



**Mutugi v Odpp (Criminal Appeal E061 of 2024)  
[2026] KEHC 464 (KLR) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 464 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E061 OF 2024  
HM NYAGA, J  
JANUARY 22, 2026**

**BETWEEN**

**EVANS MUTUGI ..... APPELLANT**

**AND**

**ODPP ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon. R. Ongira (SRM) delivered on 29th day of May 2024 in Sexual Offence Case No. E022 of 2023 SPM's Court at Nkubu)*

**JUDGMENT**

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Nkubu and was charged 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 18<sup>th</sup> September 2023 at Nkachie location in Imenti South Sub-county within Meru County he intentionally caused his penis to penetrate the vagina of NLM a child aged 7 years.
2. The appellant also faced an alternative count of indecent act with a child, contrary to section 11(1) of the [Sexual Offences Act](#).  
The particulars of this count are that on the same date and place he intentionally and unlawfully touched the vagina of NLM, a child aged seven (7) years with his penis.
3. The appellant denied the charges. After a full trial, he was convicted and sentenced to life imprisonment.
4. Aggrieved by the said conviction and sentence, the appellant preferred this appeal.
5. In his petition of appeal dated 11<sup>th</sup> June 2024, the appellant raised the following grounds:-



- a. That the trial/honourable court erred in law and facts by holding and finding that the prosecution proved its case beyond any reasonable doubts as required by the law.
  - b. That the learned trial magistrate erred in both matters of law and facts by disregarding the appellant's defense without giving cogent reasons.
  - c. That the learned trial magistrate erred in law and facts by convicting and sentencing the appellant to life sentence on a case full of hearsay, contradictions and personal vendetta.
  - d. That the learned trial magistrate erred in law and facts by relying on distorted and coached evidence full of falsehood and grudge.
  - e. That the learned trial magistrate erred in both points of law and facts by passing a life sentence upon the appellant without taking into consideration that the same is excessive and unconstitutional.
  - f. That the learned trial magistrate erred in law and facts by not considering any other punishment available for the alleged offence.
  - g. That the learned trial magistrate erred in law and facts by convicting the appellant on framed up charges brought purposely out of malice.
  - h. That the learned trial magistrate erred in law and facts by failing to appreciate that crucial witness as other children who were playing with PW1 on material day were not called upon by the prosecution to testify to shade light.
6. The appellant thus sought order that the appeal be allowed and the conviction and sentence of the lower court be quashed and set aside and, that he be set at liberty.
  7. The appeal was argued by way of written submissions.
  8. Counsel for the appellant submitted that there was only circumstantial evidence alleged by the complainant that stated that she was defiled and the doctor who saw the complainant within 24hrs. That the complainant may have been assaulted before the appellant took her at 5.00 pm as alleged, if ever he did, as alleged by the complainant's mother. That the appellant was not found in the act of defiling the complainant and thus as with all circumstantial evidence, it has be inconsistent with his innocence and inexplicable on any other hypothesis than that of guilt.
  9. That there was the presence of epithelial cells but at no point did the doctor state that the same was linked to the appellant. That no tests were conducted on the appellant herein.
  10. It was further submitted that a broken hymen alone cannot be used as proof of penetration. That there are times when the hymen is broken by factors other than sexual intercourse. Cited in support of this position was the Court of Appeal decision in the case of P. K.W. v Republic [2012] eKLR and the Canadian case of The Queen v Manuel Vincent Quintanila [1999] AB QB 769.
  11. It was further submitted that it was not very clear how and at what time the complainant's witnesses appeared and went to fetch her and that the children she was playing with who witnessed the appellant take the complainant to his house were not called to corroborate the statement of the complainant, thus rendering her testimony as just mere allegations. That there was a possibility that her to claims of defilement were meant to appease her mother.



12. Counsel further submitted that PW1's evidence on identification was evidence of a single witness for which great caution is counselled before it can be made a basis for conviction. Cited was *Oluoch v R* (1985) KLR 549.
13. The appellant further argued that the case against him was fraught with grave danger of wrongful conviction, in the absence of the evidence of the children who witnessed the appellant block and take the complainant to his house. The complainant's evidence would have pointed to the appellant as the person who took advantage of her. In the presence of these gaps, it was wholly unsafe to convict the appellant.
14. The prosecution counsel opposed the appeal. In her submissions she stated that all the ingredients of the offence of defilement were proven.
15. It was further submitted that the clinical officer who examined the complainant established that there was penetration. That the police officers who handled the case recovered two items from the appellant's house, which were mentioned by the complainant, namely a tub of Vaseline and her pink handkerchief. That the appellant was positively identified by the witnesses.
16. The prosecution urged the court to confirm the conviction.
17. On the sentence, it was submitted that being a teacher the appellant showed no remorse and thus the same was appropriate.
18. Being a first appeal, the court's duty is as was set out in *Okeno v Republic* (1972) EA 32 where it was held that:

“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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.”
19. Similarly, in *Kamau Njoroge v Republic* [1987] eKLR, the Court of Appeal stated as follows :

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”
20. With that in mind, I will look at the evidence adduced. It is summarised as hereunder.
21. The complainant told the trial court that on the material day she was playing with other children when the appellant, who she knew, called her and took her to his house. When they got there, he proceeded to remove her undergarment. He removed his trouser as well. That the appellant then applied Vaseline on her vagina and then inserted his penis therein. After his act, the appellant poured water on her. The appellant warned her of dire consequences if she told anyone of what he had done to her. She then heard her mother calling out for her from outside. The appellant took her handkerchief and inserted it into her mouth, gagging her. He then opened the door for her and she went outside. She met her mother and she informed her what the appellant had done to her. She was then escorted to the police station and then was taken to hospital.



22. The complainant's mother was PW2. She told the court that on the material day, she returned home and she did not find her daughter there. Fearing the worst, she embarked on a frantic search for the complainant. When she entered the plot where the appellant was staying, she saw him open the door to his house. Her daughter emerged from the said house. She was drenched in water and was crying. The complainant told her what the appellant had done to her. Other people including the landlord came to the scene. The chief was called. The appellant was arrested. He was then escorted to the police station, together with the complainant. Both were taken to hospital for examination.
23. PW3 was the Clinical Officer who examined the complainant. He noted that there was bruising with redness on the complainant's vaginal opening with mild laceration of both labia minora and labia majora. The hymen was freshly broken. A brownish discharge was noted. Laboratory tests revealed the presence of leucocytes and pus cells. In his opinion there was evidence of penetration of the complainant's vagina.
24. PW4 was Geoffrey Mbutia, a neighbour to the complainant and her mother. He stated that he met PW2 as he was going home. Shortly thereafter, she heard PW2's loud voice and he went to see what was going on. She found PW2 searching for her daughter and he joined her. In the process, he saw the complainant emerge from the appellant's house. She ran to her mother crying. He looked inside the appellant's house and saw him sitting on his bed. A crowd gathered but he managed to control them and saved the appellant from it. The chief arrived and arrested the appellant.
25. PW5 was the Investigating Officer. She narrated how the report was made to her. She took the complainant and the appellant to the hospital. Thereafter, she caused the appellant to be charged.
26. In his defence, the appellant stated that on the material day, he went to a pub which is near his house. That thereafter, he went to his house and fell asleep. He was awoken by noises of a woman and men fighting outside his house. He saw PW2 who was armed with a stone while the men had sticks. They proceeded to assault him for no reason. The sub-chief arrived and escorted him to the police station. Later he was taken to hospital together with the complainant. He denied the offence.
27. DW2 was Felix Mwirigi. He stated that he was with the appellant at the pub then at 4:30 pm, then the appellant left. Shortly thereafter, he also left the bar. He saw the complainant's mother and two other people. The three of them entered the plot where the appellant was residing. Then he heard screams. When he went to the plot, he found PW2 who was claiming that her daughter had been defiled.
28. The ingredients of the offence of defilement constitute the following:
  - a. The age of the complainant;
  - b. The act of penetration
  - c. The identity of the alleged perpetrator of the act causing penetration.
29. The trial court duly noted these ingredients, which were reiterated in the case of *Dominic Kibet Mwareng vs Republic* (2013) eKLR where the learned judge noted that:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.”
30. There is really no dispute as to the age of the complainant, whose certificate of birth was produced. The complainant was 7 years old. Whether that was her exact age, as argued by the appellant, was immaterial. The fact is that this was definitely a child as confirmed by all the prosecution witnesses.



31. The next element for consideration is that of penetration. 'Penetration' is defined under section 2 of the *Sexual Offences Act* to mean;  

'the partial or complete insertion of the genital organs of a person into the genital organs of another person.'
32. As regards the issue of penetration, the complainant narrated what the appellant had done to her. In her own words the appellant inserted his penis into her vagina. The medical evidence adduced fully corroborated her testimony in that there was evidence of penetration in the shape and form of;Bruising of the vagina region;Redness of the vagina opening with mild inflammation of both labiaThe hymen was freshly broken.
33. This evidence is sufficient to lead to the conclusion that there was indeed an act causing penetration. While in agreement with the appellant that a hymen can be broken by other ways other than sexual penetration, that fact is not considered in isolation. Other evidence must be considered alongside it and in this case, the medical officer, having taken the history from the complainant, was categorical that the cause of the hymen was sexual penetration.
34. The other issue to consider is whether the appellant was duly identified.
35. The incident took place at around 5.00 p.m., and therefore there was no need to start interrogating whether the circumstances were conducive to a proper identification.
36. In addition, it is clear that the complainant knew the appellant well. The other witnesses at the scene knew him too.
37. I am therefore satisfied that the appellant was duly identified.
38. The appellant argued that this was a case of circumstantial evidence that left doubts as to whether he was the one who committed the offence.
39. However, this is a case of direct evidence. The complainant was categorical and gave details of what the appellant did to her from taking her to the house until when he opened the door for her to exit. She referred to a tub of Vaseline that the appellant applied on her genital organ, and her handkerchief which he used to gag her. These items were recovered from the appellant's house.
40. The complainant also told the court that the appellant had poured water on her after he had defiled her. Her mother confirmed that when the complainant emerged from the appellant's house her clothes were drenched in water. Geoffrey (PW4) also confirmed that the complainant emerged from the appellant's house.
41. In my view, this is direct evidence adduced, and it places the appellant at the scene, which was his house. There was no other person in that house so he was the only person who could have defiled the complainant.
42. The appellant raised the issue of the assault against him. Although not desirable, the fact that he was assaulted means that there was an agitating factor that led to that. The appellant conceded that he was in his house at the material time. His own witness placed him at the scene.
43. Having considered the defence adduced, I am of the view that it did not raise any sufficient rebuttal of the clear, concise and consistent evidence that was adduced by the prosecution.
44. Therefore, just like the trial court, I find that the case against the appellant was proven to the requisite standard in law. It was a very safe conviction.



45. From the foregoing reasons, I find that the appeal on conviction lacks any merit and it is dismissed.
46. On the sentence, the appellant was convicted under section 8(1) and (2) of the *Sexual Offences Act*. The complainant was seven (7) years old. The only sentence provided for by the law is life imprisonment. This was the holding of the trial court and I uphold that finding as well.
47. In conclusion, I find that that this appeal lacks merit and it is dismissed.

**DATED, SIGNED AND DELIVERED ON THIS 22<sup>ND</sup> DAY OF JANUARY 2026.**

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**H. M. NYAGA**

**JUDGE**

