [Paticulars Withheld] in Voi sub-County within Taita Taveta County, the appellant intentionally caused his penis to penetrate the vagina of CH, a child aged seventeen (17) years.

3. In the alternative, the appellant was charged with committing an indecent act contrary to Section 11(1) of the *Sexual Offences Act* in that, at the same date, time and place, he intentionally and unlawfully touched the vagina of CH, a child aged seventeen (17) years.

4. The appellant was arraigned before the Chief Magistrate's Court at Voi on 30th September 2020 and, upon taking plea, he denied both the main and the alternative charges. A plea of not guilty was entered whereupon the prosecution called a total of 4 witnesses while the appellant testified as the sole defence witness.

5. PW2, NSH, the complainant's father, testified that, on 21st September 2020 at around 6.00 p.m., he sent his daughter, the complainant, to his farm to fetch firewood; that the complainant overstayed and that, after about 45 minutes, he decided to go and check on her; that, when he got onto the road, he saw the complainant at the appellant's gate while leaving the appellant's house; that the appellant was walking behind the complainant (hereafter PW3); that he found PW3 crying and, upon enquiring as to why she was crying, she stated that the appellant had defiled her; that he told PW3 they go back and catch the appellant; that, when the appellant saw them retreating, he started running away towards the farm where he had sent

   PW3 to fetch firewood; that he then made a report at Voi Police Station from where they were referred to Moi Hospital for treatment; and that the appellant was arrested nine days later.

6. PW2 further interrogated PW3 on how the incident took place and she explained that when she bent to tie the firewood, the appellant approached her from behind, grabbed her by the waist and neck and demanded that they had to have sex; that PW2's skirt had blood stains on lower back side; that the appellant was their neighbour; and that there was no grudge between them.

7. PW3, the complainant, in corroborating the evidence of PW2 testified that, when she bent to tie the firewood together, she saw someone from behind whom she recognized as the appellant and a neighbour; that being 6;00 p.m. when it was not dark, she was able to recognise him; that, when she refused to have sex with him, he pulled and dragged her to his house which was across the road; that she did not scream because the appellant threatened to cut her with a panga if she screamed; that, while in the house, he forcefully removed her clothes and defiled her; that, after he was done, she left while crying; that that is when she met with her father (PW2) at the gate of the appellant's house; that, on seeing PW2, the appellant ran into the bush; that she and PW2 returned to the appellant's home, but that the appellant did not return; and that, thereafter, the matter was reported to the police.

8. PW3 identified in court underpants as well as a skirt which she stated she was wearing on the material date. The skirt had a stain on the lower back side. She also identified her Birth Certificate, which indicated that she was born on 2nd May 2003.

9. PW1, Joto Nyawa, a Clinical Officer at Moi County Referral Hospital in Voi, testified that he examined the complainant on 21st September 2020. He observed presence of tenderness on the vaginal wall, the hymen was broken and painful on examination, and there was abnormal discharge. Laboratory report showed no spermatozoa, but PW3 had a bacterial infection. PW1 concluded that she had been defiled. He produced the P3 form in evidence.

10. PW4, No. 255261 PC Grace Choga attached to Voi Police Station was the investigating officer. She accompanied PW3 to Moi Referral Hospital for examination and treatment and, in addition, summed up the evidence of PW1 to PW3. She produced the complainant's grey skirt which had a stain at the back (PEXH4), a light blue innerwear (PEXH 3) and PW3's Birth Certificate (PEXH 5).

11. The appellant gave sworn evidence. His testimony was that, on 29th September 2020, he returned home from his usual activities; that, as he was reading his Bible, he heard the voices of PW2, his wife and a brother who were his neighbours, outside his home; that, when he opened the door, they begun to beat him up while PW2 was saying that he had defiled his daughter; that they then tied up his hands while ridiculing him; that he was taken some 8 kilometres away and eventually to the Voi Police Station; that he was threatened upon which he signed very many papers without knowing what was written thereon; and that there was a land dispute between him and PW2 after his father died and that, as a result, they do not talk to each other. The appellant denied committing the offence.

12. After evaluating the evidence tendered before him, the learned Magistrate (Hon. C. K. Kithinji, PM) was satisfied that the prosecution had proved its case beyond all reasonable doubt in respect of both the main and the alternative charge, albeit that a court cannot convict an accused person for a main and alternative charges simultaneously. Notably too, is that the learned Magistrate convicted the appellant for the main charge under Section 11(1) of the *Sexual Offences Act*. On sentence, the learned Magistrate stated that he would only sentence the appellant in the main charge while the sentence in the alternative charge would be held in abeyance. He accordingly meted out a sentence of 25 years imprisonment in respect of the charge of defilement contrary to Section 8(4) of the *Sexual Offences Act*.

13. Being dissatisfied with both the conviction and sentence, the appellant preferred an appeal to the High Court at Voi. He raised 13 grounds of appeal in an amended memorandum of appeal, basically complaining that: his constitutional rights under Article 50 (g) and (h) of *the Constitution* were violated; that the prosecution did not discharge its burden of proving the case beyond reasonable doubt; his request for a DNA test was not acquiesced; that the trial court failed to consider that PW3's child was born on 18th September 2020, and that, therefore, it was conceived while he was undergoing the trial; that his defence was not considered; and that the sentence meted out was harsh and excessive. The rest of the grounds of appeal as crafted by the appellant seemed to be prayers which he intended to make before the learned Judge, and hence we need not mention them at this stage but later, if circumstances so demand.

14. As to whether the appellant was accorded a fair hearing under Article 50(g) and (h) of *the Constitution*, the learned Judge held that the appellant participated in the hearing and was given an opportunity to tender his defence. As to the appellant's request to tender fresh evidence under Section 358(1) & (2) of the Criminal Procedure Code, and to be allowed to prosecute the appeal through an inmate, one Solomon Ngati under Article 50(7) of *the Constitution* (which he couched as grounds of appeal), the Judge held that no basis or justification was laid for these requests and, accordingly, the requests were disallowed.

15. As to proof of the offence charged, the learned Judge held that the complainant's age was established to be 17 years; that penetration was proved by the evidence of PW3 and PW1 even though there was absence of spermatozoa; and that the medical evidence confirmed that the hymen was missing, and that PW3 had a tender vaginal canal, all being evidence of penetration. On the issue of identification, it was held that the incidence took place in daylight, and that both the appellant and PW3 knew each other by physical appearance as they were neighbours; and that, therefore, the issue of mistaken identity did not arise. Accordingly, it was held that the case was proved beyond reasonable doubt.

16. On the issue of sentence, and after considering the prosecution's plea that the sentence be reduced to 15 years imprisonment, the court observed that there were no aggravating circumstances to justify the 25 years imprisonment meted out. It substituted the sentence of 25- year jail term for 15 years imprisonment.

17. However, the learned Judge faulted the trial Court for basing its conviction under Section 11(1) of the *Sexual Offences Act*, which section provides for the offence of indecent act which was the alternative count charged as opposed to finding a conviction under Section 8(1) as read with Section 8(4) of the Act, which was the main count for which the appellant was found guilty.

18. Further dissatisfied, the appellant has preferred this second and perhaps the last appeal. In an undated Memorandum Grounds of Appeal, he faulted the learned Judge for:

> " i. affirming a conviction based on circumstantial evidence which was unsound to withstand a conviction;

ii. failing to notice that DNA was not conducted and failure to produce the forensic evidence prejudiced him;

ii. failing to bear in mind that the same day when the alleged defilement took place and the complainant was taken to the hospital, there was missing spermatozoa which occasioned a miscarriage of justice since spermatozoa lasts in a female's cervix for approximately one to five days and the broken hymen proved defilement; and

ii. for failing to find that the prosecution did not discharge its duty pursuant to Section 107 of the *Evidence Act* Cap 80."

19. We heard this appeal virtually on 21st May 2025. The appellant appeared in person while learned Prosecution Counsel Mr. Kariuki appeared for the respondent. Both the appellant and the respondent wholly relied on their respective written submissions, which they did not wish to highlight. Those of the appellant are undated while those of the respondent are dated 9th May 2024.

20. The appellant cast doubt on the complainant's testimony that she was attacked from behind and abducted; and that it was impossible to carry a 17-year-old girl for a distance of 600 meters without her making noise to attract attention. The appellant refuted the allegations that the reason as to why the complainant did not scream was because she was threatened; and that such evidence was unreliable.

21. The appellant submitted that the clothes that the complainant was wearing on the fateful day ought to have been subjected to forensic analysis; that his request for DNA examination of the clothes was declined by the trial Magistrate and the prosecution; that this was a grave error on the part of the Magistrate, and which error the first appellate court did not correct; that, as such, the two courts below violated Section 36(6) (a) & (b) of the *Sexual Offences Act*; that the stain on the complainant's skirt was presumed to be of human blood; and that, since it was not scientifically investigated through a DNA test, it was difficult to link him to the offence charged.

22. The appellant agreed that the Clinical Officer's report to the effect that the fact that the complainant's hymen was broken proved defilement. He however submitted that, if the complainant was defiled, there would have been spermatozoa in her vagina which would have remained therein for one to five days, but that, in this case, the absence of spermatozoa cast doubt as to his culpability.

23. Finally, the appellant submitted that the prosecution failed to discharge its burden of proof pursuant to Sections 107 and 109 of the *Evidence Act*; that, had the trial court considered the fact that there was a land dispute between his parents and the complainant's father, it would have found that the charge was instigated by the grudge and acquitted him accordingly. He cited the case of Karanja vs. Republic (1983) KLR, 501 for the proposition that an accused should always give an alibi defence early enough so as to give room to the prosecution to investigate it because, when it is given too late in the day without supporting evidence, the court is likely to conclude that that defence was an afterthought; that, in this case, it was not established that he had premeditated to commit the offence; and that, therefore, the prosecution did not prove its case beyond reasonable doubt.

24. The appellant urged us to allow the appeal by quashing the conviction and setting aside the sentence meted out against him.

25. On the part of the respondent, it was submitted that the prosecution proved all the ingredients of the offence of defilement to the required standard- beyond reasonable doubt. Citing the decision of this Court in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR on proof of age of a victim, it was submitted that the complainant's age was proved by way of a Birth Certificate produced as PEXH 5;

that penetration was proved by the evidence of PW3, who narrated how the appellant attacked her and carried her to his house where he committed the heinous act; that the evidence was corroborated by the medical evidence of PW1, the Clinical Officer who examined PW3 and produced the medical report (P3 form), which indicated that PW3's vaginal wall was tender on examination, and that the hymen was missing; that PW1 concluded that PW3 had been defiled; that, on identification, the appellant was well known to PW3 as he was her neighbour; that PW2, the complainant's father, confirmed that, on the material day, he saw the appellant with PW3 coming from his house and that, when the appellant saw PW2, he fled; and that the appellant was therefore placed at the scene of crime.

26. The prosecution maintained that the appellant was convicted based on sufficient evidence, and we were urged to uphold his conviction.

27. On sentence, it was submitted that mandatory sentences under the *Sexual Offences Act* are constitutional; and that they do not take away the discretionary powers of judicial officers in sentencing and, in this regard, the Supreme Court decision of Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) was relied upon.

28. By dint of Section 361(1) of the Criminal Procedure Code, this being a second appeal, our jurisdiction is limited to matters of law only. In interpreting the said provision in Hamisi Mbela Davis & Another vs. Republic (2021) KECA 147 (KLR), this Court held as follows:

> " This being a second appeal, this Court is mandated under section 361(1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu vs Republic (1983) KLR 445: -
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> 'Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holding of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings).'"

29. However, this Court may consider matters of fact in a second appeal 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. This Court in Dzombo Mataza vs. Republic [2014] KECA 831 (KLR) observed that:

> " 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."

30. Therefore, this Court will resist interference 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).

31. We have considered the record of appeal, the respective submissions, the authorities cited and the law. The main issue that we have to determine is whether the prosecution proved that the appellant was responsible for defiling the complainant.

32. In an offence of defilement, the prosecution is obligated to prove three main ingredients, that is: the age of the complainant; the identification of the perpetrator; and penetration, whether full or partial. The proviso to Section 124 of the *Evidence Act* allows a court to receive the victim's evidence in a sexual assault case and proceed to convict if it is satisfied that the victim is telling the truth. In Moseti Tokyo Mariga vs. Republic (2014) KECA 48 (KLR), this Court held:

> "We may add that under Section 124 of the *Evidence Act* in a criminal case involving a sexual offence where the only evidence is that of the alleged victim of the offence, the court can entirely rely on that evidence and proceed to convict the accused person if, for reasons recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

33. With the above principles in mind, we take to mind that the appellant contests his culpability on the ground that no forensic evidence was produced to ascertain whether he was responsible. In particular, he contents the fact that the skirt which PW3 was allegedly wearing at the time of the incidence was said to be stained; that the source of the stain was never ascertained; and that the only way to prove whether that stain linked him to the defilement was by way of conducting a DNA test. To the appellant, failure to conduct a forensic examination meant that there was no sufficient evidence that linked him to the offence. The appellant also challenged the fact that the medical report indicated that there were no spermatozoa present in the complainant's vagina and/or cervix so as to conclude that she was defiled.

34. In Mark Oiruri Mose vs. Republic (2013) KECA 67 (KLR), this Court faulted the finding of the first appellate court that lack of presence of spermatozoa after a vaginal swab was sufficient to acquit an offender in a defilement case. It held as follows:

> "Even if the evidence of the complainant was expunged because of that omission the trial court still had the evidence of her mother, the evidence of her grandmother, and the evidence of Victor, the clinical officer upon which the appellant could still have been convicted as there was clearly evidence of penetration of the victim's vagina with the appellant's penis and the evidence of her age being six years was not challenged. Her finding that as there was no evidence of the presence of spermatozoa, the appellant could not be convicted of defilement, was with respect erroneous. As we have stated, all that was required to be proved was not presence of spermatozoa, but penetration of the victim's vagina with the appellant's penis and that was clearly proved." (Emphasis ours)

35. In the same vein, this Court held in the case of Kassim Ali vs. Republic (2006) KECA 156 (KLR) that absence of medical examination to support the fact of rape or defilement cannot be a ground for acquittal. All that is needed is the oral evidence of the victim or circumstantial evidence which may be sufficient to warrant a conviction.

36. Section 36(1) of the *Sexual Offences Act* provides as follows:

> (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain

whether or not the accused person committed an offence.

37. The above provision is not couched in mandatory terms, but in permissive terms by the use of the word 'may'. It is clear that a court can order for a DNA test to be conducted only in circumstances where it deems it necessary. In Robert Mutungi Mumbi vs. Republic (2015) KECA 584 (KLR), this Court stated as follows with respect to the application of Section 36(1):

> " Section 36(1) of the (Sexual Offences) Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

38. Likewise, in AML vs. Republic (2012) eKLR, this Court upheld the view that:

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

39. In view of the foregoing, as long as other evidence tendered proves the offence of defilement, there is no need to conduct forensic scientific investigation, such as a DNA test.

40. PW1, the Clinical Officer examined the complainant the same day when the defilement took place, and noted that there was tenderness on the vaginal wall; that the hymen was freshly broken; and that there was abnormal discharge. To our mind, this was sufficient proof that the complainant was indeed defiled.

41. The appellant also faulted the two courts below for convicting him while medical evidence established that there were no spermatozoa in PW3's vagina or cervix. Suffice it to note is the fact that the presence of spermatozoa is not one of the elements that constitute the offence of defilement. According to Section 8(1) of the *Sexual Offences Act*, all that the prosecution needs to prove as one of the elements of defilement is penetration. The Section provides:

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

42. Accordingly, the absence of spermatozoa did not have a bearing in the strength of the prosecution's case. We accordingly dismiss the appellant's ground of appeal and submission that he could not be linked to the offence by virtue of the absence of spermatozoa.

43. As to the issue of identification, it is not contested that the appellant and PW3 were neighbours. They were acquaintances, their respective homes being metres from each other. PW3 had no difficulties in disclosing to his father that it was the appellant who had defiled her, and to whom he identified by name. In addition, when PW3 took unusually too long to return home, PW2, her father, sought after her. He found PW3 at the gate of the appellant's home with the appellant walking right behind her. PW3 was crying and, after she disclosed what had happened, and in sensing danger of apprehension, the appellant took flight. PW2 also stated that he knew the appellant as their neighbour.

44. It is also notable that the incidence took place at 6:00p.m. when there was sufficient light to aid in positive identification. It then follows that the identification of the appellant was by way of recognition,

which is more assuring, more satisfactory and more reliable than identification of a stranger as was held by Madan, JA. in Anjononi and Others vs. The Republic [1980] KLR thus:

> " .....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

45. Finally, the age of PW3 was proved by a Birth Certificate, which was produced in evidence by PW4 showing that PW3 was born on 2nd May 2003, thus placing her age at 17 years as at the time of defilement.

46. In view of the foregoing findings, we come to the conclusion that the prosecution proved the offence of defilement against the appellant beyond reasonable doubt. We find no reason to disturb or interfere with the concurrent findings of fact on the charge of defilement. We accordingly uphold the conviction.

47. On the issue of sentence, Section 8(4) of *Sexual Offences Act* makes provision that any person who is convicted for the offence of defilement of a child between the age of sixteen and eighteen years is liable to imprisonment for a term of not less than fifteen years. The Supreme Court of Kenya in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (supra) affirmed that the minimum mandatory sentences provided under the *Sexual Offences Act* leaves the court with no discretion to vary those sentences.

48. In this instance, the first appellate court rightly revised the sentence downwards from 25 to 15 years imprisonment upon noting that there were no aggravating circumstances to warrant the enhancement of the minimum mandatory sentence of 15 years imprisonment. On our part, we find no reason to fault the exercise of discretion of the learned Judge in reducing the sentence to the minimum mandatory sentence as provided under Section 8(4) of the Act. In any event, the issue of sentence is a matter of fact which on this second appeal we cannot pronounce ourselves on unless the sentence meted out against the appellant was clearly unlawful, which is not the case in the instant scenario. See Section 361(1)(b) of the Criminal Procedure Code.

    Accordingly, we also uphold the sentence as meted out by the learned Judge.

49. The upshot of our findings is that this appeal lacks merit and is hereby dismissed in its entirety. Consequently, we hereby uphold the Judgment of the High Court at Voi (Dulu, J.) delivered on 26th September 2023.

50. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 30TH 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